

West Cumbria Mining Called-In Planning Application
ria Mining Called-In Planning Application

A	CD7 Relevant Judgments	
21.12.2020	CD7.1 - R (Finch) v Surrey Country Council [2020] EWHC 3559 (QB)	1 - 24
17.08.2021	CD7.2 - R (on the application of Friends of the Earth Ltd and others) (Respondents) v Heathrow Airport Ltd (Appellant)	25 - 82
17.08.2021	CD7.3 - R (Khan) v Sutton LBC [2014] 11 WLUK 151	83 - 108
17.08.2021	CD7.4 - Preston New Road Action Group v SSCLG [2018] EWCA Civ 9	109 - 143
17.08.2021	CD7.5 - R (Blewett v Derbyshire CC [2004] Env LR 29	144 - 171
17.08.2021	CD7.6 - R (Bedford and Clare) v Islington LBC [2003] Env LR 22	172 - 219
17.08.2021	CD7.7 - (R (Jones) v Mansfield DC [2003] EWCA Civ 1408	220 - 245
17.08.2021	CD7.8 - Bowen-West v SSCLG [2012] Env LR 22	246 - 259
17.08.2021	CD7.9 - Abraham v Wallonia [2008] Env LR 32	260 - 287
17.08.2021	CD7.10 - Case C-227 01 Commission v Spain [2004] ECR	288 - 310
17.08.2021	CD7.11 - R (Plan B Earth) v SST [2020] EWCA Civ 214	311 - 377
17.08.2021	CD7.12 - R (Skipton Properties Ltd) v Craven District Council [2017] EWHC 534 (Admin)	378 - 406
17.08.2021	CD7.13 - Fadeyeva v Russia (2007) 45 EHRR 10	407 - 434
17.08.2021	CD7.14 - Hardy v United Kingdom (2012) 55 EHRR 28	435 - 479
17.08.2021	CD7.15 - Application by HM, a minor, by PM, her Father, and Next Friend for Judicial Review	480 - 493
17.08.2021	CD7.16 - Lough v FSS 2004 EWCA Civ 905	494 - 509

Section A
CD7 Relevant Judgments

R (Sarah Finch) v Surrey County Council v Horse Hill Developments Limited, Secretary of State for Housing, Communities and Local Government, Friends of the Earth Limited



Court

Queen's Bench Division (Administrative Court)

Judgment Date

21 December 2020

Case No: CO/4441/2019

High Court of Justice Queen's Bench Division Planning Court

[2020] EWHC 3559 (QB), 2020 WL 07497002

Before: The Hon. Mr Justice Holgate

Date: 21/12/ 2020

Hearing dates: 17 and 18 November 2020

Representation

Marc Willers QC and Estelle Dehon (instructed by Leigh Day) for the Claimant.

Harriet Townsend and Alex Williams (instructed by Surrey County Council Legal Department) for the Defendant.

David Elvin QC and Matthew Fraser (instructed by Hill Dickinson LLP) for the 1st Interested Party.

Richard Moules (instructed by Government Legal Department) for the 2nd Interested Party.

Nina Pindham (instructed by Ms de Kauwe Solicitor) written submissions for the Intervenor.

Approved Judgment

Mr Justice Holgate

Introduction

1. The main issue raised by this challenge is whether a developer's obligation under the [Town and Country Planning \(Environmental Impact Assessment\) Regulations 2017](#) (SI 2017 No. 571) ("the 2017 Regulations") to provide an environmental statement ("ES") describing the likely significant effects of a development, both direct and indirect, requires an assessment of the greenhouse gas ("GHG") emissions resulting from the use of an end product said to have originated from that development.

2. Surrey County Council ("SCC") granted planning permission to the First Interested Party, Horse Hill Developments Limited ("HHDL"), on the Horse Hill Well Site at Horse Hill, Hookwood, Horley, Surrey ("the site") to retain and expand the site (including two existing wells), and to drill four new wells, for the production of hydrocarbons over a period of 25 years ("the development").

3. The ES assessed the GHG that would be produced from the operation of the development itself. However, this challenge concerns the non-assessment by the ES of the GHG that would be emitted when the crude oil produced from the site is used by consumers, typically as a fuel for motor vehicles, after having been refined elsewhere. The issue posed in [1] above arises in a very striking manner in the present case. It is agreed that once the crude oil produced from the development is transported off site it enters, in effect, an international market and the refined end product could be used anywhere in the world, far removed from the **Surrey** Weald.

4. Furthermore, the issue raised by the claimant has ramifications far beyond the legal merits of the present challenge as they relate to the production of crude oil. It would apply to the winning of other minerals for subsequent use in the generation of energy. Furthermore, the extraction of minerals or the production of raw materials for use in industrial processes, leading eventually to the consumption or use of an end product, will generally result in GHG emissions at each stage. For example, the production of metals, followed by their use to manufacture parts for motor vehicles and the assembly of such vehicles, will result in GHG emissions from the cars, vans and lorries when they are eventually purchased and driven.

5. Oil may be refined to produce aviation fuel. But, in addition, the manufacture of components in a number of factories, leading to the construction of aircraft in another, will result in GHG emissions, not just from each industrial process but ultimately from the use of the aircraft for aviation.

6. The examples of vehicle and aircraft production also illustrate a further point. The GHG emissions eventually resulting from the use of those products (in those cases for transportation) will flow not from just one source, but from a number of different contributing sources. They may include sites for the production of raw materials, sites for the manufacture of components, sites for the assembly of the products and sites for distribution of those products.

7. The issue raised in the present challenge may also arise in the case of other industries. For example, each of the successive stages which may be involved in the handling of waste, recycling, recovery and disposal to landfill can generate GHG.

8. Mr Marc Willers QC who, together with Ms. Estelle Dehon, appeared on behalf of the claimant, acknowledged that if the court should decide in the present case that GHG emissions from the combustion of oil products resulting from the extraction at the site had to be assessed as an "indirect effect" in the ES relating to the development permitted by SCC, then the same must hold good for the other examples referred to above, and for GHG emissions generally resulting from the use or consumption of end products emanating from a development. Indeed, Mr Willers QC submitted that this court is obliged so to hold by virtue of decisions of the Court of Justice of the European Union ("CJEU").

9. The response of the international community and the UK Government to the global problem of climate change has been summarised in a number of cases, notably **R (Spurrier) v Secretary of State for Transport [2020] PTSR 240** at [558-592]; **R (Plan B Earth) v Secretary of State for Transport [2020] PTSR 1446** at [187] to [195] and [205] to [216]; and **R (Packham) v Secretary of State for Transport [2020] EWCA Civ 1004** at [83] to [87].

10. The UK Government's fundamental objective in relation to climate change is enshrined in **s.1(1) of the Climate Change Act 2008** ("CCA 2008") which, as amended with effect from 27 June 2019, imposes a duty on the Secretary of State to ensure that the net UK carbon account for 2050 is at least 100% lower than the 1990 baseline. This is generally referred to as "the net zero target".

11. It goes without saying that the extraction of crude oil resulting in the supply of fuel will result in GHG emissions when that end product is used. It is common ground that that is addressed by Government policy on climate change and energy, aimed *inter alia* at reducing the use of hydrocarbons. The issue raised in the present challenge is whether, by virtue of the 2017 Regulations, it was necessary for the planning authority to go further than apply those policies in its decision on whether to grant planning permission for the development, by requiring those GHG emissions to be estimated and assessed as part of the Environmental Impact Assessment ("EIA") of the development.

12. This challenge arises because those opposed to the development have serious concerns about the effects which the extraction and use of hydrocarbons has on climate change. At this point it is important to emphasise the nature of the court's role in dealing with an application for judicial review. As the Divisional Court recently stated in *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 3073 (Admin) at [6]:-

"It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully".

Procedural history and grounds of challenge

13. The claimant's Statement of Facts and Grounds raised a number of grounds in addition to the main issue already identified, including a failure to take into account the impact of the development on seismicity and on the openness of the Green Belt. It was also said that SCC had failed to give adequate reasons on principal important, controversial issues.

14. The application for permission to apply for judicial review was refused by Laing J on the papers and by Lang J at a renewed hearing. On 15 July 2020 Lewison LJ granted permission to apply for judicial review in relation to grounds 1(a) and (b). He also identified an oblique challenge in the claimant's skeleton to national planning policy on the ground that it is not in conformity with EU law. He stated that that was a point of some importance which ought to be considered at a full hearing. The claim then proceeded in the High Court pursuant to CPR 52.8(6).

15. In September 2020 the High Court ordered the amendment of the Statement of Facts and Grounds to reflect the order of Lewison LJ. Grounds (2) to (5) as originally pleaded were deleted and new grounds were added to address the issue identified in the order granting permission.

16. By an order made on 20 October 2020 the Secretary of State for Housing, Communities and Local Government ("the Secretary of State") was joined as the Second Interested Party, to respond to the new grounds relating to national planning policy. In addition, Friends of the Earth Limited was granted permission to intervene by way of written submissions.

17. As amended, the grounds of challenge are now as follows:-

(1) SCC failed to comply with the obligations of Directive 2011/92/EU (as amended) ("the EIA Directive") and the 2017 Regulations by:-

- (a) failing to assess the indirect GHG impacts of the development arising from the combustion of the oil it produces; and/or
- (b) failing to take into account the environmental protection objectives established by the UK which are relevant to the project, namely the urgent need to address the climate crisis and the requirement to reduce GHG emissions by at least 100% below the 1990 baseline.

(2) SCC failed to comply with the obligations of the EIA Directive and the 2017 Regulations and/or erred in law by interpreting paragraph 183 of the National Planning Policy Framework ("NPPF") and paragraphs 12 and 112 of the Minerals Planning Practice Guidance ("Minerals PPG") so as to permit the downstream GHG emissions from the oil produced by the proposed development to be excluded from assessment.

(3) Alternatively, paragraph 183 of the NPPF and paragraphs 12 and 112 of the Minerals PPG are unlawful because they are not in conformity with the obligations of the EIA Directive and their application in this instance vitiated the defendant's decision.

18. Under ground 1(a) the claimant contends that the GHG emissions arising from the combustion of the refined oil should have been quantified, even if that would have been a difficult and uncertain exercise. Under ground 1(b) the claimant argues that an estimate of the GHG emissions from the operation of the development on the site and from the combustion of refined products emanating from the site should have been compared to a "metric" for carbon reduction, notably the net zero target at national level, national carbon budgets, and sectoral allowances. Mr Willers QC accepted that if ground 1(a) fails then each of the remaining grounds must fail. For that reason, most of the oral submissions focused on ground 1(a), as does this judgment.

19. I wish to express my gratitude to all counsel for their helpful written and oral submissions.

20. The remainder of this judgment is set out under the following headings:-

- Statutory Framework
- National Planning Policy
- Factual Background
- Ground 1(a)
- Ground 1(b)
- Grounds 2 and 3

Statutory Framework

EU Directives

21. [Directive 2011/92/EU](#) consolidated requirements for Member States to provide regimes for EIA in relation to development consents for projects likely to have significant effects on the environment.

22. For the purposes of this claim the amending [Directive 2014/52/EU](#), dated 16 April 2014, is also relevant. Recital (7) recorded that over the previous decade a number of environmental issues, including climate change, had become more important for environmental assessment and decision-making. Recital (13) provided:-

"Climate change will continue to cause damage to the environment and compromise economic development. In this regard, it is appropriate to assess the impact of projects on climate (for example greenhouse gas emissions) and their vulnerability to climate change."

Accordingly, the EIA Directive was amended so as to require EIA to address the direct and indirect effects of a project on climate change.

23. Recital (2) of the EIA Directive refers to [article 191 of the Treaty on the Functioning of the European Union](#) , which declares that the Union's policy on the environment focuses on a high level of protection and is based on the precautionary principle. Accordingly, "effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes."

24. Recital (7) provides:-

"Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question"

Two key principles are to be noted. First, EIA is concerned with the likely significant environmental effects *of a project* . Second, EIA is a process which comprises information which is supplied not only by a developer but also by the authorities and by the public.

25. [Article 1\(1\)](#) provides:-

"This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment".

26. A "project" is defined by article 1(2)(a):- "'project' means:

- the execution of construction works or of other installations or schemes,
- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources."

27. [Article 2\(1\)](#) provides:-

"Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment. Those projects are defined in [Article 4](#) ."

28. [Article 3\(1\)](#) provides:-

"The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors:

- (a) population and human health;
- (b) biodiversity, with particular attention to species and habitats protected under [Directive 92/43/EEC](#) and [Directive 2009/147/EC](#) ;
- (c) land, soil, water, air and climate;
- (d) material assets, cultural heritage and the landscape;
- (e) the interaction between the factors referred to in points (a) to (d)."

29. [Article 5\(1\)](#) provides:-

"Where an environmental impact assessment is required, the developer shall prepare and submit an environmental impact assessment report. The information to be provided by the developer shall include at least:

- (a) a description of the project comprising information on the site, design, size and other relevant features of the project;
- (b) a description of the likely significant effects of the project on the environment;
- ... "

30. [Article 5\(1\)\(f\)](#) requires the developer to provide in addition the information specified in [Annex IV](#) . That includes an estimate of emissions which will be produced during the construction and operation phases (paragraph 1(d)) and a "description of the likely significant effects of the project on the environment" resulting from "the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions)" (paragraph 5(f)). The description should cover, *inter alia* , the direct effects and any indirect effects "of the project."

31. [Article 7](#) provides for the assessment of transboundary effects where *a project* is likely to have significant effects on the environment in another Member State.

32. [Article 8a](#) requires a decision to grant development consent to incorporate *inter alia* "the reasoned conclusion" defined by [article 1\(2\)\(g\)\(iv\)](#) , that is "the reasoned conclusion by the competent authority on the significant effects of the project on the environment..."

The 2017 Regulations

33. There is no dispute for the purposes of this claim about the adequacy of the transposition of the EIA Directive by the 2017 Regulations.

34. The development falls within [schedule 1](#) and was therefore "EIA development" ([regulation 2\(1\)](#)). [Regulation 3](#) prohibited SCC from granting planning permission unless an EIA was carried out. EIA is defined by [regulation 4](#) (see [regulation 2\(1\)](#)) which provides *inter alia* :-

"(1) The environmental impact assessment ("EIA") is a process consisting of—

- (a) the preparation of an environmental statement;
- (b) any consultation, publication and notification required by, or by virtue of, these Regulations or any other enactment in respect of EIA development; and
- (c) the steps required under [regulation 26](#) .

(2) The EIA must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on the following factors—

- (a) population and human health;
- (b) biodiversity, with particular attention to species and habitats protected under [Directive 92/43/EEC](#) and [Directive 2009/147/EC](#) ;
- (c) land, soil, water, air and climate;
- (d) material assets, cultural heritage and the landscape;
- (e) the interaction between the factors referred to in sub- paragraphs (a) to (d).

(3)

(4)

(5) "

35. Regulation 26(1) reflects article 8 of the EIA Directive :-

"When determining an application or appeal in relation to which an environmental statement has been submitted, the relevant planning authority, the Secretary of State or an inspector, as the case may be, must—

- (a) examine the environmental information;
- (b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, their own supplementary examination;
- (c) integrate that conclusion into the decision as to whether planning permission or subsequent consent is to be granted; and
- (d) if planning permission or subsequent consent is to be granted, consider whether it is appropriate to impose monitoring measures."

36. The "environmental information" referred to in regulation 26 is defined in regulation 2(1):-

"environmental information" means the environmental statement, including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development;"

37. Regulation 15 enables a person who is minded to make an application for planning permission for EIA development to ask the relevant planning authority to give a scoping opinion, that is their written opinion as to "the scope and level of detail of the information to be provided in the environmental statement". Such a request must give "an explanation of the likely significant effects of the development on the environment" (regulation 15(2)(a)). Regulation 15(4) requires the authority to consult with the "consultation bodies" defined by regulation 2(1) , including the Environment Agency, before adopting a screening opinion. The adoption of a scoping opinion does not preclude the authority from requiring additional information from the party who requested that opinion when an environmental statement is subsequently submitted for the same development (regulation 15(9)).

38. Regulation 18(3) to (4) defines what must be contained in an ES. So far as relevant it provides:-

"(3) An environmental statement is a statement which includes at least —

- (a) a description of the proposed development comprising information on the site, design, size and other relevant features of the development;
- (b) a description of the likely significant effects of the proposed development on the environment;
- (c) a description of any features of the proposed development, or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;
- (d) a description of the reasonable alternatives studied by the developer, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment;
- (e) ; and
- (f) any additional information specified in Schedule 4 relevant to the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected.

(4) An environmental statement must—

(a) where a scoping opinion or direction has been issued in accordance with [regulation 15](#) or 16, be based on the most recent scoping opinion or direction issued (so far as the proposed development remains materially the same as the proposed development which was subject to that opinion or direction);

(b) include the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment; and

(c) "

39. [Regulation 18\(3\)\(f\)](#) (which reflects [article 5\(1\)\(f\) of the EIA Directive](#)) refers to the information specified by [schedule 4](#) , in so far as that is "relevant to the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected". Thus, the requirements of [schedule 4](#) are not open-ended. They are limited by *relevance* to *both* the qualities of the development for which planning permission is sought and "the environmental features which are likely to be significantly affected". Given the overarching principles contained in [articles 1\(1\)](#) , [2\(1\)](#) and [3\(1\) of the EIA Directive](#) and the requirements of [regulations 4\(2\)](#) and [26\(1\)](#) and the definition of "environmental information" in the 2017 Regulations, that second limb must be limited to environmental features which are likely to be significantly affected *by the proposed development* .

40. That last conclusion is confirmed by the provisions of [schedule 4](#) .

41. [Paragraph 1 of schedule 4](#) requires the ES to describe the development including its physical characteristics, the main characteristics of the operational phase and:-

"(d) an estimate, by type and quantity, of expected residues and emissions (such as water, air, soil and subsoil pollution, noise, vibration, light, heat, radiation and quantities and types of waste produced during the construction and operation phases."

42. [Paragraph 3 of schedule 4](#) requires the ES to describe "the relevant aspects of the current state of the environment (baseline scenario) and an outline of the likely evolution thereof without implementation of the development...".

43. [Paragraph 4 of schedule 4](#) requires the ES to describe "the factors specified in [regulation 4\(2\)](#) likely to be significantly affected by the development " (emphasis added), including "climate (for example greenhouse gas emissions)".

44. [Paragraph 5 of schedule 4](#) requires:-

"A description of the likely significant effects of the development on the environment resulting from, inter alia:

(a) the construction and existence of the development, including, where relevant, demolition works;

(b) the use of natural resources, in particular land, soil, water and biodiversity, considering as far as possible the sustainable availability of these resources;

(c) the emission of pollutants, noise, vibration, light, heat and radiation, the creation of nuisances, and the disposal and recovery of waste;

(d) the risks to human health, cultural heritage or the environment (for example due to accidents or disasters);

(e) the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources;

(f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change;

(g) the technologies and the substances used.

The description of the likely significant effects on the factors specified in [regulation 4\(2\)](#) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the development. This description should take into account the environmental protection objectives established at Union or Member State level which are relevant to the project, including in particular those established under [Council Directive 92/43/EEC](#) and [Directive 2009/147/EC](#) ."

45. The apparently broad language of some of the sub-paragraphs in [paragraph 5 of schedule 4](#) is limited by the very opening words of that paragraph. For an environmental effect to qualify as something which should be included in the EIA it is insufficient that it simply *results* from one or more of the matters described in sub-paragraphs (a) to (f). It must also be an *effect of the development* .

Climate Change Act 2008

46. The [CCA 2008](#) was passed on 27 November 2008. As the long title makes clear, in addition to setting a target for 2050 for the reduction of "targeted greenhouse gas emissions", the Act provides for a national system of carbon budgeting through to that year, the establishment of trading schemes to limit GHG and to encourage activities reducing or removing such emissions, financial incentive schemes to reduce and recycle domestic waste, and renewable transport fuel obligations.

47. [Part 1 of the CCA 2008](#) deals with the carbon target for 2050 and budgeting. In [Packham](#) , the Court of Appeal gave the following summary of steps taken under the Act:-

"83. We start with a short outline of the relevant provisions of the [Climate Change Act](#) . [Section 4\(1\)](#) imposes on the Secretary of State a duty to set carbon budgets to cap carbon emissions in a series of five-year periods (subsection (1) (a)), and to ensure that the net United Kingdom carbon account for a budgetary period does not exceed the carbon budget (subsection (1)(b)), thus ensuring progress towards the 2050 target in the period before that year. Carbon budgets must be set with a view to meeting the target for 2050 ([section 8\(2\)](#)). Before he sets a carbon budget, the Secretary of State for Business, Energy and Industrial Strategy must take into account the advice of the Committee on Climate Change ([section 9\(1\)\(a\)](#)). In setting a budget, he must take into account a number of things, including "scientific knowledge about climate change" ([section 10\(2\)\(a\)](#)), "technology relevant to climate change" ([section 10\(2\)\(b\)](#)), "economic circumstances ..." ([section 10\(2\)\(c\)](#)), and "social circumstances ..." ([section 10\(2\)\(e\)](#)). He is also required to prepare proposals and policies for meeting carbon budgets ([section 13\(1\)](#)). After a new carbon budget is set, he must lay before Parliament a report setting out proposals and policies for meeting carbon budgets for the current and future budgetary periods ([section 14\(1\)](#)). The Secretary of State is required to report to Parliament in an annual statement of emissions "[in] respect of each greenhouse gas", setting out the steps taken to calculate the net carbon account for the United Kingdom ([section 16\(2\)](#)) – which will show whether or not carbon budgets are being met. The Committee on Climate Change, whose function, in part, is to provide advice to the Government on climate change mitigation and adaptation ([section 38\(1\)](#)), is required to report annually to Parliament on the progress made towards meeting the carbon budgets ([section 36](#)), and the Secretary of State is required to respond ([section 37](#)).

84. The first five carbon budgets have now been set in legislation, for the period from 2008 to 2032. The sixth, for 2033 to 2037, will be set in 2021. The most recent of the Secretary of State's annual statements recorded emissions for 2018, the first year of the third budgetary period (2018 to 2022).

85. In October 2017, the Secretary of State published the Clean Growth Strategy, setting out the Government's policies and proposals for decarbonising the national economy, fixing policy milestones as far as 2032, describing "illustrative pathways" for spreading decarbonisation throughout the economy, but allowing the Government to respond to changes in technology in those 15 years. The Clean Growth Strategy does not prescribe one particular "pathway" in the period to 2050. It envisages various means of managing emissions – such as taxation, regulation, investment in innovation, and establishing a UK Emissions Trading Scheme. And it leaves the Government to choose how to manage increases in emissions from major infrastructure projects within its strategy for meeting the target of "net zero" emissions by 2050.

86. Energy and Emissions Projections are regularly published, which quantify the contribution of policies and proposals to the reduction of emissions and the achievement of the climate change targets in the legislation, and enable the Government to monitor progress in meeting the United Kingdom's carbon budgets.

87. As Mr Mould submitted, the statutory and policy arrangements we have described, while providing a clear strategy for meeting carbon budgets and achieving the target of net zero emissions, leave the Government a good deal of latitude in the action it takes to attain those objectives – in Mr Mould's words, "as part of an economy-wide transition". Likely increases in emissions resulting from the construction and operation of major new infrastructure are considered under that strategy. But – again as Mr Mould put it – "it is the role of Government to determine how best to make that transition".

48. The statutory carbon budgets are expressed in terms of a total number of tonnes of carbon dioxide equivalent but are not sub-divided into sectors. In December 2011 the Government presented to Parliament a report pursuant to s. 14 of the CCA 2008 on how it proposed to meet the first four carbon budgets covering the period 2008 to 2027: "The Carbon Plan: Delivering our low carbon future". This policy document does sub-divide GHG emissions by sector, by reference both to sources and end users, notably power stations, industry, buildings, transport, agricultural and land use, waste and exports.

49. The most recent statistics presented in the Secretary of State's annual report to Parliament under s. 16 of CCA 2008 (22 April 2020) deal with GHG emissions in 2018 subdivided between a number of sectors.

50. In a joint note agreed by SCC and HHDL, and not materially disputed by the claimant, the following additional points are made:-

- (1) The methods used to calculate all GHG emissions take into account the latest international guidance, research and data sources. But emission inventories always have some uncertainty because it is not possible to measure directly all the emissions from a particular country, and so the figures are largely based on statistical activity data and emissions factors;
- (2) The estimation of GHG emissions from downstream combustion of oil (eg. in the use of petrol and diesel in road transport) and the subsequent control through carbon budgets under the CCA is carried out at a national level annually;
- (3) The annual statistics provide estimates of GHG emissions by sector, which can inform the methods used by Government to manage emissions, for example, by taxation, regulation, policy or investment in innovation (*Packham* at [85]);
- (4) Emissions of GHG from road transport is the subject of national policy which is designed to reduce such usage as part of the steps being taken to achieve the 2050 net zero target (see e.g. "The Road to Zero" (2018) and the "Clean Air Strategy" (2019)).

51. The UK's Emission Trading Scheme, referred to in *Packham* at [85], was established by the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (SI 2012 No. 3038) ("the 2012 Regulations"). In a legal challenge to a development consent order for gas-fired energy generating units (*R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] PTSR 1709) the High Court noted at [213] to [214]:-

"213. The 2012 Regulations were made in order to give [effect] to a series of EU Directives establishing a scheme for trading in emission allowances for GHG, otherwise referred to in EN-1 as EU ETS. The monitoring arrangements they contain were made in order to give effect to Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC and Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Parliament and Council Directive 2003/87/EC (Text with EEA relevance) (OJ 2012 L181, p 30) and Commission Implementing Regulation (EU) 2018/2067 of 19 December 2018 on the verification of data and on the accreditation of verifiers pursuant to Parliament and Council Directive 2003/87/EC (Text with EEA relevance) (OJ 2018 L334, p 94). The scheme is focused on achieving decarbonisation.

214. Regulation 9 prohibits the carrying on of a "regulated activity" at an "installation" without a permit issued by the Environment Agency. This would apply to the operation of the gas-fired generating units. The application for a GHG emissions permit may be granted if the Agency is satisfied that the applicant will be able to monitor and report emissions from the installation in accordance with the requirements of the permit (regulation 10(4)). An application for a permit must contain a defined monitoring plan and procedures (paragraph 1(1) of Schedule 4). The permit must contain (inter alia) the monitoring plan, monitoring and reporting requirements (to cover "the annual reportable emissions of the installation") and a requirement for verification of the report (paragraph 2(1) of Schedule 4)."

52. A "regulated activity" is defined by reference to activities listed in [Annex 1 to Directive 2003/87/EC](#) (as amended), including the energy industry, chemical industry, metals and minerals industries and oil refineries (but not oil extraction or production).

53. The EU ETS operates by putting a limit or allowance each year on the GHG emissions from each installation carrying on a regulated activity. The relevant limit is reduced annually. Operators buy and sell emissions allowances according to whether their actual emissions are in deficit or in surplus relative to their own individual allowance. It is a "cap and trade" system.

54. The [Greenhouse Gas Emissions Trading Scheme Order 2020](#) (SI 2020 No. 1265) was made on 11 November 2020 under [part 3 of the CCA 2008](#) to replace the EU ETS.

National Planning Policy

55. Paragraph 205 of the NPPF published in February 2019 states that in the determination of a planning application great weight should be given to the benefits of mineral extraction, which includes oil. Mineral planning authorities should "plan positively for" the three phases of oil and gas development, namely exploration, appraisal and production (paragraph 209b).

56. On 6 March 2019 Dove J quashed paragraph 209a of the NPPF in [R \(Stephenson\) v Secretary of State for Housing, Communities and Local Government \[2019\] PTSR 2209](#). On 23 May 2019 the Secretary of State made a Written Ministerial Statement:-

"For the avoidance of doubt the remainder of the National Planning Policy Framework policies and, in particular, Chapter 17 on 'Facilitating the Sustainable Use of Minerals' remain unchanged and extant.

For the purposes of the National Planning Policy Framework, hydrocarbon development (including unconventional oil and gas) are considered to be a mineral resource. Specific policy on the planning considerations associated with their development is set out at paragraphs 203-205 and the remainder of 209 of the National Planning Policy Framework. In particular, paragraph 204(a) of the National Planning Policy Framework states that planning policies should "provide for the extraction of mineral resources of local and national importance" with paragraph 205 stating that "[w]hen determining planning applications, great weight should be given to the benefits of mineral extraction, including to the economy".

In addition, the Written Ministerial Statements of 16th September 2015 on 'Shale Gas and Oil Policy' and 17th May 2018 on 'Planning and Energy Policy' also remain unchanged and extant. The Written Ministerial Statements sit alongside the National Planning Policy Framework. Planning Practice Guidance is also unaffected by the ruling."

57. Chapter 14 of the NPPF addresses "the challenge of climate change". The planning system should support the transition to a low carbon future. It should help to shape places in ways that contribute to radical reductions in GHG emissions and support renewable and low carbon energy infrastructure (paragraph 148). New development should be planned for in ways that "can help to reduce greenhouse gas emissions, such as through its location, orientation and design" (paragraph 150). Development plans should provide a positive strategy for energy from renewable and low carbon energy sources (paragraph 151).

58. Paragraph 183 of the NPPF (which is relevant to grounds 2 and 3) provides:-

"The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities."

59. In the same context, paragraph 012 of the Minerals PPG states that the planning and other regulatory regimes are "separate but complementary", with the former focusing on whether new development would be appropriate for the location proposed. The paragraph concludes with:-

"..... the focus of the planning system should be on whether the development itself is an acceptable use of the land, and the impacts of those uses, rather than any control processes, health and safety issues or emissions themselves where these are subject to approval under regimes. Mineral planning authorities should assume that these non-planning regimes will operate effectively".

60. Paragraph 112 of the Minerals PPG addresses the issue of what hydrocarbon issues can be left by mineral planning authorities to other regulatory regimes. The passages relevant to the challenge under grounds 2 and 3 read as follows:-

"Some issues may be covered by other regulatory regimes but may be relevant to mineral planning authorities in specific circumstances. For example, the Environment Agency has responsibility for ensuring that risk to groundwater is appropriately identified and mitigated. Where an Environmental Statement is required, mineral planning authorities can and do play a role in preventing pollution of the water environment from hydrocarbon extraction, principally through controlling the methods of site construction and operation, robustness of storage facilities, and in tackling surface water drainage issues.

There exist a number of issues which are covered by other regulatory regimes and mineral planning authorities should assume that these regimes will operate effectively. Whilst these issues may be put before mineral planning authorities, they should not need to carry out their own assessment as they can rely on the assessment of other regulatory bodies. However, before granting planning permission they will need to be satisfied that these issues can or will be adequately addressed by taking the advice from the relevant regulatory body..."

Factual background

61. The claimant lives in Redhill, six miles from the site. She represents the Weald Action Group. Since 2013 they have objected to drilling at the site. She submitted two objections to the application for the development, one in February 2019 and another in June 2019.

62. The site is situated within **Surrey** and the Borough of Reigate and Banstead. It is approximately 3.1 km west of Horley town centre, 2.3km northeast of the village of Charlwood and 1.6 km northwest of the village of Hookwood. Gatwick Airport's main runway is 3.5 km southeast of the site.

63. The site has previously been developed for the exploration and appraisal phases of hydrocarbon extraction. On 16 January 2012 planning permission was granted for the construction of an exploratory well site, including plant and buildings and use for the drilling of one exploratory borehole and the subsequent short-term testing for hydrocarbons.

64. Following the discovery of oil, on 1 November 2017 HHDL obtained planning permission to drill and test an appraisal well and a sidetrack well. On 10 September 2018 HHDL declared the extraction of oil to be commercially viable.

65. On 20 December 2018, HHDL applied to the defendant for planning permission for the retention and extension of the existing well site (comprising two wells) and to allow the drilling of four new hydrocarbon wells, so as to enable the

production of hydrocarbons from six wells ("the development"). The development would be carried out over six phases of operation (with estimated durations):-

Phase 1 - modifications to well site and construction works - 3 months;

Phase 2 - well management and drilling - 17 months;

Phase 3 - installation of facilities for exporting crude oil from the site - 4 months;

Phase 4 - production and well management - 20 years; Phase 5 – plugging and decommissioning – 5 months; Phase 6 - site restoration and aftercare - 2 months.

The development would take place over a total period of about 25 years.

66. The area of the site would be increased from 2.08 hectares to about 2.8 hectares. There would be four newly-drilled hydrocarbon production wells and one new water re- injection well, four gas-to-power generators, a process and storage area, tanker loading facility and seven oil tanks each with a capacity of 1300 barrels.

67. In bringing the oil to the surface, a quantity of water and natural gas would also be produced. The fluids would be separated on site. The natural gas would be used to provide power for the site during the production phase, with any excess electricity being fed into the national grid. There would be provision for gas flaring in the event of an emergency or for maintenance.

68. The crude oil would be tankered off site to refineries for processing. It cannot be used without being refined. The refined product is likely to be used predominantly for transportation. There would also be some use for heat, manufacturing and the petrochemical industry. The amount of oil to be produced over the lifetime of the development is not known, but the parties have agreed that the development could in theory produce up to about 3.3m tonnes of crude oil over the 20 year production period.

69. It is not possible to say at this stage where the oil produced would be refined or subsequently used. It could be refined and used in the United Kingdom or exported and then refined and used abroad. It might be refined overseas and then imported back into the UK.

Surrey County **Council's** Scoping Opinion

70. Before submitting their planning application for the development, HHDL requested SCC to adopt a scoping opinion under the 2017 Regulations. On 25 October 2018 SCC adopted an Opinion in which it set out matters to be covered by the ES. Paragraph 3.9 stated:-

"The County Planning Authority is of the opinion that the primary focus for the EIA should be the potential effects of the scheme on population and human health (Regulation 4(2)(a)), on the water environment (Regulation 4(2)(c)), and on the global climate (Regulation 4(2)(c))."

71. Paragraph 3.11 stated that the request "did not appear to include detailed consideration of the question of the likely impact of the proposed development on the global climate."

72. Paragraphs 3.12 and 3.13 stated:-

"3.12 Direct emissions associated with the construction and operation of the well site, and the consumption of fuel by vehicle, plant and equipment associated with the well site, would likely be small in scale, and whilst contributing to increased concentrations of greenhouse gases in the atmosphere could not be classed as significant in their own right.

3.13 The direct emissions associated with the combustion of natural gas (methane) arising from the hydrocarbon extraction process, and the indirect effects associated with the production and sale of fossil fuels which would likely be used in the generation of heat or power, consequently giving rise to carbon emissions, cannot be dismissed as insignificant. It is acknowledged that the contribution of the proposed development would be modest when considered in a national or regional context."

73. The Opinion set out this "recommendation" in paragraph 3.14:-

"Given the nature of the proposed development, which is concerned with the production of fossil fuels, the use of which will result in the introduction of additional greenhouse gases into the atmosphere, it is recommended that the submitted EIA include an assessment of the effect of the scheme on the climate. That assessment should consider, in particular, the global warming potential of the oil and gas that would be produced by the proposed well site."

The treatment of greenhouse gas emissions in the Environmental Statement

74. Chapter 6 of the Environmental Statement ("ES") submitted by HHDL dealt with GHG emissions. Paragraph 107 stated that "the scope of the assessment was confined to the direct releases of greenhouse gases from within the well site boundary resulting from the site's construction, production, decommissioning and subsequent restoration over the lifetime of the proposed development".

75. Under "Assessment Methodology" paragraph 123 identified the GHG releases during the development considered in the ES, namely those arising from:-

- (1) The combustion of diesel fuel in construction plant;
- (2) The combustion of diesel fuel in HGVs servicing the development;
- (3) The combustion of diesel fuel in on-site engines and generation plant;
- (4) The combustion of natural gas.

76. HHDL's explanation for this approach was set out at paragraphs 121-122 of the ES:

"121. The assessment considers direct releases of greenhouse gases consistent with all phases of the proposed development as described in detail within ES Chapter 4. The essential character of the proposed development is the extraction and production of hydrocarbons and does not extend to their subsequent use by facilities and process beyond the planning application boundary and outwith the control of the site operators.

122. The assessment methodology pays regard to national planning policy and guidance that establishes that decision-makers should *'focus on whether the development is an acceptable use of land, rather than on control of processes or emissions where these are subject to approval under pollution control regimes'*. These non-planning regimes regulate hydrocarbon development and other downstream industrial processes and decision-makers can assume that these regimes will operate effectively to avoid or mitigate the scope for material environmental harm." (original emphasis)

77. Paragraph 144 of the ES concluded that the direct GHG impacts of the development itself would be of "negligible" significance.

SCC's review of the Environmental Statement

78. In June 2019 Dr. Jessica Salder, SCC's duly delegated officer, carried out a review of the ES on behalf of the **Council** ("the ES Review"). She concluded that the ES contained sufficient information to comply with the 2017 Regulations. Section 4.C of the Review addressed the scope of the assessment carried out in the ES. Paragraph 4.12 stated that the ES had responded "in an appropriate and proportionate manner to the requirements of [Regulation 4\(2\)](#) and to the relevant parts of [schedule 4](#)

of the EIA Regulations ." It is common ground that the decision of a planning authority on the adequacy of the ES and EIA is not subject to a duty to give reasons under the 2017 Regulations or the EIA Directive.

79. Section 5.B of the Review considered chapter 6 of the ES dealing with GHG emissions and the climate. The ES Review referred to paragraph 3.14 of the Opinion. It then concluded at paragraph 5.15:-

"The assessment presented in the submitted ES focusses on the direct greenhouse gas emissions of the development and operation of the proposed wellsite. The potential contribution of the hydrocarbons that would be produced over the lifetime of the wellsite is not covered in the submitted ES, the reasons for excluding those emissions are set out in paragraphs 121 and 122 (p.35) of the submitted ES. The [County Planning Authority] accepts the argument set out in paragraphs 121 and 122 (p.35) of the ES and the justification provided for excluding consideration of the global warming potential of the produced hydrocarbons from the scope of the EIA process."

Consideration of the planning application

80. SCC's Planning and Regulatory Committee considered the application on 11 September 2019. They had the benefit of a detailed and carefully prepared officer's report which recommended the grant of planning permission subject to conditions.

81. The report summarised the EIA process. It had included three consultation exercises. The officer's report records that a total of 1658 written representations had been received by September 2019, although some people may have written more than once. Approximately 921 supported the proposal and 717 objected.

82. However, the ES Review was not subject to any public consultation, it was not referred to in the officer's report and it was not in the public domain before SCC provided the document in response to the claimant's pre-action correspondence.

83. The report summarised objections to the proposal including those from the Weald Action Group. Paragraph 83 identified the issue of climate change as one of over 30 "main points of public concern." Paragraphs 92 to 101, dealing with the EIA, included a summary of how the ES had dealt with GHG emissions and climate change:-

" Greenhouse gas emissions and the climate – the question of the direct impacts of the proposed development on emissions of greenhouse gases and associated climate change is addressed in chapter 6 of the submitted ES. The question of the development's impact on climate change and global atmospheric composition is discussed in greater detail in paragraphs 102 to 162 of this report. On balance, and having taken account of the information and evidence submitted by all parties with an interest in the determination of the current planning application, the CPA has concluded that the proposed development would not give rise to significant impacts on the climate as a consequence of the emissions of greenhouse gases directly attributable to the implementation and operation of the scheme."

Paragraphs 102 to 162 of the officer's report dealt with climate change as one of the key strands of Government policy, along with the need for security of energy supply and UK production of oil and gas.

84. The officer's report set out the EU and national policy context in the section entitled "Need for Hydrocarbon Development" (paragraphs 102-162). The report summarised relevant parts of the NPPF. It referred to the amendment of the CCA 2008 in June 2019 to include the net zero target. Paragraph 134 of the report referred to the quashing of paragraph 209(a) of the NPPF in *Stephenson* (see [56] above), along with the need for the local planning authority to "consider reasonable and recent scientific evidence in relation to climate change and CO2 and methane emissions".

85. Paragraph 135 of the report referred to objections that the development would be incompatible with international and national objectives on climate change. The report stated at paragraph 159:-

"As can be seen from Government policy and guidance above, the Government makes it clear that oil and gas remains an important part of the UK's energy mix. Policies recognise the continuing importance of fossil fuels but aim to manage reliance on them, their potential environmental effects and the risks associated with security of supply. While the Government manages the transition to a low carbon energy mix this will mean that oil and gas remain key elements of the energy system for years to come (especially for transport and heating). Based on the UK Government's current policy, it is ... recognised that the proposed development would not be in conflict with the Government's climate change agenda".

86. In paragraph 421 of the section headed "Conclusion" the report returned to the subject of climate change:-

"Officers consider that given the production function of the development, it is not in conflict with the Government's policy and the climate change agenda. ... This leads Officers to conclude that on the basis of Government guidance there is a national need for the development subject to the proposal satisfying other national policies and the policies of the Development Plan."

87. A number of representations contained objections to the proposal on the ground of climate change, including the following:-

- (1) Mr Keith Taylor, MEP referring to The Intergovernmental Panel on Climate Change ("IPCC") report "*Global Warming of 1.5°C*" (October 2018) said "it is clear from this report that greenhouse gas emissions need to be curbed as a matter of urgency to stay within the 1.5C limit. The report says we have only 12 years to steer a course away from catastrophic climate change so a 25-year greenhouse gas intensive project is grossly inconsistent with that advice.";
- (2) In a letter dated 7 September 2019 the Weald Action Group referred to the report of the Committee on Climate Change ("CCC"): "*The UK's Contribution to Stopping Global Warming*" (May 2019). This report recommended that the Government adopt a target of net zero GHG emissions by 2050. The Group also referred to the amendment of the [CCA 2008](#) in June 2019 and asked how the proposed development over a 25 year period squared with the net zero target. The letter contended that the analysis in the officer's report of the interaction between policies on energy need and climate change was incomplete and out of date (but it should be noted that this claim has not raised that issue at all);
- (3) Objectors also relied upon the quashing of paragraph 209a of the NPPF in [Stephenson](#) and contended that that had undermined the analysis of need in the officer's report based on Government policy.

88. Matters raised after the production of the officer's report were addressed in an "Update Sheet" for the Committee's meeting. In relation to questions raised about the [Stephenson](#) case and the relationship between the proposal and government policy on energy supply and climate change, the approved minutes record that the Written Ministerial Statement made on 23 May 2019 (see [56] above) was read out in its entirety to the members at the meeting.

89. The Committee resolved to approve the application on 11 September 2019. SCC issued the decision notice granting planning permission for the development on 27 September 2019.

Ground 1(a)

90. The claimant submits that the GHG emissions which would inevitably result from the combustion of end products emanating from crude oil produced at the site had to be estimated and assessed as an indirect, long-term, negative effect of the development on the site. It is common ground that the EIA before SCC contained no information on this source of GHG emissions, as opposed to GHG emissions directly resulting from oil production on the site itself.

91. The claimant had also contended at paragraphs 61 to 63 of her skeleton that the failure to assess GHG emissions from combustion of the oil product involved a breach of [regulation 18\(4\)](#) of the 2017 Regulations by failing to follow SCC's scoping opinion adopted on 25 October 2018. In his oral submissions Mr Willers QC did not pursue this complaint, rightly in my judgment. He accepted that it is not supported by any authority.

92. [Regulation 15\(1\)](#) provides that a scoping opinion states the *opinion* of the planning authority as to the scope and level of detail to be provided in the ES. The opinion does not fix or determine what *must* be provided in the ES. [Regulation 15](#) recognises that more than one scoping opinion may be issued over time.

93. [Regulation 18\(4\)\(a\)](#) simply requires that the ES be "based on" the most recent scoping opinion, but only in so far as the proposed development remains materially the same as that which was the subject of the opinion. The 2017 Regulations do not go so far as to require the ES to contain information which complies with the scoping opinion.

94. In this regard, [regulation 18\(4\)\(a\)](#) is to be contrasted with [regulation 18\(4\)\(b\)](#). The latter requires the ES to *include* "the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment...". Likewise, [regulation 18\(3\)](#) provides that an ES is a statement which *includes* at least the matters set out in sub-paragraphs (a) to (f). Sub-paragraph (b) refers to "a description of the likely significant effects of the proposed development on the environment". If an applicant submits an ES which does not provide details specified in a scoping opinion, it is open to the authority to notify the applicant under [regulation 25](#) that further information *must* be provided. Furthermore, the authority is not bound by the terms of its scoping opinion, in that [regulation 15\(9\)](#) expressly allows the authority to *require* additional information to be provided (ie. under [regulation 25](#)). For all these reasons, the mere fact that an applicant produces an ES which does not comply with the terms of a scoping opinion does not of itself amount to a breach of the 2017 Regulations.

95. Next, it should be noted that the claimant accepts that, for the purposes of the 2017 Regulations, the relevant project or development in this case is that authorised to take place on the site by the planning permission granted on 27 September 2019. It is not suggested that GHG emissions from the combustion of end products was required to be assessed because the development permitted on Horse Hill by SCC formed part of some bigger project. The claimant does not contend that the ES should have addressed, for example, GHG emissions from a refinery used to produce end products. In other words, this is not a case where the claimant complains about the true overall project having been "salami-sliced" so as to avoid, or artificially affect, the application of the 2017 Regulations.

96. It is convenient to deal with the issues raised by the parties under the following headings:-

- Whether the 2017 Regulations, correctly interpreted, required the EIA to assess GHG emissions from the combustion of refined oil products;
- Whether SCC's reasons for not requiring an assessment of GHG from the combustion of refined oil products discloses an error of law.

Whether the 2017 Regulations required the Eia to assess Ghg emissions from the combustion of refined oil products

97. Mr Willers QC submitted that something may be treated as an environmental effect "of a project" if it is *attributable* to that project.

98. In essence the Intervenor adopted the same approach in paragraph 56 of their written submissions: -

"the question which then arises is how the court is to interpret the meaning of " *indirect effect* ". It is submitted that indirect effects are likely environmental effects more remote than direct effects (whether in time or location), but not so remote they cannot be attributed to the development at all, having regard to the purpose, nature, and any end product of the development, including the environmental impacts liable to result from the use and exploitation of the end product. It is then a question for the decision maker whether those are " *significant* ".

99. As I pointed out at the beginning of this judgment, this argument, if correct, would apply very much more widely than simply to climate change and the GHG emissions upon which this case focuses. The combustion of oil produces other emissions, such as particulate matter and NO_x, which may also give rise to environmental and public health concerns. Many upstream forms of mineral and industrial development will inevitably result in end products, the making and consumption of which will involve downstream environmental effects, including GHG and other emissions. Those effects may include not just emissions to air, but also to land and water. They may be significant and indeed important.

100. Both the claimant and the intervenor seek to reinforce their submissions by relying upon matters of common ground: it is inevitable that oil produced from the site will be refined and, as an end product, will eventually undergo combustion, and that that combustion will produce GHG emissions.

101. In my judgment, the fact that the environmental effects of consuming an end product will flow "inevitably" from the use of a raw material in making that product does not provide a legal test for deciding whether they can properly be treated as effects "of the development" on the site where the raw material will be produced for the purposes of exercising planning or land use control over that development. The extraction of a mineral from a site may have environmental consequences remote from that development but which are nevertheless inevitable. Instead, the true legal test is whether an effect on the environment is an effect of the development for which planning permission is sought. An inevitable consequence may occur after a raw material extracted on the relevant site has passed through one or more developments elsewhere which are not the subject of the application for planning permission and which do not form part of the same "project".

102. The inevitability that the crude oil to be transported off site will eventually lead to additional GHG emissions when the end product is consumed is simply a response to the defendant's point that when the oil leaves the site it becomes an indistinguishable part of the international oil market, so that the GHG emissions generated by combustion in vehicles cannot be attributed to any particular oil well or well site. Like the debate between the witness statements as to whether the oil produced on the site would only displace oil production elsewhere or would instead increase overall net consumption, these are forensic arguments about the market consequences of extracting oil at the site which do not address the real legal issues raised by ground 1(a).

103. One of the main concerns raised by the claimant is that unless the 2017 Regulations are interpreted so that, in the present case, GHG emissions from the use of an end product are required to be assessed in the EIA for the development, there is no other mechanism, it is said, by which those emissions can be controlled as a contribution to achieving the net zero target in the CCA 2008 . The claimant relies upon *Abraham v Wallonia (case C- 2/07; [2008] Env. L.R. 66)* at [32] and *Ecologistas en Accion - CODA v Ayuntamiento de Madrid Case C-142/07; [2009] PTSR 458* at [28] for the proposition that a broad purposive interpretation should be given to the EIA Directive for the protection of the environment and the assessment of environmental effects.

104. Nevertheless, as was pointed out during argument, it is also well established that that approach cannot disregard the clearly expressed wording of the legislation *Brussels Hoofdstedelijk Gewest v Vlaams Gewest (Case C-275/09) [2011] Env. L.R. 26* at [AG28] and [29]. Effect must be given to that language even if the result is that some environmental effects are not assessed (see by analogy *R (Buckinghamshire County Council) v Secretary of State for Transport [2014] 1 WLR 324* at [120] and *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government [2020] EWHC 3073 (Admin)* at [91] to [94]).

105. Although it is not essential to my conclusions on this challenge, I should record in passing that I do not accept the proposition that there are no other measures in place within the UK for assessing and reducing GHG emissions from the combustion of oil products in motor vehicles. The measures include the net zero target in the CCA 2008 , and the various matters referred to in [46] to [54] above. The overall responsibility for the economy-wide transition to a low carbon society is the responsibility of the UK Government (*Packham* at [87]). A range of measures is being pursued to achieve a reduction in the consumption of oil products including road pricing, taxation and future controls on the source of energy which may be used by vehicles. The object of these measures is to reduce substantially the demand for diesel and petrol from UK consumers.

106. The claimant fairly says that these measures do not affect the consumption of oil products by consumers in other countries. But, on the other hand, the Paris Agreement was signed by many countries throughout the world and it is the responsibility of each such country to determine its contribution to achieving the global target for 2050. Whether these issues are thought to be adequately addressed in other countries, or even in the UK, can provide no guide to the interpretation of our domestic legislation on EIA for the consenting of new development.

107. It has to be recognised that development control and the EIA process have a specific and, to some extent, limited ambit, namely to assess and control proposals for new development and in some circumstances, the retention of existing development. But, because the incidence of planning control depends upon whether planning permission is required, or enforcement action is possible, these regimes do not regulate the environmental effects of the general use of all land in the country. So, for example, the use of motor vehicles in connection with, or GHG emissions from, development which has already been permitted is generally not regulated by the development control system. Whatever the outcome of ground 1(a), that would remain the position.

108. The jurisdiction of this Court is only concerned with questions of law. It is therefore necessary to return to the language and scheme of the relevant statutory law which the Court must apply, the 2017 Regulations (and, if necessary, the EIA Directive), together with any relevant case law.

109. No help is to be gained by substituting different language for that contained in the legislation. The word "attributable" simply means "able to be attributed to" (see Shorter Oxford English Dictionary). But the verb "attribute" can mean "ascribe to as an inherent quality or characteristic" or "ascribe to as an effect or consequence".

110. It is common ground that an EIA should assess both the direct and indirect effects of the development for which planning permission is sought which are likely to be significant. "Indirect effects" cover these consequences which are less immediate, but they must, nevertheless, be effects which *the development itself* has on the environment.

111. One difficulty with the claimant's argument is that Mr Willers QC was not able to offer any test or criteria by which decision-makers could distinguish between indirect effects which qualify for EIA from those which do not, if the former were to be treated as including matters as indirect as GHG emissions from the downstream combustion of refined oil products.

112. The 2017 Regulations do not require EIA to cover the environmental effects of other development on a different site unless separate applications have artificially been made for several developments which in reality form part of an overall project ("salami slicing"), or it is relevant to assess the effects of one development cumulatively with other projects (see [paragraph 5 of schedule 4](#) to the 2017 Regulations). Where that holistic approach is taken, EIA is still only carried out in relation to the effects of "development", whether that development has already been consented or is yet to be approved. Essentially, development control and the EIA process are concerned with the use of land for development and the effects of that use. They are not directed at the environmental effects which result from the consumption, or use, of an end product, be it a manufactured article or a commodity such as oil, gas or electricity used as an energy source for conducting other human activities.

113. A further problem with the claimant's argument is that it is not contended that the EIA for HHDL's development should have taken into account the GHG emissions (or indeed other emissions) from the intervening stage of refining crude oil obtained from the site. If the GHG resulting from combustion of the end product in vehicles qualifies for EIA in the present case, it is impossible to see why GHG resulting from the operation of an essential oil refinery would not do so as well. It is no answer to say that emissions in the latter case are taken into account in the development control and regulatory regimes applied to refineries. That of itself would not prevent those emissions from being taken into account as cumulative effects under [paragraph 5 of schedule 4](#) to the 2017 Regulations.

114. Mr Willers QC submitted that the claimant's approach is supported by authority. He relied in particular upon the judgment of the CJEU in *Abraham* at [43]. But it is necessary to read that passage in the context of the preceding paragraph. Together they read:-

"42. As stated at [32] of this judgment, the Court has frequently pointed out that the scope of [Directive 85/337](#) is wide and its purpose very broad. In addition, although the second subparagraph of [Art.4\(2\) of Directive 85/337](#) confers on Member States a measure of discretion to specify certain types of projects which will be subject to an assessment or to establish the criteria and/or thresholds applicable, the limits of that discretion are to be found in the obligation set out in [Art.2\(1\)](#) that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment. In that regard, [Directive 85/337](#) seeks an overall assessment of the environmental impact of projects or of their modification.

43. It would be simplistic and contrary to that approach to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works."

115. The project in that case was for the widening of runways at an airport and the construction of a new control tower, runway exits and aprons, to enable the airport to be used more intensively. The issue was whether the EIA was required to assess the effects of the projected increase in the activity of the airport as a result of the modification. It was in that context that the court decided that the environmental effects requiring assessment were not limited to the direct effects of the works to be carried out but also had to include the environmental impact resulting from the use of the improved airport. These overall effects could properly be regarded as effects of the *development*, namely the increased usage of the airport enabled by the

works to improve the existing infrastructure. The phrase "end product" was simply used by the Court to describe the *outcome* of the project. *Abraham* cannot be taken as laying down any principle that an EIA should assess the environmental effects of the use by consumers of an "end product", that is an article or item sold or distributed from a processing facility using a raw material produced on the development site.

116. It is plain from [44] and [45] of its judgment, that the CJEU was simply dealing with the impact of the increased use of infrastructure which would be enabled by works modifying that infrastructure. That impact was an environmental effect *of the development*. The opinion of Advocate General Kokott was to the same effect ([AG31]).

117. Next, Mr Willers QC relied upon the *Ecologistas* case. At [39] the court set out the same statement of principle as in *Abraham* at [43]. The case concerned the improvement of the Madrid urban ring road. The CJEU decided that the project was liable to EIA, which could not be avoided by being split into sub-projects, and that the impact of the use of the road as altered should be assessed, and not simply the direct effect of the construction work. Like *Abraham*, this decision lends no support to the claimant's argument.

118. Mr Willers QC stated that he was not aware of any other decision of the CJEU which had applied the requirement for EIA to the environmental effects of using an "end product" in any way analogous to the use of refined oil products deriving from a development for the production of crude oil.

119. Mr Willers QC submitted that the domestic authority which was most supportive of his argument is *R (Squire) v Shropshire Council* [2019] Env. L.R. 835. A farmer obtained planning permission to build 4 poultry buildings. The facility was to operate on a 48-day cycle, under which 210,000 chicks would be brought into the buildings, reared for 38 days, and moved elsewhere before the next flock was brought in. About 1.57m chickens would be reared in a year and over 2000 tonnes of manure produced annually. The manure was to be spread on farmland close to residential areas, about half on land owned by the farmer, and the remainder on unidentified third-party land ([73]). Not surprisingly, it was common ground that odour and dust arising from the storage and spreading of manure on land outside the site of the poultry buildings were indirect effects of the development [39]. But the ES did not describe the arrangements in respect of third-party land or make an assessment of odour and dust impacts in relation to any of the spreading of manure on farmland ([65] to [66]). The ES placed some reliance upon the environmental permit regime operated by the Environmental Agency, but it did not recognise that that control would not apply to third party land ([58] and [67]).

120. So, the challenge in *Squire* succeeded because of a "patent defect" in the ES and EIA (*Plan B Earth* at [137]). It was plainly irrational for the local authority to have based their decision on an EIA which had completely failed to address an "obviously material consideration" (*R (Blewett) v Derbyshire County Council* [2004] Env. L.R. 29 and *Gathercole v Suffolk County Council* [2020] EWCA Civ 1179 at [53] to [55]). *Squire* does not lend any support at all to the far-reaching proposition for which the claimant contends. The case was concerned with a failure to assess an obvious environmental effect of the proposed development, namely the disposal of the waste it would generate and, moreover, on land in the locality.

121. Mr Willers QC sought to rely upon *H J Banks & Co. Ltd v Secretary of State for Housing, Communities and Local Government* [2019] Env. L.R. 433. There the developer challenged the Secretary of State's refusal to grant planning permission for a surface coal mine. The developer accepted that GHG emissions from the burning of coal for power generation were capable of being a material planning consideration in the determination of the application ([69]). The challenge was successful because of the Secretary of State's failure to explain why coal extraction, which he had found to be necessary, should be refused on the basis of GHG emissions without explaining how that need would be addressed from sources resulting in fewer emissions ([93] to [96]). As Mr Willers QC rightly accepted, the ground of challenge upheld by the Court did not involve any decision on the issue which arises in the present case. That point was not in contention and was not argued.

122. Several of the cases cited in the hearing were to do with defining the "project" requiring EIA. Although that issue does not arise in the present case, I refer to them because they confirm that it is necessary to define the extent of a project correctly, because that is one determinant of the scope of the EIA that may lawfully be required under the 2017 Regulations. The EIA cannot be required to include effects which go beyond the effects *of the project or development*.

123. So, in *R (Brown) v Carlisle City Council* [2011] Env. L.R. 71 the Court of Appeal held that where the acceptability in planning terms of a proposal for a freight distribution centre was contingent upon the provision of improvements to the runway and terminal at Carlisle Airport (which was reflected in a planning obligation under s. 106 of the *Town and Country Planning Act 1990*) the airport improvement formed part of the overall project comprising the distribution centre. Consequently, the EIA was required to assess the environmental effects of that overall project and not just the distribution centre.

124. By contrast, in *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] Env. L.R. 440 the Court of Appeal held that exploratory wells to test the commercial feasibility of extracting shale gas at a site was a freestanding project which did not include any subsequent phase for commercial exploitation, distinguishing the *Carlisle* case. Lindblom LJ stated at [68]:-

"... On the facts, in contrast with cases such as *Brown v Carlisle City Council*, the exploration and monitoring project under consideration here was a free-standing project of development, which did not depend on any other project, present or future, including any future proposals for the commercial extraction of shale gas. That is a material difference between this case and *Brown v Carlisle City Council*, where an environmental statement for the development of a freight distribution centre at an airport had not included an assessment of the effects of the associated improvements to the airport itself, which were part of the same project though the subject of a separate application for planning permission (see paras [29] and [30] of Sullivan J.'s judgment). In this case, the environmental statement for the project under consideration was a comprehensive environmental statement for that whole project, undertaken on the basis of what was known at the time, and without speculation as to the content and timing of some other future project, which might never happen. However broad a construction is placed on the expression "the direct and indirect significant effects of a project ..." in art.3(1) of the EIA Directive, and the expression "any indirect, secondary, cumulative ... effects of the project" in paragraph 5 of Annex IV, these concepts cannot be stretched to include effects that are not effects of the project at all (see paragraph 31 of Advocate General Kokott's Opinion in *Abraham*)." (emphasis added)

125. The Court of Appeal made a separate, additional point, namely that there had been no obligation to assess in the EIA process GHG emissions from the use of gas produced by a development for extracting shale gas where no evidence was placed before the decision-maker that the gas, which would become an indistinguishable part of a general market supply, would result in an increase in the overall consumption of gas and hence additional GHG emissions ([72] to [73]). I appreciate that this factor did not form part of the reasoning in the ES in the present case as to why GHG emissions from combustion of oil products were not included in that assessment. But the Court was not shown any attempt by objectors to the Horse Hill proposal to address this additional reason given by the Court of Appeal as to why criticism made of the EIA in the *Preston New Road* case was unjustified.

126. The upshot is that the case law confirms that EIA must address the environmental effects, both direct and indirect, of the development for which planning permission is sought, (and also any larger project of which that development forms a part), but there is no requirement to assess matters which are not environmental effects of the development or project. In my judgment the scope of that obligation does not include the environmental effects of consumers using (in locations which are unknown and unrelated to the development site) an end product which will be made in a separate facility from materials to be supplied from the development being assessed. I therefore conclude that, in the circumstances of this case, the assessment of GHG emissions from the future combustion of refined oil products said to emanate from the development site was, as a matter of law, incapable of falling within the scope of the EIA required by the 2017 Regulations for the planning application.

Whether the reasons for not requiring an assessment of Ghg from the combustion of refined oil products disclose an error of law

127. For the reasons given above, ground 1(a) must fail. But what if, contrary to my conclusion, the view were to be taken that it was legally possible under the 2017 Regulations for the assessment of GHG emissions from the use of refined oil products to fall within the scope of EIA for the extraction development proposed at Horse Hill? It is well established that the decision on whether such an assessment should be carried out as part of an EIA is a matter of judgment for the planning authority, subject to judicial review applying the *Wednesbury* standard, in particular irrationality (see eg. *Gathercole* at [53] to [55] and *R (Friends of the Earth Limited v Heathrow Airport Limited)* [2020] UKSC 52 at [142] to [145]). The threshold for establishing irrationality in such circumstances is high (see e.g. *Newsmith Stainless Limited v Secretary of State for the Environment, Transport and the Regions* [2017] PTSR 1126). The issue is whether the reasons accepted in SCC's Review of the ES (see [76] and [79] above) disclose any error of law.

128. In my judgment it is clear that they do not. In summary, HHDL stated and SCC accepted that the essential character of the proposed development of the site is for the extraction and production of hydrocarbons. The character of that land use did not include subsequent processing, distribution, sale and consumption of end products.

129. The ES went on to refer to national policy stating that the planning system should focus on land use issues rather than the control of process or emissions for which there are other specific regulatory regimes. This part of the reasoning was based upon *inter alia* paragraph 183 of the NPPF and case law such as *Gateshead Metropolitan Borough Council v Secretary of*

State for the Environment [1994] *Env. L.R.* 37 and *R (An Taisce, the National Trust for Ireland) v Secretary of State for Energy and Climate Change* [2013] *EWHC* 4161 (*Admin*); [2015] *PTSR* 189, summarised by Gilbert J in *R (Frack Free Balcombe Residents Association) v West Sussex County Council* [2014] *EWHC* 4108 (*Admin*). Paragraph 122 of the ES makes it clear that it was only referring to "hydrocarbon development and other downstream industrial processes" as being regulated by pollution control regimes. In other words, this passage in the ES explained why no assessment was being made of emissions from, for example, oil refineries. Likewise, the reference at the end of paragraph 121 to "facilities and process" beyond the site boundary and outwith HHDL's control should be understood in that same sense. It is plain that the ES did not rely upon lack of control or the existence of other regulatory regimes to justify the non-assessment of GHG from the combustion of refined oil products. The same applies to SCC's acceptance of that reasoning in paragraphs 121 to 122 of the ES.

130. The claimant's challenge does not relate to the non-assessment of GHG emissions once the crude oil has left the site, except for those arising from the consumption of the end products. There is no challenge to the non-assessment in the ES of GHG from, for example, the process of refining. Accordingly, once paragraphs 121 to 122 of the ES are read properly, the criticism made of the reliance placed upon lack of control and alternative regulatory regimes falls away.

131. We are left with the real reason given in paragraph 121 of the ES and paragraph 5.15 of the ES Review for non-assessment of GHG emissions from the use of refined oil products. This was that the essential character of the proposed development is the extraction and production of crude oil, and not the subsequent process of refining the crude oil at separate locations remote from Horse Hill, followed by the use of infrastructure and/or transport for the distribution of the end products, whether in the UK or elsewhere in the world. That explanation is sufficient to deal with any suggestion of irrationality. But it is further supported by the broad thrust of the elucidation of her contemporaneous thinking (as it was described by Mrs Townsend for SCC at the hearing) in paragraphs 15 to 31 of Dr. Salder's witness statement.

132. I conclude that no legal criticism can be made of SCC's focus on the land use and development proposed because that was the "project" which was the subject of the planning application and the related EIA. Viewed in that way it is impossible to say that SCC's judgment that GHG emissions from the combustion of refined fuels were not an environmental effect of the proposed development was, as a matter of law, irrational. SCC's judgment was not beyond the range of conclusions which rational decision-makers could lawfully reach.

133. For these reasons, ground 1(a) must be rejected. As I have previously explained, the remaining grounds may be dealt with more briefly, given that the claimant accepts that they would fall away if ground 1(a) failed.

Ground 1(b)

134. Given that I have found that there was no legal requirement for the amount of GHG emissions from the combustion of refined oil products to be estimated in the EIA of the proposed development at Horse Hill, it follows that there was no requirement, in this context, for that estimate to be compared to any GHG or climate change metric. That is why Mr Willers QC accepted that ground 1(b) falls away if ground 1(a) fails.

135. Having said that, I have noted that several objectors to this project made representations to SCC that it would be inappropriate for planning permission to be granted for the production of hydrocarbons given the national policy objective to reduce their consumption as a contribution to achieving the net zero target. I have referred to national policy stating that the planning system should support the transition to a low carbon future and have regard to climate change ([57] above), while at the same time providing some support for oil and gas developments ([55] above).

136. It is not the Court's role to deal with the merits of these policies or their application. On the other hand, the Court may review the consideration given to a planning application by a planning authority to see whether the authority failed to take into account a relevant policy which it was legally obliged to consider, or whether it has misinterpreted the language of a relevant policy.

137. The main document to be considered is the officer's report to committee. The document summarised in some detail the representations made by objectors. For example, Friends of the Earth said the proposal was incompatible with the need to

tackle climate change and to reduce the use of fossil fuels. A number of other objections regarding effects on climate change were summarised as follows:-

"Concern that production and burning of fossil fuels will contribute to global warming and climate change; does not accord with Climate Change agreements such as the Paris Agreement and UN targets; UK has legal commitments to reduce carbon emissions; not green/carbon neutral footprint; need for diesel is decreasing with advancements in electric cars; local authorities have to consider the impact on climate change."

On the other hand, supporters of the proposal said that there was a national need for the oil at Horse Hill to meet UK policy on energy security, to reduce the need for imports and to meet a continuing need for oil until sustainable renewable resources provide sufficient energy. Plainly, SCC took these competing views into account.

138. In [83] above I have referred to that part of the officer's report which explained how far GHG had been addressed in the ES and that the broad impact on global climate change would be addressed in paragraphs 102 to 162 of the report. Paragraphs 106 to 118 summarised development plan and national planning policy. Paragraphs 119 to 136 dealt with EU and UK policy on the relationship between energy supply and climate change. The policy objectives include reduction in the use of fossil fuels, whilst also maximising economic production in the UK of fossil fuels of the kind proposed in this case, and maintaining energy security. Having summarised relevant policies, the officer's report dealt with the need for hydrocarbon supply at paragraphs 137 to 162, arriving at the conclusion that there is a national need for the development. That was a matter for the judgment of SCC, not the Court.

139. Some members of the public wrote to SCC to criticise the officer's report, before it was considered by the Committee, for failing to refer to more recent policy or other official documents on these subjects. There is no dispute that that material was sufficiently drawn to the attention of the members of the Committee. So, taken overall, it would be impossible for the Court to say that the Committee did not have an adequate picture of relevant policies, or that any policy was misinterpreted. Very properly, Mr Willers QC accepted that that was the case.

140. For all these reasons, ground 1(b) must be rejected.

Grounds 2 and 3

141. It is appropriate to consider grounds 2 and 3 together. Under ground 2 the claimant submitted that paragraph 183 of the NPPF and paragraphs 012 and 112 of the Minerals PPG have been misinterpreted by SCC as allowing the downstream GHG emissions from the combustion of refined oil products to be excluded from the EIA for this development. Under ground 3 the claimant submitted in the alternative that if SCC had not misinterpreted those policies, then the policies were unlawful in so far as they allowed *inter alia* planning permission to be granted for an oil production development without requiring GHG emissions from the combustion of end products to be assessed in EIA, in breach of the EIA Directive and the 2017 Regulations.

142. These grounds assume that the non-assessment of GHG emissions from the use of end products involved a breach of the EIA Directive and the 2017 Regulations. I have rejected that argument under ground 1(a). But even if I am wrong in that conclusion, it turns out that grounds 2 and 3 do not arise on the facts of this case. As I have explained in [129] above, the reasoning in paragraph 122 of the ES, which was accepted by SCC, simply applied the policies in question to processing facilities used in the production of end products, notably refineries, and not to the combustion of those end products in, for example, vehicles being driven by consumers. The claimant accepts that emissions from these processing facilities did not have to be included in the EIA for the development of the site. Accordingly, grounds 2 and 3 do not arise from the way in which the ES and SCC dealt with these EIA issues.

143. However, I think it appropriate to add that I do accept the analysis on this part of the case by Mr. Richard Moules on behalf of the Secretary of State. The national policies in question do not purport to limit the scope of ES or EIA under the 2017 Regulations and so there is no question of those policies being unlawful on the grounds of conflict with the EIA Directive or those Regulations. The policies, like the case law which they reflect, do not allow a planning authority (or ES) to disregard a relevant environment effect of a particular development proposal, but do allow an authority to exercise judgment as to the extent to which such an effect should be assessed in the development control process, taking into account the existence of other dedicated regulatory regimes (see eg. Sullivan LJ in *An Taisce [2015] PTSR* at [47] to [51]). The existence of such regulatory regimes may also inform a planning authority's judgment as to the extent of the project or of the environmental effects which should be the subject of EIA for a particular planning application (see eg. Lang J in *R (Friends of the Earth) v North Yorkshire County Council [2017] Env L.R. 497*).

144. For these reasons grounds 2 and 3 must be rejected.

Evidence

145. A substantial amount of evidence was produced in this case, particularly in the form of witness statements. Some of this material was, on its face, inadmissible in proceedings for judicial review. The admissibility of certain other passages was either unclear or dubious. This necessitated attempts by parties to clarify the status of the material, which were not wholly successful. Fortunately, I was not asked to make, nor, as it turns out, did I need to make, formal rulings on this subject. The reasoning in this judgment does not depend upon the resolution of any such issue.

146. The principles governing the admissibility of evidence in proceedings for judicial review are well-established and should, by now, be well-known. They were summarised, for example, in *Flaxby Park Limited v Harrogate Borough Council [2020] EWHC 3204 (Admin)* at [15] to [20].

147. It is also important to draw attention to the observations of the Court of Appeal, presided over by Lord Burnett LCJ, in *R (Dolan) v Secretary of State for Health and Social Care [2020] EWCA Civ 1605* at [116] to [121]. There is an increasing concern about the need for procedural rigour in judicial review in order for justice to be done. Prolix documents conceal rather than illuminate the case being advanced and the real issues genuinely needing to be resolved. This makes the Court's task more difficult, it is wasteful of costs and it may lead to delay. It can also lead to a disproportionate and unjustifiable use of the Court's resources for one case at the expense of other litigants waiting to have important issues raised by their cases resolved. The delivery of justice by allocating an "appropriate share" of the Court's resources to a case, while taking into account the needs of other cases underlies the overriding objective in CPR1.1 and other recent decisions, such as *R (Wingfield) v Canterbury City Council [2020] EWCA Civ 1588* at [5] to [11]. These are matters to which practitioners, their clients and litigants need to pay careful attention in accordance with CPR 1.3, both in their own interests and in the interests of all court users.

Conclusion

148. For all the reasons set out above the claim is dismissed.

Crown copyright



Michaelmas Term
[2020] UKSC 52
On appeal from: [2020] EWCA Civ 214

JUDGMENT

**R (on the application of Friends of the Earth Ltd
and others) (Respondents) v Heathrow Airport Ltd
(Appellant)**

before

**Lord Reed, President
Lord Hodge, Deputy President
Lady Black
Lord Sales
Lord Leggatt**

JUDGMENT GIVEN ON

16 December 2020

Heard on 7 and 8 October 2020

Appellant

Lord Anderson of Ipswich KBE QC
Michael Humphries QC
Richard Turney
Malcolm Birdling
(Instructed by Bryan Cave Leighton
Paisner LLP)

Respondent (1)

David Wolfe QC
Peter Lockley
Andrew Parkinson

(Instructed by Leigh Day
(London))

Respondent (2)

Tim Crosland, Director,
Plan B Earth

Respondents:

- (1) Friends of the Earth
- (2) Plan B Earth

LORD HODGE AND LORD SALES: (with whom Lord Reed, Lady Black and Lord Leggatt agree)

Introduction

1. This case concerns the framework which will govern an application for the grant of development consent for the construction of a third runway at Heathrow Airport. This is a development scheme promoted by the appellant, Heathrow Airport Ltd (“HAL”), the owner of the airport.
2. As a result of consideration over a long period, successive governments have come to the conclusion that there is a need for increased airport capacity in the South East of England to foster the development of the national economy.
3. An independent commission called the Airports Commission was established in 2012 under the chairmanship of Sir Howard Davies to consider the options. In its interim report dated 17 December 2013 the Airports Commission reached the conclusion that there was a clear case for building one new runway in the South East, to come into operation by 2030. In that report the Airports Commission set out scenarios, including a carbon-traded scenario under which overall carbon dioxide (CO₂) emissions were set at a cap consistent with a goal to limit global warming to 2°C. The Commission reduced the field of proposals to three main candidates. Two of these involved building additional runway capacity at Heathrow Airport, either to the north west of the existing two runways (“the NWR Scheme”) or by extending the existing northern runway (“the ENR Scheme”). The third involved building a second runway at Gatwick airport (“the G2R Scheme”).
4. The Airports Commission carried out an extensive consultation on which scheme should be chosen. In its final report dated 1 July 2015 (“the Airports Commission Final Report”) the Commission confirmed that there was a need for additional runway capacity in the South East by 2030 and concluded that, while all three options could be regarded as credible, the NWR Scheme was the best way to meet that need, if combined with a significant package of measures which addressed environmental and community impacts.
5. The Government carried out reviews of the Airports Commission’s analysis and conclusions. It assessed the Airports Commission Final Report to be sound and robust. On 14 December 2015 the Secretary of State for Transport (“the Secretary of State”) announced that the Government accepted the case for airport expansion;

agreed with, and would consider further, the Airports Commission's short-list of options; and would use the mechanism of a national policy statement ("NPS") issued under the Planning Act 2008 ("the PA 2008") to establish the policy framework within which to consider an application by a developer for a development consent order ("DCO"). The announcement also stated that further work had to be done in relation to environmental impacts, including those arising from carbon emissions.

6. In parallel with the development of national airports policy, national and international policy to combat climate change has also been in a state of development. The Climate Change Act 2008 ("the CCA 2008") was enacted on the same day as the PA 2008. It sets a national carbon target (section 1) and requires the Government to establish carbon budgets for the UK (section 4). There are mechanisms in the CCA 2008 to adjust the national target and carbon budgets (in sections 2 and 5, respectively) as circumstances change, including as scientific understanding of global warming develops.

7. In 1992, the United Nations adopted the United Nations Framework Convention on Climate Change. 197 states are now parties to the Convention. Following the 21st Conference of the parties to the Convention, on 12 December 2015 the text of the Paris Agreement on climate change was agreed and adopted. The Paris Agreement set out certain obligations to reduce emissions of greenhouse gases, in particular CO₂, with the object of seeking to reduce the rate of increase in global warming and to contain such increase to well below 2°C above, and if possible to 1.5°C, above pre-industrial levels. On 22 April 2016 the United Kingdom signed the Paris Agreement and on 17 November 2016 the United Kingdom ratified the Agreement.

8. An expansion of airport capacity in the South East would involve a substantial increase in CO₂ emissions from the increased number of flights which would take place as a result. The proposals for such expansion have therefore given rise to a considerable degree of concern as to the environmental impact it would be likely to have on global warming and climate change. This is one aspect of the proposals for expansion of airport capacity, among many others, which have made the decision whether to proceed with such expansion a matter of controversy.

9. On 25 October 2016, the Secretary of State announced that the NWR Scheme was the Government's preferred option. In February 2017 the Government commenced consultation on a draft of an Airports NPS which it proposed should be promulgated pursuant to the PA 2008 to provide the national policy framework for consideration of an application for a DCO in respect of the NWR Scheme. A further round of consultation on a draft of this NPS was launched in October 2017. There were many thousands of responses to both consultations. In June 2018 the Government published its response to the consultations. It also published a response

to a report on the proposed scheme dated 1 November 2017 by the Transport Committee (a Select Committee of the House of Commons).

10. On 5 June 2018 the Secretary of State laid before Parliament the final version of the Airports NPS (“the ANPS”), together with supporting documents. As is common ground on this appeal, the policy framework set out in the ANPS makes it clear that issues regarding the compatibility of the building of a third runway at Heathrow with the UK’s obligations to contain carbon emissions and emissions of other greenhouse gases could and should be addressed at the stage of the assessment of an application by HAL for a DCO to allow it to proceed with the development. As is also common ground, the ANPS makes it clear that the emissions obligations to be taken into account at the DCO stage will be those which are applicable at that time, assessed in the light of circumstances and the detailed proposals of HAL at that time.

11. On 25 June 2018 there was a debate on the proposed ANPS in the House of Commons, followed by a vote approving the ANPS by 415 votes to 119, a majority of 296 with support from across the House.

12. On 26 June 2018 the Secretary of State designated the ANPS under section 5(1) of the PA 2008 as national policy. It is the Secretary of State’s decision to designate the ANPS which is the subject of legal challenge in these proceedings.

13. Objectors to the NWR Scheme commenced a number of claims against the Secretary of State to challenge the lawfulness of the designation of the ANPS on a wide variety of grounds. For the most part, those claims have been dismissed in the courts below in two judgments of the Divisional Court (Hickinbottom LJ and Holgate J) in the present proceedings, [2019] EWHC 1070 (Admin); [2020] PTSR 240, and an associated action ([2019] EWHC 1069 (Admin)) and in the judgment of the Court of Appeal in the present proceedings: [2020] EWCA Civ 214; [2020] PTSR 1446.

14. The Divisional Court dismissed all the claims brought by objectors, including those brought by the respondents to this appeal (Friends of the Earth - “FoE” - and Plan B Earth). FoE is a non-governmental organisation concerned with climate change. Plan B Earth is a charity concerned with climate change.

15. However, the Court of Appeal allowed appeals by FoE and Plan B Earth and granted declaratory relief stating that the ANPS is of no legal effect and that the Secretary of State had acted unlawfully in failing to take into account the Paris

Agreement in making his decision to designate the ANPS. The Court of Appeal set out four grounds for its decision:

(i) The Secretary of State breached his duty under section 5(8) of the PA 2008 to give an explanation of how the policy set out in the ANPS took account of Government policy, which was committed to implementing the emissions reductions targets in the Paris Agreement (“the section 5(8) ground”);

(ii) The Secretary of State breached his duty under section 10 of the PA 2008, when promulgating the ANPS, to have regard to the desirability of mitigating and adapting to climate change, in that he failed to have proper regard to the Paris Agreement (“the section 10 ground”);

(iii) The Secretary of State breached his duty under article 5 of the Strategic Environmental Assessment Directive (“the SEA Directive”, Directive 2001/42/EC of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment) to issue a suitable environmental report for the purposes of public consultation on the proposed ANPS, in that he failed to refer to the Paris Agreement (“the SEA Directive ground”); and

(iv) The Secretary of State breached his duty under section 10 of the PA 2008, when promulgating the ANPS, in that he failed to have proper regard to (a) the desirability of mitigating climate change in the period after 2050 (“the post 2050 ground”) and (b) the desirability of mitigating climate change by restricting emissions of non-CO₂ impacts of aviation, in particular nitrous oxide (“the non-CO₂ emissions ground”).

16. The Court of Appeal also rejected a submission by HAL, relying on section 31 of the Senior Courts Act 1981, that it should exercise its discretion as to remedy to refuse any relief, on the grounds that (HAL argued) it was highly likely that even if there had been no breach of duty by the Secretary of State the decision whether to issue the ANPS would have been the same.

17. HAL appeals to this court with permission granted by the court. HAL is joined in the proceedings as an interested party. It has already invested large sums of money in promoting the NWR Scheme and wishes to carry it through by applying for a DCO in due course and then building the proposed new runway. The Secretary of State has chosen not to appeal and has made no submissions to us. However, HAL

is entitled to advance all the legal arguments which may be available in order to defend the validity of the ANPS.

18. Prior to the Covid-19 pandemic, Heathrow was the busiest two-runway airport in the world. The pandemic has had a major impact in reducing aviation and the demand for flights. However, there will be a lead time of many years before any third runway at Heathrow is completed and HAL's expectation is that the surplus of demand for aviation services over airport capacity will have been restored before a third runway would be operational. Lord Anderson QC for HAL informed the court that HAL intends to proceed with the NWR Scheme despite the pandemic.

The Planning Act 2008

19. We are grateful to the Divisional Court for their careful account of the PA 2008, on which we draw for this section. The PA 2008 established a new unified "development consent" procedure for "nationally significant infrastructure projects" defined to include certain "airport-related development" including the construction or alteration of an airport that is expected to be capable of providing air passenger services for at least 10m passengers per year (sections 14 and 23). Originally, many of the primary functions under the Act were to be exercised by the Infrastructure Planning Commission, established under section 1. However, those functions were transferred to the Secretary of State by the Localism Act 2011.

20. The mischiefs that the Act was intended to address were identified in the White Paper published in May 2007, Planning for a Sustainable Future (Cm 7120) ("the 2007 White Paper"). Prior to the PA 2008, a proposal for the construction of a new airport or extension to an airport would have required planning permission under the Town and Country Planning Act 1990. An application for permission would undoubtedly have resulted in a public inquiry, whether as an appeal against refusal of consent or a decision by the Secretary of State to "call in" the matter for his own determination. As paragraph 3.1 of the 2007 White Paper said:

"A key problem with the current system of planning for major infrastructure is that national policy and, in particular, the national need for infrastructure, is not in all cases clearly set out. This can cause significant delays at the public inquiry stage, because national policy has to be clarified and the need for the infrastructure has to be established through the inquiry process and for each individual application. For instance, the absence of a clear policy framework for airports development was identified by the inquiry secretary in his report on the planning inquiry as one of the key factors in the very long

process for securing planning approval for Heathrow Terminal 5. Considerable time had to be taken at the inquiry debating whether there was a need for additional capacity. The Government has since responded by publishing the Air Transport White Paper to provide a framework for airport development. This identifies airport development which the Government considers to be in the national interest, for reference at future planning inquiries. But for many other infrastructure sectors, national policy is still not explicitly set out, or is still in the process of being developed.”

21. Paragraph 3.2 identified a number of particular problems caused by the absence of a clear national policy framework. For example, inspectors at public inquiries might be required to make assumptions about national policy and national need, often without clear guidance and on the basis of incomplete evidence. Decisions by Ministers in individual cases might become the means by which government policy would be expressed, rather than such decisions being framed by clear policy objectives beforehand. In the absence of a clear forum for consultation at the national level, it could be more difficult for the public and other interested parties to have their say in the formulation of national policy on infrastructure. The ability of developers to make long-term investment decisions is influenced by the availability of clear statements of government policy and objectives, and might be adversely affected by the absence of such statements.

22. The 2007 White Paper proposed that national policy statements would set the policy framework for decisions on the development of national infrastructure.

“They would integrate the Government’s objectives for infrastructure capacity and development with its wider economic, environmental and social policy objectives, including climate change goals and targets, in order to deliver sustainable development.”

The role of Ministers would be to set policy, in particular the national need for infrastructure development (para 3.4).

23. Paragraph 3.11 envisaged that any public inquiry dealing with individual applications for development consent would not have to consider issues such as whether there is a case for infrastructure development, or the types of development most likely to meet the need for additional capacity, since such matters would already have been addressed in the NPS. It was said that NPSs should have more weight than other statements of policy, whether at a national or local level: they

should be the primary consideration in the determination of an application for a DCO (para 3.12), although other relevant considerations should also be taken into account (para 3.13). To provide democratic accountability, it was said that NPSs should be subject to Parliamentary scrutiny before being adopted (para 3.27).

24. In line with the 2007 White Paper recommendation, Part 2 of the PA 2008 provides for NPSs which give a policy framework within which any application for development consent, in the form of a DCO, is to be determined. Section 5(1) gives the Secretary of State the power to designate an NPS for development falling within the scope of the Act; and section 6(1) provides that “[t]he Secretary of State must review each [NPS] whenever the Secretary of State thinks it appropriate to do so”.

25. The content of an NPS is governed by section 5(5)-(8) which provide that:

“(5) The policy set out in [an NPS] may in particular -

(a) set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area;

(b) set out criteria to be applied in deciding whether a location is suitable (or potentially suitable) for a specified description of development;

(c) set out the relative weight to be given to specified criteria;

(d) identify one or more locations as suitable (or potentially suitable) or unsuitable for a specified description of development;

(e) identify one or more statutory undertakers as appropriate persons to carry out a specified description of development;

(f) set out circumstances in which it is appropriate for a specified type of action to be taken to mitigate the impact of a specified description of development.

(6) If [an NPS] sets out policy in relation to a particular description of development, the statement must set out criteria to be taken into account in the design of that description of development.

(7) [An NPS] must give reasons for the policy set out in the statement.

(8) The reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change.”

As is made clear, the NPS may (but is not required to) identify a particular location for the relevant development.

26. In addition, under the heading “Sustainable development”, section 10 provides (so far as relevant to these claims):

“(1) This section applies to the Secretary of State’s functions under sections 5 and 6.

(2) The Secretary of State must, in exercising those functions, do so with the objective of contributing to the achievement of sustainable development.

(3) For the purposes of subsection (2) the Secretary of State must (in particular) have regard to the desirability of -

(a) mitigating, and adapting to, climate change; ...”

27. The process for designation of an NPS is also set out in the Act. The PA 2008 imposed for the first time a transparent procedure for the public and other consultees to be involved in the formulation of national infrastructure policy in advance of any consideration of an application for a DCO.

28. The Secretary of State produces a draft NPS, which is subject to (i) an appraisal of sustainability (“AoS”) (section 5(3)), (ii) public consultation and

publicity (section 7), and (iii) Parliamentary scrutiny (sections 5(4) and 9). In addition, there is a requirement to carry out a strategic environmental assessment under the SEA Directive as transposed by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) (“the SEA Regulations”) (see regulation 5(2) of the SEA Regulations).

29. The consultation and publicity requirements are set out in section 7, which so far as relevant provides:

“(1) This section sets out the consultation and publicity requirements referred to in sections 5(4) and 6(7).

(2) The Secretary of State must carry out such consultation, and arrange for such publicity, as the Secretary of State thinks appropriate in relation to the proposal. This is subject to subsections (4) and (5).

(3) In this section ‘the proposal’ means -

(a) the statement that the Secretary of State proposes to designate as [an NPS] for the purposes of this Act or

(b) (as the case may be) the proposed amendment.

(4) The Secretary of State must consult such persons, and such descriptions of persons, as may be prescribed.

(5) If the policy set out in the proposal identifies one or more locations as suitable (or potentially suitable) for a specified description of development, the Secretary of State must ensure that appropriate steps are taken to publicise the proposal.

(6) The Secretary of State must have regard to the responses to the consultation and publicity in deciding whether to proceed with the proposal.”

30. A proposed NPS must be laid before Parliament (section 9(2) and (8)). The Act thus provides an opportunity for a committee of either House of Parliament to scrutinise a proposed NPS and to make recommendations; and for each House to scrutinise it and make resolutions (see section 9(4)).

31. An NPS is not the end of the process. It simply sets the policy framework within which any application for a DCO must be determined. Section 31 provides that, even where a relevant NPS has been designated, development consent under the PA 2008 is required for development “to the extent that the development is or forms part of a nationally significant infrastructure project”. Such applications must be made to the relevant Secretary of State (section 37).

32. Chapter 2 of Part 5 of the Act makes provision for a pre-application procedure. This provides for a duty to consult pre-application, which extends to consulting relevant local authorities and, where the land to be developed is in London, the Greater London Authority (section 42). There are also duties to consult the local community, and to publicise and to take account of responses to consultation and publicity (sections 47-49; and see also regulation 12 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572), which makes provision for publication of and consultation on preliminary environmental information). Any application for a DCO must be accompanied by a consultation report (section 37(3)(c)); and adequacy of consultation is one of the criteria for acceptance of the application (section 55(3) and (4)(a)).

33. Part 6 of the PA 2008 is concerned with “Deciding applications for orders granting development consent”. Once the application has been accepted, section 56 requires the applicant to notify prescribed bodies and authorities and those interested in the land to which the application relates, who become “interested parties” to the application (section 102). The notification must include a notice that interested parties may make representations to the Secretary of State. Section 60(2) provides that where a DCO application is accepted for examination there is a requirement to notify any local authority for the area in which land, to which the application relates, is located (see section 56A)) and, where the land to be developed is in London, the Greater London Authority, inviting them each to submit a “local impact report” (section 60(2)).

34. The Secretary of State may appoint a panel or a single person to examine the application (“the Examining Authority”) and to make a report setting out its findings and conclusions, and a recommendation as to the decision to be made on the application. The examination process lasts six months, unless extended (section 98); and the examination timetable is set out in the Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010/103) (“the Examination Rules”). In addition to local

impact reports (section 60), the examination process involves written representations (section 90), written questions by the Examining Authority (rules 8 and 10 of the Examination Rules), and hearings (which might be open floor and/or issue specific and/or relating to compulsory purchase) (sections 91-93). As a result of the examination process, the provisions of the proposed DCO may be amended by either the applicant or the Examination Authority, eg in response to the representations of interested parties; and it is open to the Secretary of State to modify the proposed DCO before making it.

35. Section 104 constrains the Secretary of State when determining an application for a DCO for development in relation to which an NPS has effect, in the following terms (so far as relevant to these claims):

“(2) In deciding the application the Secretary of State must have regard to -

(a) any [NPS] which has effect in relation to development of the description to which the application relates (a ‘relevant [NPS]’), ...

(b) any local impact report ...,

(c) any matters prescribed in relation to development of the description to which the application relates, and

(d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State’s decision.

(3) The Secretary of State must decide the application in accordance with any relevant [NPS], except to the extent that one or more of subsections (4) to (8) applies.

(4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant [NPS] would lead to the United Kingdom being in breach of any of its international obligations.

(5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant [NPS] would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.

(6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant [NPS] would be unlawful by virtue of any enactment.

(7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.

(8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with [an NPS] is met.

(9) For the avoidance of doubt, the fact that any relevant [NPS] identifies a location as suitable (or potentially suitable) for a particular description of development does not prevent one or more of subsections (4) to (8) from applying.”

36. Section 104 is complemented by section 106 which, under the heading “Matters which may be disregarded when determining an application”, provides (so far as relevant to these claims):

“(1) In deciding an application for an order granting development consent, the Secretary of State may disregard representations if the Secretary of State considers that the representations -

(a) ...

(b) relate to the merits of policy set out in [an NPS]....

(2) In this section ‘representation’ includes evidence.”

That is also reflected in sections 87(3) and 94(8), under which the Examining Authority may disregard representations (including evidence) or refuse to allow representations to be made at a hearing if it considers that they “relate to the merits of the policy set out in [an NPS] ...”.

37. By section 120(1), a DCO may impose requirements in connection with the development for which consent is granted, eg it may impose conditions considered appropriate or necessary to mitigate or control the environmental effects of the development. Section 120(3) is a broad provision enabling a DCO to make provision relating to, or to matters ancillary to, the development for which consent is granted including any of the matters listed in Part 1 of Schedule 5 (section 120(4)). That schedule lists a wide range of potentially applicable provisions, including compulsory purchase, the creation of new rights over land, the carrying out of civil engineering works, the designation of highways, the operation of transport systems, the charging of tolls, fares and other charges and the making of byelaws and their enforcement.

38. Section 13 concerns “Legal challenges relating to [NPSs]”. Section 13(1) provides:

“A court may entertain proceedings for questioning [an NPS] or anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement only if -

- (a) the proceedings are brought by a claim for judicial review, and
- (b) the claim form is filed before the end of the period of six weeks beginning with the day after -
 - (i) the day on which the statement is designated as [an NPS] for the purposes of this Act, or
 - (ii) (if later) the day on which the statement is published.”

It was under section 13 that the claims by objectors to the ANPS were brought.

The Climate Change Act 2008

39. Again, we gratefully draw on the account given by the Divisional Court. As they explain, the UK has for a long time appreciated the desirability of tackling climate change, and wished to take a more rigorous domestic line. In the 2003 White Paper, “Our Energy Future - Creating a Low Carbon Economy”, the Government committed to reduce CO₂ emissions by 60% on 1990 levels by 2050; and to achieve “real progress” by 2020 (which equated to reductions of 26-32%). The 60% figure emanated from the EU Council of Ministers’ “Community Strategy on Climate Change” in 1996, which determined to limit emissions to 550 parts per million (ppm) on the basis that to do so would restrict the rise in global temperatures to 2°C above pre-industrial levels which, it was then considered, would avoid the serious consequences of global warming. However, by 2005, there was scientific evidence that restricting emissions to 550ppm would be unlikely to be effective in keeping the rise to 2°C; and only stabilising CO₂ emissions at something below 450ppm would be likely to achieve that result.

40. Parliament addressed these issues in the CCA 2008.

41. Section 32 established a Committee on Climate Change (“the CCC”), an independent public body to advise the UK and devolved Governments and Parliaments on tackling climate change, including on matters relating to the UK’s statutory carbon reduction target for 2050 and the treatment of greenhouse gases from international aviation.

42. Section 1 gives a mandatory target for the reduction of UK carbon emissions. At the time of designation of the ANPS, it provided:

“It is the duty of the Secretary of State [then, the Secretary of State for Energy and Climate Change: now, the Secretary of State for Business, Enterprise and Industrial Strategy (‘BEIS’)] to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline.”

The figure of 80% was substituted for 60% during the passage of the Bill, as evolving scientific knowledge suggested that the lower figure would not be sufficient to keep the rise in temperature to 2°C in 2050. Therefore, although the CCA 2008 makes no mention of that temperature target, as the CCC said in its report on the Paris Agreement issued in October 2016 (see para 73 below):

“This 2050 target was derived as a contribution to a global emissions path aimed at keeping global average temperatures to around 2°C above pre-industrial levels.”

The statutory target of a reduction in carbon emissions by 80% by 2050 was Parliament’s response to the international commitment to keep the global temperature rise to 2°C above pre-industrial levels in 2050. Since the designation of the ANPS, the statutory target has been made more stringent. The figure of 100% was substituted for 80% in section 1 of the CCA 2008 by the Climate Change Act 2008 (2050 Target Amendment) Order 2019/1056.

43. The Secretary of State for BEIS has the power to amend that percentage (section 2(1) of the CCA 2008), but only:

(i) if it appears to him that there have been significant developments in scientific knowledge about climate change since the passing of the Act, or developments in European or international law or policy (section 2(2) and (3)): the Explanatory Note to the Act says, as must be the case, that “this power might be used in the event of a new international treaty on climate change”;

(ii) after obtaining, and taking into account, advice from the CCC (section 3(1)); and

(iii) subject to Parliamentary affirmative resolution procedure (section 2(6)).

44. Section 1 of the CCA 2008 sets a target that relates to carbon only. Section 24 enables the Secretary of State for BEIS to set targets for other greenhouse gases, but subject to similar conditions to which an amendment to the section 1 target is subject.

45. In addition to the carbon emissions target set by section 1 - and to ensure compliance with it (see sections 5(1)(b) and 8) - the Secretary of State for BEIS is also required to set for each succeeding period of five years, at least 12 years in advance, an amount for the net UK carbon account (“the carbon budget”); and ensure that the net UK carbon account for any period does not exceed that budget (section 4). The carbon budget for the period including 2020 was set to be at least 34% lower than the 1990 baseline.

46. Section 10(2) sets out various matters which are required to be taken into account when the Secretary of State for BEIS sets, or the CCC advises upon, any carbon budget, including:

- “(a) scientific knowledge about climate change;
- (b) technology relevant to climate change;
- (c) economic circumstances, and in particular the likely impact of the decision on the economy and the competitiveness of particular sectors of the economy;
- (d) fiscal circumstances, and in particular the likely impact of the decision on taxation, public spending and public borrowing;
- (e) social circumstances, and in particular the likely impact of the decision on fuel poverty;
- (f) ...
- (h) circumstances at European and international level;
- (i) the estimated amount of reportable emissions from international aviation and international shipping ...”

Therefore, although for the purposes of the CCA 2008 emissions from greenhouse gases from international aviation do not generally count as emissions from UK sources (section 30(1)), by virtue of section 10(2)(i), in relation to any carbon budget, the Secretary of State for BEIS and the CCC must take such emissions into account.

47. The evidence for the Secretary of State explains that the CCC has interpreted that as requiring the UK to meet a 2050 target which includes these emissions. The CCC has advised that, to meet the 2050 target on that basis, emissions from UK aviation (domestic and international) in 2050 should be no higher than 2005 levels, ie 37.5 megatons (million tonnes) of CO₂ (MtCO₂). This is referred to by the respondents as “the Aviation Target”. However, the Aviation Policy Framework

issued by the Government in March 2013 explains that the Government decided not to take a decision on whether to include international aviation emissions in its carbon budgets, simply leaving sufficient headroom in those budgets consistent with meeting the 2050 target including such emissions, but otherwise deferring a decision for consideration as part of the emerging Aviation Strategy. The Aviation Strategy is due to re-examine how the aviation sector can best contribute its fair share to emissions reductions at both the UK and global level. It is yet to be finalised.

The SEA Directive

48. Again, in this section we gratefully draw on the careful account given by the Divisional Court. As they explain, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment as amended (“the EIA Directive”), as currently transposed by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571), requires a process within normal planning procedures. (For the purposes of these claims, the transposing regulations have not materially changed over the relevant period; and we will refer to them collectively as “the EIA Regulations”.) The SEA Directive as transposed by the SEA Regulations concerns the environmental impact of plans and programmes. The SEA Directive and Regulations applied to the ANPS. The EIA Directive would apply when there was a particular development for which development consent was sought, at the DCO stage.

49. Recital (1) to the SEA Directive states:

“Article 174 of the Treaty provides that Community policy on the environment is to contribute to, *inter alia*, the preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilisation of natural resources and that it is to be based on the precautionary principle. Article 6 of the Treaty provides that environmental protection requirements are to be integrated into the definition of Community policies and activities, in particular with a view to promoting sustainable development.”

As suggested here, the SEA Directive relies upon the “precautionary principle” where appropriate.

50. Recital (4) states:

“Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the member states, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption.”

51. Recital (9) states:

“This Directive is of a procedural nature, and its requirements should either be integrated into existing procedures in member states or incorporated in specifically established procedures. With a view to avoiding duplication of the assessment, member states should take account, where appropriate, of the fact that assessments will be carried out at different levels of a hierarchy of plans and programmes.”

Thus, the requirements of the SEA Directive are essentially procedural in nature; and it may be appropriate to avoid duplicating assessment work by having regard to work carried out at other levels or stages of a policy-making process (see article 5(2)-(3) below).

52. Recital (17) states:

“The environmental report and the opinions expressed by the relevant authorities and the public, as well as the results of any transboundary consultation, should be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.”

53. The objectives of the SEA Directive are set out in article 1:

“The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.”

54. Article 3(1) requires an “environmental assessment” to be carried out, in accordance with articles 4 to 9, for plans and programmes referred to in article 3(2)-(4) which are likely to have significant environmental effects. Article 3(2) requires strategic environmental assessment generally for any plan or programme which is prepared for (inter alia) transport, town and country planning or land use and which sets the framework for future development consent for projects listed in Annexes I and II to the EIA Directive. Strategic environmental assessment is also required for other plans and programmes which are likely to have significant environmental effects (article 3(4)). By virtue of sections 104 and 106 of the PA 2008, the ANPS designated under section 5 sets out the framework for decisions on whether a DCO for the development of an additional runway at Heathrow under Part 6 of that Act should be granted. That development would, in due course, require environmental impact assessment under the EIA Directive and Regulations; and there is no dispute that the ANPS needed to be subjected to strategic environmental assessment under the SEA Directive and the SEA Regulations.

55. Article 2(b) of the SEA Directive defines “environmental assessment” for the purposes of the Directive:

“‘environmental assessment’ shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with articles 4 to 9.”

56. Article 4(1) requires “environmental assessment to be carried out during the preparation of a plan or programme and before its adoption ...”, which in this instance would refer to the Secretary of State’s decision to designate the ANPS.

57. Article 5 sets out requirements for an “environmental report”. By article 2(c):

“‘environmental report’ shall mean the part of the plan or programme documentation containing the information required in article 5 and Annex I.”

In the case of the ANPS the environmental report was essentially the AoS.

58. Article 5(1) provides:

“Where an environmental assessment is required under article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.”

Annex I states, under the heading, “Information referred to in article 5(1)”:

“The information to be provided under article 5(1), subject to article 5(2) and (3), is the following:

- (a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes;
- (b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;
- (c) the environmental characteristics of areas likely to be significantly affected;
- (d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to [the Habitats and Birds Directives];
- (e) the environmental protection objectives, established at international, Community or member state level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;
- (f) the likely significant effects on the environment, including on issues such as biodiversity, population,

human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;

(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;

(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;

(i) a description of the measures envisaged concerning monitoring in accordance with article 10;

(j) a non-technical summary of the information provided under the above headings.”

Thus, the information required by the combination of article 5(1) and Annex I is subject to article 5(2) and (3), which provide:

“(2) The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

(3) Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation may be used for providing the information referred to in Annex I.” (Emphasis added)

59. Accordingly, the information which is required to be included in an “environmental report”, whether by article 5(1) itself or by that provision in conjunction with Annex I, is qualified by article 5(2) and (3) in a number of respects. First, the obligation is only to include information that “may reasonably be required”, which connotes the making of a judgment by the plan-making authority. Second, that judgment may have regard to a number of matters, including current knowledge and assessment methods. In addition, the contents and level of detail in a plan such as the ANPS, the stage it has reached in the decision-making process and the ability to draw upon sources of information used in other decision-making, may affect the nature and extent of the information required to be provided in the environmental report for the strategic environmental assessment.

60. The stage reached by the ANPS should be seen in the context of the statutory framework of the PA 2008, as set out above (see paras 19-38). Section 5(5) authorises the Secretary of State to set out in an NPS the type and size of development appropriate nationally or for a specified area and to identify locations which are either suitable or unsuitable for that development. In addition, the Secretary of State may set out criteria to be applied when deciding the suitability of a location. Section 104(3) requires the Secretary of State to decide an application for a DCO in accordance with a relevant NPS, save in so far as any one or more of the exceptions in section 104(4)-(8) applies, which include the situation where the adverse impacts of a proposal are judged to outweigh its benefits (section 104(7)). Section 106(1) empowers the Secretary of State to disregard a representation objecting to such a proposal in so far as it relates to the merits of a policy contained in the NPS.

61. In the present case, the Secretary of State made it plain in the strategic environmental assessment process that the AoS drew upon and updated the extensive work which had previously been carried out by, and on behalf of, the Airports Commission, including numerous reports to the Airports Commission and its own final report. It is common ground that the Secretary of State was entitled to take that course.

62. Article 6 of the SEA Directive sets out requirements for consultation. Article 6(1) requires that the draft plan or programme and the environmental report be made available to the public and to those authorities designated by a member state under article 6(3) which, by virtue of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes. In England, the designated authorities are Natural England, Historic England and the Environment Agency (see regulation 4 of the SEA Regulations). In the case of the ANPS, the Secretary of State also had to consult those designated authorities on the scope and level of detail of the information to be included in the environmental report (article 5(4)).

63. In relation to the consultation process, article 6(2) provides:

“The authorities referred to in para 3 and the public referred to in para 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.”

64. “The public referred to in [article 6(4)]” is a cross-reference to the rules made by each member state for defining the public affected, or likely to be affected by, or having an interest in the decision-making on the plan. Regulation 13(2) of the SEA Regulations leaves this to be determined as a matter of judgment by the plan-making authority.

65. Article 8 requires the environmental report prepared under article 5, the opinions expressed under article 6, and the results of any transboundary consultations under article 7 to be “taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure”.

66. In *Cogent Land LLP v Rochford District Council* [2012] EWHC 2542 (Admin); [2013] 1 P & CR 2, Singh J held that a defect in the adequacy of an environmental report prepared for the purposes of the SEA Directive may be cured by the production of supplementary material by the plan-making authority, subject to there being consultation on that material (see paras 111-126). He held that articles 4, 6(2) and 8 of the Directive, along with their transposition in the SEA Regulations, are consistent with that conclusion; and that none of the previous authorities on the SEA Directive (which he reviewed) suggested otherwise. He held that SEA is not a single document, still less is it the same thing as the “environmental report”. Rather, it is a process, during the course of which an environmental report must be produced (see para 112). The Court of Appeal endorsed this analysis in *No Adastral New Town Ltd v Suffolk Coastal District Council* [2015] EWCA Civ 88; [2015] Env LR 28, in deciding that SEA failures in the early stages of an authority’s preparation of its Core Strategy (a statutory development plan) were capable of being, and were in fact, cured by the steps taken in subsequent stages (see paras 48-54). We agree with this analysis.

67. It follows that strategic environmental assessment may properly involve an iterative process; and that it is permissible for a plan-making authority to introduce alterations to its draft plan subject to complying with the information requirements in article 5 and the consultation requirements in articles 6 and 7.

68. Regulation 12 of the SEA Regulations transposes the main requirements in article 5 of the Directive governing the content of an environmental report as follows (emphasis added):

“(2) The report shall identify, describe and evaluate the likely significant effects on the environment of -

(a) implementing the plan or programme; and

(b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.

(3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of -

(a) current knowledge and methods of assessment;

(b) the contents and level of detail in the plan or programme;

(c) the stage of the plan or programme in the decision-making process; and

(d) the extent to which certain measures are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.”

Schedule 2 replicates the list of items in Annex I to the SEA Directive. No issue is raised as to the adequacy of that transposition.

69. As the Divisional Court observed, it is plain from the language “as may reasonably be required” that the SEA Regulations, like the SEA Directive, allow the plan-making authority to make a judgment on the nature of the information in Schedule 2 and the level of detail to be provided in an environmental report, whether as published initially or in any subsequent amendment or supplement.

Factual background

70. At the heart of the challenge to the ANPS is the Paris Agreement (para 7 above) which acknowledged that climate change represents “an urgent and potentially irreversible threat to human societies and the planet” (Preamble to the Decision to adopt the Paris Agreement). In article 2 the Paris Agreement sought to enhance the measures to reduce the risks and impacts of climate change by setting a global target of “holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels”. Each signatory of the Paris Agreement undertook to take measures to achieve that long-term global temperature goal “so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century ...” (article 4(1)). Each party agreed to prepare, communicate and maintain successive nationally determined contributions (“NDCs”) that it intended to achieve and to pursue domestic mitigation measures with the aim of achieving the objectives of such NDCs (article 4(2)). A party’s successive NDC was to progress beyond its current NDC and was to reflect its highest possible ambition (article 4(3)).

71. Notwithstanding the common objectives set out in articles 2 and 4(1), the Paris Agreement did not impose an obligation on any state to adopt a binding domestic target to ensure that those objectives were met. The specific legal obligation imposed in that regard was to meet any NDC applicable to the state in question. So far as concerns the United Kingdom, it is common ground that the relevant NDC is that adopted and communicated on behalf of the EU, which set a binding target of achieving 40% reduction of 1990 emissions by 2030. This is less stringent than the targets which had already been set in the fourth and fifth carbon budgets issued pursuant to section 4 of the CCA 2008, which were respectively a 50% reduction on 1990 levels for the period 2023-2027 and a 57% reduction for the period 2028-2032.

72. Before the United Kingdom had signed or ratified the Paris Agreement two Government Ministers made statements in the House of Commons about the Government’s approach to the Paris Agreement. On 14 March 2016 the Minister of State for Energy, Andrea Leadsom MP, told the House of Commons that the Government “believe we will need to take the step of enshrining the Paris goal of net zero emissions in UK law - the question is not whether, but how we do it, and there is an important set of questions to be answered before we do”. Ten days later (24 March 2016) Amber Rudd MP, Secretary of State for Energy and Climate Change, responded to an oral question on what steps her department was taking to enshrine the net zero emissions commitment of the Paris Climate Change Conference by stating that “the question is not whether we do it but how we do it.”

73. The Government received advice from the CCC on the UK's response to the Paris goal. At a meeting on 16 September 2016 the CCC concluded that while a new long-term target would be needed to be consistent with the Paris goal, "the evidence was not sufficient to specify that target now".

74. In October 2016 the CCC published a report entitled "UK Climate Action following the Paris Agreement" on what domestic action the Government should take as part of a fair contribution to the aims of the Paris Agreement. In that report the CCC stated that the goals of the Paris Agreement involved a higher level of global ambition in the reduction of greenhouse gases than that which formed the basis of the UK's existing emissions reduction targets. But the CCC advised that it was neither necessary nor appropriate to amend the 2050 target in section 1 of the CCA 2008 or alter the level of existing carbon budgets at that time. It advised that there would be "several opportunities to revisit the UK's targets in the future" and that "the UK 2050 target is potentially consistent with a wide range of global temperature outcomes". In its executive summary (p 7) the CCC summarised its advice:

"Do not set new UK emissions targets now ... The five-yearly cycle of pledges and reviews created by the Paris Agreement provides regular opportunities to consider increasing UK ambition."

75. In October 2017 the Government published its "Clean Growth Strategy" which set out its policies and proposals to deliver economic growth and decreased emissions. In Annex C in its discussion of UK climate action it acknowledged the risks posed by the growing level of global climate instability. It recorded the global goals of the Paris Agreement and that global emissions of greenhouse gases would need to peak as soon as possible, reduce rapidly thereafter and reach a net zero level in the second half of this century. It recorded the CCC's advice in these terms:

"In October 2016 the [CCC] said that the Paris Agreement target 'is more ambitious than both the ambition underpinning the UK 2050 target and previous international agreements', but that the UK should not set new UK emissions targets now, as it already had stretching targets and achieving them will be a positive contribution to global climate action. The CCC advised that the UK's fair contribution to the Paris Agreement should include measures to maintain flexibility to go further on UK targets, the development of options to remove greenhouse gases from the air, and that its targets should be kept under review."

76. In December 2017 Plan B Earth and 11 other claimants commenced judicial review proceedings against the Secretary of State for BEIS and CCC alleging that the Secretary of State had unlawfully failed to revise the 2050 target in section 1 of the CCA 2008 in line with the Paris Agreement.

77. The Secretary of State pleaded:

“[While] the Government is fully committed to the objectives in the Paris Agreement, the legal obligation upon the Parties is to prepare, communicate and maintain nationally determined contributions to reduce net emissions, with a view to achieving the purpose of holding global average temperature increases to ‘well below 2°C’ above pre-industrial levels and pursuing efforts to limit them to 1.5°C. This is not the same as a legal duty or obligation for the Parties, individually or collectively, to achieve this aim.” (Emphasis in original)

The CCC also explained its position in its written pleadings:

“The CCC recommended no change to the existing UK 2050 target (at that time, October 2016), not because a more ambitious target was unfeasible, but rather because the existing UK target was potentially consistent with more ambitious global temperature goals, including that in the Paris Agreement.”

78. At an oral hearing ([2018] EWHC 1892 (Admin); [2019] Env LR 13), Supperstone J refused permission to proceed with the judicial review, holding among other things that the Paris Agreement did not impose any legally binding target on each contracting party, that section 2 of the CCA 2008 gave the Secretary of State the power, but did not impose a duty, to amend the 2050 target in the event of developments in scientific knowledge or European or international law or policy, and that on the basis of the advice of the CCC, the Secretary of State was plainly entitled to refuse to change the 2050 target. Asplin LJ refused permission to appeal on 22 January 2019.

79. In January 2018 the CCC published “An independent assessment of the UK’s Clean Growth Strategy”. In that report the CCC explained that the aim of the Paris Agreement for emissions to reach net zero in the second half of the century was likely to require the UK to revise its statutory 2050 target to seek greater reductions and advised that “it is therefore essential that actions are taken now to enable these

deeper reductions to be achieved” (p 21). The CCC invited the Secretary of State for BEIS to seek further advice from it and review the UK’s long-term emissions targets after the publication of the report by the Intergovernmental Panel on Climate Change (“IPCC”) on the implications of the Paris Agreement’s 1.5°C goal.

80. In January 2018 the Government published “A Green Future: Our 25 Year Plan to Improve the Environment” in which it undertook to continue its work in providing international leadership to meet the goals of the Paris Agreement (for example, p 118). In early 2018 governments, including the UK Government, were able to review a draft of the IPCC report and in early June 2018 the UK Government submitted final comments on the draft of the IPCC report.

81. On 17 April 2018 the Government announced at the Commonwealth Heads of Government Meeting that after the publication of the IPCC report later that year, it would seek the advice of the CCC on the implications of the Paris Agreement for the UK’s long-term emissions reductions targets.

82. At the same time the Government was working to develop an aviation strategy which would address aviation emissions. In April 2018, after public consultation, the Department for Transport published “Beyond the Horizon: The Future of UK Aviation - Next Steps towards an Aviation Strategy” in which it undertook to investigate technical and policy measures to address aviation emissions and how those measures related to the recommendations of the CCC. It stated (para 6.24):

“The government will look again at what domestic policies are available to complement its international approach and will consider areas of greater scientific uncertainty, such as the aviation’s contribution to non-carbon dioxide climate change effects and how policy might make provision for their effects.”

83. On 1 May in response to an oral parliamentary question concerning the offshore wind sector Claire Perry MP, Minister of State for Energy and Clean Growth, stated that the UK was the first developed nation to have said that it wanted to understand how to get to a zero-carbon economy by 2050.

84. On 5 June 2018, the Government issued its response to the consultation on the draft ANPS and the Secretary of State laid the proposed ANPS before Parliament. On the same day, the Secretary of State presented a paper on the proposed ANPS to a Cabinet sub-committee giving updated information on the three short-listed schemes and the Government’s preference for the NWR scheme. In

relation to aviation emissions it stated that it was currently uncertain how international carbon emissions would be incorporated into the Government's carbon budget framework, that policy was developing and would be progressed during the development of the Aviation Strategy. The Government's position remained that action to address aviation emissions was best taken at an international level.

85. On 14 June 2018 the Chair of the CCC (Lord Deben) and Deputy Chair (Baroness Brown) wrote to the Secretary of State expressing surprise that he had not referred to the legal targets in the CCA 2008 or the Paris Agreement commitments in his statement to the House of Commons on the proposed ANPS on 5 June and stressing the need for his department to consider aviation's place in the overall strategy for UK emissions reduction. They stated that the Government should not plan for higher levels of aviation emissions "since this would place an unreasonably large burden on other sectors".

86. The Secretary of State responded on 20 June 2018 stating that the Government remained committed to the UK's climate change target and that the proposed ANPS made it clear that an increase in carbon emissions that would have a material impact on the Government's ability to meet its carbon reduction targets would be a reason to refuse development consent for the NWR. He stated that the Government was confident that the measures and requirements set out in the proposed ANPS provided a strong basis for mitigating the environmental impacts of expansion. He explained that the forthcoming Aviation Strategy would put in place a framework for UK carbon emissions to 2050, "which ensures that aviation contributes its fair share to action on climate change, taking into account the UK's domestic and international obligations".

87. After the Parliamentary debate on 25 June 2018 (para 11 above), the Secretary of State designated the ANPS as national policy on 26 June 2018 (para 12 above). Section 5 of the ANPS focused on the potential impacts of the NWR Scheme and the assessments that any applicant would have to carry out and the planning requirements which it would have to meet in order to gain development consent. In its discussion of greenhouse gas emissions the ANPS stated that the applicant would have to undertake an environmental impact assessment quantifying the greenhouse gas impacts before and after mitigation so that the project could be assessed against the Government's carbon obligations. In para 5.82 the ANPS stated:

"Any increase in carbon emissions alone is not a reason to refuse development consent, unless the increase in carbon emissions resulting from the project is so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets, including carbon budgets."

88. As in this appeal a challenge has been made as to the factual basis of the Secretary of State's decision not to consider the possible new domestic emissions targets which might result from the Paris Agreement, it is necessary to mention the evidence before the Divisional Court on this matter. In her first witness statement Ms Caroline Low, the Director of the Airport Capacity Programme at the Department for Transport, stated (para 458):

“In October 2016 the CCC said that the Paris Agreement ‘is more ambitious than both the ambition underpinning the UK 2050 target and previous international agreements’ but that the UK should not set new UK emissions targets now, as it already has stretching targets and achieving them will be a positive contribution to global climate action. Furthermore, the CCC acknowledged in the context of separate legal action brought by Plan B against the Secretary of State for Business, Energy and Industrial Strategy that it is possible that the existing 2050 target could be consistent with the temperature stabilization goals set out in the Paris Agreement. Subsequently, in establishing its carbon obligations for the purpose of assessing the impact of airport expansion, my team has followed this advice and considered existing domestic legal obligations as the correct basis for assessing the carbon impact of the project, and that it is not appropriate at this stage for the government to consider any other possible targets that could arise through the Paris Agreement.”

89. Her account was corroborated by Ms Ursula Stevenson, an engineering and project management consultant whom the Secretary of State retained to deal with the process for consideration of the environmental impacts of the NWR Scheme. She stated (witness statement para 3.128) that the Department had followed the CCC's advice when preparing the AoS required by the PA 2008 (see para 28 above) and accordingly had considered existing domestic legal obligations to be the correct basis for assessing the carbon impact of the project. She added:

“At this stage, it is not possible to consider what any future targets [sic] might be recommended by the CCC to meet the ambitions of the Paris Agreement. It is expected that, should more ambitious targets be recommended and set through the carbon budgets beyond 2032, then government will be required to make appropriate policy decisions across all sectors of the economy to limit emissions accordingly.”

She emphasised (para 3.129) that the obligations under the CCA 2008 could be made more stringent in future, should that prove necessary, and that the ANPS provided that any application for a DCO would have to be assessed by reference to whatever obligations were in place at that time.

90. The IPCC Special Report on Global Warming of 1.5°C was published on 8 October 2018. It concluded that limiting global warming to that level above pre-industrial levels would significantly reduce the risks of challenging impacts on ecosystems and human health and wellbeing and that it would require “deep emissions reductions” and “rapid, far-reaching and unprecedented changes to all aspects of society”. To achieve that target global net emissions of CO₂ would need to fall by about 45% from 2010 levels by 2030, reaching zero by 2050.

91. The Government commissioned the CCC to advise on options by which the UK should achieve (i) a net zero greenhouse gas target and/or (ii) a net zero carbon target in order to contribute to the global ambitions set out in the Paris Agreement, including whether now was the right time to set such a target.

92. In December 2018 the Department for Transport published consultation materials on its forthcoming Aviation Strategy. In “Aviation 2050: The future of UK aviation” the Department stated (paras 3.83-3.87) that it proposed to negotiate in the International Civil Aviation Organisation (the UN body responsible for tackling international aviation climate emissions) for a long-term goal for international aviation that is consistent with the temperature goals of the Paris Agreement and that it would consider appropriate domestic action to support international progress. It stated that the Government would review the CCC’s revised aviation advice and advice on the implications of the Paris Agreement. In the same month, in a paper commissioned and published by the Department and written by David S Lee, “International aviation and the Paris Agreement temperature goals” the author acknowledged that the Paris Agreement had a temperature-based target which implied the inclusion of all emissions that affect the climate. The author stated that aviation had significant climate impacts from the oxides of nitrogen, particle emissions, and effects on cloudiness but that those impacts were subject to greater scientific uncertainty than the impacts of CO₂. It recorded that examples of CO₂ emission equivalent metrics indicated up to a doubling of aviation CO₂ equivalent emissions to account for those non-CO₂ effects.

93. On 1 May 2019 Parliament approved a motion to declare a climate and environmental emergency.

94. On the following day, the CCC published a report entitled “Net zero: The UK’s contribution to stopping global warming”, in which they recommended that

legislation should be passed as soon as possible to create a new statutory target of net-zero greenhouse gases by 2050 and the inclusion of international aviation and shipping in that target (p 15). That recommendation, so far as it related to the CO₂ target, was implemented on 26 June 2019 when the Climate Change Act (2050 Target Amendment) Order 2019 amended section 1(1) of the CCA 2008.

95. On 24 September 2019 the CCC wrote to the Secretary of State for Transport advising that the international aviation and shipping emissions should be brought formally within the UK's net-zero statutory 2050 target. The statutory target has not yet been changed to this effect but international aviation and shipping are taken into account when the carbon budgets are set against the statutory target: section 10(2)(i) of the CCA 2008.

96. On 25 June 2020 the CCC published its 2020 Progress Report to Parliament entitled "Reducing UK emissions", in which it recommended that international aviation and shipping be included in the UK climate targets when the Sixth Carbon Budget is set (which should be in 2021) and net zero plans should be developed (p 22). It recommended that the UK's airport capacity strategy be reviewed in the light of COVID-19 and the net-zero target and that action was needed on non-CO₂ effects from aviation (p 180). The parties to this appeal have stated in the agreed Statement of Facts and Issues that it was expected that the Government's Aviation Strategy will be published before the end of 2020.

97. From this narrative of events it is clear that the Government's response to the targets set in the Paris Agreement has been developing over time since 2016, that it has led to the amendment of the statutory CO₂ target in section 1(1) of the CCA 2008 approximately one year after the Secretary of State designated the ANPS, and that the Government is still in the process of developing its Aviation Strategy in response to the advice of the CCC.

98. Before turning to the legal challenges in this appeal it is also important to emphasise that, as we have stated in para 10 above, HAL, FoE and Plan B Earth agree that should the NWR Scheme be taken forward to a DCO application, the ANPS would not allow it to be assessed by reference to the carbon reduction targets, including carbon budgets, that were in place when the ANPS was designated in June 2018. The ANPS requires that the scheme be assessed against the carbon reduction targets in place at the time when a DCO application is determined: para 5.82 of the ANPS which we have set out in para 87 above. There is therefore no question of the NWR Scheme being assessed in future against outdated emissions targets.

The judgments of the Divisional Court and the Court of Appeal

99. A number of objectors to the NWR Scheme and the ANPS brought a large number of disparate claims in these proceedings to challenge the ANPS. The Divisional Court heard the claims on a “rolled up” basis, that is to say by considering the question of whether to grant permission to apply for judicial review at the same time as considering the merits of the claims should permission be granted. The hearing lasted for seven days and involved a full merits consideration of all the claims by the Divisional Court. In a judgment of high quality, described by the Court of Appeal as a tour de force, the Divisional Court dismissed all of the claims. For some claims it granted permission to apply for judicial review and then dismissed them on the merits. For others, it decided that they were not reasonably arguable on the merits and refused to grant permission. After thorough examination, the Divisional Court reached the conclusion that none of the claims which form the subject of grounds (i) to (iv) in the present appeal were reasonably arguable, and accordingly refused permission to apply for judicial review in relation to each of them.

100. In relation to those claims, the Court of Appeal decided that they were both arguable and that they were made out as good claims. Accordingly, the Court of Appeal granted permission in relation to them for the respondents to apply for judicial review of the decision to designate the ANPS and then held that the ANPS was of no legal effect unless and until a review was carried out rectifying the legal errors.

Analysis

Ground (i) - the section 5(8) ground

101. This ground raises a question of statutory interpretation. Section 5(7) and (8) of the PA 2008, which we set out in para 25 above, provide that an NPS must give reasons for the policy set out in the statement and that the reasons must explain how the policy in the NPS “takes account of Government policy relating to the mitigation of, and adaptation to, climate change”.

102. Mr Crosland for Plan B Earth presented this argument. Mr Wolfe QC for FoE adopted his submissions. Mr Crosland submits that it was unlawful for the Secretary of State when stating the reasons for the policy in the ANPS in June 2018 to have treated as irrelevant the Government’s commitment to (a) the temperature target in the Paris Agreement and (b) the introduction of a new net-zero carbon target. The Government’s commitment to the Paris Agreement targets constituted “Government

policy” within the meaning of section 5(8) of the PA 2008 and so should have been addressed in giving the reasons for the ANPS.

103. Plan B Earth advanced this argument before the Divisional Court, which rejected the submission. The Divisional Court held that the Paris Agreement did not impose an obligation on any individual state to implement its global objective in any particular way, Parliament had determined the contribution of the UK towards global targets in section 1 of the CCA 2008 as a national carbon cap which represented the relevant policy in an entrenched form, and the Secretary of State could not change that carbon target unless and until the conditions set out in that Act were met.

104. The Court of Appeal disagreed with the approach of the Divisional Court and held that Government policy in section 5(8) was not confined to the target set out in the CCA 2008. The words “Government policy” were words of the ordinary English language. Taking into account the consequences of the Paris Agreement involved no inconsistency with the provisions of the CCA 2008. Based on the Secretary of State’s written pleadings the Court of Appeal concluded that the Secretary of State had received and accepted legal advice that he was legally obliged not to take into account the Paris Agreement and the court characterised that as a misdirection of law. We address that conclusion in the next section of this judgment at paras 124-129 below. The court held that section 5(8) of the PA 2008 simply required the Government to take into account its own policy. The statements of Andrea Leadsom MP and Amber Rudd MP in March 2016 (para 72 above) and the formal ratification of the Paris Agreement showed that the Government’s commitment to the Paris Agreement was part of “Government policy” by the time of the designation of the ANPS in June 2018.

105. The principal question for determination is the meaning of “Government policy” in section 5(8) of the PA 2008. We adopt a purposive approach to this statutory provision which expands upon the obligation in section 5(7) that an NPS give reasons for the policy set out in it and interpret the statutory words in their context. The purpose of the provision is to make sure that there is a degree of coherence between the policy set out in the NPS and established Government policies relating to the mitigation of and adaptation to climate change. The section speaks of “Government policy”, which points toward a policy which has been cleared by the relevant departments on a government-wide basis. In our view the phrase is looking to carefully formulated written statements of policy such as one might find in an NPS, or in statements of national planning policy (such as the National Planning Policy Framework), or in government papers such as the Aviation Policy Framework. For the subsection to operate sensibly the phrase needs to be given a relatively narrow meaning so that the relevant policies can readily be identified. Otherwise, civil servants would have to trawl through Hansard and press statements to see if anything had been said by a minister which might be

characterised as “policy”. Parliament cannot have intended to create a bear trap for ministers by requiring them to take into account any ministerial statement which could as a matter of ordinary language be described as a statement of policy relating to the relevant field.

106. In our view, the epitome of “Government policy” is a formal written statement of established policy. In so far as the phrase might in some exceptional circumstances extend beyond such written statements, it is appropriate that there be clear limits on what statements count as “Government policy”, in order to render them readily identifiable as such. In our view the criteria for a “policy” to which the doctrine of legitimate expectations could be applied would be the absolute minimum required to be satisfied for a statement to constitute “policy” for the purposes of section 5(8). Those criteria are that a statement qualifies as policy only if it is clear, unambiguous and devoid of relevant qualification: see for example *Inland Revenue Comrs v MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569 per Bingham LJ; *R (Gaines-Cooper) v Comrs for Her Majesty’s Revenue and Customs* [2011] UKSC 47; [2011] 1 WLR 2625, paras 28 and 29 per Lord Wilson of Culworth, delivering the judgment with which the majority of the court agreed, and para 70 per Lord Mance. The statements of Andrea Leadsom MP and Amber Rudd MP (para 72 above) on which the Court of Appeal focused and on which Plan B Earth particularly relied do not satisfy those criteria. Their statements were not clear and were not devoid of relevant qualification in this context. They did not refer to the temperature targets at all and they both left open the question of how the Paris Agreement goal of net zero emissions would be enshrined in UK law. Andrea Leadsom went out of her way to emphasise that “there is an important set of questions to be answered before we do.” The statements made by these ministers were wholly consistent with and plainly reflected the fact that there was then an inchoate or developing policy being worked on within Government. This does not fall within the statutory phrase.

107. We therefore respectfully disagree with the Court of Appeal in so far as they held (para 224) that the words “Government policy” were ordinary words which should be applied in their ordinary sense to the facts of a given situation. We also disagree with the court’s conclusion (para 228) that the statements by Andrea Leadsom MP and Amber Rudd MP constituted statements of “Government policy” for the purposes of section 5(8).

108. Although the point had been a matter of contention in the courts below, no party sought to argue before this court that a ratified international treaty which had not been implemented in domestic law fell within the statutory phrase “Government policy”. Plan B Earth and FoE did not seek to support the conclusion of the Court of Appeal (para 228) that it “followed from the solemn act of the United Kingdom’s ratification of [the Paris Agreement]” that the Government’s commitment to it was part of “Government policy”. The fact that the United Kingdom had ratified the Paris Agreement is not of itself a statement of Government policy in the requisite sense.

Ratification is an act on the international plane. It gives rise to obligations of the United Kingdom in international law which continue whether or not a particular government remains in office and which, as treaty obligations, “are not part of UK law and give rise to no legal rights or obligations in domestic law” (*R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, para 55). Ratification does not constitute a commitment operating on the plane of domestic law to perform obligations under the treaty. Moreover, it cannot be regarded in itself as a statement devoid of relevant qualification for the purposes of domestic law, since if treaty obligations are to be given effect in domestic law that will require law-making steps which are uncertain and unspecified at the time of ratification.

109. Before applying these conclusions to the facts of this case, it is necessary to consider another argument which HAL advances in this appeal. HAL renews an argument which the Divisional Court had accepted at least in part. HAL argues that because Parliament had set out the target for the reduction of carbon emissions in section 1 of the CCA 2008 and had established a statutory mechanism by which the target could be altered only with the assent of Parliament, “Government policy” was entrenched in section 1 and could not be altered except by use of the subordinate legislation procedure in sections 2 and 3 of the CCA 2008. The statutory scheme had either expressly or by necessary implication displaced the prerogative power of the Government to adopt any different policy in this field. In support of this contention HAL refers to the famous cases of *Attorney General v De Keyser’s Royal Hotel Ltd* [1920] AC 508 and *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, to which this court referred in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61.

110. The short answer to that submission is that it is possible for the Government to have a policy that it will seek Parliamentary approval of an alteration of the carbon target, which is to be taken into account in section 5(8) of the PA 2008. The ousting of a prerogative power in a field which has become occupied by a corresponding power conferred or regulated by statute is a legal rule which is concerned with the validity of the exercise of a power, and to the extent that exercise of powers might require reference to the target set out in section 1 of the CCA 2008 it would not be open to the Government to make reference to a different target, not as yet endorsed by Parliament under the positive resolution procedure applicable to changes to that statutory target. However, the rule does not address what is Government policy for the purposes of section 5(8) of the PA 2008. If at the date when the Secretary of State designated the ANPS, the Government had adopted and articulated a policy that it would seek to introduce a specified new carbon target into section 1 of the CCA 2008 by presenting draft subordinate legislation to that effect for the approval of Parliament, the Secretary of State could readily record in the ANPS that the Government had resolved to seek that change but that it required the consent of Parliament for the new target to have legal effect. Further, questions such as how to

mitigate non-CO₂ emissions fell outside the carbon emissions target in the CCA 2008.

111. Turning to the facts of the case, it is clear from the narrative of events in paras 70-96 above that in June 2018, when the Secretary of State for Transport designated the ANPS, the Government's approach on how to adapt its domestic policies to contribute to the global goals of the Paris Agreement was still in a process of development. There was no established policy beyond that already encapsulated in the CCA 2008. The Government followed the advice of the CCC. The CCC's advice in 2016 was that the evidence was not sufficient to specify a new carbon target and that it was not necessary to do so at that time (paras 73-74 above). In early 2018 the CCC invited the Government to seek further advice from it after the publication of the IPCC's report (para 79 above). During 2018 the Government's policy in relation to aviation emissions was in a process of development and no established policy had emerged on either the steps to be taken at international level or about which domestic measures would be adopted; it was expected that the forthcoming Aviation Strategy would clarify those matters (paras 83 and 86 above). The Government's consultation in December 2018 confirmed that the development of aviation-related targets was continuing and in 2020 the Government's Aviation Strategy is still awaited (paras 92 and 96 above).

112. Against this background, the section 5(8) challenge fails and HAL's appeal on this ground must succeed. It is conceded that the Paris Agreement itself is not Government policy. The statements by Andrea Leadsom MP and Amber Rudd MP in 2016, on which Plan B Earth principally founds, do not amount to Government policy for the purpose of section 5(8) of the PA 2008. The statements concerning the development of policy which the Government made in 2018 were statements concerning an inchoate and developing policy and not an established policy to which section 5(8) refers. Mr Crosland placed great emphasis on the facts (i) that the Airports Commission had assessed the rival schemes against scenarios, one of which was that overall CO₂ emissions were set at a cap consistent with a worldwide goal to limit global warming to 2°C, and (ii) that that scenario was an input into Secretary of State's assessment of the ANPS at a time when the UK Government had ratified the Paris Agreement and ministers had made the statements to which we referred above. But those facts are irrelevant to the section 5(8) challenge. It is not in dispute that the internationally agreed temperature targets played a formative role in the development of government policy. But that is not enough for Plan B Earth to succeed in this challenge. What Mr Crosland characterised as a "policy commitment" to the Paris Agreement target did not amount to "Government policy" under that subsection.

113. Finally, Mr Crosland sought to raise an argument under section 3 of the Human Rights Act 1998 that interpreting section 5(8) so as to preclude consideration of the temperature limit in the Paris Agreement would tend to allow major national

projects to be developed and that those projects would create an intolerable risk to life and to people's homes contrary to articles 2 and 8 of the European Convention on Human Rights ("ECHR"). This argument must fail for two reasons. First, as Lord Anderson for HAL submits, the argument was advanced as a separate ground before the Divisional Court and rejected, that finding was not appealed to the Court of Appeal, and is therefore not before this court. Secondly, even if it were to be treated as an aspect of Plan B Earth's section 5(8) submission and thus within the scope of the appeal (as Mr Crosland sought to argue), it is in any event unsound because any effect on the lives and family life of those affected by the climate change consequences of the NWR Scheme would result not from the designation of the ANPS but from the making of a DCO in relation to the scheme. As HAL has conceded and the respondents have agreed, the ANPS requires the NWR Scheme to be assessed against the emissions targets which would be current if and when an application for a DCO were determined.

Ground (ii): the section 10 ground

114. Mr Wolfe for FoE presented the submissions for the respondents on this ground and grounds (iii) and (iv). Mr Crosland for Plan B Earth adopted those submissions.

115. Section 10 of the PA 2008 applies to the Secretary of State's function in promulgating an NPS. In exercising that function the Secretary of State must act with the objective of contributing to the achievement of sustainable development. Sustainable development is a recognised term in the planning context and its meaning is not controversial in these proceedings. As explained in paras 7 and 8 of the National Planning Policy Framework (July 2018), at a very high level the objective of sustainable development involves "meeting the needs of the present without compromising the ability of future generations to meet their own needs"; it has three overarching elements, namely an environmental objective, an economic objective and a social objective. For a major infrastructure project like the development of airport capacity in the South East, which promotes economic development but at the cost of increased greenhouse gases emissions, these elements have to be taken into account and balanced against each other. Section 10(3)(a) provides that the Secretary of State must, in particular, have regard to the desirability of "mitigating, and adapting to, climate change". Unlike in section 5(8) of the PA 2008, this is not a factor which is tied to Government policy.

116. As it transpired, very little divided the parties under this ground. The basic legal approach is agreed. A useful summation of the law was given by Simon Brown LJ in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, 1049, in which he identified three categories of consideration, as follows:

“... [T]he judge speaks of a ‘decision-maker who fails to take account of all and only those considerations material to his task’. It is important to bear in mind, however, ... that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process.”

117. The three categories of consideration were identified by Cooke J in the New Zealand Court of Appeal in *CREEDNZ Inc v Governor General* [1981] NZLR 172, 183:

“What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the [relevant public authority] as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision.”

Cooke J further explained at p 183 in relation to the third category of consideration that, notwithstanding the silence of the statute, “there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] ... would not be in accordance with the intention of the Act.”

118. These passages were approved as a correct statement of principle by the House of Lords in *In re Findlay* [1985] AC 318, 333-334. See also *R (Hurst) v London Northern District Coroner* [2007] UKHL 13; [2007] 2 AC 189, paras 55-59 (Lord Brown of Eaton-under Heywood, with whom a majority of the Appellate Committee agreed); *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756, para 40 (Lord Bingham of Cornhill, with whom a majority of the Appellate Committee agreed); and *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3; [2020] PTSR 221, paras 29-32 (Lord Carnwath, with whom the other members of the court agreed). In the *Hurst* case, Lord Brown pointed out that it is usually lawful for a

decision-maker to have regard to unincorporated treaty obligations in the exercise of a discretion (para 55), but that it is not unlawful to omit to do so (para 56).

119. As the Court of Appeal correctly held in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305; [2018] PTSR 2063, paras 20-26, in line with these other authorities, the test whether a consideration falling within the third category is “so obviously material” that it must be taken into account is the familiar *Wednesbury* irrationality test (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411 per Lord Diplock).

120. It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness. Lord Bingham deals with such a case in *Corner House Research* at para 40. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion.

121. Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to give the consideration no weight. As we explain below, this is what happened in the present case. The question again is whether the decision-maker acts rationally in doing so. Lord Brown deals with a case of this sort in *Hurst* (see para 59). This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight: see, in the planning context, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL), 780 (Lord Hoffmann).

122. The Divisional Court (para 648) and the Court of Appeal (para 237) held that the Paris Agreement fell within the third category identified in *Fewings*. In so far as it is an international treaty which has not been incorporated into domestic law, this is correct. In fact, however, as we explain (para 71 above), the UK’s obligations under the Paris Agreement are given effect in domestic law, in that the existing carbon target under section 1 of the CCA 2008 and the carbon budgets under section 4 of that Act already meet (and, indeed, go beyond) the UK’s obligations under the Paris Agreement to adhere to the NDCs notified on its behalf under that Agreement. The duties under the CCA 2008 clearly were taken into account when the Secretary of State decided to issue the ANPS.

123. At para 5.69 of the ANPS the Secretary of State stated:

“The Government has a number of international and domestic obligations to limit carbon emissions. Emissions from both the construction and operational phases of the [NWR Scheme] project will be relevant to meeting these obligations.”

This statement covered the Paris Agreement as well as other international treaties. At para 5.71 the ANPS correctly stated that “[t]he UK’s obligations on greenhouse gas emissions are set under the [CCA 2008]”. As explained above, the relevant NDCs required to be set under the Paris Agreement were covered by the target in the CCA 2008 and the carbon budgets set under that Act. At paras 5.72-5.73 of the ANPS it was explained how aviation emissions were taken into account in setting carbon budgets under the CCA 2008 in accordance with the advice given by the CCC.

124. We have set out the evidence of Ms Low and Ms Stevenson regarding this topic (paras 88 and 89 above) which confirms that, in acting for the Secretary of State in drawing up the ANPS, they followed the advice of the CCC that the existing measures under the CCA 2008 were capable of being compatible with the 2050 target set by the Paris Agreement. The CCC did not recommend adjusting the UK’s targets further at that stage. They were to be kept under review and appropriate adjustments could be made to the emissions target and carbon budgets under the CCA 2008 in future as necessary. According to that advice, therefore, sufficient account was taken of the Paris Agreement by ensuring that the relevant emissions target and carbon budgets under the CCA 2008 would be properly taken into account in the construction and operation of the NWR Scheme. The ANPS ensured that this would occur: see para 5.82 (set out at para 87 above).

125. Therefore, on a correct understanding of the ANPS and the Secretary of State’s evidence, this is not a case in which the Secretary of State omitted to give any consideration to the Paris Agreement; nor is it one in which no weight was given to the Paris Agreement when the Secretary of State decided to issue the ANPS. On the contrary, the Secretary of State took the Paris Agreement into account and, to the extent that the obligations under it were already covered by the measures under the CCA 2008, he gave weight to it and ensured that those obligations would be brought into account in decisions to be taken under the framework established by the ANPS. On proper analysis the question is whether the Secretary of State acted irrationally in omitting to take the Paris Agreement further into account, or give it greater weight, than in fact he did.

126. In its judgment, the Divisional Court recorded (para 638) that the Secretary of State accepted that, in designating the ANPS, he took into account only the CCA 2008 carbon emission targets and did not take into account either the Paris Agreement or otherwise any post-2050 target or non-CO₂ emissions (these latter points are relevant to ground (iv) below). However, this way of describing the position masks somewhat the way the Paris Agreement did in fact enter into consideration by the Secretary of State. In the same paragraph, the Divisional Court summarised two submissions advanced by counsel for the Secretary of State as to why the Secretary of State's approach was not unlawful: (i) on its proper construction, and having regard to the express reference to the UK's international obligations in section 104(4) of the PA 2008, the PA 2008 requires the Secretary of State to ignore international commitments except where they are expressly referred to in that Act; alternatively, (ii) even if not obliged to ignore such commitments, the Secretary of State had a discretion as to whether to do so and was not obliged to take them into account. The Divisional Court rejected the first argument but accepted the second. It noted that the Secretary of State was bound by the obligations in the CCA 2008, "which ... effectively transposed international obligations into domestic law" (para 643). Beyond that, the Secretary of State had a discretion whether to take the Paris Agreement further into account, and had not (even arguably) acted irrationally in deciding not to do so. It therefore refused to give permission for judicial review of the ANPS on this ground. The Court said (para 648):

"In our view, given the statutory scheme in the CCA 2008 and the work that was being done on if and how to amend the domestic law to take into account the Paris Agreement, the Secretary of State did not arguably act unlawfully in not taking into account that Agreement when preferring the NWR Scheme and in designating the ANPS as he did. As we have described, if scientific circumstances change, it is open to him to review the ANPS; and, in any event, at the DCO stage this issue will be re-visited on the basis of the then up to date scientific position."

127. Mr Wolfe sought to support the judgment of the Court of Appeal in relation to this ground. He argued that the evidence for the Secretary of State had to be read in the light of the first submission made by his counsel in the Divisional Court, and that the true position was that the Secretary of State (acting by his officials and advisers) had been advised that he was not entitled to have regard to the Paris Agreement when deciding whether to designate the ANPS and had proceeded on that basis, with the result that he had not in fact exercised any discretion in deciding not to have further regard to the Paris Agreement. He also submitted that it was obvious that it was a material consideration. Mr Wolfe was successful in persuading the Court of Appeal on these points (paras 203 and 234-238 of its judgment). The Court of Appeal accepted his submissions that there was an error of law in the

approach of the Secretary of State “because he never asked himself the question whether he could take into account the Paris Agreement pursuant to his obligations under section 10” and “[i]f he had asked himself that question ... the only answer that would reasonably have been open to him is that the Paris Agreement was so obviously material to the decision he had to make in deciding whether to designate the ANPS that it was irrational not to take it into account”.

128. With respect to the Court of Appeal, they were wrong to overturn the judgment of the Divisional Court on this ground. Mr Wolfe’s submissions conflated a submission of law (submission (i) above) made by counsel for the Secretary of State as recorded in para 638 of the judgment of the Divisional Court and the evidence of fact given by the relevant witnesses for the Secretary of State. In making his submission of law, counsel was not giving evidence about the factual position. There is a fundamental difference between submissions of law made by counsel and evidence of fact. Clearly, if the Secretary of State had been correct in submission (i) that would have provided an answer to the case against him whatever the position on the facts. This explains why counsel advanced the submission. But it is equally clear that if that submission failed, the Secretary of State made an alternative submission that he had a discretion whether to take the Paris Agreement further into account than was already the case under the CCA 2008 and that there had been no error of law in the exercise of that discretion. That was the submission accepted by the Divisional Court.

129. In our view, both the submissions of Mr Wolfe which the Court of Appeal accepted are unsustainable. The Divisional Court’s judgment on this point is correct. On the evidence, the Secretary of State certainly did ask himself the question whether he should take into account the Paris Agreement beyond the extent to which it was already reflected in the obligations under the CCA 2008 and concluded in the exercise of his discretion that it would not be appropriate to do so. As mentioned above, this case is in the class referred to in para 121 above.

130. Mr Wolfe sought to suggest that in deciding the case as it did, the Court of Appeal had acted as a first instance court (since the Divisional Court had refused to give permission for judicial review on this ground) and that it had made factual findings to contrary effect which this court was not entitled to go behind. He also submitted that HAL, in its notice of appeal, had not questioned the factual position as it was taken to be by the Court of Appeal and was therefore not entitled to dispute it on this appeal.

131. Neither of these submissions has any merit. The Divisional Court considered the claims brought against the Secretary of State at a rolled up hearing lasting many days and considered each claim in full and in depth. In respect of all aspects of the Divisional Court’s decision, both in relation to those claims on which it granted

permission for judicial review but then dismissed the claim and in relation to those claims (including those relating to grounds (i) to (iv) in this appeal) on which after full consideration it decided they were unarguable and so refused to grant permission for judicial review, the Court of Appeal correctly understood that its role was the conventional role of an appellate court, to examine whether the Divisional Court had erred in its decision. In any event, this court can read the undisputed evidence of Ms Low and Ms Stevenson for itself and has the benefit of an agreed Statement of Facts and Issues which makes it clear what the true factual position was. The Court of Appeal was wrong to proceed on the basis of a different assessment of the facts. On a fair reading of HAL's notice of appeal, it indicated that its case under this ground was to be that the Secretary of State had a discretion whether to have regard to the Paris Agreement, which discretion had been exercised lawfully. In any event, that was put beyond doubt by HAL's written case. FoE and Plan B Earth have been on notice of HAL's case under this ground for a long time and are in no way prejudiced by it being presented in submissions to this court.

132. The view formed by the Secretary of State, that the international obligations of the UK under the Paris Agreement were sufficiently taken into account for the purposes of the designation of the ANPS by having regard to the obligations under the CCA 2008, was in our judgment plainly a rational one. Mr Wolfe barely argued to the contrary. The Secretary of State's assessment was based on the advice of the CCC, as the relevant independent expert body. The assessment cannot be faulted. Further, the ANPS itself indicated at para 5.82 that the up-to-date carbon targets under the CCA 2008, which would reflect developing science and any change in the UK's international obligations under the Paris Agreement, would be taken into account at the stage of considering whether a DCO should be granted. That was a necessary step before the NWR Scheme could proceed. Moreover, as observed by the Divisional Court, there was scope for the Secretary of State to amend the ANPS under section 6 of the PA 2008, should that prove to be necessary if it emerged in the future that there was any inconsistency between the ANPS and the UK's obligations under the Paris Agreement.

133. It should also be observed that the carbon emissions associated with all three of the principal options identified by the Airports Commission (that is, the NWR Scheme, the ENR Scheme and the G2R Scheme) were assessed to be broadly similar. Accordingly, reference to the Paris Agreement does not provide any basis for preferring one scheme rather than another. To the extent the obligations under the Paris Agreement have a bearing on the decision to designate the ANPS, therefore, they are only significant if it is to be argued that there should not be any decision to meet economic needs by increasing airport capacity by one of these schemes. But in light of the extensive work done by the Airports Commission about the need for such an increase in capacity it could not be said that the Secretary of State acted irrationally in considering that the case for airport expansion had been sufficiently made out to allow the designation of the ANPS. The respondents did not

seek to argue that this aspect of his reasoning was irrational. As we have noted above, the concept of sustainability in section 10 of the PA 2008 includes consideration of economic and social factors as well as environmental ones.

134. In light of the factual position, it is not necessary to decide the different question whether, if the Secretary of State had omitted to think about the Paris Agreement at all (so that this was a case of the type described in para 120 above), as an unincorporated treaty, that would have constituted an error of law. That is not a straightforward issue and we have not heard submissions on the point. We say no more about it.

Ground (iii): the SEA Directive ground

135. The SEA Directive operates along with the EIA Directive to ensure that environmental impacts from proposals for major development are properly taken into account before a development takes place. The relationship between the Directives was explained by Lord Reed in *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51, paras 10-30. The SEA Directive applies “upstream”, at the stage of preparation of strategic development plans or proposals. The EIA Directive requires assessment of environmental impacts “downstream”, at the stage when consent for a particular development project is sought. Although the two Directives are engaged at different points in the planning process for large infrastructure projects such as the NWR Scheme, they have similar objects and have to deal with similar issues of principle, including in particular the way in which regard should be had to expert assessment of various factors bearing on that process. These points indicate that a similar approach should apply under the two Directives.

136. The SEA Directive is implemented in domestic law by the SEA Regulations. It is common ground that the SEA Regulations are effective in transposing the Directive into domestic law. Accordingly, it is appropriate to focus the discussion of this ground on the SEA Directive itself.

137. The structure of the SEA Directive appears from its provisions, set out and discussed above. The Directive requires that an environmental assessment of major plans and proposals should be carried out. The ANPS is such a plan, which will have a significant effect in setting the policy framework for later consideration of whether to grant a DCO for implementing the NWR Scheme. Therefore the proposal to designate it under section 5 of the PA 2008 required an “environmental assessment” as defined in article 2(b). The environmental assessment had to include “the preparation of an environmental report” and “the carrying out of consultations”. An environmental report for the purposes of the Directive is directed to providing a basis for informed public consultation on the plan.

138. The decision-making framework under the SEA Directive is similar to that under the EIA Directive for environmental assessment of particular projects. Under the EIA Directive, an applicant for planning consent for particular projects has to produce an environmental statement which, among other things, serves as a basis for consultation with the public. Under the SEA Directive, the public authority which proposes the adoption of a strategic plan has to produce an environmental report for the same purpose. In due course, any application by HAL for a DCO will have to go through the process of environmental assessment pursuant to the EIA Directive and the EIA Regulations.

139. FoE and Plan B Earth complain that the environmental report which the Secretary of State was required under the SEA Directive to prepare and publish was defective, in that it did not make reference to the Paris Agreement. Mr Wolfe pointed out that the Secretary of State did not include the Paris Agreement in the long list of legal instruments and other treaties appended to the scoping report produced in March 2016 (ie after the Paris Agreement was adopted in December 2015 but before it was signed by the UK in April 2016 and ratified by it in November 2016) for the purposes of preparing the draft AoS which was to stand as the Secretary of State's environmental report for the purposes of the SEA Directive for the consultation on the draft ANPS. No reference to the Paris Agreement was included in the AoS used for the February 2017 consultation on the draft ANPS, nor in that used for the October 2017 consultation on the draft ANPS.

140. Against this, HAL points out that the carbon target in the CCA 2008 and the carbon budgets set under that Act were referred to in the AoS, as well as in the draft ANPS itself, so to that extent the UK's obligations under the Paris Agreement were covered in the environmental report. Beyond that, the evidence of Ms Stevenson (who led the team who prepared the AoS on behalf of the Secretary of State) makes it clear that the Secretary of State followed the advice of the CCC in deciding that it was not necessary and would not be appropriate to make further reference to the Paris Agreement in the AoS. The existing domestic legal obligations were considered to be the correct basis for assessing the carbon impact of the project, and it would be speculative and unhelpful to guess at what different targets might be recommended by the CCC in the future. Therefore, despite its omission from the scoping report, when the AoS actually came to be drafted the Paris Agreement (which had been ratified by the UK after the scoping report was issued) had been considered and the Secretary of State, acting by Ms Stevenson and her team, had decided in the exercise of his discretion not to make distinct reference to it.

141. As regards the law, the parties are in agreement. Any obligation to make further reference to the Paris Agreement in the environmental report depended on the application of three provisions of the SEA Directive. Under paragraph (e) of Annex I, the AoS had to provide information in the form of "the environmental protection objectives, established at international, Community or member state

level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation”. But, as stated in the introduction to Annex I, this was “subject to article 5(2) and (3)” of the Directive, set out at para 58 above.

142. It is common ground that the effect of article 5(2) and (3) is to confer on the Secretary of State a discretion regarding the information to include in an environmental report. It is also common ground that the approach to be followed in deciding whether the Secretary of State has exercised his discretion unlawfully for the purposes of that provision is that established in relation to the adequacy of an environmental statement when applying the EIA Directive, as set out by Sullivan J in *R (Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin); [2004] Env LR 29 (“*Blewett*”). *Blewett* has been consistently followed in relation to judicial review of the adequacy of environmental statements produced for the purposes of environmental assessment under the EIA Directive and endorsed at the highest level. In *Shadwell Estates Ltd v Breckland District Council* [2013] EWHC 12 (Admin) Beatson J held that the *Blewett* approach was also applicable in relation to the adequacy of an environmental report under the SEA Directive. The Divisional Court and the Court of Appeal in the present case endorsed this view (at paras 401-435 and paras 126-144 of their respective judgments). The respondents have not challenged this and we see no reason to question the conclusion of the courts below on this issue.

143. As Sullivan J held in *Blewett* (paras 32-33), where a public authority has the function of deciding whether to grant planning permission for a project calling for an environmental impact assessment under the EIA Directive and the EIA Regulations, it is for that authority to decide whether the information contained in the document presented as an environmental statement is sufficient to meet the requirements of the Directive, and its decision is subject to review on normal *Wednesbury* principles. Sullivan J observed (para 39) that the process of requiring that the environmental statement is publicised and of public consultation “gives those persons who consider that the environmental statement is inaccurate or inadequate or incomplete an opportunity to point out its deficiencies”. The EIA Directive and Regulations do not impose a standard of perfection in relation to the contents of an environmental statement in order for it to fulfil its function in accordance with the Directive and the Regulations that it should provide an adequate basis for public consultation. At para 41 Sullivan J warned against adoption of an “unduly legalistic approach” in relation to assessment of the adequacy of an environmental statement and said:

“... The [EIA] Regulations should be interpreted as a whole and in a common-sense way. The requirement that ‘an [environmental impact assessment] application’ (as defined in the Regulations) must be accompanied by an environmental

statement is not intended to obstruct such development. As Lord Hoffmann said in *R v North Yorkshire County Council, Ex p Brown* [2000] 1 AC 397, at p 404, the purpose is ‘to ensure that planning decisions which may affect the environment are made on the basis of full information’. In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant’s environmental statement will always contain the ‘full information’ about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting ‘environmental information’ provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations ..., but they are likely to be few and far between.”

Lord Hoffmann (with whom the other members of the Appellate Committee agreed on this issue) approved this statement in *R (Edwards) v Environment Agency* [2008] UKHL 22; [2008] 1 WLR 1587, para 38.

144. As the Divisional Court and the Court of Appeal held in the present case, the discretion of the relevant decision-maker under article 5(2) and (3) of the SEA Directive as to whether the information included in an environmental report is adequate and appropriate for the purposes of providing a sound and sufficient basis for public consultation leading to a final environmental assessment is likewise subject to the conventional *Wednesbury* standard of review. We agree with the Court of Appeal when it said (para 136):

“The court’s role in ensuring that an authority - here the Secretary of State - has complied with the requirements of article 5 and Annex I when preparing an environmental report, must reflect the breadth of the discretion given to it to decide what information ‘may reasonably be required’ when taking into account the considerations referred to - first, ‘current knowledge and methods of assessment’; second, ‘the contents and level of detail in the plan or programme’; third, ‘its stage in the decision-making process’; and fourth ‘the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment’. These requirements leave the authority with a

wide range of autonomous judgment on the adequacy of the information provided. It is not for the court to fix this range of judgment more tightly than is necessary. The authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind. This, in our view, indicates a conventional ‘Wednesbury’ standard of review - as adopted, for example, in *Blewett*. A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court.”

145. The EIA Directive and the SEA Directive are, of course, EU legislative instruments and their application is governed by EU law. However, as the Court of Appeal observed (paras 134-135), the type of complex assessment required in compiling an environmental report for the purposes of environmental assessment is an area where domestic public law principles have the same effect as the parallel requirements of EU law. As Advocate General Léger stated in his opinion in *Upjohn Ltd v Licensing Authority Established Under Medicines Act 1968* (Case C-120/97) [1999] 1 WLR 927, para 50, “[the] court has always taken the view that when an authority is required, in the exercise of its functions, to undertake complex assessments, a limited judicial review of the action which that authority alone is entitled to perform must be exercised, since otherwise that authority’s freedom of action would be definitively paralysed ...”.

146. The appropriateness of this approach is reinforced in the present context, having regard to the function which an environmental report is supposed to fulfil under the scheme of the SEA Directive. It is intended that such a report should inform the public by providing an appropriate and comprehensible explanation of the relevant policy context for a proposed strategic plan or project to enable them to provide comments thereon, and in particular to suggest reasonable alternatives by which the public need for development in accordance with the proposed plan or project could be met. As article 6(2) states, the public is to have an early and “effective” opportunity to express their opinion on a proposed plan or programme. It is implicit in this objective that the public authority responsible for promulgating an environmental report should have a significant editorial discretion in compiling the report to ensure that it is properly focused on the key environmental and other factors which might have a bearing on the proposed plan or project. Absent such a discretion, there would be a risk that public authorities would adopt an excessively defensive approach to drafting environmental reports, leading to the reports being excessively burdened with irrelevant or unfocused information which would undermine their utility in informing the general public in such a way that the public is able to understand the key issues and comment on them. In the sort of complex

environmental report required in relation to a major project like the NWR Scheme, there is a real danger that defensive drafting by the Secretary of State to include reference to a wide range of considerations which he did not consider to be helpful or appropriate in the context of the decision to be taken would mean that the public would be drowned in unhelpful detail and would lose sight of the wood for the trees, and their ability to comment effectively during the consultation phase would be undermined.

147. The appositeness of Sullivan J's analysis in *Blewett* at para 41, quoted above, has been borne out in this case. The draft ANPS issued with the AoS for the purposes of consultation included the statement that it was compatible with the UK's international obligations in relation to climate change. Concerns about the impact of the expansion of Heathrow on the UK's ability to meet its climate change commitments were raised in representations made during the consultation. In the Government's response to the consultation published on 5 June 2018 these representations were noted and the Government's position in relation to them was explained (paras 8.18-8.19 and 8.25). The Government's view was that the NWR Scheme was capable of being compatible with the UK's international obligations and that there was no good reason to hold up the designation of the ANPS until future policy in relation to aviation carbon emissions, which was in a state of development internationally and domestically, was completely fixed. Accordingly, it is clear that the public was able to comment on the Paris Agreement in the course of the consultation and that their comments were taken into account in the environmental assessment required by the SEA Directive. It again appears from this material that the Secretary of State did have regard to the Paris Agreement when deciding to designate the ANPS.

148. As we have said, Mr Wolfe did not challenge the legal framework set out above. In particular, he did not challenge the appropriateness of applying the *Wednesbury* standard in relation to the exercise of discretion under article 5(2) and (3). Instead, in line with his submission under ground (ii) above, his submission was that the Secretary of State had decided that the Paris Agreement was not a relevant statement of international policy falling within Annex I, paragraph (e), because he had been advised that it was legally irrelevant to the decision he had to take as to whether to designate the ANPS. Thus, according to Mr Wolfe, the Secretary of State had never reached the stage of exercising his discretion whether to include a distinct reference to the Paris Agreement in the AoS. The Secretary of State's decision that the Paris Agreement was irrelevant as a matter of law was wrong, and therefore the Secretary of State had erred in law because he simply did not turn his mind to whether reference to it should be included in the environmental report (the AoS). This was the argument which the Court of Appeal accepted at paras 242 to 247. The Court of Appeal's reasoning on this point was very short because, as it pointed out, it followed its reasoning in relation to the respondents' submissions in relation to section 10 of the PA 2008 (ground (ii) above).

149. In our view, as with the ground (ii) above, Mr Wolfe’s submission and the reasoning of the Court of Appeal cannot be sustained in light of the relevant evidence on the facts. As we have explained, the Secretary of State did not treat the Paris Agreement as legally irrelevant and on that basis refuse to consider whether reference should be made to it. On the contrary, as Ms Stevenson explains in her evidence, in compiling the AoS as the environmental statement required under the SEA Directive the Secretary of State decided to follow the advice of the CCC to the effect that the UK’s obligations under the Paris Agreement were sufficiently taken into account in the UK’s domestic obligations under the CCA 2008, which were referred to in the ANPS and the AoS. Further reference to the Paris Agreement was not required. As we have already held above, this was an assessment which was plainly rational and lawful.

150. Therefore, we would uphold this ground of appeal as well. Having regard to the evidence regarding the factual position, the Divisional Court was right to reject this complaint by the respondents (paras 650-656). The Secretary of State did not act in breach of any of his obligations under the SEA Directive in drafting the AoS as the relevant environmental report in respect of the ANPS, and in omitting to include any distinct reference in it to the Paris Agreement.

Ground (iv) - the post-2050 and non-CO₂ emissions grounds

151. This ground concerns other matters which it is said that the Secretary of State failed to take into consideration in the performance of his duty under section 10(2) and (3) of the PA 2008. Those provisions, as we have said, obliged the Secretary of State in performing his function of designating the ANPS to do so “with the objective of contributing to sustainable development” and in so doing to “have regard to the desirability of ... mitigating, and adapting to, climate change”.

152. FoE has argued and the Court of Appeal (paras 248-260) has accepted that the Secretary of State failed in his duty under section 10 to have regard to (i) the effect of emissions created by the NWR Scheme after 2050 and (ii) the effect of non-CO₂ emissions from that scheme. The Divisional Court dealt with this matter together with the matter which has become ground (ii) in this appeal, namely whether the Secretary of State failed to have regard to the Paris Agreement in breach of section 10, as issue 19 in the rolled up hearing (paras 633-648, 659(iv)) and held that that FoE’s case was not arguable. The Court of Appeal (para 256) correctly treated this issue as closely bound up with what is now ground (ii) in this appeal. It is not in dispute in this appeal that in assessing whether the Secretary of State was bound to address the effect of the post-2050 emissions and the effect of the non-CO₂ emissions in the ANPS we are dealing with the third category of considerations in Simon Brown LJ’s categorisation in *R v Somerset County Council, Ex p Fewings* (para 116 above). The Secretary of State had a margin of appreciation in deciding

what matters he should consider in performing his section 10 duty. It is also not in dispute that it is appropriate to apply the *Wednesbury* irrationality test to that decision (para 119 above). The task for the court therefore is one of applying that legal approach to the facts of this case.

153. We address first the question of post-2050 emissions before turning to the non-CO₂ emissions.

(i) *post-2050 emissions*

154. FoE's argument on the relevance to the objectives of the Paris Agreement of the impacts of emissions after 2050 was straightforward. An assessment of the impact of the emissions from aircraft using the North West Runway by reference to a greenhouse gas target for 2050 fails to consider whether it would be sustainable for the additional aviation emissions from the use of the North West Runway to occur after 2050 given the goal of the Paris Agreement for global emissions to reach net zero in the second half of the century.

155. HAL submitted that the Secretary of State's approach is entirely rational. Lord Anderson points out, and FoE accepts, that the Airports Commission assessed the carbon emissions of each of the short-listed schemes over a 60-year appraisal period up to 2085/2086 and that the same appraisal period was used in the AoS which accompanied the ANPS. The Secretary of State therefore did take into account the fact that there would be carbon emissions from the use of the North West Runway after 2050 and quantified those emissions. It was not irrational to decide not to attempt to assess post-2050 emissions by reference to future policies which had yet to be formulated. It was rational for him to assume that future policies in relation to the post-2050 period, including new emissions targets, could be enforced by the DCO process and mechanisms such as carbon pricing, improvements to aircraft design, operational efficiency improvements and limitation of demand growth.

156. In our view, HAL is correct in its submission that the Secretary of State did not act irrationally in not attempting in the ANPS to assess post-2050 emissions against policies which had yet to be determined. It is clear from the AoS that the Department for Transport modelled the likely future carbon emissions of both Heathrow and Gatwick airports, covering aircraft and other sources of emissions, to 2085/2086 (paras 6.11.1- 6.11.3, 6.11.13 and Table 6.4). As we have set out in our discussion of ground (i) above, policy in response to the global goals of the Paris Agreement was in the course of development in June 2018 when the Secretary of State designated the ANPS and remains in development.

157. Further, as we have already pointed out (paras 10 and 98 above), the designation of the NWR Scheme in the ANPS did not immunise the scheme from complying with future changes of law and policy. The NWR Scheme would fall to be assessed against the emissions targets which were in force at the date of the determination of the application for a DCO. Under section 120 of the PA 2008 (para 37 above) the DCO may impose requirements corresponding to planning conditions and requirements that the approval of the Secretary of State be obtained. Under section 104 (para 35 above), the Secretary of State is not obliged to decide the application for the DCO in accordance with the ANPS if (i) that would lead the United Kingdom to be in breach of any of its international obligations, (ii) that would lead the Secretary of State be in breach of any duty imposed by or under any other enactment, (iii) the Secretary of State is satisfied that deciding the application in accordance with the ANPS would be unlawful by virtue of any enactment and (iv) the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits. There are therefore provisions in place to make sure that the NWR Scheme complies with law and policy, including the Government's forthcoming Aviation Strategy, at the date when the DCO application is determined.

158. There are also mechanisms available to the Government, as HAL submits (para 155 above), by which the emissions from the use of the North West Runway can be controlled.

(ii) *non-CO₂ emissions*

159. To understand FoE's argument in relation to non-CO₂ emissions, it is necessary first to identify what are the principal emissions which give rise to concern. Mr Tim Johnson, of the Aviation Environmental Federation, explained in his first witness statement that aircraft emit nitrogen oxides, water vapour and sulphate and soot aerosols, which combine to have a net warming effect. Depending on atmospheric humidity, the hot air from aircraft exhausts combines with water vapour in the atmosphere to form ice crystals which appear as linear condensation trails and can lead to cirrus-like cloud formation. Using the metric of radiative forcing (RF), which is a measure of changes in the energy balance of the atmosphere in watts per square metre, it is estimated that the overall RF by aircraft is 1.9 times greater than the forcing by aircraft CO₂ emissions alone, but the RF metric is not suitable for forecasting future impacts. He recognised that there is continuing uncertainty about the impacts of non-CO₂ emissions, which tend to be short-lived, but he stated that there is high scientific consensus that the total climate warming effect of aviation is more than that from CO₂ emissions alone. Scientists are exploring metrics to show how non-CO₂ impacts can be reflected in emission forecasts for the purpose of formulating policy.

160. There is substantial agreement between the parties that there is continuing uncertainty in the scientific community about the effects of non-CO₂ emissions. The Department for Transport acknowledged this uncertainty in the AoS (para 6.11.11):

“The assessment undertaken is based on CO₂ emissions only ... There are likely to be highly significant climate change impacts associated with non-CO₂ emissions from aviation, which could be of a similar magnitude to the CO₂ emissions themselves, but which cannot be readily quantified due to the level of scientific uncertainty and have therefore not been assessed. There are also non-CO₂ emissions associated with the operation of the airport infrastructure, such as from refrigerant leaks and organic waste arisings, however, evidence suggests that these are minor and not likely to be material.”

The AoS returned to this topic (Appendix A-9, para 9.11.5):

“In addition, there are non-carbon emissions associated with the combustion of fuels in aircraft engines while in flight, which are also thought to have an impact on climate change. As well as CO₂, combustion of aviation fuel results in emission of water vapour, nitrogen oxides (NO_x) and aerosols. NO_x are indirect greenhouse gases, in that they do not give rise to a radiative effect themselves, but influence the concentration of other direct greenhouse gases ... With the exception of sulphate aerosols, all other emissions cause warming. In addition, the flight of aircraft can also cause formation of linear ice clouds (contrails) and can lead to further subsequent aviation-induced cloudiness. These cloud effects cause additional warming. Evidence suggests that the global warming impact of aviation, with these sources included, could be up to two times that of the CO₂ impact by itself, but that the level of scientific uncertainty involved means that no multiplier should be applied to the assessment. For these reasons the [Airports Commission] did not assess the impact of the non-CO₂ effects of aviation and these have not been included in the AoS assessment. This position is kept under review by DfT but it is worth noting that non-CO₂ emissions of this type are not currently included in any domestic or international legislation or emissions targets and so their inclusion in the assessment would not affect its conclusion regarding legal compliance. It is recommended that further work be done on these impacts by the applicant during the detailed scheme design, according to the latest appraisal guidance.” (Emphasis added)

161. This approach of addressing the question of capacity by reference to CO₂ emissions targets, keeping the policy in relation to non-CO₂ emissions under review and requiring an applicant for a DCO to address such impacts by reference to the state of knowledge current at the time of the determination of its application was consistent with the advice of the CCC to the Airports Commission and to the Secretary of State. The Airports Commission recorded that advice in its interim report in December 2013: because of the uncertainties in the quantification of the impact of non-CO₂ emissions, the target for constraining CO₂ emissions remained the most appropriate basis for planning future airport capacity. The approach of reconsidering the effect of all significant emissions when determining an application for a DCO is reflected in the ANPS which addressed the CO₂ emissions target and stated (para 5.76):

“Pursuant to the terms of the Environmental Impact Assessment Regulations, the applicant should undertake an assessment of the project as part of the environmental statement, to include an assessment of any likely significant climate factors. ... The applicant should quantify the greenhouse gas impacts before and after mitigation to show the impacts of the proposed mitigation.” (Emphasis added)

The approach remains consistent with the CCC’s advice since the designation of the ANPS. In its letter of 24 September 2019 to the Secretary of State recommending that international aviation and shipping emissions be included in a net-zero CO₂ emissions target, the CCC stated:

“Aviation is likely to be the largest emitting sector in the UK by 2050, even with strong progress on technology and limiting demand. Aviation also has climate warming effects beyond CO₂, which it will be important to monitor and consider within future policies.” (Emphasis added)

162. The Government in its response to consultations on the ANPS (para 11.50) stated that it will address how policy might make provision for the effects of non-CO₂ aviation emissions in its Aviation Strategy. That strategy is due to be published shortly.

163. The Secretary of State when he designated the ANPS was aware that the applicant for a DCO in relation to the NWR Scheme would have to provide an environmental assessment which addressed, and would be scrutinised against, the then current domestic and international rules and policies on aviation and other emissions. He would have been aware of his power to make requirements under

section 120 of the PA 2008 and to depart from the ANPS in the circumstances set out in section 104 of that Act (para 157 above).

164. The Court of Appeal (para 258) upheld FoE's challenge stating the precautionary principle and common sense suggested that scientific uncertainty was not a reason for not taking something into account at all, even if it could not be precisely quantified at this stage. The Court did not hold in terms that the Secretary of State had acted irrationally in this regard but said (para 261) that, since it was remitting the ANPS to the Secretary of State for reconsideration, the question of non-CO₂ emissions and the effect of post-2050 emissions would need to be taken into account as part of that exercise.

165. We respectfully disagree with that approach. The precautionary principle adds nothing to the argument in this context and we construe the judgment as equating the principle with common sense. But a court's view of common sense is not the same as a finding of irrationality, which is the only relevant basis on which FoE seeks to impugn the designation in its section 10 challenges. In any event we are satisfied that the Secretary of State's decision to address only CO₂ emissions in the ANPS was not irrational.

166. In summary, we agree with the Divisional Court that it is not reasonably arguable that the Secretary of State acted irrationally in not addressing the effect of the non-CO₂ emissions in the ANPS for six reasons. First, his decision reflected the uncertainty over the climate change effects of non-CO₂ emissions and the absence of an agreed metric which could inform policy. Secondly, it was consistent with the advice which he had received from the CCC. Thirdly, it was taken in the context of the Government's inchoate response to the Paris Agreement. Fourthly, the decision was taken in the context in which his department was developing as part of that response its Aviation Strategy, which would seek to address non-CO₂ emissions. Fifthly, the designation of the ANPS was only the first stage in a process by which permission could be given for the NWR Scheme to proceed and the Secretary of State had powers at the DCO stage to address those emissions. Sixthly, it is clear from both the AoS and the ANPS itself that the applicant for a DCO would have to address the environmental rules and policies which were current when its application would be determined.

Conclusion

167. It follows that HAL succeeds on each of grounds (i) to (iv) of its appeal. It is not necessary therefore to address ground (v) which is concerned with the question whether the court should have granted the relief which it did. We would allow the appeal.

The Queen on the Application of Khan v London Borough of Sutton v Viridor Waste (Thames) Limited, Thames Water Utilities Limited, South London Waste Partnership



No Substantial Judicial Treatment

Court

Queen's Bench Division (Administrative Court)

Judgment Date

6 November 2014

Case No: CO/1878/2014

High Court of Justice Queen's Bench Division Administrative Court

[2014] EWHC 3663 (Admin), 2014 WL 5599455

Before: The Honourable Mrs Justice Patterson DBE

Date: Thursday 6th November 2014

Hearing dates: 9-10 October 2014

Representation

Justine Thornton (instructed by Deighton Pierce Glynn) for the Claimant.

Saira Kabir Sheikh QC (instructed by Sharpe Pritchard) for the Defendant.

David Elvin QC and Heather Sargent (instructed by Bevan Brittan LLP) for the First Interested Party.

Judgment

Mrs Justice Patterson:

Introduction

1. This is an application for judicial review of a decision by the defendant on 14 March 2014 to grant planning permission for development at Beddington Farmlands Waste Management Facility, Beddington Lane, Beddington (“the Beddington site”). The planning permission is in the following terms:

“Phased demolition of existing buildings and development of an energy recovery facility (ERF) and buildings ancillary to the ERF, construction of two combined heat and power pipe lines, revisions to the approved restoration plan for the Beddington landfill site, amendments to the existing in-vessel composting operations, removal of existing access and provisions of new access road and reconfiguration of access to Thames Water site to the north.”

2. The claimant is a hotel manager who lives in Croydon, about two miles from the proposed site. He is co-ordinator of the Sutton and Croydon Green Party. He helped found the ‘Stop the Incinerator Group’, a loosely formed local group which campaigns against the development.

3. The defendant is the waste planning authority with statutory responsibility for determining planning applications for waste management facilities proposed for its area. The defendant is also part of the South London Waste Partnership, formed in 2003, which consists of the London Boroughs of Merton, Croydon, Sutton and Kingston (the partnership). The partnership is responsible for the collection of municipal waste in the four London Boroughs and its treatment or disposal. It acts jointly on waste matters including the procurement of waste services.
4. The first interested party is a waste management company and the applicant for planning permission at the Beddington site. In 2012 it entered into a twenty-five year contract with the South London Waste Partnership to process the partnership's municipal waste from 2017 onwards. The second and third interested parties did not take part in the proceedings before the court.
5. The Beddington proposal has been high profile and quite controversial. It is development of potential strategic importance to London, by virtue of its size and being located on Metropolitan Open Land (MOL).
6. On 13 June 2014 the claimant was granted permission to bring the proceedings by Collins J on four grounds. Those grounds are:
 - i) Whether there was an error in the interpretation of the South London Waste Plan?
 - ii) Whether the defendant erred in its consideration of “very special circumstances”?
 - iii) Whether the defendant fettered its discretion in the decision making exercise? and
 - iv) Whether the defendant erred in its assessment of the environmental impact of the combined heat and power (CHP) pipework beyond the boundaries of the site?

Background

7. The Beddington site is some 97.2 hectares. The development is planned for the north-eastern corner of the application site. The site has temporary planning permission for a landfill facility which covers most of the site, a recycling and composting centre where the permission expires in 2023 and a skip waste recycling facility.
8. The site is entirely within designated MOL in the London Plan.
9. Policy 7.17 of the London Plan states that, “the strongest protection should be given to London's MOL and inappropriate development refused, except in very special circumstances.”
10. In addition to the MOL designation the site has been safeguarded as part of the Wandle Valley Regional Park. In 1996 the defendant teamed up with the boroughs of Croydon and Merton to create the Wandle Valley Country Park Master Plan which includes the whole of the Beddington Farmlands. The proposed Wandle Valley Regional Park includes the 200 hectare country park at Beddington Farmlands linking Beddington Park with Mitcham Common.
11. On 16 July 2012 the interested party applied to the defendant for planning permission in the terms set out above.

12. The planning application was reported to the development control committee on 24 April 2013. The officer report recommended approval of the application subject to the conclusion of a legal agreement, the provision of additional areas for habitat and access and no adverse direction being received from the Mayor of London to whom the application had to be referred.

13. The application was deferred so that there could be further investigation on air quality and traffic issues, to consider reinforced conditions on those topics and related provision in the draft [section 106](#) agreement.

14. On 15 May 2013 the development control committee resolved to grant planning permission.

15. The Mayor was consulted and indicated that he was content for the defendant to decide the application.

16. On 14 March 2014 planning permission was granted subject to conditions and after the execution of a [section 106](#) agreement.

17. As part of a statement under [Regulation 24](#) the defendant set out the main reasons and considerations on which the decision was based. That reads as follows:

“The main reasons and considerations on which the decision is based are set out in the reports to the Development Control Committee on 24th April 2013 and 15th May 2013 and the subsequent minutes of those meetings.

The development would be contrary to London Plan Policy 7.17 and Sutton Core Planning Strategy PMP 9 that broadly seek to protect the open character of the proposed Wandle Valley Regional Park and wider MOL. It would also constitute inappropriate development on MOL within the terms of the NPPF.

However, it was acknowledged that the application site is expressly safeguarded for continued waste management use under Policy WP3 of the South London Waste Plan. The Waste Plan, which was adopted in 2012, post-dates the Core Planning Strategy by three years and is the most up to date expression of the Council's waste planning policy. Whilst the Waste Plan has a lifetime of 10 years and the ERF would be expected to stand for at least 25 years, the proposal cannot be considered contrary to Policy WP3. Policy WP3 encourages safeguarded sites to maximise their potential for waste use subject to other policies in the Waste Plan and Development Plan.

As the proposal is in conflict with development plan policy, it was necessary to consider whether there were other material planning considerations that outweigh the conflict and whether they constitute the very special circumstances necessary to clearly outweigh the harm including that arising from the inappropriate nature of the development.

The following material considerations to justify inappropriate development on MOL were considered to have been demonstrated:

1. Whilst the current waste use is subject to time limited permissions, waste management activity at the site has taken place for many years and is safeguarded in the development plan. Further, intensification of that use is encouraged by the development plan.
2. There is an identifiable and urgent need to divert residual waste arising from landfill and the proposals will provide for this in line with European Directives and national policies and strategies.

3. The alternative sites assessment report shows that there are no alternative sites that are suitable, available and achievable to deliver this proposal in the required timescale.
4. The ability of ERF in this location to provide heat for local homes to augment and secure local CHP initiatives.
5. The energy to be produced from the biodegradable element of the input to the ERF is classed as renewable, and therefore paragraph 91 of the NPPF applies.

Other material considerations to be taken into account that were considered to weigh in favour of the application are:

1. The proposal would see development consolidated on a smaller area of the site when compared to existing and permitted buildings and hardstandings.
2. The proposed inputs of residual waste and recyclables are already delivered to the site in similar or greater volumes, meaning that new traffic impacts would be limited except than during the construction of the plant.
3. Where potentially adverse environmental impacts have been identified, mitigation has been secured by legal agreement or planning conditions. Importantly, this includes securing access to additional areas of land to help mitigate the permanent loss of part of the restored lands to the ERF and funding for a warden to help manage the restored lands.

The planning conditions which have been applied and the legal agreement which has been entered into ensure that these mitigation measures will be provided.

The permanent loss of part of the site to development and the impact this would have on the open character of the proposed Wandle Valley Regional Park and wider MOL were significant policy concerns. However, the material considerations in favour of the development were also significant and it was considered that sufficient very special circumstances had been demonstrated to justify inappropriate development on MOL. The balance was considered to be clearly in favour of the scheme.”

Ground One: Did the defendant err in its interpretation of the South London Waste Plan?

Submissions

18. The claimant's original submission that the defendant had decided the planning application by reference to the wrong waste policy, namely, WP5, was not pursued.
19. Instead the claimant contended that policy WP3 was more than a safeguarding policy. It was a policy which was prescriptive and which set a time period after which waste disposal at the Beddington site was not acceptable.
20. The claimant contends that there is a statutory requirement to determine the application in accordance with the development plan as a whole. As a result the Beddington site is safeguarded until 2023 for waste uses but thereafter it is to return to MOL.
21. To focus exclusively on policy WP3 ignores the development plan as a whole. It depends on characterising the footnote to policy WP3 as no more than supporting text. That is an interpretation which is not sensible or pragmatic. Further, such an interpretation is contrary to the main understanding of the main players in the South London Waste Plan during the evolution of the plan's policies.
22. In particular, the claimant refers to the initial policy comments made by the then relevant planning officer, Duncan Clarke, when he said:

“5.5. The South London Waste Plan recognises the importance of the Metropolitan Open Land designation on the site but also notes the Resolution to Grant Planning Permission that exists on the site. Through Policy WP3, the site is safeguarded for its existing waste use (as required by Policy 5.17 of the London Plan and Policy BP8 of the Sutton Core Strategy) but it is recognised, in [Schedule 1](#) that accompanies the policy, that when the current Resolution to Grant expires in 2023, the site will cease to be safeguarded and so other designations will have their full effect.

5.6. The policy stance taken by the South London Waste Plan has been formulated to be in conformity with the higher policy documents and also in response to representations received from statutory consultees at consultation stages on the South London Waste Plan. At publication stage, the Mayor of London commented: “The GLA support the inclusion of this site in the SLWDPD given the fact that note has been made of the Mayor's previous advice with regards to the site having temporary permissions for waste only till 2023, after which, the land will be required to be incorporated into the Wandle Valley Regional Park.” Natural England stated: “Natural England acknowledges the location of this existing, and operational site together with the adjacent Thames Water site. The statement that upon expiration of the existing permissions for the Viridor site, the land will be remediated and incorporated in to the Wandle Valley Regional Park, by 2023 is welcomed and strongly supported”.

5.7. Consequently, the extension of any waste activities on the site beyond 2023 would be considered contrary to policy expressed in the South London Waste Plan, which has been formulated on the advice of the Mayor of London and to be in conformity with the Sutton Core Strategy.”

23. That officer continued when dealing with the Wandle Valley Regional Park as follows:

“5.14. During the Consultation to the Proposed Changes to the South London Waste Plan (September 2011), Viridor made representations to alter the [Schedule 1](#) by proposing that the final sentence (“After this, the land will be incorporated into the Wandle Valley Regional Park.”) should be deleted and replaced with: “However, there is potential for the grant of further planning permissions for continuing waste management uses, or for additional waste management uses, in accordance with the policies of the development plan and taking into account the wider landfill restoration plan and proposals for a Wandle Valley Regional Park.” In addition, Viridor also made a representation to change the reference on Page 71 to “Ensuring that any proposals for new facilities, extension of time, or intensification of use at the site takes account of the sites relationship with the proposed Wandle Valley Regional Park.” The Inspector did not accept these representations.”

24. As a whole the Core Strategy, South London Waste Plan and the London Plan which together are the development plan make the policy position clear, namely, that the waste use is to cease in 2023. The error made by the defendant in concluding that there was compliance with waste policy was one that carried through into its consideration of very special circumstances. There was a further flaw in that the defendant failed in its evaluation of the proposal, to consider it against a post-2023 baseline with no development on the site.

25. The case of *R (on the application of Cherkley Campaign) v Mole Valley District Council [2014] EWCA Civ 567* relied upon by the defendant and interested party was inapplicable in the current circumstances. That was because there was no inconsistency within the development plan.

26. The defendant and interested party contend that policy WP3 is clear in its wording. It applies to existing permitted sites which Beddington clearly is. The sites are listed in [schedule 1](#) . They are to be encouraged to maximise their potential provided that the proposals satisfy all other policy requirements of the South London Waste Plan and satisfy other relevant policies within the applicable borough's development plan.

27. There is nothing in the footnote to the policy which states that the site is safeguarded beyond the planned period which expires in 2021. Nor is there anything which says the site is to be within the Wandle Valley Regional Park. What the footnote sets out is a factual statement of the position.

28. The defendant refers to the inspector's report at the examination of the plan when he considered under issue 2 policy WP3. He raised the following issue:

“3.4. Once planning permission is granted for a waste management or waste transfer site does it then come within the scope of this policy? In which case, is there not a tension between this policy and other aspirations with respect to Viridor's non-landfill facilities at Beddington Farmlands (both existing and prospective)?”

29. The Local Authority responded as follows:

“3.2.4. The boroughs intend that, once planning permission is granted for a waste management site over 0.2 ha in size, it will come within the scope of this policy. As a waste management facility, it will be recorded as existing capacity in the boroughs' monitoring procedures. Since the plan is for ten years, the boroughs do not consider there is tension between Policy WP3 and Viridor's non-landfill facilities at Beddington Farmlands. Until the end of the plan period (2021), Viridor has scope to develop its recycling and composting centre as it sees appropriate provided development meets the other requirements of the South London Waste Plan and the London Borough of Sutton's Development Plan. The requirement to vacate the site at Beddington Farmlands by 2023 in order to make way for the creation of Wandle Valley Regional Park is well-known and is established by references within the plan and previous planning decisions. It is intended that a future plan dealing with the period beyond 2021 will address the issue of the loss of capacity.”

30. The inspector concluded:

“12. Any proposals brought forward by the successful bidder are likely to be within the Partnership Councils' area and therefore considered against the policies in the SLWP. Not knowing either the technology to be used or the site(s) to be considered has caused a degree of frustration among some participants who have therefore found it difficult to engage effectively with the process. It is evident also that some of the representations focus upon the NSW contract process rather than the SLWP proposals. That is not within my remit, something I emphasised in my Guidance Notes.”

31. The case of Cherkley is applicable. That makes it clear that the planning policy is the policy itself and does not extend to supporting text.

32. The officer report clearly did deal with the position post-2023. An addendum to the ES was submitted in February 2013 which incorporated the 2023 baseline report. That had been requested by independent environmental compliance consultants, SKM Enviro, who had been retained by the defendant to assist with the technical assessment of the ES. A fair reading of the officer report of the 24 April shows that the post-2023 position without the development was very much taken into account: see 6.4 on the impact on openness, 6.9 and 6.10 for an overview on conservation management and landscape impact, 6.25 and 6.27 develop those matters in greater detail and 6.33 considers the transport position after 2023.

33. The overall conclusions note the position if the restoration to open land does not proceed and deal with the harm identified: see paragraphs 7.7 and 7.12 in particular.

34. The community impacts were also taken into account within the officer report as is evident in paragraphs 6.86, 6.87 and 6.94. The evaluation of that impact was a matter of planning judgment for the council.

35. The Wandle Valley Regional Park is an aspiration in the process of being developed. It had some funding from the National Heritage Lottery Fund and the Lord Mayor's Green Fund and some core funding. The Wandle Valley Regional Park Trust has been established as an independent body and a charity to link the four boroughs of Croydon, Merton, Sutton and Wandsworth within which the mapped area of the park is situated. Not all of the land within the park is green space and discussions are ongoing between the Trust and the boroughs on issues and opportunities to develop projects and funding opportunities.

Discussion and conclusions

36. The South London Waste Plan was prepared jointly by the London Boroughs of Croydon, Kingston, Merton and Sutton.

37. Policy WP3 is entitled ‘Existing waste sites’, it reads:

“All existing permitted sites (except those with a site area of 0.2 ha or less that are located outside SILs and LSILs) will be safeguarded for their current use or conversion to waste management. The current list (2011) is set out in [Schedule 1](#) .

These sites will be encouraged to maximise their potential, provided that proposals satisfy all other policy requirements of this South London Waste Plan. Proposals must also satisfy any other relevant policies within the applicable borough's Development Plan.

If, for any reason, an existing site is lost to a non-waste use, replacement compensatory provision will be required that, as a minimum, meets the maximum throughput that the site could have achieved. Any compensatory provision will need to comply with the policies of this South London Waste Plan together with any other relevant policies within the applicable borough's Development Plan.

In accordance with the plan's objectives and Policy WP1, if a redevelopment results in waste being treated higher up in the waste hierarchy but leads to a reduction in overall throughput, permission may also be granted.”

38. [Schedule 1](#) referred to is entitled ‘Existing permitted waste sites’, and contains a list of sites safeguarded by the 2011 London Plan. Site 18 is described as “Viridor Recycling and Composting Centre’ (also known as CIC), Beddington Lane, Beddington*.”

39. The asterisk is explained in a footnote at the end of the schedule in the following words:

“These sites are subject to temporary planning permissions or resolutions to grant temporary planning permissions. All are due to expire in 2023. After this, the land will be incorporated into the Wandle Valley Regional Park.”

40. As no reliance is now being placed on WP5 I do not set that out. It deals with windfall sites which the Beddington site is clearly not and is not applicable to the development proposals.

41. The relevant paragraphs of the officer report are:

“Impact on openness

6.4. The site of the ERF already includes buildings, hardstandings and structures associated with the permitted existing waste management uses, and is subject to a resolution to grant permission for additional development in the form of an anaerobic digestion plant. The openness of MOL in this location is therefore already affected, albeit on the basis of temporary planning permissions that require all buildings and structures to be removed by 2023 and the land to be fully restored soon after.

...

6.6. The proposals would be mostly contained within the boundaries of the safeguarded site and would have a marginally smaller footprint than the existing buildings and structures. However, where the existing uses are divided between a number of medium size buildings of limited height spread over a relatively wide area, the proposal is to replace these with a single very large building (the ERF) and a number of lower height but not insubstantial ancillary buildings. The latter would stand in close proximity to the ERF giving the proposals a monolithic character that the existing buildings and structures lack. It is considered that this monolithic character would impact adversely on the openness of that part of the site on which the ERF is to stand. However, this adverse impact must be balanced against the removal of all buildings and structures (with the exception of the gas plant compound) from the remaining area of the safeguarded

site. It is relevant to note that the proposal would consolidate waste management on about 3 hectares of the 7.4 hectare safeguarded area, and the remainder would be restored to open land uses.

...

6.8. Overall, having regard to the additional height and mass of the ERF building, it is considered that the development would be harmful to the openness of the proposed Wandle Valley Regional Park and wider MOL contrary to London Plan Policy 7.17 and that part of Sutton Core Planning Strategy Policy PMP 9 that seeks to enhance MOL within the borough.

Conservation Management, Public Access and Landscape Impact

6.9. Core Planning Strategy Policy PMP5 states that the Council will promote the creation of the Wandle Valley Regional Park including improved provision for recreation and leisure. Core Planning Strategy Policy PMP9 confirms that the Council will seek to safeguard open space and to protect and enhance biodiversity within the area of the proposed Regional Park. Policy PMP9 also confirms the importance of protecting MOL. Site Development DPD Policy DM17 addresses development within a Site of Importance for Nature Conservation (SINC), stating that permission will not be granted where there is a significant damaging impact on the nature conservation value or integrity of the site unless the need for, and benefits of, the development clearly outweigh the harm, the Council is satisfied that there are no reasonable alternative sites that would result in less harm and adequate mitigation and compensation measures can be put in place.

6.10. The applicants state that landfill activity at the application site would cease upon completion and commissioning of the ERF, expected in 2017. Operations in 2018 would include final importation of inert fill to complete the landform, importation of remaining topsoil, seeding, planting and path construction in all areas except that occupied by the IVC operations which would continue until 2022 when the IVC contract with the Partnership ends. Restoration would be completed in 2023.

Conservation Management and Biodiversity

6.11. The restored landfill would be subject to on-going maintenance as set out in the agreed Conservation Management Scheme (CMC) (see 1.11 to 1.14 above). However, the construction of the ERF would result in the loss of about 3% of the agreed area. The area lost to the ERF is shown under the agreed CMS to become wet grassland and although the applicant proposed to provide a comparable amount of wet grassland elsewhere within the Beddington Farmlands, this would result in the fragmentation of this particular habitat.

6.12. The fragmentation of wet grassland is a key concern for all nature conservation bodies who consider this a key habitat for bird life. Wildlife groups seek the relocation of the ERF to the frontage land so that one large area of wetland might be retained and/or compensatory provision for lost grasslands within the Hundred Acres to the north. The Beddington Farmlands Bird Group is also concerned about a possible adverse impact on the tree sparrow population (the site is one of London's most important sparrow habitats) and on reptiles (they refer to their own reptile survey which is not reflected in the applicant's study).

6.13. In respect of nature conservation, the applicant has agreed three main measures. Firstly, they propose to provide funding of £40,000 per annum for 25 years (index linked) for a warden to oversee management of the Beddington Farmlands from both an access and nature conservation point of view. Secondly, they have agreed to secure an additional area from the Hundred Acres, broadly equivalent to the site area of the ERF, to supplement the area for habitat creation, together with a payment of £50,000 to fund this and additional access (see below). This sum will be in addition to the £1.84m already secured through the existing [Section 106](#) legal agreement to manage the restored lands. It should be noted that the additional land to be provided does not form part of the planning application or the restoration scheme, but would be subject to the control of the Beddington Farmlands Conservation and Access Management Committee (CAMC) established under the existing legal agreement. Thirdly, they have agreed to develop and implement a tree sparrow mitigation strategy, to be secured by a planning condition.

...

Public Access

6.19. Viridor claim that bringing forward implementation of the CMS by up to five years is a significant material consideration in their favour. Although there will be no significantly earlier access to the main public access area identified in the CMS because landfill has already ceased in this area, earlier access to some peripheral parts of the site still to be restored is possible. The application also proposed to retain the existing north-south footpath on the western site of the site, whereas the 2005 application replaced this with a route within the site. Both routes are now proposed, representing an increase in access provision over the previous proposals.

6.20. Also, the applicants have agreed to secure additional land within the SAM site to enable an access to be created to Beddington Lane from the public access area within the restored land. As for the additional Hundred Acres, this would not be part of the application but would be made available to the CAMC to implement the access, together with £50,000 funding for this and the project to manage habitats within the Hundred Acres. While this access was implied in the original restoration scheme there were no measures to implement it.

6.21. It should be noted that public access to the restored site will always depend on health and safety risks associated with methane gas emissions, which are likely to persist for a number of years. Full public access is unlikely to be provided for 20 to 30 years, with access until then limited to defined footpaths. This is a similar timescale to the original proposals. Nevertheless, the increased certainty of the new proposals is considered beneficial.

6.22. The applicant was specifically requested to provide funding to secure the future of the bridges over the railway line linking the restored area to Hackbridge. The applicant would ensure that the restored area provides links to these bridges, but does not propose to fund the retention of the bridges specifically.

6.23. In summary, although the majority of the restored land would continue to be reserved for nature conservation purposes, the proposals offer some additional public access to the restored lands relative to the previously agreed scheme. The area of the ERF and associated buildings that would be lost to any form of public access for the life of the development had been identified to become a wet grassland habitat in the previously agreed restoration plans and would have offered limited if any public access. Overall, the proposals are not considered contrary to Core Strategic Planning Policy PMP5 or the public access expectations of Policy PMP9.

...

Landscape Impact

6.25. The proposed Wandle Valley Regional Park will comprise a network of open spaces and the relationship between these spaces is both a visual and functional one. The London Plan and Sutton Core Planning Strategy both require the Regional Park to be considered as a whole. The ERF would introduce a large new element in the landscape that would have a significant impact on views across and therefore the open character of the Regional Park.

6.26. The applicants accept that the proposal would have a significant and adverse landscape impact, although they argue that this would be ameliorated by the urban context particularly of Croydon and the industrial background. The applicants have agreed to fund off-site landscaping in the sum of £35,000, and this should be helpful in softening the impact from some short views, but the longer views could not readily be mitigated.

6.27. For these reasons it is considered that the development would be contrary to London Plan Policy 7.17 and Sutton Core Planning Strategy Policy PMP9 that broadly seek to protect the open character of the proposed Wandle Valley Regional Park and wider MOL.

...

Transport

6.33. It is considered reasonable for the applicants to argue that their proposals have no adverse impact to 2023, other than for construction traffic, and the proposals for the construction phase are considered reasonable. They also argue that

there is no adverse impact post-2023, as the adverse comparison with the traffic situation if waste management ceased is hypothetical, and any continuing highways concerns at that time relate more to growth in background traffic levels, and cannot reasonably be taken into account from a planning point of view. However, it is considered that there should be some mitigation post-2023, as from then landfill traffic would have ceased in the absence of the ERF proposal, but this should take the form of community funding rather than highways funding, as the issue being addressed is community well being, not highways mitigation. A contribution of £100,000 is therefore proposed to supplement the community fund referred to in 6.37 below. The funds might be used to address concerns related to traffic by contributing to highways improvements, or to some other environmental or community project to offset the adverse impact on well being. The sum of £100,000 is justified to enable the community to undertake a project or projects of sufficient significance to offset the adverse impact on well being significant.

...

Section 106 Matters

6.94. The legal agreement would also secure the establishment of a community fund. This is required to address the considerable community concern about the adverse impacts of consolidating a waste management use on this site, given the previous commitment to discontinue waste management in 2023.”

The relevant paragraphs from [section 7](#) of the officer report are set out in paragraph 73 below.

42. In dealing with officer reports to planning committees Sullivan LJ said in *R (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286 at [19]:

“It has been repeatedly emphasised that officers' reports such as this should not be construed as though they were enactments. They should be read as a whole and in a commonsense manner, bearing in mind the fact that they are addressed to an informed readership, in this case the respondent's planning subcommittee. In *R v Selby District Council ex parte Oxtou Farms* [1997] EGCS 60 , Judge LJ, as he then was, said this:

“From time to time there will no doubt be cases when judicial review is granted on the basis of what is or is not contained in the planning officer's report. This reflects no more than the court's conclusion in the particular circumstances of the case before it. In my judgment an application for judicial review based on criticisms on the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken.”

43. In *R (on the application of Morge) v Hampshire County Council* [2011] UKSC 2 Baroness Hale said at [36]:

“Some may think this an unusual and even unsatisfactory situation, but it comes about because in this country planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities. As Lord Hoffmann put it in *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 , para 69, “In a democratic country, decisions about what the general interest requires are made by democratically elected bodies or persons accountable to them.” Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's, to weigh the competing public and private interests involved.”

44. It follows that, in considering an officer report, the court must consider it as a whole and in the context that it was addressed to an informed local readership.

45. There are two material issues under this ground. First, the meaning of policy WP3. Second, whether the defendant adopted the appropriate baseline in its assessment by failing to take into account as a material consideration how the land would be post-2023 without any development.

46. The construction of policy is a matter of law for the court to determine: *Tesco Stores Limited v Dundee City Council* [2012] PTSR 983 at [17] to [19].

47. The meaning of policy WP3 is, in my judgment, clear. It applies to all existing permitted sites the current list of which (in 2011) was set out in [schedule 1](#). That list includes the Beddington site. The policy is that the listed sites will be safeguarded for their current use or conversion to waste management during the plan period.

48. Not only that but the listed sites are to be encouraged to maximise their potential for waste uses. That is to be subject to, first, all other policy requirements of the South London Waste Plan, and second, any other relevant policies within the applicable borough's development plan.

49. The policy position is thus that the site is safeguarded for waste use for the life of the plan under policy WP3, namely, until 2021.

50. In *R (on the application of Cherkley Campaign) v Mole Valley District Council* [2014] EWCA Civ 567 Richards LJ said:

“16. Leaving aside the effect of the saving direction, it seems to me, in the light of the statutory provisions and the guidance, that when determining the conformity of a proposed development with a local plan the correct focus is on the plan's detailed *policies* for the development and use of land in the area. The supporting text consists of *descriptive and explanatory matter* in respect of the policies and/or a *reasoned justification* of the policies. That text is plainly relevant to the interpretation of a policy to which it relates but it is not itself a policy or part of a policy, it does not have the force of policy and it cannot trump the policy. I do not think that a development that accorded with the policies in the local plan could be said not to conform with the plan because it failed to satisfy an additional criterion referred to only in the supporting text. That applies even where, as here, the local plan states that the supporting text indicates how the policies will be implemented.

17. In this case, therefore, the correct focus is on the terms of Policy REC12. That policy contains no requirement to demonstrate need. It sets out six criteria against which proposals for new golf courses will be considered, none of which relate to need. It provides in addition that the Council will require evidence that the proposed development is a *sustainable* project without the need for significant additional development in the future. It also provides that new golf courses in the AONB and the AGLV will only be permitted if they are consistent with the primary aim of *conserving and enhancing* the existing landscape. None of those matters can be equated with or involves a requirement to demonstrate need and in my view no such requirement can be read into them. The policy must of course be read in the light of the supporting text, given the statutory role of that text as descriptive and explanatory matter and/or reasoned justification for the policy, and also bearing in mind the statement in paragraph 1.10 of the Local Plan that the text indicates how the policy will be implemented by the Council. But making all due allowance for the role thereby performed by paragraph

12.71, I do not see how the paragraph can provide a basis for reading a need requirement into the policy. For whatever reason, the reference to a requirement to demonstrate need was not carried over into the terms of the policy. Nor can paragraph 12.71 operate independently to impose a policy requirement that Policy REC12 does not contain.

...

21. It should already be clear why I disagree with that reasoning. The policy is what is contained in the box. The supporting text is an aid to the interpretation of the policy but is not itself policy. To treat as part of the policy what is said in the supporting text about a requirement to demonstrate need is to read too much into the policy. I do not accept that such a requirement is implicit in the policy or, therefore, that paragraph 12.71 makes explicit what is implicit. In my judgment paragraph 12.71 goes further than the policy and has no independent force when considering whether a development conforms with the Local Plan. There is no requirement to demonstrate need in order to conform with the Local Plan either in its original form or as saved.”

51. Policy WP3 itself is the equivalent of what Richards LJ was referring to in Cherkley as being contained within the box. The policy can go no further than safeguarding the listed sites for the duration of the plan period. I reject the claimant's submission that Cherkley is inapplicable. It clearly is. It restates in very clear terms the relationship between a planning policy and the supporting text which is one of the points in issue in the instant case.

52. The asterisk/footnote is, in my judgment, to draw attention to the fact that there is a temporary planning permission on the Beddington site. If, therefore, there is to be any change to that position there is a clear link to other policies in the development plan. There would be no expectation to find any designation of country parks or policies which deal with land use proposals outside waste in a waste local plan. In my judgment, the only sensible interpretation of the asterisk/footnote is that it is there to draw the decision maker's attention to the fact that any proposal for development on the Beddington site would have to consider other parts of the development plan.

53. That there was cognisance of the broader development plan position is clearly evident from the officer report and the extracts set out above. In particular, given the concern of the claimant that the land should return to the proposed Wandle Valley Regional Park it is noted in paragraph 6.27 of the officer report that the development would be contrary to London Plan policy 7.17 and Sutton Core Planning Strategy policy PMP9 that broadly seek to protect the open character of the proposed Wandle Valley Regional Park and wider MOL.

54. The fact that other consultees during the course of the planning application or even preceding that may have held different views is not material to the proper interpretation of the policy itself. Likewise, the genesis of the policy and the inspector's examination of it as part of the Local Plan are interesting background but not determinative of what the policy means.

55. The remaining issue under this ground is whether the officer report was misleading in that it failed to consider an accurate baseline position in omitting to consider the situation after the expiration of the temporary planning permissions in 2023 when the land would otherwise be restored as the appropriate comparison against which the development proposal was to be judged.

56. It is abundantly clear from the officer report that full consideration was given to the post-2023 situation.

57. At the beginning of the report as part of the summary as to why the application proposals are acceptable the first bullet point begins, “although the proposals would perpetuate waste management on the site in the long term, contrary to community

expectations...” and the second bullet point sets out that the development would be contrary to London Plan policy 7.17 and Sutton Core Planning Strategy policy PMP9 that broadly seek to protect the open character of the proposed Wandle Valley Regional Park and the wider MOL.

58. Those points are then dealt with in greater detail in [section 6](#) of the report. Paragraph 6.4 deals with the restoration of the site on the basis of the temporary planning permission, paragraph 6.8 deals with harm to openness of the proposed Wandle Valley Regional Park, paragraphs 6.18 to 6.23 deal with community concern about public access, paragraphs 6.25 to 6.27 deal with the significant adverse landscape impact contrary to London Plan policy 7.17 and Sutton Core Planning Strategy policy PMP9 and paragraph 6.94 deals with the establishment of a community fund to address community concern after the previous commitment to discontinue waste management in 2023.

59. Reading the report fairly and as a whole there is no basis for saying that the officer report failed to consider the proposals without taking into account the effect of the expiry of the existing planning permissions in 2023.

60. This ground fails.

Ground Two: Was there an error on the part of the defendant in its assessment of Metropolitan Open Land?

Submissions

61. The claimant submits that the defendant failed to take into account harm to the MOL and the Wandle Valley Regional Park arising from the fact that the Beddington site would no longer be open land from 2023. There was a passing reference only in the officer report and no in depth discussion or analysis of harm. There was no consideration of “other harm” to the local community.

62. Further, the defendant fell into error in its identification of very special circumstances. What was relied upon were factors that were commonplace and not special enough to merit the classification as very special circumstances: see *Wychavon District Council v Secretary of State for Communities and Local Government* [2008] EWCA Civ 692 .

63. Further, the assertion that there was an “urgent” need to divert waste from landfill was not borne out by any target or the Local Plan. The government had withdrawn funding from the waste procurement project on the basis that it would no longer be needed in order to meet the 2020 landfill diversion targets set by the EU. The revised definition of municipal waste included more commercial waste than previously which affected the waste disposal performance against EU landfill targets. Yet further, the inspector on the South London Waste Plan referred to a greater imperative rather than an urgent need.

64. The defendant and interested party contend that it is evident that the defendant applied the correct legal approach as can be seen in paragraphs 6.1 to 6.3 of the officer report.

65. What are very special circumstances is a matter of judgment for the decision maker: see *Wychavon* (supra).

66. The defendant here was entitled to look at the factors which it considered important and weight them accordingly. That was a matter entirely for it.

67. The conclusion section of the report illustrates that the defendant applied itself properly in terms of approach to MOL and very special circumstances that needed to be demonstrated.

68. The impact of the proposed development on the Wandle Valley Regional Park was fully assessed within the officer report.

69. The claimant's contention that there is no urgent need to divert waste from landfill is in substance an impermissible challenge to the merits of the council's planning judgment. In any event there is ample evidence to justify that conclusion, as follows:

- i) The current EU Waste Framework Directive 2008/98/EC ;
- ii) The stipulation by the Mayor that by 2025 no municipal waste should be sent direct to landfill;
- iii) The difference in the local plan inspector's phrase of "greater imperative" as opposed to "urgent need" is a semantic quibble;
- iv) The December 2013 Waste Management Plan for England recognises that the landfill tax remains the key driver to divert waste from landfill to ensure that EU targets are met under the Landfill Directive;
- v) The withdrawal of funds by the Department of Environment, Food and Rural Affairs (DEFRA) in October 2010 from the project was for general austerity reasons as opposed to anything else and did not detract from the obligation to drive waste management up the waste hierarchy.

70. The interested party emphasises that the study of alternatives was carried out for the planning application as it was necessary to know that there was no reasonable alternative site that was available that would not impact on the MOL. The study had considered the three sites referred to in the Waste Local Plan, namely Garth Road Civic Community, Factory Lane and Villiers Road. They were all ruled out as not being alternatives as they were smaller than the minimum size required of 3 hectares.

71. Overall the defendant's approach was entirely appropriate.

Discussion and conclusions

72. The jurisprudence on officer reports, in particular, in the planning context I have set out above.

73. [Section 7](#) of the officer report sets out the conclusions. It reads:

"7.1. The development would be contrary to London Plan Policy 7.17 and Sutton Core Planning Strategy Policy PMP 9 that broadly seek to protect the open character of the proposed Wandle Valley Regional Park and wider MOL. It would also constitute inappropriate development on MOL within the terms of the NPPF.

7.2. It needs to be acknowledged, however, that the application site is expressly safeguarded for continued waste management use under Policy WP3 of the South London Waste Plan. The Waste Plan, which was adopted in 2012, post-dates the Core Planning Strategy by three years and is the most up to date expression of the Council's waste planning policy. Whilst the Waste Plan has a lifetime of 10 years and the ERF would be expected to stand for at least 25 years, the proposal cannot be considered contrary to Policy WP3. Policy WP3 encourages safeguarded sites to maximise their potential for waste use subject to other policies in the Waste Plan and Development Plan.

7.3. As the proposal is in conflict with development plan policy, it is necessary to consider whether there are other material planning considerations that outweigh the conflict and whether they constitute the very special circumstances necessary to clearly outweigh the harm including that arising from the inappropriate nature of the development.

7.4. It is considered that significant weight should be attached to national waste policy and strategy that seeks to divert waste away from landfill. The Government Review of Waste Policy 2011 supports energy recovery from waste where appropriate and for waste which cannot be recycled. National Policy Statement EN-1 recognises that the recovery of energy from waste, where in accordance with the waste hierarchy, will play an increasingly important role in meeting the UK's energy needs and form an important element of waste management strategies in England and Wales.

7.5. There is considered to be an identifiable and urgent need to divert residual waste arising from landfill and the proposals would provide for this in line with European Directives and national policies and strategies.

7.6. The choice of the application site rests in large part on the urgent need for the facility and the unavailability of a suitable alternative site that would be available within the required time frame. It is accepted that the alternative sites assessment carried out by the applicant has demonstrated that there are no alternative sites that are suitable, available and achievable to deliver this proposal in the timescale set by the Partnership. The need for the facility to be operational within the identified timeframe reflects also the escalating cost of landfill.

7.7. It is considered that significant weight should be attached to the fact that the site is in existing waste management use and is expressly safeguarded for such use in the development plan. Although the current waste use is subject to time limited permissions and is contained in smaller buildings than now proposed, waste management activity has been a feature of the site since 1995 and is currently a defining characteristic of the land. The adverse impact that the development would have on the openness of MOL derives more from the height and visibility of the ERF than its spread across the site. The adverse impact on the open character of the wider area needs to be balanced against the arguably beneficial but more localised effect of consolidating waste management activity within the safeguarded area and restoring the majority of the safeguarded area to open land uses, although noting that these areas would all be restored to open land under the terms of the existing legal agreements and planning permissions were the ERF not to go ahead. Previous permissions at the site (e.g. that for the anaerobic digestion plant) have used the existing waste uses at the site as a component of the very special circumstances to allow permission, albeit subject to time limitations.

7.8. Significant weight should also be attached to the ability to link an ERF in this location to a scheme being pursued by Viridor to provide heat from the existing landfill gas engines to development at the Felnax site in Hackbridge. This initial heat network has significant potential to be extended in the future. Locating the ERF at the site would allow it to augment the landfill gas potential, providing greater longevity and security of supply. Whilst the delivery of heat to local homes cannot at this stage be guaranteed, a strong business case for the applicant to enter into a CHP agreement with an ESCo has been demonstrated, so there is good reason to believe the measure will be implemented.

7.9. The energy to be produced from the biodegradable element of the input to the ERF is classed as renewable. The NPPF, at paragraph 91, states that where renewable energy projects are located in the Green Belt (and therefore MOL also) Very Special Circumstances may include the wider environmental benefits associated with increased production of energy from renewable sources.

7.10. In summary, the following Very special Circumstances to justify inappropriate development on MOL are considered to have been demonstrated:

- Whilst the current waste use is subject to time limited permissions, waste management activity at the site has taken place for many years and is safeguarded in the development plan. Further, intensification of that use is encouraged by the development plan.
- There is an identifiable and urgent need to divert residual waste arising from landfill and the proposals will provide for this in line European Directives and national policies and strategies. The alternative sites assessment report shows that there are no alternative sites that are suitable, available and achievable to deliver this proposal in the required timescale.
- The ability of ERF in this location to provide heat for local homes to augment and secure local CHP initiatives.
- The energy to be produced from the biodegradable element of the input to the ERF is classed as renewable, and therefore paragraph 91 of the NPPF applies.

7.11. Other material considerations to be taken into account that are considered to weigh in favour of the application are:

- The proposal would see development consolidated on a smaller area of the site when compared to existing and permitted buildings and hardstandings.
- The proposed inputs of residual waste and recyclables are already delivered to the site in similar or greater volumes, meaning that new traffic impacts would be limited except than during the construction of the plant.
- Where potentially adverse environmental impacts have been identified, these are capable of mitigation to be secured by legal agreement or planning conditions. Importantly, this includes securing access to additional areas of land to help mitigate the permanent loss of part of the restored lands to the ERF and funding for a warden to help manage the restored lands.

7.12. The permanent loss of part of the site to development and the impact this would have on the open character of the proposed Wandle Valley Regional Park and wider MOL remain significant policy concerns. A building of the size

of the ERF would inevitably be visible in long views across a wide area and this adverse landscape impact could not readily be mitigated. However, the material considerations in favour of the development are also significant and it is considered that sufficient very special circumstances have been demonstrated to justify inappropriate development on MOL. The balance is considered to be clearly in favour of the scheme.

7.13. The recommendation, therefore, is that permission be granted subject to the conditions set out in the draft decision letter, the completion of the legal agreement to secure the mitigation measures outlined in this report and confirmation of the delivery of the additional areas to provide additional habitat and access to the restored lands.”

74. The claimant submits that the defendant failed to identify and take into account harm to the MOL and to the proposed Wandle Valley Regional Park that would result from the proposed development. Originally, the claimant placed reliance upon *R (on the application of Riverclub) v Secretary of State for Communities and Local Government [2010] JPL 584* which considered the phrase “any other harm” against the then policy framework of PPG 2. The claimant submitted that the defendant had failed to provide a clear identification of harm against which the benefits of the development could be weighed so as to be able to conclude whether very special circumstances existed to warrant the grant of planning permission.

75. At the hearing it was accepted that Riverclub had been overtaken by *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government [2014] EWHC 2476* which considered the issue of any other harm in the National Planning Policy Framework (NPPF) context. During the course of the hearing it became known that that decision had been overturned by the Court of Appeal but that their reasons were to be handed down later. As a result I gave the parties a total period of fourteen days after the hand down of that judgment with which to make any submissions upon it in the context of the current case. Judgment was handed down on 24 October 2014 in [2014] EWCA Civ 1386. All parties have notified the court in the instant case that they have no further submissions to make on the issue of “any other harm” and the judgment in Redhill .

76. The upshot of the Redhill judgment is that the approach of Riverclub survives the coming into effect of the NPPF. The judgment means that “any other harm”, in addition to that caused as a result of the development being harmful due to its inappropriateness, is to be taken into account as part of the harm caused by the proposed development and only if that cumulative harm is clearly outweighed by other considerations will very special circumstances exist. In short, the NPPF on this aspect of green belt policy has wrought no change to the previous policy position.

77. The claimant's submission that the defendant failed to identify and take into account the harm that would be caused to the MOL and to the proposed Wandle Valley Regional Park if the site was not returned to open land in 2023 and also failed to give any consideration to the harm which that turn of events would cause to the local community is based, in my judgment, on a misreading of the officer report. There was nothing in the report which significantly misled the committee about material matters. In particular:

- i) in the summary of why the first interested party's proposals were acceptable the report began by acknowledging perpetuation of waste management on the site contrary to community expectations, conflict with London Plan policy 7.17 and Sutton Core Strategy policy PMP9 together with an adverse impact on the openness of the MOL but, concluded that subject to the completion of a legal agreement and implementation of mitigation ... there will be an acceptable impact on amenity and nature conservation interests.
- ii) the report acknowledged that the site was within the MOL and part of the proposed Wandle Valley Regional Park both of which in part would be lost if the proposed development proceeded.
- iii) as the proposal constituted inappropriate development in the MOL an assessment of alternative sites was sought by the defendant and provided by the interested party and scrutinised in the officer report. Within that the application site was ranked joint second behind land in the ownership of Thames Water.
- iv) the establishment of a community fund to address the considerable community concern about adverse impacts of consolidating a waste management use of the site was also referenced.

- v) within the conclusions the fact that the proposed development was inappropriate development and was in conflict with development plan policy so that there was a need to consider whether there were other material planning considerations and whether they constituted very special circumstances was clearly identified: see paragraph 7.3
- vi) the harm to the open character of the wider area was acknowledged but needed to be balanced against the consolidation of waste management activity within the safeguarded area: see paragraph 7.7.
- vii) permanent loss of part of the site and the impact that had on the proposed Wandle Valley Regional Park and the MOL were clearly set out but the conclusion drawn that material considerations in favour of the development were also significant and were sufficient to enable a judgment to be drawn that very special circumstances had been demonstrated to justify inappropriate development: see paragraph 7.12.

78. It is quite clear that the officers considered the issue of harm by reason of the development being inappropriate together with any other harm to the Wandle Valley Regional Park and other development plan policies but were satisfied that there were sufficient very special circumstances to overcome the identified harm. The defendant's approach was thus unassailable.

79. That leads on to the separate point as to whether the defendant properly identified very special circumstances. In *Wychavon Carnwath LJ* (as he then was) said at 21:

“I say at once that in my view the judge was wrong, with respect, to treat the words “very special” in the paragraph 3.2 PPG2 as simply the converse of “commonplace”. Rarity may of course contribute to the “special” quality of a particular factor, but it is not essential, as a matter of ordinary language or policy. The word “special” in PPG2 connotes not a quantitative test, but a qualitative judgment as to the weight to be given to the particular factor for planning purposes.”

He continued at 23:

“...As it is, the guidance neither excludes nor restricts the consideration of any potentially relevant factors (including personal circumstances). PPG2 limits itself to indicating that the balance of such factors must be such as “clearly” to outweigh Green Belt considerations. It is thus left to each inspector to make his own judgment as to how to strike that balance in a particular case.”

80. The guidance in the NPPF is unchanged in relation to very special circumstances. As such, whether a factor constitutes a very special circumstance is a matter for the decision maker in the exercise of his judgment in any particular case.

81. The claimant submitted that compliance with policy is commonplace and, therefore, could not constitute a very special circumstance. The position, in my judgment, is more nuanced than that. Waste management use of the MOL or greenbelt is unusual. As the committee report set out at paragraph 6.2, “the proposal is therefore in the unusual position of being in conformity with the waste policies of the development plan, including the use of safeguarded site, whilst also being inappropriate development in MOL.” The defendant clearly thought that policy compliance was sufficient as a very special circumstance as summarised in paragraph 7.10 above.

82. As to the identifiable and urgent need to divert residual waste from landfill the claimant contends that the defendant should have asked whether the need to maximise waste diversion from landfill was so urgent as to require the Beddington waste site. That was not done because the urgency came from the contractual relationship between the interested party and the defendant.

83. In my judgment the evidence before the council amply justified its conclusion that an urgent need existed, as follows:

i) The EU Waste Framework Directive 2008/98/EC requires authorities to drive waste management policy away from disposal including landfill which is regarded as the waste management option of last resort. Article 4 sets out the waste hierarchy which has disposal at the bottom. The purpose of the Directive is set out in the preamble which includes at 6:

“The first objective of any waste policy should be to minimise the negative effects of the generation and management of waste on human health and the environment. Waste policy should also aim at reducing the use of resources and favour the practical application of the waste hierarchy.”

ii) The Mayor has stipulated that by 2025 no municipal waste should be sent direct to landfill.

iii) The reference to the inspector's examination of the local plan and his reference to greater imperative as representing a change from urgent need is to take a pedantic approach and look at the words out of context.

iv) The witness statement of Mr Ryan explains the financial driver to divert waste from landfill to ensure that EU targets under the Landfill Directive are met. The financial cost of landfill tax is a burden upon the partnership boroughs which, as Mr Ryan explains, can be alleviated through the development proposed.

84. As to the withdrawal of funding by DEFRA in October 2010 from the partnership it is clear from the DEFRA letter dated 20 October 2010 that that was in response to the general climate of austerity and the broader financial issues which the government was required to manage. It did not detract from the obligation to drive waste management up the waste hierarchy.

85. It follows that there was an ample basis upon which the defendant could conclude rationally that there was an urgent need to develop their waste facilities. It was a matter for its judgment as to whether it constituted a very special circumstance. Its judgment that it did is unimpeachable.

86. The remaining issue then is the alternative sites survey that was carried out by the interested party in response to a request on behalf of the defendant. The claimant contends that the sites that should have been accorded preference to the application site were those which had been identified in the South London Waste Disposal Plan exercise. That submission ignores the fact that the three sites identified in the local plan exercise were excluded at an early sift of alternative sites by reason of them being too small to accommodate the development proposals. In my judgment it was reasonable to have a size threshold as part of the alternative site exercise and, therefore, the exclusion of the local plan sites cannot be vulnerable to any challenge.

87. It follows that there is nothing in this ground of challenge.

Ground Three: Did the defendant fetter its discretion?

88. The claimant contends that the reality of the case is that the decision making was driven by contractual considerations and not planning considerations.

89. The claimant relies, in particular, upon the following chronology:

- July 2011: Sutton and the other London Boroughs made it clear in the public examination into the South London Waste Plan that there would be cessation of waste use at the Beddington site in 2023.
- May 2012: In pre-application discussions with Viridor senior planning officers from the defendant were not prepared to accept waste use at the site after 2023.
- September 2012: The interested party applied for planning permission.

- November 2012: The waste contract was signed containing a key requirement for an incinerator at the Beddington site by no later than 2017.
- April 2013: The defendant's planning officer recommended approval of the waste development on the application site until 2040.

90. There was evidence of deference to the procurement process as seen in the officer report as follows:

“Viridor's selection of the application site over the frontage land relies heavily on operational deliverability by 2017. Whilst the terms of Viridor's contract with the waste partnership are not *per se*, considered to be a material planning consideration, the terms given for the delivery of the project is...”

91. In addition the officer said:

“Whilst it might theoretically be possible to provide for the waste needs of the partnership by splitting activities between small sites, possibly involving more upfront processing, this did not emerge as an option from the procurement process and therefore cannot realistically be considered to be a deliverable waste management solution for the partnership.”

92. In fact, rather than being theoretically possible, the three sites identified in the South London Waste Plan process were able to meet the waste needs of the boroughs.

93. The claimant submits that the need to meet the targets set within the contract meant that the defendant did not assess the planning application with an open mind. Although the claimant accepts that in principal time scale for delivery can be a material consideration it was not so in this case because of the availability of alternative sites.

94. The defendant has filed a witness statement from Mr Webber, head of development management and strategic planning. In that he deals with the structures of decision making within the defendant to ensure that it has and maintains a clear separation of its functions. The council has a scrutiny committee which can hold main committees including the development control committee to account. The role of the scrutiny committee is critical to the functioning of the defendant by demonstrating openness and accountability in the council's decision making process. The scrutiny committee had reported on the waste disposal contract and proposal for an energy recovery facility at the Beddington waste site. That made findings and recommendations as to how, if the planning application proceeded, it was to be dealt with. As Mr Webber says:

“One of the key roles of the scrutiny committee is to ensure there is complete transparency in the understanding of how various decision making functions of the council are separated to remain independent and mutually exclusive of each other in their terms of reference. This is to ensure that there is no fettering of decision making of relevant policy and regulatory committees by the decisions of another.”

95. The defendant entered into a planning performance agreement with the interested party on 10 August 2012. In a letter of the same date the interim executive head of planning and transportation wrote to the interested party and agreed the terms of the PPA. Paragraph 1.3 of the agreement states:

“Nothing in this agreement shall predetermine or prejudice the proper consideration or determination of any consent or application or override or fetter the statutory powers, duties or responsibility of any party.”

96. The report of the scrutiny overview committee clarified the different roles within the Local Authority as follows:

“The scrutiny committee acknowledge and assert that by making recommendations regarding the proposed energy recovery facility at Beddington Lane waste site, the committee is not seeking to predetermine or even usurp any decision making function of the development control committee delegated to it by full council. Scrutiny function of the committee and the decision making function of the development control committee are separate and distinct.”

97. The separate nature of the functions of the two committees was repeated elsewhere within the report. It continued:

“The executive head of street scene services outlined to the committee that as unitary authority, the council had responsibility for both waste collection and disposal of household waste. It also has an entirely separate responsibility as the planning authority for assessing new developments proposed within the area. The committee was assured that these were two completely different functions overseen by different committees made up of different members.”

98. As part of the briefing sessions to members on the planning application members were reminded to avoid active lobbying either against or for the proposal and to contact the council's monitoring officer for advice if they were in any doubt as to whether they had a disclosable pecuniary interest in the matter.

99. Further, within the contract of 5 November 2012 clause 1.8 on statutory capacity reads:

“Save as otherwise expressly provided, the obligations of the Authority under this Contract are obligations of the Authority in its capacity as a contracting counterparty and waste disposal authority and nothing in this Contract shall operate as an obligation upon, or in any other way fetter or constrain, the Authority in any other capacity, nor shall the exercise by the Authority of its duties and powers in any other capacity, lead to any liability under this Contract (howsoever arising) on the part of the Authority to the Contractor.”

Discussion and conclusions

100. The dual role of the defendant as local planning authority and as waste disposal authority is a requirement imposed by Parliament. The relevant statutory provisions are [section 1\(2\) of the Town and Country Planning Act 1990](#) which reads:

“The council of a metropolitan district is the local planning authority for the district and the council of a London borough is the local planning authority for the borough.”

Under the [Environmental Protection Act 1990 section 30\(2\)](#) waste disposal authorities are:

“(b) in Greater London, the following—

- (i) for the area of a London waste disposal authority, the authority constituted as the waste disposal authority for that area;
- (ii) for the City of London, the Common Council;
- (iii) for any other London borough, the council of the borough;”

101. Mr Webber's witness statement shows that the defendant took care to ensure that those council members involved in decision making were properly informed of their different functions and so were aware of the need to act properly in respect of both.

102. Not only that but clause 1.8 of the partnership's residual waste treatment contract set out above clearly records that the authority shall not be fettered or constrained in acting in any other capacity as a result of being a contracting party.

103. The claimant can point to no specific act on the part of the defendant that would demonstrate that its discretion in determining the planning application had been fettered. As a result the claimant is seeking to run an argument that the defendant's discretion is fettered by inference. That is tantamount to saying that because permission was granted after the contract was procured the council's discretion was inevitably fettered.

104. Such a submission ignores:

- i) The explicit dual role of the council imposed by Parliament;
- ii) The specific precautions taken in the contract and in the decision making process by the defendant to ensure distinct and proper decision making;
- iii) The absence of convincing or any evidence that there was any fettering of discretion in the planning process.

105. The claimant asserted, but not with any real force, that there was a real possibility of bias or predetermination on the part of the defendant. I reject that submission as quite hopeless. Mr Webber's evidence makes it clear that the council was throughout sensitive to the potential for challenge on that ground and took all necessary steps to ensure that no such ground for any challenge arose.

106. There is simply no evidence in the officer report or anywhere of deference to the procurement process. Paragraph 6.57 of the officer report states expressly:

“The terms of Viridor's contract with the waste partnership are not, *per se*, considered to be a material planning consideration, the timescale for deliverability of the project is. The need for the facility to be operational within the identified timeframe reflects also the escalating cost of landfill and the need to plan now and deliver the necessary facilities to divert waste from landfill in line with European Directives and national targets. Were Viridor to be required to acquire or assemble a site this would risk delaying the delivery of the facility and perpetuating the landfill activities unacceptably.”

There is simply no basis for this ground.

Ground Four: Did the defendant err in failing to assess the environmental impact of the CHP pipes?

Submissions

107. The environmental statement which accompanied the planning application did not assess the environmental impact of the CHP pipelines running from the boundary of the site onwards to customers for the heat.

108. The claimant submits that the development includes the provision of underground pipelines for the delivery of heat to the site boundaries in order to allow for onward connection to customers. Two pipelines are proposed. The interested party has relied on the export of heat from the ERF to show that the project was compliant with the London Plan. The ES envisages CHP provision:

“The CHP plant will initially operate in electricity only mode. Once potential heat customers are agreed, contracts signed and offsite infrastructure has been provided, the plant can operate in full heat and power mode.”

109. The interested party has entered a memorandum of understanding with the company that is developing a sustainable housing development nearby called Felnex. The pipeline route has been defined. Where the installation and use of CHP pipes is probable, the environmental effects of laying them down and using them should be assessed: see *Marton-cum-Grafton Parish Council v North Yorkshire County Council and Others* [2014] Env LR 10 .

110. Both the defendant and interested party submit that the relevant legal authority dealing with general principles is set out in *R (on the application of Blewett) v Derbyshire County Council* [2004] Env LR 29 and *R (on the application of Littlewood) v Bassetlaw District Council* [2009] Env LR 21 .

111. It is well established that it is for the local planning authority to determine whether the environmental statement meets the requirements of the EIA regulations in a specific case subject only to Wednesbury scrutiny.

112. The position prior to the grant of permission was reviewed by the defendant in February 2014 when it considered whether any new material considerations had arisen that required the application to be taken back to committee prior to issuing the decision notice. That included the possible need to provide details of the proposed pipeline for CHP as a result of an email sent by solicitors acting for the claimant which referred to the then recent judgment of Marton-cum-Grafton Parish Council (supra).

113. As a result the matter had been given express consideration and the judgment made by the defendant was that there was no need for further information. The pipeline route concerned was entirely speculative. As a result the defendant's judgment was that it was unreasonable to request further information.

114. It was not the case that the defendant had overlooked the issue.

Discussion and conclusions

115. The proposed development was “EIA development” within the meaning of [regulation 2\(1\) of the Town and Country Planning \(Environmental Impact Assessment\) Regulations 2011](#) (the EIA regulations). [Regulation 3\(4\)](#) of the EIA regulations provides:

“The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission or subsequent consent pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so.”

116. Environmental information is defined by [regulation 2\(1\)](#) of the EIA regulations as:

“...“environmental information” means the environmental statement, including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development;...”

117. Environmental statement means a statement:

“(a) that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but

(b) that includes at least the information referred to in Part 2 of Schedule 4 ;...”

118. The information referred to in [part 1 of schedule 4](#) includes:

“A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative short, medium and long term permanent and temporary, positive and negative effects of the development...”

119. The general principle is that it is for the local planning authority to determine whether the ES meets the requirements of the EIA regulations in a specific case. In Blewett (supra) Sullivan J (as he then was) held:

“40. In the light of the environmental information the local planning authority may conclude that the environmental statement has failed to identify a particular environmental impact, or has wrongly dismissed it as unlikely, or not significant. Or the local planning authority may be persuaded that the mitigation measures proposed by the applicant are inadequate or insufficiently detailed. That does not mean that the document described as an environmental statement falls out with the definition of an environmental statement within the Regulations so as to deprive the authority of jurisdiction to grant planning permission. The local planning authority may conclude that planning permission should be refused on the merits because the environmental statement has inadequately addressed the environmental implications of the proposed development, but that is a different matter altogether. Once the requirements of [Sch.4](#) are read in the context of the Regulations as a whole, it is plain that a local planning authority is not deprived of jurisdiction to grant planning permission merely because it concludes that an environmental statement is deficient in a number of respects.

41. Ground 1 in these proceedings is an example of the unduly legalistic approach to the requirements of [Sch.4](#) to the Regulations that has been adopted on behalf of claimants in a number of applications for judicial review seeking to prevent the implementation of development proposals. The Regulations should be interpreted as a whole and in a common-sense way. The requirement that “an EIA application” (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. As Lord Hoffmann said in *R. v North Yorkshire CC Ex p. Brown [2000] 1 A.C. 397*, at p.404, the purpose is “to ensure that planning decisions which may affect the environment are made on the basis of full information”. In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant’s environmental statement will always contain the “full information” about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting “environmental information” provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations (*Tew* was an example of such a case), but they are likely to be few and far between.”

120. In the case of Littlewood (supra) it was argued that the council ought to have required the production of a master plan and EIA for the area as a whole before determining the application. Its failure to do so, it was submitted, amounted to a failure to take into account the likely significant environmental effects of the development, including the cumulative impact of the proposal together with any likely future proposal on the rest of the site, contrary to the requirements of the EIA regulations. Sir Michael Harrison rejected that argument and said:

“32. Equally importantly, at that time no proposals had yet been formulated by Laing for the rest of the site for the reasons that I have mentioned. I simply do not see how there could be a cumulative assessment of the proposed development and the development of the rest of the site pursuant to the [EIA Regulations](#) when there was no way of knowing what development was proposed or was reasonably foreseeable on the rest of the site. The site was not allocated for development in the local plan. No planning application had been made and no planning permission given in respect of the rest of the site, and no proposals had yet been formulated for that part of the site. There was not any, or any adequate, information upon which a cumulative assessment could be based. In my judgement, there was not a legal requirement for a cumulative assessment under the [EIA Regulations](#) involving the rest of the Steetley site in those circumstances.

33. Having therefore considered the various submissions made under the planning regime and under the EIA regime, I have come to the conclusion that there was no legal error involved by the council not insisting on a masterplan as a pre-condition to the grant of permission, and there was no obligation on the council in the circumstances to consider the cumulative impact of the unknown future development on the rest of the Steetley site. In my view, the council were entitled to decide the application as a stand alone development and to require the subsequent production of a masterplan by way of [s.106](#) agreement so that cumulative impact could be considered when future proposals for the rest of the site were forthcoming.”

121. The key is that the environmental statement in the EIA regulations is only required to include such information as is reasonably required to assess the environmental effects of the development and which the applicant can reasonably be required to compile having regard to current knowledge.

122. In R (on the application of Bristol City Council) v Secretary of State for Communities and Local Government [2011] EWHC 4014 a case which concerned future CHP pipelines which had not got beyond a possibility Collins J said:

“26. It was only because on its facts, as is clear, that there was known to be a probability of CHP and the routes were again known, in the sense that there had been a degree of research into what would be appropriate, that it was considered, on the facts of that case to be a reasonable requirement (and note a reasonable requirement). There is an element of judgment involved in whether that situation can properly be said to have arisen.

27. In those circumstances, in my view, this other ground would have no prospect of success. Accordingly, whether or not I granted leave to amend would make no difference. So I simply dispose of it in that way.”

123. On the facts in the instant case the February 2014 report of the defendant dealt with the email from the claimant's solicitors. Paragraph 6 set out the earlier decision that there was no reasonable basis for the applicants to submit further information relating to the pipe network outside the application site under the provisions of [regulation 22](#) of the EIA regulations.

124. Notwithstanding that the report went on to consider again whether it was reasonable to require further information in relation to the environmental impact of the pipe network. In some detail and over the following thirteen paragraphs the matter was considered by the officer. The report considered that:

- i) While commitments given by the applicants were such that significant weight to the ability for the CHP to be implemented could be given the reports to both authorities made it clear that there was no certainty that CHP would be provided (paragraph 11);
- ii) That the interested party had referred to potential heat users to the east and west of the site as potential and any CHP was dependant on a number of factors which could not be certain at the outset (paragraph 9);
- iii) The applicants had confirmed that there was no contract to provide heat from the proposal (paragraph 10).

125. Mr Molnar's first witness statement dealt with the fact that it was not possible to include details of the route for the CHP pipe work beyond the boundary of the site when the application was prepared as the end users were not the subject of any concluded contract. Once end users had been identified it would be necessary to design the route for the required pipe work and infrastructure necessary which would require planning permission. At that stage, if necessary, environmental effects arising from the proposed pipe work and infrastructure would be assessed as part of that planning application.

126. Mr Ryan's first witness statement indicates that the defendant intended to establish an energy services company to facilitate the use of the CHP between the interested party and potential end-users such as the development at Felnex. However, there was no memorandum of understanding or binding agreement in relation to any CHP user.

127. In those circumstance there remains a want of detail about both the end-user and possible route of the pipeline. The defendant was, therefore, reasonably entitled not to require further information.

128. Until the end-user and likely route were known it would be virtually impossible to include a description of the likely significant environmental effects of the relevant pipe work. Once that was known an EIA of the offsite pipe work, including the assessment of the cumulative effect of the pipe work together with the proposed development, could be carried out as part of that planning application. Until then it is an unrealistic expectation to contend that the defendant should have sought that that was done as part of the instant application.

129. In paragraph 20 of the February 2014 report SKM Enviro, the independent environmental consultants instructed by the defendant, are recorded as emailing the defendant saying, "I also concur with the conclusion that no further information needs to be sought from the applicant on the CHP pipes issue on the basis that the ES in front of the committee at the time of the decision was complete in terms of scope of issues assessed therein."

130. The February 2014 report concluded on this issue in paragraph 21. That reads:

"21. It is therefore concluded that it would be unreasonable to request further information from the applicants in relation to the pipe network outside the application site because:

- There is no certainty of either a pipe network being provided, or of the route of any pipe network
- If a CHP network is implemented it is likely that the first phase would be to provide a pipe network to the gas engines within the application site to a heat user, so the ERF will link to a pre-existing pipe network and will not itself be the cause of the pipe network outside the site being provided
- If a CHP network is provided, it may well include a link from the application site to the Felnax development, but while not formally assessed, this link would be short and entirely underneath a road and is therefore highly unlikely to have any adverse environmental consequences."

131. That conclusion was entirely justified on the information before the defendant. It would be quite unrealistic to hold that the defendant's decision was unreasonable on the evidence before it.

132. For the sake of completeness the claimant relied upon the case of Marton-cum-Grafton Parish Council (*supra*) where, at [50], His Honour Judge Gosnell sitting as a Deputy High Court Judge said:

"I think what can be learnt from a comparison of the two decisions is that where the installation use of CHP pipes is probable the environmental effects of laying them and using them should be assessed. This of course makes logical sense as if it is probable that the pipes would be used then it is easier to argue that they are part of the physical characteristics of the whole development and subject to environmental assessment."

The claimant submits that it is probable in relation to the Felnax site CHP pipes will be used.

133. It is clear from what I have set out that at the time of making the decision there was no application for pipe work outside the red line of the planning application site. What in essence was being considered by the defendant was a phased development the second phase of which had not reached any real level of probability. There were no confirmed end-users. In the absence of that there was no known pipeline route. Without that, it is quite impossible to say that the defendant acted unreasonably

or irrationally in not requiring an amendment to the environmental statement. Any future pipelines will doubtless be subject to their own EIA which will consider the cumulative impact with the permitted development as part of that next phase.

134. It follows that this ground fails also.

135. In these circumstances I dismiss this application for judicial review. I invite submissions as to the final order and costs.

Crown copyright



Neutral Citation Number: [2018] EWCA Civ 9

Case Nos: C1/2017/1252 and C1/2017/1283

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE DOVE
[2017] EWHC 808 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 January 2018

Before:

Lord Justice Simon
Lord Justice Lindblom
and
Lord Justice Henderson

Between:

Case No: C1/2107/1252

Preston New Road Action Group
(Through Mrs Susan Holliday)

Appellant

- and -

(1) Secretary of State for Communities and
Local Government

(2) Cuadrilla Bowland Ltd.

Respondents

Dr David Wolfe Q.C. and Dr Ashley Bowes (instructed by **Leigh Day**) for the **Appellant**
Mr David Elvin Q.C. and Mr David Blundell (instructed by the **Government Legal**
Department) for the **First Respondent**
Ms Nathalie Lieven Q.C. and Mr Yaaser Vanderman (instructed by **Herbert Smith**
Freehills LLP) for the **Second Respondent**

And between:

Case No: C1/2017/1283

Gayzer Frackman

Appellant

- and -

**(1) Secretary of State for Communities and
Local Government**

(2) Lancashire County Council

(3) Cuadrilla Bowland Ltd.

(4) Cuadrilla Elswick Ltd.

Respondents

Mr Marc Willers Q.C. and Ms Estelle Dehon (instructed by **Richard Buxton
Environmental and Public Law**) for the **Appellant**
Mr David Elvin Q.C. and Mr David Blundell (instructed by **the Government Legal
Department**) for the **First Respondent**
Ms Nathalie Lieven Q.C. and Mr Yaaser Vanderman (instructed by **Herbert Smith
Freehills LLP**) for the **Third and Fourth Respondents**

Hearing dates: 30 and 31 August 2017

**Judgment Approved by the court
for handing down
(subject to editorial corrections)**

Lord Justice Lindblom:

Introduction

1. Did the Secretary of State for Communities and Local Government err in law in granting planning permission for exploration works to test the feasibility of extracting shale gas by the process of hydraulic fracturing – commonly known as “fracking” – at two sites in Lancashire? That is the basic question in these two appeals. It does not raise any novel or controversial issue of law.
2. Though they are concerned only with exploration for shale gas, and not with its commercial extraction, the proposals have attracted strong opposition in the local communities affected by them. Our task, however, is not to consider whether the Secretary of State’s decision was right. Any view the court might hold about “fracking”, or about the planning merits of these particular proposals, is entirely irrelevant. What we must do, and all we can do, is to decide whether the Secretary of State committed any error of law. To do this we must apply well established principles governing the review of planning decisions, recently confirmed by this court in *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643 (see my judgment, at paragraph 6).
3. In the first appeal the appellant is the Preston New Road Action Group; in the second, Mr Gayzer Frackman. The appeals are against the order of Dove J., dated 25 April 2017, by which he dismissed applications made under section 288 of the Town and Country Planning Act 1990 challenging the decisions of the Secretary of State, the first respondent in both appeals, to allow appeals by Cuadrilla Bowland Ltd. and Cuadrilla Elswick Ltd. against refusals of planning permission by Lancashire County Council as mineral planning authority. I shall refer to both companies simply as “Cuadrilla”. Their proposals were for exploration works, including exploratory wells, and associated monitoring to test the feasibility of the commercial extraction of shale gas, on two sites – one at Plumpton Hall Farm, off Preston New Road, near Fylde, the other at Roseacre Wood, Roseacre Hall, Roseacre and Wharles, near Preston, and to restore the sites to agriculture once exploration has concluded.
4. In June 2015 the county council refused both applications for the Preston New Road site and the application for exploration works at Roseacre Wood, but granted planning permission for monitoring works at Roseacre Wood, subject to conditions. Cuadrilla appealed. An inspector appointed by the Secretary of State, Ms Wendy McKay, held an inquiry in February and March 2016. In a report dated 4 July 2016 she recommended that the appeals for the Preston New Road development and for the monitoring works at Roseacre Wood be allowed, and that for the exploration works at Roseacre Wood be dismissed. In his decision letter, dated 6 October 2016, the Secretary of State allowed the appeals for the Preston New Road development, and for the Roseacre Wood monitoring works. But instead of dismissing the appeal for the exploration works on that site, he decided to re-open the inquiry to enable Cuadrilla to submit further evidence on highway capacity and safety, and indicated that he was minded to allow the appeal if the new evidence was satisfactory. Both challenges came before Dove J. at a “rolled-up” hearing on 15 and 16 March 2017. He dismissed both applications. The action group’s appeal is against the judge’s order where it concerns the development proposed at Preston New Road. Mr Frackman’s relates to the proposals on both sites.

5. A full account of the relevant facts is to be found in Dove J.’s judgment, in paragraphs 6 to 37. It is not necessary to repeat that narrative here. I gratefully adopt it.

The issues in the appeals

6. The two appeals raise quite different issues. In the first appeal there are four live grounds, which give rise to these main issues:
- (1) whether the Secretary of State misconstrued and misapplied Policy CS5 of the Joint Lancashire Minerals and Waste Development Framework Core Strategy (“the minerals core strategy”) (ground 1 of the appeal);
 - (2) whether the Secretary of State misconstrued and misapplied Policy DM2 of the Joint Lancashire Minerals and Waste Local Plan: Site Allocation and Development Management Policies – Part One (“the minerals local plan”) (ground 5);
 - (3) whether the Secretary of State misconstrued and misapplied the policy for “protecting and enhancing valued landscapes” in paragraph 109 of the National Planning Policy Framework (“the NPPF”) (ground 3); and
 - (4) whether the Secretary of State’s decisions were vitiated by procedural unfairness – because he concluded that Policy EP11 of the Fylde Local Plan was not engaged by the proposals without giving the parties the opportunity to comment on that conclusion (ground 4).

In the second appeal, the four main issues are these:

- (1) whether, for the purposes of Directive 2011/92/EU, as amended (“the EIA Directive”), the Secretary of State failed to heed the relevant principles on “cumulative effects” – in particular, for the direct impact of the extended flow testing phase of the proposed development, and for the indirect impact of the production stage of the project (ground 1);
- (2) whether he failed to act in accordance with the principle, under the regime for environmental impact assessment (“EIA”), that potentially significant effects on the environment ought to be taken into account at the earliest possible stage (ground 2);
- (3) whether his decisions are flawed by inconsistency because he took into account the benefits of shale gas production but left out of account the harmful effects it would have (ground 3); and
- (4) whether he failed to apply the “precautionary principle”, in particular by discounting evidence of uncertainty over the possible effects of the development on human health and assuming that the regulatory regime would operate effectively (grounds 4 and 5).

Issue (1) in the first appeal – Policy CS5 of the minerals core strategy

7. The development plan at the time of the Secretary of State’s decisions comprised the minerals core strategy (adopted in February 2009), the minerals local plan (adopted in September 2013) and the saved policies of the Fylde Local Plan (adopted in 2003 and altered in 2005). It seems sensible to set out the relevant policies together.

8. Policy CS5 of the minerals core strategy is in section 6.5, under the heading “Achieving Sustainable Minerals Production”. The relevant part of it states:

“... ”

Criteria will be developed for the site identification process, and also for considering other proposals brought forward outside the plan-making process, to ensure that:

...

- (ii) features and landscapes of historic and cultural importance and their settings are protected from harm and opportunities are taken to enhance them;

...

- (iv) proposals for mineral workings incorporate measures to conserve, enhance and protect the character of Lancashire’s landscapes;

...

- (vii) sensitive environmental restoration and aftercare of sites takes place, appropriate to the landscape character of the locality and the delivery of national and local biodiversity action plans. Where appropriate, this will include improvements to public access to the former workings to realise their amenity value.

... ”.

9. Policy DM2 of the minerals local plan, “Development Management”, states:

“Development for minerals or waste management operations will be supported where it can be demonstrated to the satisfaction of the mineral and waste planning authority, by the provision of appropriate information, that all material, social, economic or environmental impacts that would cause demonstrable harm can be eliminated or reduced to acceptable levels. In assessing proposals account will be taken of the proposal’s setting, baseline environmental conditions and neighbouring land uses, together with the extent to which its impacts can be controlled in accordance with current best practice and recognised standards.

In accordance with Policy CS5 and CS9 of the Core Strategy developments will be supported for minerals or waste developments where it can be demonstrated to the satisfaction of the mineral and waste planning authority, by the provision of appropriate information, that the proposals will, where appropriate, make a positive contribution to the:

- Local and wider economy
- Historic environment
- Biodiversity, geodiversity and landscape character
- Residential amenity of those living nearby
- Reduction of carbon emissions
- Reduction in the length and number of journeys made

This will be achieved through for example:

- The quality of design, layout, form, scale and appearance of buildings
- The control of emissions from the proposal including dust, noise, light and water
- Restoration within agreed time limits, to a beneficial afteruse and the management of landscaping and tree planting.

- The control of the numbers, frequency, timing and routing of transport related to the development”.

The “Justification” for the policy states, in paragraph 2.2.1, that “[minerals] and waste developments ... are essential for the nation’s prosperity, infrastructure and quality of life”, but acknowledges that “they have the potential to cause disruption to local communities and the environment due to the nature of their operations ...”. It says that “[these] impacts can often be addressed through the sensitive design and operation of the facility”.

Paragraph 2.2.3 says that “[a] balance needs to be struck between the social, economic and environmental impacts of, and the need for, the development”, and “[thus], if the adverse impacts of the operations cannot be reduced to acceptable levels through careful working practices, planning conditions or legal agreements, then the operation will not be permitted”; and paragraph 2.2.4 that “[the] impact of a development can be positive or negative; short, medium or long term; reversible or irreversible; permanent or temporary”. Under the heading “Visual”, paragraph 2.2.8 says that “[careful] consideration of the siting of the development, the method of working and the layout and design of the site will be required to mitigate any visual impact”. Paragraph 2.2.27 says that Policy DM2 “should be read within the context of [minerals core strategy] Policies CS5, CS9 and Appendix F”.

10. In a section of the Fylde Local Plan headed “Building Design and Landscape Character”, Policy EP11 states:

“New development in rural areas should be sited in keeping with the distinct landscape character types identified in the Landscape Strategy for Lancashire and the characteristic landscape features defined in Policy EP10. Development must be of a high standard of design. Matters of scale, features and building materials should reflect the local vernacular style.”

11. Paragraph 109 of the NPPF appears in section 11, “Conserving and enhancing the natural environment”, in the part headed “Delivering sustainable development”. So far as is relevant here, it states:

“109. The planning system should contribute to and enhance the natural and local environment by:

- protecting and enhancing valued landscapes, ...

... .”

12. In the final section of her report, under the heading “Overall Conclusions – Landscape and Visual Impact [Preston New Road Exploration Works]”, the inspector drew together her main conclusions on the effect that the proposed development would be likely to have on the landscape:

“12.149 I conclude that the development would not require the removal of any significant existing landscape features and any landscape change would not be of a permanent nature. However, having regard to aesthetic and perceptual considerations, there would be a significant impact upon the landscape during the first phase of the development that would last about two and a half years. These significant landscape effects would be limited to a distance of up to around 1km from the site. There would be no material indirect adverse landscape effects on any neighbouring local landscape character areas.

12.150 The significant impact on the landscape would be short-term during the first phase of the development, although there would be some varying degree of impact for the duration of the temporary permission. This would be wholly reversible and the site would be fully restored after 75 months. The mitigation proposed is reasonable and would represent a positive contribution, as far as can be achieved, to the appearance of the site. The restoration proposals would reinstate the localised landscape characteristics, such that there would be no lasting change to landscape character.”

In paragraphs 12.151 and 12.152 she turned to the part of Policy DM2 that concerns the effect of development on “landscape character”, and then to Policy CS5:

“12.151 Policy DM2 supports development that makes a positive contribution to matters such as landscape character, “*where appropriate*”. It also indicates that this might be achieved through the quality of design, layout, form, scale and appearance of buildings and restoration within agreed limits, to a beneficial after use and the management of landscaping and tree planting. Given the nature of the development, there are obvious limitations on what can be achieved in terms of design, layout and appearance.

12.152 Nevertheless, having regard to the limited direct landscape impacts, and the proposed mitigation, I consider that the scheme incorporates measures that would at least serve to conserve and protect Lancashire’s Landscape Character. The impacts on positive landscape features would not be lasting changes. The restoration of the site at the end of the temporary period in a manner appropriate to the Landscape Character of the locality would be in accordance with Policy CS5. Although there are landscape impacts that would cause demonstrable harm which cannot be eliminated, I am satisfied that they have been reduced to an acceptable level. The development would therefore be in accordance with Policy DM2.”

In paragraph 12.153 she addressed the action group’s contention that the proposed development would conflict with Policy EP11 of the Fylde Local Plan:

“12.153 [The action group] submits that the siting of the development would not be in keeping with the distinct landscape character types identified in the landscape strategy for Lancashire and it is therefore in conflict with Policy EP11. However, it is hard to envisage any shale gas development that could be sited without a degree of conflict with that strategy. As indicated above, I do not consider that this policy can be sensibly applied to these schemes.”

In paragraph 12.154, she stated her conclusion on the likely effects of the development on a “valued” landscape, in the context of the policy in paragraph 109 of the NPPF:

“12.154 Although there would be an adverse impact upon a ‘valued’ landscape, this particular landscape is valued only at local level and does not have the highest status of protection. Given the temporary nature of the development, and the mitigation and restoration proposals, there would be no conflict in the long-term with the aim of the NPPF to conserve and enhance the natural environment.”

As to “visual effects”, she concluded in paragraph 12.155:

“12.155 Whilst there would be some significant adverse visual effects, only a low number of residential receptors would experience effects of that magnitude. These significant effects would only arise during the drilling, fracturing and initial flow testing phase over a period of some 29 months. The mitigation proposed is reasonable and the limitations in what can be achieved in that respect are acknowledged. There would be additional adverse visual impacts, including upon users of transport corridors over and above what has been identified in the LVIA. However, these would not amount to significant impacts. There would be little scope for any cumulative visual issues between the Preston New Road and Roseacre Wood during this phase, or with any other developments within the area.”

She returned to Policy DM2 in paragraph 12.156:

“12.156 Policy DM2 supports minerals development where it can be demonstrated that the proposals would, where appropriate, make a positive contribution to the residential amenity of those living nearby. There are examples set out showing how this might be achieved. In terms of siting of the development, [the action group’s] witness could not point to a better location for the developed part of the site. The development would be sited in a location where only a relatively small number of residential properties would experience a significant adverse impact. The reduction in height of the drill rig to 36m would serve to keep the development as low as practicable to minimise visual intrusion. A lighting scheme would be in place and other mitigation is proposed including the colour of the fencing and other structures. It seems to me that all appropriate measures to mitigate the impact on visual amenity have been included within the scheme. There would be harm arising from the visual impact associated with the development but this has been reduced to an acceptable level such that there would not be conflict with Policy DM2.”

Finally, in paragraph 12.157, she stated her conclusions on landscape and visual impact, recalling the county council’s relevant reasons for refusal:

“12.157 Based on the evidence given above in relation to the reasons for refusal pertaining to both landscape and visual issues, and my inspections of the site and surroundings, I conclude that the development at Preston New Road would not ‘cause an unacceptable adverse impact on the landscape’ nor would it ‘result in an adverse urbanising effect on the open and rural character of the landscape and visual amenity of local residents’. The landscape and visual impacts associated with the scheme would not be unacceptable.”

Those conclusions were repeated, largely verbatim, in the inspector’s “Overall Conclusions”, in paragraphs 12.791 to 12.797, and, in substance, in paragraphs 12.821 to 12.828 – culminating in her conclusion, in paragraph 12.828, that “there are no other material considerations that indicate other than that the [Preston New Road exploration works] should be permitted in accordance with the Development Plan, subject to the imposition of appropriate planning conditions”.

13. In his decision letter the Secretary of State said, in paragraph 4, that “except where stated” he agreed with his inspector’s conclusions on all four appeals. In paragraph 24 he said he agreed with the inspector, in paragraph 12.18 of her report, that “Policy DM2 is consistent with the NPPF and should be given full weight, and ... on its own it provides a sufficient basis to judge the acceptability of the appeal proposals in principle”. He said in paragraph 50 that he had “given very careful consideration to the effect that the proposed development [at Preston New Road] would have on the character and appearance of the surrounding rural landscape and the visual amenities of local residents”. In paragraph 51 he said he agreed with the inspector, in paragraph 12.85 of her report, that “the landscape does have some value at local level”, that “the appeal site displays a number of positive characteristics identified by the Lancashire Landscape Strategy”, and that it is therefore “a ‘valued’ landscape in NPPF terms”. In paragraph 52 he also agreed with the inspector that “the combined effect of the changes would result in a significant impact on the immediate landscape that would be perceived from a wider area of about 1km”, and that “the adverse landscape effects of greatest significance would be experienced during the first phase of the development and this would be a short-term impact”. He said (*ibid.*) that he had “taken into account that the particular effects associated with the proposed development would be reversed at the end of the temporary six-year period, and that any localised changes to landscape components would be fully remediated ...”. In paragraph 54 he said:

“54. For the reasons given at IR12.117-12.120, the Secretary of State agrees with the Inspector that the proposal would not affect the outlook of any residential property to such an extent that it would be so unpleasant, overwhelming and oppressive that it would become an unattractive place to live (IR12.118). He agrees that the significant effects would only arise during the earlier phases and would therefore be limited in their duration and would not be experienced throughout the temporary six-year period (IR12.120). ...”.

He also agreed, in paragraph 55, that “any cumulative landscape and visual effects would be very limited and would certainly not be of any significance”, and, in paragraph 56, that the imposition of a condition limiting the height of the drilling rig to 36 metres was appropriate. And he went on, in paragraph 57, to say this:

“57. The Secretary of State has considered the Inspector’s overall conclusions on landscape and visual impact. For the reasons given at IR12.149-12.153, he agrees with the Inspector at IR12.152 that although there are landscape impacts that would cause demonstrable harm which cannot be eliminated, they have been reduced to an acceptable level and the development would therefore be in accordance with Policy DM2. ... For the reasons given at IR12.70 and IR12.155-12.156, he agrees with the Inspector at IR12.156 that there would be harm arising from the visual impact associated with the development but this has been reduced to an acceptable level such that there would not be conflict with Policy DM2. Overall he agrees with the Inspector’s assessment at IR12.157 that the landscape and visual impacts associated with the scheme would not be unacceptable.”

Under the heading “Planning balance and overall conclusions”, he concluded, in paragraph 66, that “the proposal would be in accordance with the development plan taken as a whole”, and, in paragraph 70, “that there are no material considerations indicating other than that the [Preston New Road exploration works] development should be permitted in accordance

with the development plan, subject to the imposition of appropriate planning conditions ...”.

14. The approach the court must take when dealing with an argument that a planning decision-maker has misinterpreted or misapplied a planning policy requires no explanation beyond what has recently been said by the Supreme Court in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2017] UKSC 37, [2017] 1 W.L.R. 1865 (see Lord Carnwath’s judgment, at paragraphs 22 to 26), and by this court in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314 (see my judgment, at paragraph 41). The court must remember that planning policies should not be construed as if they were provisions in a statute or a contract (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] P.T.S.R. 983, at paragraphs 17 to 22). Its role here is limited (see the judgment of Lord Carnwath in *Suffolk Coastal District Council*, at paragraphs 21 to 25). It risks exceeding that role if it neglects the basic distinction between discerning the meaning of a planning policy – read in its “proper context” and with common sense – and bringing public law principles to bear on the application of that policy in a planning decision. It must not step too far in interpreting policies written for planning decision-makers, in language intended to inform their exercise of planning judgment, not for judges considering the lawfulness of a planning decision when challenged.

15. For the action group, Dr David Wolfe Q.C. submitted that both the inspector and the Secretary of State misinterpreted and misapplied Policy CS5, and that Dove J. was wrong not to accept that they did. The inspector had concluded that the policy would be complied with because the harm to the landscape would only be temporary. Dr Wolfe pointed out that the policy does not say that it only concerns harm likely to be lasting or permanent, but not harm that is likely to be only temporary. Nor, he submitted, can such a qualification be implied. Any likely harm within the scope of the second, fourth and seventh objectives stated in the policy, even if not harm to landscape of “historic [or] cultural importance”, and whether it would be lasting or short-lived, would be a breach of the policy. In principle, there was no reason why the protection from harm afforded by the policy should be withheld if the harm, perhaps serious, would last only a short time and then be removed or repaired. The duration of harm to the landscape is one of the relevant factors in the Guidelines for Landscape and Visual Impact Assessment methodology. In this case, submitted Dr Wolfe, the harm would not be transient. It would last about two and a half years while the exploration works were in place, and the site would only be restored after that if the commercial production of shale gas did not go ahead. This was, inevitably, a conflict with Policy CS5. The duration of any harm to the landscape, whether long or short, is to be taken into account under section 38(6) of the Planning and Compulsory Purchase Act 2004 as a material consideration to be weighed against any conflict with Policy CS5. In failing to acknowledge this breach of development plan policy, submitted Dr Wolfe, the inspector and the Secretary of State neglected the statutory imperative in section 38(6) – that the decision “must be made in accordance with the development plan unless material considerations indicate otherwise”. This was a clear error of law.

16. That argument was rejected by Dove J.. He could not accept an interpretation of Policy CS5 in which the policy is read as prohibiting any harm to the landscape, including temporary harm. This was “a strategic policy within a hierarchy of policies created by the development plan[,] ... setting out the strategic objectives to enable more detailed criteria to be developed for land allocation and decision-taking”. It was “not designed or expressed for the purpose of being applied in a literal manner in decision-taking without regard ... to

other policies prepared pursuant to it to give detailed effect to the objectives [it] sets out” (paragraph 84 of the judgment). Policy DM2 of the minerals local plan was “the articulation of [Policy] CS5 at the level of decision-taking ... [,] obviously prepared, examined and adopted to give expression to [it] at [that] level” (paragraph 85). The language of Policy DM2, which contemplates “harm” being reduced to “acceptable levels” was “wholly inconsistent” with the action group’s construction of Policy CS5. The Secretary of State had not failed to discharge the decision-maker’s duty under section 38(6) (paragraph 86). Given that mineral development often entails the restoration of the land once extraction is finished, it would be “surprising”, said Dove J., “if the duration of the development, and the duration of any harm, was irrelevant to the overall assessment of harm for the purpose of [Policy CS5]” (paragraph 87). The inspector had “correctly interpreted and applied” the policy in paragraphs 12.152 to 12.156 of her report, as had the Secretary of State in paragraphs 50 to 57 of his decision letter (paragraph 88).

17. I think those conclusions of the judge are sound, and I agree with them.
18. As was submitted to us by Mr David Elvin Q.C. for the Secretary of State and Ms Nathalie Lieven Q.C. for Cuadrilla, one must start with the purpose of Policy CS5 and the context in which it sits. There are three things to say about that. First, Policy CS5 is a policy specifically concerned, in part, with the working of minerals. It is a truism that minerals can only be worked where they are found, and, equally, that they can only be found where they lie (see the judgment of Ouseley J. in *Europa Oil and Gas Ltd. v Secretary of State for Communities and Local Government* [2013] EWHC 2643 (Admin), at paragraph 67, and the judgment of Stephen Richards L.J. in the appeal in that case ([2014] EWCA Civ 825, at paragraph 37)). The working of minerals will likely alter the landscape during the extraction phase, but such effects will often be reversed or repaired in the course of the site’s restoration. The same may also be said of works required in the exploration for minerals. Secondly, the policy is, both in its status and in its terms, a strategic policy, whose aim is “Achieving Sustainable Minerals Production”. It looks to a further policy to translate its objectives and requirements into “[criteria] ... for considering ... proposals brought forward outside the plan-making process ...” – applications for planning permission for development on unallocated sites. That further policy is Policy DM2 of the minerals local plan. These two policies should be read together, taking the two elements of the development plan to which they belong as a coherent whole (see the judgment of Lewison L.J. in *R. (on the application of TW Logistics Ltd.) v Tendring District Council* [2013] EWCA Civ 9, at paragraph 18). Thirdly, therefore, to apply these two policies in such a way as to create unnecessary tension or conflict between them would be wrong. If a proposal is found to comply with Policy DM2 it is difficult to see how it could nevertheless be found to be in conflict with Policy CS5.
19. Even if one were to ignore Policy DM2 altogether – which, of course, one cannot – it would still not be possible to read Policy CS5 as standing in the way of every minerals development except those likely to cause no more than “de minimis” harm before restoration is complete. That is not what the policy says, and not what it means. The expressions “protected from harm”, “protect” and “protected” in the policy are not to be read as foreclosing the exercise of planning judgment. On the contrary, they require planning judgment to be exercised, having regard to the particular facts and circumstances of the case in hand. The broad concept of “harm” is not defined in Policy CS5. The policy allows a planning judgment, in a particular case, that temporary effects on the landscape – even if likely to last for several years before their remediation – do not offend its objectives

and do not constitute a conflict with it. The duration of any such harm, and the likely effectiveness of the site's restoration, are not material considerations outside the policy. They are, as Mr Elvin and Ms Lieven submitted, embraced within the policy itself. They go to the exercise of planning judgment required under the policy.

20. The connection between the two policies is not only plain from their content. It is clear also from the reference to Policy CS5 in Policy DM2 itself, and from paragraph 2.2.27 of the supporting text. Upon the adoption of the minerals local plan, Policy CS5 did not become irrelevant for the purposes of development control decision-making. It contains concepts that bear on the determination of planning applications and appeals. But Policy DM2 refined those concepts into an approach to be adopted in decision-making, case by case, and specific considerations to be taken into account in deciding whether a particular proposal is acceptable or not. In describing that approach and in specifying those considerations, it is clearly intended to be relevant to all proposed “[developments] for minerals ...”, including – as is common ground between the parties here – exploration to establish whether a commercially worthwhile mineral resource exists in a particular location.
21. The county council did not specifically rely on Policy CS5 in refusing planning permission for the proposed development. It did rely, however, on Policy DM2. In paragraph 12.18 of her report the inspector said that she “[concurred] with [the county council] that Policy DM2, on its own, provides a sufficient basis to judge the acceptability of the appeal proposals, in principle”, and that “[the] policy is consistent with the NPPF and should be given full weight” – conclusions explicitly endorsed by the Secretary of State in paragraph 24 of his decision letter. Nonetheless, the inspector did not put Policy CS5 to one side. She tested the proposals' acceptability against it, as well as against Policy DM2. Her relevant conclusions, in paragraph 12.152 of her report, were expressly endorsed by the Secretary of State in paragraph 57 of his decision letter.
22. The inspector's assessment in paragraphs 12.149 to 12.157 of her report, adopted by the Secretary of State in paragraph 57 of his decision letter, was faithful to the terms of both policies, properly construed in their context. She made the planning judgments required by the policies. In doing so, she had regard to the nature, extent and duration of the impacts the development would have on the landscape, on landscape character and on visual amenity. She took into account the mitigation and ultimate restoration proposed within the project. And she clearly gave significant weight to the fact that the adverse effects would largely be temporary. She concluded, in paragraph 12.152, that the proposals were in accordance with Policy CS5, and, in paragraph 12.156, that because the harmful landscape and visual impacts had been “reduced to an acceptable level” they were not in conflict with Policy DM2. Her relevant findings and conclusions are legally unassailable.
23. The judge was, in my view, right to conclude as he did on this ground of the action group's challenge. The inspector and the Secretary of State did not misdirect themselves in their handling of Policy CS5. They did not misinterpret that policy, nor misapply it. In this respect, they discharged the section 38(6) duty lawfully. No relevant planning judgment was either neglected or exercised unreasonably. Nor were the relevant reasons inadequate or unclear – either in the inspector's report or in the Secretary of State's decision letter.

Issue (2) in the first appeal – Policy DM2 of the minerals local plan

24. The action group's argument here is, essentially, that the inspector and the Secretary of State misunderstood or simply ignored the second part, or "limb", of Policy DM2, and failed to grapple with the question of whether the proposed development would make a "positive contribution" of any relevant kind – including a "positive contribution" to the "[residential] amenity of those living nearby". Dr Wolfe submitted that this was required by the policy. Before Dove J. it was also argued that the inspector misapplied the policy when she said, in paragraph 12.118 of her report, that "even on the basis of around 11 residential receptors being affected in this way, the total number ... that would experience a significant visual impact remains low", and that the development "would not affect the outlook of any residential property to such an extent that it would be so unpleasant, overwhelming and oppressive that it would become an unattractive place to live".
25. Dove J. did not find those submissions persuasive. He said it was "obvious from the way in which [Policy DM2] is set out that it is possible that compliance with either of the parts of the policy will lead to the development proposal being supported" (paragraph 96 of his judgment). The second part of the policy did "not establish a policy test for the acceptability of development which requires it to demonstrate a positive contribution to any or all of the socio-economic or environmental headings ...". The language of the first part of the policy, said the judge, "clearly [called] for a planning judgment as to what level of demonstrable harm would be acceptable". The inspector reached a conclusion on that question in paragraph 12.156 of her report – that "the harm arising from visual impact associated with the development had been reduced to an acceptable level". In doing so, "she took account of ... the number of residential properties affected, the extent of the impact and the duration of that impact". The "formulation" she adopted in paragraph 12.118 was "a rational approach to the question of the threshold of acceptability" (paragraph 97). Her planning judgment here was "entirely lawful" (paragraph 98).
26. Like the judge, I cannot accept that the inspector and the Secretary of State either misinterpreted Policy DM2 or failed to apply it lawfully, in accordance with section 38(6).
27. Policy DM2 does not withhold its support from proposals involving "... environmental impacts that would cause demonstrable harm" if such harm cannot be "eliminated". It supports proposals in which harm is minimized. That is the sense in which the first part of the policy countenances development whose harmful impacts on the environment can be either "eliminated" or "reduced to acceptable levels". This will always be a matter of planning judgment for the decision-maker. The policy also speaks of impacts being "controlled in accordance with current best practice and recognised standards", not of their having to be avoided or removed or repaired altogether. The text in the "Justification" for the policy – in particular, in paragraphs 2.2.3, 2.2.4 and 2.2.8 – is in similar terms. This approach clearly applies to all proposals to which the policy relates, and to the whole range of their potential impacts on the environment. As is implied by the words "account will be taken of the proposal's setting ...", those impacts include the effects a development is likely to have on the landscape and, indeed, all its visual impacts.
28. When Policy DM2 refers, in its second part, to Policy CS5, and says that "developments will be supported ... where it can be demonstrated to the satisfaction of the mineral and waste planning authority ... that the proposals will, where appropriate, make a positive contribution" to the interests referred to, it is again acknowledging the need for a decision-maker to exercise planning judgment. In an appeal, planning judgment will be exercised by an inspector and the Secretary of State. The concept of a "positive contribution" is

distinctly protean. The policy does not say what that expression means. It provides examples of considerations relevant to the decision-maker's exercise of planning judgment when assessing whether a proposal does promise a relevant "positive contribution". But, crucially, it does not require the refusal of planning permission for proposals that do not hold in prospect a "positive contribution", let alone a "positive contribution" in the form of some specific planning benefit. That is not how the policy works. This part of it is deliberately qualified by the important words "where appropriate". If, for whatever reason, it is not "appropriate" for a particular proposal to make a "positive contribution" of some kind, the policy does not rule out, or presume against, the grant of planning permission for it. If the policy had purported to do that, it would have been contradicting itself, because it would then, in effect, have been withdrawing its explicit support for development whose "... environmental impacts that would cause demonstrable harm can be ... reduced to acceptable levels". The policy must be read as a whole. Read as a whole, it does not make a "positive contribution" a prerequisite to compliance. The second part of it does not create an additional requirement to the first.

29. Dr Wolfe asked rhetorically what would be the purpose of the second part of Policy DM2 if only the lower threshold for the policy's support need be surmounted – namely "demonstrable harm ... reduced to acceptable levels", in the first part of the policy – and not also the higher threshold – namely "a positive contribution", in the second. The answer is twofold. First, the policy explicitly qualifies the applicability of its second part, but not its first, with the words "where appropriate". It thus acknowledges that in some cases a "positive contribution" will not be "appropriate", and need not be sought or required. Secondly, however, the second part of the policy has the effect of encouraging a "positive contribution" to be made where that is "appropriate", and it assists developers and third parties by identifying the kinds of "positive contribution" the county council has in mind. Both the first and the second part of the policy have an obvious and different purpose. And the third explains, with examples, how its objectives will be "achieved".
30. Whether, in a particular case, harm has been "reduced to acceptable levels", whether or not it is also "appropriate" to seek or require a "positive contribution" from the developer, what that "positive contribution" may be – whether, in particular, it should take the form of some planning benefit, and whether the proposed development complies with Policy DM2 as a whole, are all, quintessentially, matters of planning judgment for the planning decision-maker.
31. There is nothing in the inspector's report or in the Secretary of State's decision letter to indicate, on their part, any misunderstanding or misapplication of Policy DM2. In paragraph 1.156 of her report, for example, the inspector said that "Policy DM2 sets out the principles that will govern the management of development, and that applications will be supported where any material, social, economic or environmental impacts that would cause demonstrable harm can be eliminated or reduced to acceptable levels", and also that the policy "expresses support for applications which, for example, make a positive contribution to ... landscape character; ... and sets out some ways in which these goals can be achieved". In my view it cannot sensibly be suggested that she overlooked the second part of the policy or misdirected herself as to what it means. Her conclusions in paragraphs 12.151, 12.152 and 12.156 faithfully reflect the language and purpose of the policy. She did not ignore the second part of it. On the contrary, in paragraph 12.151, she stressed the critical words "where appropriate", which appear in that part of the policy. She went on, in the same paragraph, to acknowledge that in this particular case there were "obvious

limitations on what can be achieved in terms of design, layout and appearance”. But she then, in paragraph 12.152, concluded that the scheme incorporated measures that would “at least serve to conserve and protect Lancashire’s Landscape Character”. In the last two sentences of that paragraph she said that “[although] there are landscape impacts that would cause demonstrable harm which cannot be eliminated”, she was “satisfied that they have been reduced to an acceptable level”, and that “[the] development would therefore be in accordance with Policy DM2”. And in the final sentence of paragraph 12.156 she said “[there] would be harm arising from the visual impact associated with the development but this has been reduced to an acceptable level such that there would not be conflict with Policy DM2”.

32. Those conclusions must be read together with everything else the inspector said in paragraphs 12.149 to 12.157. When that is done, their meaning is unmistakeable: that in the inspector’s planning judgment – with which the Secretary of State expressly agreed in paragraph 57 of his decision letter – the proposals did not conflict with Policy DM2 taken as a whole, and not merely that they complied only with the first part of the policy, disregarding the second. The inspector did not fail to exercise any relevant planning judgment called for by the policy, and the planning judgment she did exercise is legally faultless. There is no error of law here.
33. Finally, it seems to me to be a misreading of what the inspector said in paragraph 12.118 of her report to take it as a softening of the requirement in the first part of Policy DM2 for harmful impacts to be “reduced to acceptable levels”. This was, as Dove J. concluded (in paragraph 97 of his judgment), a legitimate and realistic application of that policy test, through the exercise of planning judgment in the particular circumstances of this case – nothing more and nothing less. Here too I agree.
34. In my view, therefore, there is no basis on which the court could hold that the Secretary of State erred in law in his conclusion that the proposed development was “in accordance with the development plan taken as a whole”, including, in particular, both Policy CS5 of the minerals core strategy and Policy DM2 of the minerals local plan. That conclusion is not upset by any misinterpretation or misapplication of relevant development plan policy, nor by any unlawful planning judgment.

Issue (3) in the first appeal – paragraph 109 of the NPPF

35. In paragraph 12.81 of her report the inspector recorded the fact that the appeal site at Preston New Road was “not within an area formally designated for its natural scenic beauty or landscape qualities”, and that “[there] would be no impact upon any designated landscape to which the NPPF, para 115, requires great weight to be given”. She went on to say that “[although] the site does not fall within an area to which the highest status of protection should be afforded, the NPPF, para 109, also seeks to protect and enhance ‘valued’ landscapes”. In paragraph 12.85 she said that “the landscape does have some value at local level and the appeal site displays a number of positive characteristics identified by the Lancashire Landscape Strategy”. For those reasons she “[considered] that it is a ‘valued’ landscape in NPPF terms”. I have already quoted her relevant conclusion, in paragraph 12.154, that “[given] the temporary nature of the development, and the mitigation and restoration proposals, there would be no conflict in the long-term with the

aim of the NPPF to conserve and enhance the natural environment”. The Secretary of State agreed, in paragraph 57 of his decision letter.

36. Dr Wolfe’s argument here was similar to his submissions on the previous issue. He submitted that the inspector and the Secretary of State adopted an incorrect interpretation of the policy in the first bullet point in paragraph 109 of the NPPF. The use of the concept of harm in “the long-term” to modify the simple and unqualified terms of the policy for the protection and enhancement of “valued landscapes” in paragraph 109 was, he said, unjustified. There was no such “temporal” restriction. Any harm to such a landscape, of whatever duration, was necessarily a breach of the policy. Having concluded in paragraph 12.154 of her report that there would be “an adverse impact” on a locally “valued” landscape, the inspector ought to have concluded that the proposals were in conflict with the policy. In not doing so, she erred in law.
37. Dove J. rejected that argument. Having in mind Lord Clyde’s observations on the wide, strategic purpose of national planning policy in his speech in *R. (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment Transport and the Regions* [2001] UKHL 23, [2001] 2 A.C. 295 (at paragraph 140), he concluded that the policy for “protecting and enhancing valued landscapes” in paragraph 109 of the NPPF was “to be ... understood as a high-order strategic objective of the planning system as a whole”, to be achieved by means of “the planning policies which address the appraisal of landscape impact in the context of particular kinds of development”. It was not to be interpreted “as providing that any harm, including temporary harm other than for a wholly insignificant or *de minimis* period, is a breach of [it]”. It “calls for an overall assessment of harm to the landscape, including short-term and any longer-term resolution of that harm and beneficial effects, in order to reach a planning judgment ... as to whether or not the valued landscape has been protected and enhanced” (paragraph 92). The inspector had “properly understood and interpreted” the policy in her conclusion in paragraph 12.154, and so had the Secretary of State in accepting that conclusion (paragraph 94).
38. Mr Elvin and Ms Lieven supported those conclusions of the judge; I think rightly. In my view the inspector and the Secretary of State interpreted the policy in paragraph 109 of the NPPF correctly, and applied it lawfully, as one of the “material considerations” under section 38(6).
39. Paragraph 109 of the NPPF is a broad statement of national planning policy for the “natural and local environment”. The introductory words declare what the “planning system” should do – that it “should contribute to and enhance the natural and local environment”. The objective with which we are concerned is also expressed in general terms – “protecting and enhancing valued landscapes”. The means by which the planning system is to achieve that objective are not stated. But the two ways in which it obviously might do so are plan-making and the determination of planning applications and appeals in accordance with the relevant provisions of the development plan (unless material considerations indicate otherwise). As Lord Clyde said in *Alconbury* (in paragraph 140 of his speech), “[national] planning guidance can be prepared and promulgated and that guidance will influence the local development plans and policies which the planning authorities will use in resolving their own local problems”. This seems to me a good description of the policy in paragraph 109 of the NPPF. Dove J. recognized this.

40. In Lancashire, for minerals development, there are development plan policies that do what the “planning system” is encouraged to do by paragraph 109. They are Policy CS5 of the minerals core strategy and Policy DM2 of the minerals local plan. It is in those policies that the county council, as mineral planning authority, has provided for the protection and enhancement of the landscape in decision-making on proposals for minerals development, including a landscape that is locally “valued”. If a scheme complies with those policies, as the inspector and the Secretary of State concluded here, it is difficult to see how it could be regarded as being in conflict with national policy in paragraph 109.
41. As Dove J. also recognized, the policy in paragraph 109 does not compel a decision-maker to find conflict with it when the harmful effects of minerals development on a “valued” landscape would, in the course of the project, be reversed or mitigated. The policy is not framed in terms of preventing any harm at all to such landscape. When applied in the making of a planning decision, it requires from the decision-maker a planning judgment on the question of whether, in the circumstances, the general policy objective of “protecting and enhancing” such landscapes would be offended or not. It is for the decision-maker to consider whether any temporary harm to the landscape would breach the policy. The nature of the damage to the landscape, its duration, the importance of the “valued” landscape, and the degree of formal protection it has been given, if any, are likely to be relevant factors.
42. In this case the relevant exercise of planning judgment is to be seen in paragraph 12.154 of the inspector’s report. She acknowledged that “there would be an adverse impact upon a ‘valued’ landscape”. But against this she weighed three considerations: first, that the landscape in question was “valued only at local level and does not have the highest status of protection”; second, “the temporary nature of the development”; and third, “the mitigation and restoration proposals”. Taken together, those three considerations were enough, in her view, to justify the conclusion that “there would be no conflict in the long-term with the aim of the NPPF to conserve and enhance the natural environment”. Her use of the phrase “in the long-term” was appropriate. It was not intended as a gloss on the policy in paragraph 109. It was simply to stress that, as the inspector said, the development would be “temporary” and that “mitigation” and “restoration” were part of the project. When tested against the policy in paragraph 109, the proposals were, in her view, acceptable. This was a planning judgment of the kind with which the court will rarely interfere. There is no basis on which it could do so in this case.

Issue (4) in the first appeal – Policy EP11 of the Fylde Local Plan

43. In a statement of common ground prepared by the county council and Cuadrilla before the inquiry, and published, under rule 14 of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000, Policy EP11 was included in the list of development plan policies that the parties agreed “should be taken into account in the determination of [the Preston New Road exploration works] appeal” (paragraphs 6.1 and 6.6.4(B) of the statement of common ground). At the inquiry, however, Cuadrilla’s planning witness, Mr Mark Smith, maintained in his proof of evidence (at paragraph 8.24) that Policy EP11 was not relevant to the proposed development. He was cross-examined on that evidence by counsel for the county council, Mr Alan Evans, and by counsel for the action group, Dr Ashley Bowes. The county council’s planning witness, Mrs Katie Atkinson, was also cross-examined on this point by Ms Lieven, for Cuadrilla. Submissions were made on it in closing, by Dr Bowes, by Mr Evans, and by Ms Lieven. Cuadrilla’s position at that stage,

as Ms Lieven explained in her closing submissions, was that Policy EP11 was not a relevant policy.

44. In paragraph 12.25 of her report, under the heading “The relevance of the Fylde Borough Local Plan”, the inspector recorded Cuadrilla’s argument that that the Fylde Local Plan “... does not purport to deal with minerals development and has no relevance to this form of development”. She noted, however, that the statements of common ground produced by Cuadrilla and the county council “recognise the relevance to these appeals of policies in [the Fylde Local Plan]...”. But she concluded, in paragraph 12.31:

“12.31 In relation to Policy EP11, [Cuadrilla] claim that this is obviously a policy aimed at built development and not an engineering operation such as shale gas exploration. ... [The county council] accepts that the requirement that [“building materials should reflect the local vernacular style”] could not apply to the proposed development. However, it seems to me that it is not only that aspect of the policy that is obviously inapplicable, but also the main thrust of the policy is aimed at the assimilation of new built development, rather than the type of development that is the subject of these appeals. This is an instance where the most appropriate policy against which to consider the landscape character impact and the design of the proposed development falls within [the minerals local plan]. Policy EP11 cannot sensibly be applied to these schemes. ...”.

That last conclusion – that “Policy EP 11 cannot sensibly be applied to these schemes” – was repeated by the inspector in paragraphs 12.153 and 12.823 of her report, which the Secretary of State incorporated in his own reasons, respectively, in paragraphs 57 and 66 of his decision letter.

45. The action group’s grievance, essentially, is that Cuadrilla changed their position on the relevance of Policy EP11 during the inquiry, that this had not been made clear before Ms Lieven closed their case, and was never the subject of an appropriate amendment to the statement of common ground; that its own case before the inspector had been based on the contention that the policy was relevant and was breached; that its closing submissions had been presented on the understanding that Cuadrilla conceded the relevance of the policy; that it was never given an opportunity, either by the inspector or by the Secretary of State, to make representations in the light of Cuadrilla’s alleged volte-face; and that this was unfair and prejudicial to it, and enough to vitiate the Secretary of State’s decisions.
46. Dove J. rejected that argument. Dr Wolfe submitted to us that he was wrong to do so.
47. The judge reminded himself of relevant case law illustrating the principles of procedural fairness when applied in planning appeals – in particular, the decisions of this court in *Hopkins Developments Ltd. v Secretary of State for Communities and Local Government* [2014] EWCA Civ 470, [2014] P.T.S.R. 1145 and *Secretary of State for Communities and Local Government v Engbers* [2016] EWCA Civ 1183. He saw a distinction between cases in which an inspector differs from an agreed position reached between the parties and recorded in a statement of common ground, and a case such as this, in which one of the parties itself departs from a previously agreed position (paragraph 104 of his judgment). He concentrated on Beatson L.J.’s observations in *Hopkins Developments Ltd.* about the “right to be heard” as a principle of natural justice – in particular (at paragraph 87), that “what is required is an opportunity to be heard, an opportunity to participate in the procedure by

which the decision is made”, and (at paragraph 90) that, as the authorities referred to by Jackson L.J. had shown, “what is needed is knowledge of the issues in fact before the decision-maker ... , and an opportunity to adduce evidence and make submissions on those issues”. In Dove J.’s view, therefore, it was “necessary to examine whether, notwithstanding the terms of [the statement of common ground, the action group] was aware that there was an issue over the applicability of [Policy] EP11 and had an opportunity to present evidence and submissions on the point” (paragraph 109).

48. Dove J. focused on Mr Smith’s cross-examination by Dr Bowes, which he had quoted earlier in his judgment (in paragraph 34). In the course of that cross-examination Mr Smith accepted that, on a “[strict] interpretation” of Policy EP11, “a development that was not in keeping with the landscape character types identified in the Landscape Strategy for Lancashire would conflict with [it]”. But he then said that, “as [he had] explained in [cross-examination] from Mr Evans, that policy is principally directed toward new permanent build development not minerals ...”, and added that he “[did] not think this policy really gave any consideration to those temporary forms of development such as minerals”. In answer to a further question from Dr Bowes, he acknowledged that Policy EP11 was “in the statement of common ground” as one of the “policies ... relevant to consideration of the exploration application”.
49. That exchange showed, said the judge, that there was “clearly an issue as to the relevance and applicability of [Policy] EP11”. The action group had taken the “opportunity to provide evidence and submissions on that issue”. It had done so “in pointing out to the [inspector] in [its] closing submissions that [Policy] EP11 was contained within the [statement of common ground], and also that Mr Smith had accepted a conflict with that policy”. As Dove J. said, Dr Bowes “properly and effectively took up the points in this regard with [Cuadrilla’s] witness, called evidence from his own expert on the issue, and then incisively set out the case for the [inspector] in his closing submissions” (paragraph 110 of the judgment). The relevant submissions made by Dr Bowes in closing, which the judge had also quoted (in paragraph 35), had referred to the fact that Policy EP11 had been included in the list of “policies ... engaged by the appeal scheme” in the statement of common ground (paragraph 5 of Dr Bowes’ closing submissions), reminded the inspector that “Mr Smith accepted in [cross-examination] that a conflict with [the Landscape Strategy for Lancashire] must ... amount to a conflict with ... [Policy] EP11” (paragraph 19), contended that “[the] proposal ... , by definition, conflicts with the development plan policies adopted to promote that Strategy”, and confirmed that “[accordingly], we say there [is] a clear and inescapable conflict with policies EP11 Fylde Local Plan (2005), DM2 Lancashire Waste and Minerals Plan (2013) and CS5 Lancashire Waste and Minerals Core Strategy (2009)” (paragraph 29).
50. In these circumstances, the judge found himself “unable ... to conclude that there was any procedural unfairness in what occurred during ... the inquiry”. The action group had “participated in [the] debate” on the applicability of Policy EP11. Cuadrilla’s position, as put to the inspector in their closing submissions, had been “clearly foreshadowed in their evidence and indeed challenged in that respect by [the action group’s] counsel”. The inquiry had been attended by representatives of the action group throughout, and the proceedings transmitted live on a webcast. But in any event the judge was “satisfied that there was no unfairness to [the action group] in the respect alleged ...” (paragraph 111). He was “unimpressed” by the suggestion that it could have sought to make further submissions to the Secretary of State after the inquiry had been closed, in response to those made for

Cuadrilla. Whether or not the Secretary of State would have disregarded such submissions, as he had a discretion to do under rule 17(4) of the inquiries procedure rules, was “moot” (paragraph 112).

51. I am in no doubt that the judge’s approach here was correct, and I do not think his conclusion could realistically have been any different.
52. At the inquiry there plainly was an issue between Cuadrilla, on one side, and the county council and the action group, on the other, as to the relevance and applicability of Policy EP11 to these proposals. The inspector grasped that issue. She dealt with it under a specific heading in her conclusions, and resolved it, in paragraphs 12.31 and 12.153 of her report, in favour of Cuadrilla. She accepted their contention that Policy EP11 was not relevant to proposals for hydrocarbon exploration, and that it “cannot sensibly be applied to these schemes”. That conclusion was adopted by the Secretary of State. It has not been questioned in these proceedings. And it is legally secure.
53. The critical question, however, is not whether the relevance of Policy EP11 was a live issue at the inquiry. It is whether the action group had a fair opportunity, in the course of the inquiry, to address that issue. The judge concluded that the action group did have that opportunity, and that neither the inspector nor the Secretary of State breached any principle of procedural fairness in not inviting further submissions from it after the inquiry had closed. That conclusion was consistent with the relevant legal principles, illuminated by Beatson L.J. in *Hopkins Developments Ltd.* (at paragraphs 84 to 90).
54. The fact that Dr Bowes took the opportunity to cross-examine Mr Smith as he did on the relevance and effect of Policy EP11 shows that the action group saw this as a matter that it should tackle in this way. The questions put to Mr Smith on Policy EP11 were perfectly proper questions, designed to establish his position on the relevance and effect of the policy, and the submissions made by Dr Bowes in closing, in the light of Mr Smith’s evidence on the point, were perfectly proper submissions. Mr Evans’ submissions for the county council were to similar effect. He too recognized the need to address the relevance of Policy EP11 as a controversial matter. But Mr Smith’s answers in cross-examination – including that he “[did] not think [Policy EP11] really gave any consideration to those temporary forms of development such as minerals” – did not constrain Ms Lieven in submitting as she did in closing on behalf of Cuadrilla. Nor was the inspector compelled to accept Mr Smith’s evidence, or the evidence of any other witness, on the relevance and effect of Policy EP11, or the submissions made on this issue by counsel for any of the parties. She had to make up her own mind on these matters, and so did the Secretary of State. Ultimately, the correct interpretation of Policy EP11, had it been controversial in these proceedings, would have been a matter for the court. But lest there be any doubt about that, I should say that in my view the policy was neither incorrectly understood nor unlawfully applied. The inspector’s conclusions in paragraphs 12.31 and 12.153, on which the Secretary of State depended in his own conclusions in paragraph 57 of the decision letter, are, in my view, unimpeachable.
55. As the judge recognized, the question here was whether the action group had “an opportunity to participate in the procedure by which the decision [was] made”. It manifestly did. It exercised its “opportunity to participate” in the inquiry process as it chose, with the benefit of advice and representation by experienced planning counsel. It was able to tackle the relevance of Policy EP11 as an issue before the inspector and Secretary of State, and to

do so effectively in the course of the inquiry. A fair procedure did not require it to be given a different opportunity to do that, or a renewed opportunity after the inquiry was closed. The opportunity it had was ample. The procedure was, at every stage, fair. Dr Bowes was not present at the inquiry throughout, though it seems that members of the action group were there when he was not, and the proceedings were broadcast. He was able to cross-examine Cuadrilla's witnesses, including Mr Smith, and at the end of the inquiry to make closing submissions – though not to go last, which was Cuadrilla's right as appellant. The essential requirements of a fair procedure were, in the circumstances, wholly fulfilled.

56. In my view, therefore, the appeal must fail on this ground too.

Issues (1), (2) and (3) in the second appeal – the lawfulness of the assessment under the regime for EIA and alleged inconsistency in the Secretary of State's approach

57. These three issues relate closely to each other and are best dealt with together.

58. Recital (2) to the EIA Directive states that “[pursuant] to Article 191 of the Treaty on the Functioning of the European Union, Union policy on the environment is based on the precautionary principle ...”, and that “[effects] on the environment should be taken into account at the earliest possible stage ...”. Article 3(1) requires assessment of “the direct and indirect significant effects of a project ...”. Paragraph 5 of Annex IV states that “... [the] description of the likely significant effects on the factors specified in Article 3(1) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project ...”. The corresponding provision in paragraph 4 of Part 1 of Schedule 4 to the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (“the EIA regulations”), is in materially the same terms. The definition of an “environment statement” in regulation 2 of the EIA regulations is a statement “... that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile”.

59. For Mr Frackman, Mr Marc Willers Q.C. made three main submissions on these issues. The first was that the Secretary of State had neglected the relevant principles applied by the Court of Justice of the European Union in cases where, under the regime for EIA, a decision-maker has had to consider “indirect, secondary [or] cumulative effects” on the environment. In particular, he had failed to require an assessment that included both the direct impacts on the environment of the extended flow testing phase of the proposed development and the indirect impacts of the succeeding production stage if the exploration phase proved the existence of a viable resource of shale gas. Exploration was only being carried out “with a view to production”. Production was “reasonably foreseeable”, and was the “end product of exploration”. That, in essence, is the argument on issue (1). Mr Willers sought to rely here on the decisions in *Abraham v Region Wallonne* (Case C-2/07) [2008] E.C.R. I-1197 and *Ecologistas v Ayuntamiento de Madrid* (Case C-142/07) [2009] P.T.S.R. 458 and decisions of the domestic courts to similar effect, among them the Court of Appeal's decision in *R. (on the application of Brown) v Carlisle City Council* [2011] Env. L.R. 5 and the first instance decision in *R. (on the application of Khan) v Sutton London Borough Council* [2014] EWHC 3663 (Admin). Secondly, he submitted, the judge erred in

rejecting the argument that the Secretary of State had acted contrary to the EIA Directive and the EIA regulations by failing to ensure that environmental effects were taken into account and assessed “at the earliest possible stage” (see the decisions of the Court of Justice of the European Union in *R. (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions* (Case C-201/02) [2004] Env. L.R. 27, at paragraphs 51 to 53, and 62, and *Brussels Hoofdstedelijk Gewest v Vlaams Gewest* (Case C-275/09) [2011] Env. L.R. 26, at paragraph 33). That is the argument on issue (2). And thirdly, Mr Willers submitted, the Secretary of State’s approach was inconsistent in that he had taken into account the benefits of the production of shale gas without weighing against those benefits the harmful environmental impacts of production. That is the argument on issue (3).

60. Dove J. rejected Mr Willers’ argument on “indirect, secondary [and] cumulative” effects. He identified the legal principles in play and relevant European and domestic case law, including *Abraham, Ecologistas, Brown v Carlisle City Council* and *R. (on the application of Frack Free Ryedale) v North Yorkshire County Council and another* [2016] EWHC 3303 (Admin). In his view “there were no indirect, secondary or cumulative impacts which had to be assessed arising from the suggestion that there might be some continuation of the use of the site for gas extraction after the completion of the development for which permission was sought”. The proposal before the Secretary of State “had to be addressed on its own terms”. It was “strictly limited in time and solely for the purpose of exploration of the potential gas resource” (paragraph 126 of the judgment). And “any further gas extraction beyond that for which the application had been made would have to be the subject of a new planning application either ... under section 70 of the 1990 Act, or alternatively ... for a change of the conditions on the present consent under section 73 ...”. Either way, “a new [environmental statement] would have to be prepared describing the likely significant effects of that further application”. There were “no indirect, secondary or cumulative effects to be evaluated in the present [environmental statement]”, which was “therefore legally adequate” (paragraph 127).
61. In the judge’s view there was a parallel between this case and *Frack Free Ryedale*. In that case the gas produced by the proposed works was to be burned at Knapton generating station under an existing planning permission, and within the existing limits permitted by the Environment Agency. The proposal involved no net increase in capacity. An argument that it was an integral part of a more substantial project, including Knapton generating station, was held to have been rightly abandoned (see paragraph 39 of the judgment of Lang J. in that case). Here, as Dove J. said, “quite apart from the fact that this complaint was not raised either prior to or during the public inquiry, there is and was no evidence to support any suggestion that the provision of gas from the [appeal] site to the grid, and thereby to residential or industrial users, will lead to any increase in the consumption of gas and therefore the generation of greenhouse emissions in the UK”. It was, he said, a “perfectly sensible assumption” on the evidence before the Secretary of State “that any gas provided to the grid during the extended flow phase [would] simply replace gas that would otherwise be consumed by residential and industrial users supplied by the grid ...”. There were thus “no indirect, secondary or cumulative [effects] of the kind suggested arising from the exploration phase which required inclusion within the [environmental statement]”. A “clear distinction” was to be drawn between, on the one hand, the production of gas during the “extended flow phase when the wells would be connected to the grid” and, on the other, “the flaring which would occur during the initial flow testing phase”. That flaring would “plainly [give] rise to the burning of gas and generation of greenhouse gases that would not

otherwise arise” and was “therefore ... properly the subject of assessment within the [environmental statement]” (paragraph 128).

62. The judge concluded, therefore, that the approach indicated by the Government’s guidance in paragraph 27-120-20140306 of the Planning Practice Guidance: Minerals published by the Government in March 2014 (“the PPG”) was correct and in accordance with the requirements of the EIA Directive and the EIA regulations. As that guidance makes plain, the judge said, proposals for exploration should be considered on their own merits “without speculation or hypothetical assumptions in relation to future activities which will require their own consenting and EIA processes” (paragraph 129).
63. In my view the judge’s approach and conclusions were correct. As Mr Elvin and Ms Lieven submitted, the court must focus on the nature of the consent procedure for the project under consideration. The crucial point here is that the scheme before the Secretary of State was a single, clearly defined project limited to exploration for shale gas on the two sites, and the associated monitoring. And the consent procedure for it was not a “multi-stage consent process” (see paragraphs 21 to 25 of Lord Hope’s speech in *R. (on the application of Barker) v Bromley London Borough Council* [2007] 1 A.C. 470, which concerned an outline planning permission for major development at Crystal Palace and the subsequent reserved matters approvals required; and paragraphs 32 and 33 of the judgment in *Brussels Hoofdstedelijk Gewest*, which concerned successive works of development at Brussels Airport). The consent procedure here was confined to the approval or rejection of the present proposals for exploration and monitoring. The project did not include any subsequent commercial production. That would be the subject of a second, distinct and different project – if, but only if, the exploration project proved the existence of a viable resource of gas. The granting of planning permission for the exploration and monitoring works did not, and could not, pre-empt or pre-judge the determination of that future application, if it were ever to be made. That possible future proposal would have to be considered on its own planning merits when the time came, in the light of the assessment contained in its own environmental statement. The purpose, and sole purpose, of the present project was to establish whether or not shale gas existed in a sufficient quantity and was capable, both technically and viably, of being extracted should planning permission later be granted for its extraction. If the appeals before the Secretary of State succeeded, and planning permission for the proposals before him were granted, there would not be any approval for the commercial extraction of gas. The effects of such an operation were, therefore, neither direct effects of the project under consideration nor “indirect, secondary [or] cumulative” effects of it.
64. As the Government has recognized in the written ministerial statement issued by the Secretary of State for Energy and Climate Change on 16 September 2015, “[we] do not yet know the full scale of the UK’s shale resources nor how much can be extracted technically or economically”. That, of course, is a statement of the national position. But, as Mr Elvin and Ms Lieven submitted, the scale of resources present in particular locations and the technical and economic feasibility of extraction in those locations are also uncertain. That was so here: hence the need for exploration. What any future extraction project might comprise was also, at this stage, a matter of conjecture. So it was not only unnecessary, and inappropriate, for the environmental effects of that unknown development to be included in the EIA for the present project. It was also impossible.

65. That logic is not disturbed by Mr Willers' submission that the purpose of the exploration project was not merely to establish the presence of a commercial resource of shale gas, but also to enable commercial extraction. The fact that commercial extraction would only be proposed if the exploration project proved the presence of a commercial resource does not mean that the two operations are necessarily and indivisibly parts of the same project. They are not. Extraction, if it is ever proposed, will only proceed after exploration and monitoring have been carried out. But this does not justify the concept that the two projects, if there are two, will have "cumulative" effects on the environment, or that the present project – for exploration – will have "indirect" or "secondary" effects that are, in truth, impacts associated only with a hypothetical future project – for extraction.
66. As the judge concluded, this straightforward analysis accords not only with common sense, but also with the Government's guidance in paragraph 27-120-20140306 of the PPG, under the heading "Should mineral planning authorities take account of the environmental effects of the production phase of hydrocarbon extraction at the exploration phase?". The guidance emphasizes that "[individual] applications for the exploratory phase should be considered on their own merits" and "should not take account of hypothetical future activities, for which planning consent has not yet been sought, since the further appraisal and production phases will be the subject of separate planning applications and assessments". It also acknowledges that "[when] determining applications for subsequent phases, the fact that exploratory drilling has taken place on a particular site is likely to be material in determining the suitability of continuing to use that site only insofar as it establishes the presence of hydrocarbon resources".
67. A principle well established in both European and domestic authority is that the existence and nature of "indirect", "secondary" or "cumulative" effects will always depend on the particular facts and circumstances of the project under consideration (see Sullivan L.J.'s judgment in *Brown v Carlisle City Council*, at paragraph 21, and Laws L.J.'s judgment in *Bowen-West v Secretary of State for Communities and Local Government* [2012] Env. L.R. 22, at paragraph 28). An equally robust principle is that an environmental statement is not expected to include more information than is reasonably required to assess the likely significant environmental effects of the development proposed, in the light of current knowledge (see, for example, the judgment of Patterson J. in *Khan*, at paragraphs 121 to 134).
68. Dove J.'s conclusions on "indirect, secondary [and] cumulative" effects are entirely loyal to both of those principles. On the facts, in contrast with cases such as *Brown v Carlisle City Council*, the exploration and monitoring project under consideration here was a free-standing project of development, which did not depend on any other project, present or future, including any future proposals for the commercial extraction of shale gas. That is a material difference between this case and *Brown v Carlisle City Council*, where an environmental statement for the development of a freight distribution centre at an airport had not included an assessment of the effects of the associated improvements to the airport itself, which were part of the same project though the subject of a separate application for planning permission (see paragraphs 29 and 30 of Sullivan J.'s judgment). In this case, the environmental statement for the project under consideration was a comprehensive environmental statement for that whole project, undertaken on the basis of what was known at the time, and without speculation as to the content and timing of some other future project, which might never happen. However broad a construction is placed on the expression "the direct and indirect significant effects of a project ..." in article 3(1) of the

EIA Directive, and the expression “any indirect, secondary, cumulative ... effects of the project” in paragraph 5 of Annex IV, these concepts cannot be stretched to include effects that are not effects of the project at all (see paragraph 31 of Advocate General Kokott’s Opinion in *Abraham*).

69. I do not see how Mr Willers’ argument can gain any strength from European or domestic authority on EIA flawed by the splitting of projects into their constituent phases or parts – sometimes referred to as “salami slicing”. The two decisions of the Court of Justice of the European Union most familiar in this context are *Abraham* and *Ecologistas*. The defect of the EIA in *Abraham* was that only the works of improvement to the infrastructure of the airport had been assessed, and the increased numbers of flights that would be enabled by those improvements had not (see paragraphs 26 and 42 to 46 of the court’s judgment). The defect in *Ecologistas* was that the works for improving the Madrid urban ring road had been assessed separately, as a number of individual projects, rather than overall, as a composite whole (see paragraphs 34 to 39 and 44 to 46 of the court’s judgment). This case is quite different from those. In this case there is no question of the purpose of the EIA Directive being circumvented by splitting into separate parts or phases what is truly a single project. The assessment here was of the whole project, not merely parts of it.
70. The Non-Technical Summary of Cuadrilla’s environmental statement explains, in subsection 3.4.5, “Extended Flow Testing”, that “[if] the flow of gas from the wells is assessed as being sufficient a period of extended flow testing may be undertaken”, which “could last for 18 to 24 months per well”; and that “[natural] gas produced during extended flow testing ... would not be burned in the flare stacks”, but “... the well would be connected to the gas grid for use in homes or by business or industrial users”. The assessment in chapter 8 of the environmental statement, “Greenhouse Gas Emissions”, embraces the full range of greenhouse gas emissions associated with the project. Paragraph 2 in that chapter states that “[both] direct and indirect GHG emissions have been assessed”. Paragraph 3, in section 8.3, “Scoping and Consultation” confirms that “the assessment has taken into account the Scoping Opinion from [the county council] ... and stakeholders”, including Natural England, CPRE Lancashire, the Environment Agency and Public Health England. The “GHG emissions by source (ranged result in tCO_{2e})” are set out in Table 8.3, in section 8.7, “Assessment”. Paragraph 36 refers to Figure 8.3, “Percentage GHG emissions by source for the entire Project”, which “shows the range of GHG emissions by emission source for all of the activities associated with the Project”. It states that “[approximately] 70% of the Project greenhouse gas emissions can be attributed to flaring [i.e. the burning of gas in the flare stacks during the initial flow testing stage], which will be captured under the EU ETS”; that “[with] the embedded mitigation measures ... proposed[,] fugitive gas emissions from the Site are expected to consist of un-combusted methane as a result of incomplete combustion in the flare, accounting for 13% of the total emissions”; and that “[the] embedded mitigation measures proposed are known to achieve an estimated reduction in fugitive emissions of 97%-98%”. Paragraph 37 refers to Figure 8.4, “GHG emissions by Project stage ...”. It confirms that “[initial] flow testing is the most significant contributor due to flaring, accounting for approximately 87% of the Project carbon footprint”. In the pie chart in Figure 8.4 the percentage of greenhouse gas emissions attributable to the extended flow testing phase is only 0.1104%. The “Chapter Summary – Greenhouse Gas Emissions” states:

“... ”

The greatest source (73%) of the project GHG emissions come from burning the gas in the flare. The total Project GHG emissions could be between 118,418 (lower range) to 124,397 (higher range) tCO₂e. The higher range is the equivalent of 0.002% of the current UK Carbon Budget set by the government and as such the Project's potential contribution to national GHG emissions is negligible. Furthermore, due to the conservative nature of the assessment there is potential for the actual GHG emissions to be even smaller."

71. There is, it seems to me, no force in Mr Willers' submission that the environmental statement was inadequate because it lacked an assessment of the effects of greenhouse gas emissions arising from the extended flow testing phase of the project – a point not raised before the inspector, and which emerged only in these proceedings. Because the extended flow testing phase would last some three years, Mr Willers described it as "production by any other name". In my view, however, the judge's conclusions on this argument in paragraph 128 of the judgment are plainly correct. There was no defect in the assessment in the environmental statement. Greenhouse gas emissions associated with exploration, including the extended flow testing phase, were fully assessed.

72. Gas produced during that phase, when piped into the grid, would merge with existing supplies to consumers. It would be an indistinguishable part of the existing supply, not additional to that supply. It would not, therefore, lead to an increase in greenhouse gas emissions (see the analogous conclusions in Lang J.'s judgment in *Frack Free Ryedale*, at paragraphs 37 to 39). As Ms Lieven emphasized, there was no evidence before the inspector and the Secretary of State to support a different conclusion. The idea that, in a project of exploration for shale gas such as this, as opposed to the commercial production of shale gas, the substitution of new gas for existing gas in the grid will raise the total consumption of gas by increasing gas usage, that significant additional greenhouse gas emissions are thus likely, and that there might be some conflict with the objectives of the Climate Change Act 2008, gains no credence in the report of the Committee on Climate Change, "Onshore Petroleum: The compatibility of onshore petroleum with meeting the UK's carbon budgets", published in March 2016, or in the Government's response, published in July 2016. As Mr Elvin and Ms Lieven submitted, the passages in the report on which Mr Willers relied do not serve to demonstrate that such consequences are likely. In Chapter 4, "Emissions relating to onshore petroleum extraction", the report states that "[exploration] emissions are generally small ...", that "[small] volumes of gas may be generated during the development of the well, most of which is likely, at a minimum, to be burned in a flare", that "[it] should not be taken as a given that emissions from exploration will be low, especially for any extended well tests", and that "[appropriate] mitigation techniques should be employed where practical". Such statements do not undermine the integrity of the EIA undertaken for this project. They do not show that the burning of shale gas from the extended flow testing phase here would be likely to increase greenhouse gas emissions to any significant degree. The environmental statement effectively concludes to the contrary. It is not necessary to go as far as Mr Elvin said we could, and to accept, in the light of the Committee on Climate Change report, that domestically produced gas may in fact generate a lower level of greenhouse emissions than imported liquefied natural gas. It is enough for us to conclude, as in my view we can, that there is nothing before the court by way of evidence specific to this project of shale gas exploration to substantiate the shortcomings in the EIA asserted by Mr Willers.

73. In short, there is no evidence, let alone clear evidence, of any likely material increase in greenhouse gas emissions, or any other likely significant effect on the environment, that ought to have been addressed in the EIA but was not. In the circumstances, I cannot see how the court, adopting the conventional public law approach well settled in the relevant authorities, could find itself satisfied that the Secretary of State committed an error of law in accepting the assessment presented in Cuadrilla's environmental statement (see Laws L.J.'s judgment in *Bowen-West*, at paragraphs 36 to 42, citing the judgment of Sullivan J., as he then was, in *R. (on the application of Blewett) v Derbyshire County Council* [2004] Env. L.R. 29, at paragraphs 32 and 33; and Lang J.'s judgment in *Frack Free Ryedale*, at paragraphs 21 to 23). Neither is there any demonstrable legal flaw within the assessment contained in the environmental statement, nor is the assessment demonstrably incomplete. The Secretary of State was entitled to regard the environmental statement as compliant with the definition in the EIA regulations, which looks to what an applicant may "reasonably" be required to provide. The judge's analysis was right.
74. It follows, in my view, that the second appeal cannot succeed on Mr Willers' main argument, on "indirect, secondary [or] cumulative" effects – issue (1). His submissions on the timing of assessment – issue (2), and on the alleged inconsistency in the Secretary of State's approach – issue (3), can be dealt with quite shortly.
75. The argument on the timing of assessment is, I think, misconceived. It fails on the same analysis as the argument on "indirect, secondary [or] cumulative" effects. The judge reminded himself of the European and domestic jurisprudence on EIA emphasizing the need for projects to be assessed in their entirety, rather than in partial or piecemeal fashion. It cannot sensibly be suggested that he overlooked a basic principle inherent in the need for a complete assessment: that such assessment must be timely – undertaken "at the earliest possible stage". These principles are not divorced from each other; they go together. Assessment must be complete. And to be complete, it must be timely. If a future project is truly separate from the project under consideration, the assessment of its likely significant effects in the environmental statement for the present project is both unnecessary and inappropriate. If it is also uncertain in its conception and content, an attempt to assess its effects in the environmental statement for the present project would also be futile and potentially misleading. Such an exercise would not be timely; it would be premature and untimely. One comes back then to the same basic point. If, in the future, a project emerges for the commercial production of shale gas on these two sites, it can only properly be the subject of assessment under the regime for EIA when it comes to be promoted as a real, not merely hypothetical, proposal in an application for planning permission (see the conclusions to similar effect in the judgment of Sir Michael Harrison in *R. (on the application of Littlewood) v Bassetlaw District Council* [2009] Env. L.R. 21, at paragraph 32).
76. Mr Willers' argument alleging inconsistency in the Secretary of State's consideration of the possible future production of shale gas at the appeal sites is also, in my view, mistaken. Its premise is wrong. The proposition that the Secretary of State took into account the potential benefits of shale gas production, but not the harm it would cause to the environment, does not reflect his relevant conclusions.
77. In a section of the NPPF headed "Meeting the challenge of climate change, flooding and coastal change", paragraph 93 says that "[planning] plays a key role in helping shape places to secure radical reductions in greenhouse gas emissions, minimising vulnerability and

providing resilience to the impacts of climate change, and supporting the delivery of renewable and low carbon energy and associated infrastructure”. In a subsequent section headed “Facilitating the sustainable use of minerals”, paragraph 147 says that, among other things, mineral planning authorities “should ... when planning for on-shore oil and gas development, including unconventional hydrocarbons, clearly distinguish between the three phases of development (exploration, appraisal and production) ...”.

78. In paragraph 1.181 of her report, when summarizing relevant NPPF policy, the inspector noted the policies in paragraphs 142 to 148, including the requirement that “decision makers should recognise a distinction between exploration, appraisal and production in the extraction of gas, including unconventional hydrocarbons”. In paragraph 12.686, under the heading “Conclusions on Climate Change”, she concluded that “the projects would be consistent with the NPPF aim to support the transition to a low carbon future in a changing climate”. She did “not consider that [paragraph 93 of the NPPF] should be read in isolation, or applied out of context”. Taking an “overall view of national policy”, she was in “no doubt that shale gas is seen as being compatible with the aim to reduce [greenhouse gases] by assisting in the transition process over the longer term to a low carbon economy”. And she was “satisfied that [Cuadrilla] have demonstrated ... that all material, social, economic or environmental impacts that would cause demonstrable harm would be reduced to an acceptable level and that the projects represent a positive contribution towards the reduction of carbon”. The proposed development would be in accordance with Policy DM2 of the minerals local plan and “relevant national policy.” In paragraph 12.757, under the heading “Economic benefits”, she said:

“12.757 I acknowledge that the [written ministerial statement of 16 September 2015] does make reference to the substantial benefits that exploring and developing our shale gas and oil resources could potentially bring. However, it seems to me that, in the light of the NPPF and [the PPG] guidance, the potential wider economic benefits of shale gas production at scale should be given very limited weight at this stage.”

In her “Overall conclusions”, in paragraph 12.826, she said that “[any] future proposal for production would require a further application and assessment” and “... little weight is attributed to the wider economic benefits that might be derived from shale gas production on a large scale”. And in paragraph 12.840, when dealing with the proposed monitoring works at Preston New Road, she acknowledged that “account should not be taken of hypothetical future activities relating to shale gas production over the wider area”.

79. The Secretary of State concluded, in paragraph 28 of his decision letter that, in the light of the written ministerial statement of September 2015, “the need for shale gas exploration is a material consideration of great weight in these appeals ...”. In paragraphs 36 and 37, under the heading “Climate change”, he said:

“36. The Secretary of State considers that the need for shale gas exploration set out in the [written ministerial statement] reflects ... the Government’s objectives in the [written ministerial statement], in that it could help to achieve lower carbon emissions and help meet its climate change target. ...

37. Overall, the Secretary of State agrees with the Inspector’s conclusion at IR12.686 that the projects would be consistent with the NPPF aim to support the transition

to a low carbon future in a changing climate. He further agrees that [Cuadrilla] have demonstrated, by the provision of appropriate information, that all material, social, economic or environmental impacts that would cause demonstrable harm would be reduced to an acceptable level and that the projects represent a positive contribution towards the reduction of carbon, and that the proposed development would be in accordance with [Policy DM2 of the minerals local plan] and relevant national policy.”

and in paragraph 47, under the heading “Economic benefits”:

“47. For the reasons given in IR12.749-12.769 and IR12.818, the Secretary of State agrees with the Inspector at IR12.769 that the local economic benefits of the exploration stage would be modest. He attributes little positive weight to these benefits. The Secretary of State notes that the Inspector considers little weight should be attributed to the national economic benefits which could flow from commercial production at scale at some point in the future, in the context of the exploratory works development which is the subject of these appeals. As the NPPF makes clear that each stage should be considered separately, the Secretary of State considers that in the context of these appeals, no weight should be attributed to the national economic benefits which could flow from commercial production in relation to these sites at scale at some point in the future.”

80. As always, one must read the relevant passages in the inspector’s report, and the corresponding conclusions in the Secretary of State’s decision letter, fairly and as a whole – and not with the aim to find fault (see my judgement in *St Modwen*, at paragraph 7). When that is done here, I cannot see how the Secretary of State’s conclusions in paragraphs 28, 36, 37 and 47 of his decision letter can be criticized. Those conclusions are cogent, and entirely compatible. They do not betray an unlawful approach.
81. One should not read more into paragraphs 28, 36 and 37 than is actually there. The conclusion in paragraph 28, that the need for shale gas exploration should have “great weight”, was one the Secretary of State was entitled to reach in the light of government policy. And it was consistent with his conclusions in paragraphs 36 and 37 that the written ministerial statement and the NPPF encourage shale gas exploration as an activity consistent with the Government’s objectives “to achieve lower carbon emissions and help meet its climate change target”, and “to support the transition to a low carbon future in a changing climate”; and that the proposed development would “represent a positive contribution towards the reduction of carbon”. The Secretary of State was not saying – nor could he – that this development would itself bring about a reduction in carbon emissions, or that such a benefit should weigh for it in the planning balance. Contrary to Mr Willers’ submission, he did not give “significant weight”, or any weight, to that supposition. He was merely recognizing, quite properly, that the development would help to achieve the objective of reducing carbon by establishing whether or not a commercially viable resource of shale gas existed on these sites. That makes sense. Exploration for shale gas is necessary before a commercial decision can be taken on the viability of production, and a planning decision on the merits of such development, if ever proposed. The Secretary of State’s conclusion in paragraph 37 did not anticipate those future decisions. Rather, it acknowledged that such decisions would only be possible if the present proposals for exploration went ahead.

82. The conclusion in paragraph 47 of the decision letter, that “no weight” should be given to the “national economic benefits” of possible future “commercial production” was not at odds with those earlier conclusions. It was, however, a different conclusion from the inspector’s in paragraph 12.757 of her report, which was not that “no weight” should be given to such benefits, but that they should have “very limited weight”. The difference here was not simply one of degree; it was a difference of principle. The Secretary of State meant to stress it. He said that he noted – not that he agreed with – the inspector’s conclusion as to weight, and he deliberately distanced himself from it. He plainly had in mind here the policy in paragraph 147 of the NPPF, which is amplified in the guidance in paragraph 27-120-20140306 of the PPG – in effect, that decision-makers must be careful to distinguish between “exploration” for hydrocarbons, “appraisal”, and subsequent commercial “production” if proposed. He also referred to “commercial production” of shale gas on the appeal sites and its potential benefits – carefully and correctly – in uncertain terms: “... benefits which could flow from commercial production ... at some point in the future” (my emphasis).
83. There is nothing legally wrong with any of that. The Secretary of State was, in my view, entitled to conclude as he did in those passages of his decision letter. As Mr Elvin and Ms Lieven submitted, there was nothing inconsistent in his conclusions, and nothing inconsistent between them and the approach taken in the EIA, which made no attempt to assess some future and still unknown proposal for shale gas production.
84. On all three of these issues, therefore, I think the second appeal must fail.

Issue (4) in the second appeal – the “precautionary principle”

85. Mr Willers submitted that the Secretary of State fell into error in his treatment of evidence on the possible effects of the proposed development on human health, and in assuming that the relevant regulatory regime would operate as it should; that there was “a real doubt” as to the health effects of shale gas production, which the Secretary of State failed to heed, and that these errors amounted to a failure to apply the “precautionary principle”.
86. I am unable to accept those submissions. They were rejected by Dove J., who concluded that “the approach taken by the Inspector to the relationship between the decision-taking process and the planning regime and other regulatory regimes in paragraphs 12.590-12.595 [was] entirely orthodox and unimpeachable” (paragraph 137 of the judgment), and found himself “wholly unpersuaded that it [was] arguable that, taking account of the precautionary principle, it was irrational for the Inspector to recommend approval, and ... [the Secretary of State] to accept that recommendation” (paragraph 138). I agree.
87. The argument here, essentially, is that the Secretary of State could not reasonably reach the conclusions he did on the possible health effects of the development – that his conclusions were irrational. Such a contention is never easy to sustain in a challenge to a planning decision. It is especially difficult when – as in this case – it goes to the decision-maker’s exercise of planning judgment. Where a planning decision-maker accords appropriate respect to the position of a statutory environmental regulator, whose own decision-making, within its own statutory remit, is guided by expert scientific opinion, it will, I think, be rare for the court to interfere (see the judgment of Beatson L.J. in *R. (on the application of Mott) v Environment Agency* [2016] EWCA Civ 564, at paragraphs 67 to 82, and the judgment of

Carnwath L.J., as he then was, in *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government* [2012] EWCA Civ 379, at paragraph 34).

88. The inspector devoted a lengthy passage of her report – in paragraphs 12.636 to 12.662 – to the issue of “Public Health and Public Concern”. She concluded in paragraph 12.655 that “[as] regards the hazards associated with potential exposure to air and water pollutants, [Cuadrilla] point out that such matters would be strictly controlled by [the Environment Agency] through the permitting system”, and that “[this] would ensure that no levels which could have an impact on human health would be reached”. She noted that the Annex to the written ministerial statement “provides support for that position”. In the light of paragraph 122 of the NPPF, and the court’s decision in *R. (on the application of Frack Free Balcombe Residents Association) v West Sussex County Council* [2014] EWHC 4108 (Admin), she was “content that it could be assumed that the regulatory system would operate effectively to control such emissions”, and that “[there] would be no health impacts resulting from these matters”. In paragraph 12.656 she said:

“12.656 ... [Dr David McCoy, an expert medical witness called at the inquiry on behalf of Friends of the Earth] identified noise and other nuisances as being the most likely causes of negative direct impacts on human health. I have given consideration to noise, visual amenity, and other potential impacts upon health and wellbeing elsewhere in this report. I do not believe that there will be additional negative health and wellbeing impacts on nearby communities associated with the matters raised by Dr McCoy. ...”.

In paragraph 12.658 she said that the evidence of interested parties did “not lead [her] to find that the regulatory regime could not be relied upon to operate effectively in these cases”. In paragraph 12.659 she said Cuadrilla had accepted that “public concern is capable of being a material planning consideration”, citing *West Midlands Probation Committee v Secretary of State for the Environment and Walsall Metropolitan Council* (1998) 76 P. & C.R. 589. Here, however, “the processes would be regulated and all pathways that could potentially impact upon human health would be monitored and appropriately controlled”. She therefore agreed with Cuadrilla that “little weight should be given to these concerns”. She did “not consider the expressed fear and anxiety can be regarded as being reasonably engendered or a justifiable emotional response to the projects in the light of the level of monitoring and controls that would be imposed upon the proposed activities”. In paragraph 12.661 she concluded that “[the] health impacts associated with these exploratory works appeals should be distinguished from those which might be associated with production at scale”, and that “[the] available evidence does not support the view that there would be profound socio-economic impacts or the climate change impacts on health envisaged by Dr McCoy associated with these exploratory works”. In paragraph 12.662 she said:

“12.662 I am satisfied that [Cuadrilla] have demonstrated, by the provision of appropriate information, that all potential impacts on health and wellbeing associated with the projects would be reduced to an acceptable level. The proposed development would be in accordance with [Policy DM2 of the minerals local plan, Policy CS5 and Policy CS9 of the minerals core strategy] and relevant national policy.”

Those conclusions were repeated in her “Overall Conclusions”, in paragraphs 12.805 to 12.808 of her report.

89. The policy in paragraph 122 of the NPPF, to which the inspector referred in paragraph 12.655 of her report, states:

“122. ... [Local] planning authorities should focus on whether the development itself is an acceptable use of the land, and the impact of the use, rather than the control of processes or emissions themselves where these are subject to approval under pollution control regimes. Local planning authorities should assume that these regimes will operate effectively. ...”.

The guidance in paragraph 27-012-20140306 of the PPG is to the same effect.

90. In paragraph 34 of his decision letter, under the heading “Public health and Public concern”, the Secretary of State said:

“34. The Secretary of State has considered carefully the evidence and the representations that were put forward in respect of public health and public concern (IR12.636-12.662). He agrees with the Inspector for the reasons given at IR12.655 and IR12.658 that it could be assumed that the regulatory regime system would operate effectively to control emissions and agrees that there would be no health impacts arising from potential exposure to air and water pollutants. He has considered the potential health impacts of public concern. He agrees with the Inspector at IR12.659 that the processes would be regulated and all pathways that could potentially impact upon human health would be monitored and appropriately controlled, and therefore considers these concerns carry little weight in the planning balance. He agrees with the Inspector at IR12.661 that the available evidence does not support the view that there would be profound socio-economic impacts or climate change impacts on health associated with these exploratory works. He notes that there is no outstanding objection raised by Public Health England to the proposed development on public health impact grounds (IR12.644). Overall he agrees with the Inspector that [Cuadrilla] have demonstrated by the provision of appropriate information that all potential impacts on health and wellbeing associated with the projects would be reduced to an acceptable level, and further agrees that the proposed development would be in accordance with [Policy DM2 of the minerals local plan, Policy CS5 and Policy CS9 of the minerals core strategy] and relevant national policy (IR12.662).”

91. In attacking those conclusions, Mr Willers pointed to the evidence of Dr McCoy and various material that was before the inspector relating to health impacts, including a report written by Dr McCoy and Dr Patrick Saunders, entitled “Health & Fracking – The impacts & opportunity costs”, published by Medact in 2015, a subsequent report written by Dr McCoy and Dr Alice Munro, entitled “Shale Gas Production in England – An Updated Public Health Assessment”, published by Medact in 2016, and a document published in October 2015 by the Concerned Health Professionals of New York, entitled “Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking (Unconventional Gas and Oil Extraction)”. That last document adopted the opinion of the New York State Health Commissioner that “[the] overall weight of the evidence from the cumulative body of information contained in [the] Public Health Review demonstrates that there are significant uncertainties about the kinds of adverse health outcomes that may be associated with [high volume hydraulic fracturing], the likelihood of the occurrence of adverse health outcomes, and the effectiveness of some of the mitigation measures in

reducing or preventing environmental impacts which could adversely affect public health” (p.2).

92. It is not the court’s task to review Dr McCoy’s evidence or the content of the documents relating to human health relied on by objectors to the proposed development, or the evidence given by Mr Smith in his rebuttal proof of evidence. The question for the court is whether, as a matter of planning judgment, the inspector could reasonably reach the conclusions she did in the light of the evidence before her. In my view she undoubtedly could, not least because Dr McCoy himself expressed his conclusions in appropriately measured terms. In paragraph 7.4 of his proof of evidence he said that “[from] the specific perspective of only shale gas exploration in two sites, my view is that while both projects *will* produce some health and environmental hazards, any negative direct impacts on human health will be concentrated in people living in the immediate surroundings of the two proposed sites and be most likely caused by the effects of noise and other nuisances”; and that “[depending] on the extent to which noise and other nuisances are effectively mitigated or tolerated, the level of negative impact may range from being negligible to being significant”. As for “other hazards (notably water and air borne pollutants)”, he said that “a negligible to low risk is due to the specific combination of the temporary and limited nature of shale gas exploration; and assumes that measures will be effectively applied to mitigate risk and harm”.
93. Mr Willers did not point to any evidence before the inspector to negate the principle expressed in paragraph 122 of the NPPF, that “[local] planning authorities should assume that [pollution control] regimes will operate effectively”. That principle in national planning policy is not easy to reconcile with an argument that the Secretary of State has acted irrationally in making a planning decision on the assumption that other regulatory regimes, including those concerned with public health, will operate as they should. But even if the NPPF had not said so, that assumption would surely be a reasonable one for a planning decision-maker, unless there was clear evidence to cast doubt upon it. There was no such evidence here. Similar conclusions were reached by Gilbert J. in *Frack Free Balcombe* (at paragraphs 100 to 102) and Patterson J. in *R. (on the application of An Taisce (the National Trust for Ireland)) v Secretary of State for Energy and Climate Change* [2013] EWHC 4161 (Admin) (at paragraphs 177 to 193), in an analysis endorsed by the Court of Appeal ([2014] EWCA Civ 1111: see Sullivan L.J.’s judgment at paragraphs 46 to 51). As Mr Elvin and Ms Lieven submitted, the opposite conclusion is not supported by the decision of the Court of Justice of the European Union in *Afton Chemical Ltd. v Secretary of State for Transport* (Case C-343/09) [2011] 1 C.M.L.R. 16 – because in the United Kingdom a relevant regulatory regime, derived from the law of the European Union, already existed. In the circumstances, there was no “gap” in the relevant environmental controls. Nor is it possible for Mr Willers to argue, in effect, that statutory regulatory authorities with responsibilities relevant to human health were themselves unreasonable in failing to object to the proposals. There was, in fact, no objection from those authorities. And it was not for the inspector and the Secretary of State, in performing their responsibilities under the statutory planning code, to duplicate controls for which statutory responsibility lay elsewhere. On the evidence before them, they were able to conclude as they did: that there would be no adverse effects on health justifying the refusal of planning permission. Legally, that was an impeccable conclusion.
94. I therefore reject Mr Willers’ argument that the conclusions of the inspector and the Secretary of State on health impacts are at odds with the “precautionary approach” or the

“precautionary principle”. The existence of “uncertainty in [relevant] scientific knowledge” – as Mr Willers put it – does not render unlawful the approach adopted by the inspector and the Secretary of State. Both were satisfied that the relevant regulatory controls would operate effectively to prevent harm to the environment and to human health arising from the proposed development, where such harm lay beyond the reach of the statutory planning regime. Not only was this conclusion properly open to them on the evidence; it was also entirely consistent with the “precautionary approach”. For the purposes of a planning decision, it was a perfectly rational conclusion. And it was not undermined by the existence of scientific doubt or dispute. In my view the judge was right to reject the argument put to him on this ground.

95. This analysis is not disturbed by observations on the potential effects of fracking in the “Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes on his mission to the United Kingdom ...” to the United Nations Human Rights Council for its meeting between 11 and 29 September 2017, first published on 5 September 2017 (see in particular paragraphs 32 to 44). That document could not have been taken into account by the Secretary of State, because it came into existence only after his decision. But in any event it does not undermine any of the conclusions he reached on “Public Health and Public concern” for the purposes of making his decision on this particular project of shale gas exploration, on the evidence as it was before him. The observations made by the Special Rapporteur, whilst they refer to the Secretary of State’s decisions in the present case, do not suggest that the Secretary of State failed to address concerns relating to human health, or environmental effects, with sufficient thoroughness and care, or that the “precautionary approach” or “precautionary principle” was not applied (see, in particular, paragraphs 35, 40 and 42 of the report).
96. I should add, finally, that the conclusions to which I have come on this issue, and on the previous three issues where they impinge on EIA, are not, in my view, inconsistent in any way with the analysis in the recent decision of the Court of Appeal in Northern Ireland in *An Application by Friends of the Earth Ltd. for Judicial Review* [2017] NICA 41. That case concerned the extraction of sand by dredging from the bed of Lough Neagh, an activity that had been proceeding for many years without planning permission, whose environmental effects had been acknowledged by the Department of the Environment as likely to be significant. Further assessment under the EIA Directive, and under Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, was required and was yet to be carried out. What the likely significant effects would actually be was still unknown at the time of the minister’s decision not to issue a stop notice (see paragraphs 2 to 13 of the judgment of the court, delivered by Weatherup L.J.). It was in this specific context that Weatherup L.J. observed that “[the] proper approach is to proceed on the basis that there is an absence of evidence that the operations are not having an unacceptable impact on the environment” (paragraph 34), that the minister, in making his decision, had failed to put into the balance “the absence of evidence that there is no harm”, and that, in the circumstances, this was “the negation of the precautionary principle” (paragraph 37). The facts and circumstances in this case are materially different. Here, as I have said, no identified likely significant effect on the environment, or specifically on human health, was ignored or went unassessed before the Secretary of State made his decisions. There was, in the circumstances here, no breach of the “precautionary principle”.

A reference for a preliminary ruling?

97. I see no justification for a reference to the Court of Justice of the European Union in this case. The contentious matters are “acte clair”, and there is no scope for reasonable doubt as to the answers to be given (see the judgment of the court in *CILFIT v Ministry of Health* (Case C-283/81) [1982] E.C.R. 3415, at paragraph 16).

Conclusion

98. For the reasons I have given, I would dismiss both appeals.

Lord Justice Henderson

99. I agree.

Lord Justice Simon

100. I also agree.

The Queen on the Application of Blewett v Derbyshire County Council



Positive/Neutral Judicial Consideration

Court

Queen's Bench Division (Administrative Court)

Judgment Date

7 November 2003

CO/1902/2002

High Court of Justice Queen's Bench Division The Administrative Court

Neutral Citation Number: [2003] EWHC 2775 (Admin), 2003 WL 22656473

Before: Mr Justice Sullivan

Friday 7th November, 2003

Representation

Mr D Wolfe (Mr M Purchase for judgment) (instructed by Public Interest Lawyers) appeared on behalf of the Claimant.
Mr A Evans (instructed by Derbyshire County Council) appeared on behalf of the Defendant.
Mr J Barrett appeared on behalf of Derbyshire Waste Limited as Interested Party.

JUDGMENT

MR JUSTICE SULLIVAN:

1..

Introduction

2.. In this application for judicial review the claimant seeks a quashing order in respect of a grant of planning permission dated 23rd December 2002 by the defendant to the interested party for “land reclamation by waste disposal with restoration to agricultural, woodland, grassland and nature conservation uses at Smith's void, Former Glapwell Colliery, Palterton Lane, Sutton Scarsdale”.

Factual background

3.. Glapwell Colliery closed in the mid-1970s leaving two spoil tips. Planning permission was granted for a reclamation scheme which involved tip washing, opencast mining of shallow seams under the spoil tips and the replacement of the opencast mine spoil and washed deep mine spoil into a landscaped profile. Smith's void was to be reprofiled as part of these operations but the contractor employed to carry out the coal recovery scheme went into receivership, leaving the scheme incomplete. Voids had been created within the reprofiled spoil tips as part of the reclamation works to facilitate landfills.

4.. Glapwell 1 was the first of the voids to be filled. Over a five year period between 1983 and 1988 it accommodated some 750,000 cubic metres of waste. Planning permission was granted in 1984 for the filling of two further voids, Glapwell 2 and 3. Waste disposal in Glapwell 2 commenced in 1988, and finished in November 2002 after planning permission had been granted in 1995 for additional tipping. No tipping took place in Glapwell 3 (Smith's void) pursuant to the 1984 permission, but that planning permission remains valid until December 2003 (operations were limited to a period of 15 years from the start of tipping). The 1984 planning permission envisaged that Glapwell 3 would have a capacity of about 1 million cubic metres. The

present proposal involves tipping around 850,000 cubic metres of domestic, industrial, commercial and inert waste over a period of four years, with the overall operational programme, including restoration to agriculture et cetera, taking six years.

5.. The application site covers about nine hectares and is located within one kilometre of the villages of Glapwell, Palterton, Bramley Vale and Doe Lea. The claimant lives in Bramley Vale. In his witness statement he states that the nearest site boundary of Glapwell 3 is about 800 metres from his home, which is about 200 metres from the nearest site boundary of the existing tipped voids, Glapwell 1 and 2.

6.. The claimant is registered disabled and suffers from chronic bronchitis and also from asthma and angina. He contends that these conditions have been exacerbated by dust and smells from the landfilling operations on Glapwell 1 and 2. He also complains of noise from the landfilling operations, that some of his pet pigeons have been killed by rats living in the landfills, and that he is plagued by the noise and droppings of the many seagulls who are attracted to the landfills. The claimant has actively opposed the grant of planning permission for Glapwell 3. He made representations to the defendant both personally and in his capacity as a member of the "Stop the Landfill Group".

7.. The defendant County Council is both the waste planning authority, and thus responsible for granting planning permission for landfilling operations, and the waste disposal authority for its area. Derbyshire Waste Limited (the interested party) was set up by the County Council, pursuant to arrangements made under [section 30 of the Environment Protection Act 1990](#), to dispose of Derbyshire's waste. The company remains 20 per cent owned by the County Council and disposes of the County's waste under a long term contract with the County Council.

8.. The development proposed in the application for planning permission was a "Schedule 2" development as defined by the [Town and Country Planning \(Environmental Impact Assessment\) \(England and Wales\) Regulations 1999](#) ("the Regulations"). An environmental statement was required if the development was likely to have significant effects on the environment by virtue of factors such as its nature, size or location. The application was accompanied by an environmental statement which was submitted to the County Council on 8th February 2001.

9.. The defendant's Regulatory Planning and Control Committee first considered the application on 11th March 2002. The defendant's Director of Environmental Services advised members as to the merits of the application in a 55-page report ("the Report"). He recommended that planning permission should be granted, subject to no less than 53 conditions.

10.. On the morning of the meeting the Secretary of State issued an Article 14 direction preventing the defendant from determining the application. Members resolved that had they been in a position to determine the application they would have granted planning permission, as recommended in the Report, subject to a minor amendment to one of the recommended conditions.

11.. Application for permission to apply for judicial review of the Committee's resolution was lodged on 22nd April on a precautionary basis, since at that time it was unclear whether the three month period prescribed by [CPR Part 54.5\(1\)\(b\)](#) ran from the date of the resolution to grant planning permission or from the date of the permission itself. I adjourned consideration of the application pending the outcome of the Secretary of State's Article 14 direction. In the event, the Secretary of State decided not to call in the application, but the judicial review challenge had by then been overtaken by the decision of the [House of Lords in R \(Burkett\) v Hammersmith & Fulham London Borough Council \[2002\] 1 WLR 1593](#). Although the challenge to the resolution to grant planning permission was premature in the light of that decision, the application for permission to apply for judicial review was adjourned to enable the claimant to challenge the grant of planning permission in due course, if so advised. On 4th November 2002 the Committee reconsidered the application for planning permission. In addition to the Report, members were provided with a Joint Report of the County Secretary and Director of Environmental Services. The Joint Report responded to the contentions which were being advanced in the judicial review proceedings. The officers recommended that planning permission should be granted. Members resolved to grant planning permission and permission was granted on 23rd December 2002.

12.. Having considered the amended claim form, Collins J granted permission to apply for judicial review on 29th April 2003.

Submissions

13.. On behalf of the claimant, Dr Wolfe submitted that the decision to grant planning permission was unlawful on three grounds:

(1) The environmental statement did not include an assessment of the potential impact of the use of Glapwell 3 for landfill on groundwater and on human health and instead unlawfully left those matters to be assessed after planning permission had been granted. So far as groundwater is concerned, the defendant had impermissibly approached the issue by assuming that contemplated “complex” mitigation measures would be successful (“Environmental Statement”).

(2) The defendant failed to give effect to its obligations under [Schedule 4 to the Waste Management Licensing Regulations 1994](#) (“the 1994 Regulations”) by failing to keep the objectives of avoiding, or at least minimising, nuisance from noise and smell, in mind (“Relevant Objectives”).

(3) The defendant failed to comply with its obligations under the Government's Waste Strategy 2000 to carry out an assessment in order to determine whether the proposed landfill was the Best Practicable Environmental Option (BPEO) for the waste stream(s) in question (“BPEO”).

14.. In his submissions before me Dr Wolfe placed ground (3) in the forefront of the claimant's case.

Analysis and conclusions

15.. I find it convenient to begin with ground (2), I will then consider ground (1) and finally ground (3).

Ground (2) (Relevant Objectives)

16.. [Schedule 4](#) to the 1994 Regulations implements certain provisions of Council Directive 75/442/EEC (“the Waste Framework Directive”). Article 4 of the Directive provides:

“Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment and in particular—

...

without causing a nuisance through noise or odours ...”

[Paragraph 2\(1\) of Schedule 4](#) states that:

“... the competent authority shall discharge their specified functions insofar as they relate to the recovery or disposal of waste with the relevant objectives.”

The wording of [paragraph 2\(1\)](#) is, to say the least, inelegant. It appears that a word or words may have been omitted in the process of transposing the requirements of the Directive.

17.. In any event, the defendant is a competent authority and when it granted planning permission it was discharging a specific function: see [paragraphs 1 and 3 and Table 5 in Schedule 4](#) .

18.. [Paragraph 4 in Schedule 4](#) sets out the relevant objectives in relation to the disposal or recovery of waste. They include:

“ensuring that waste is ... disposed of without endangering human health and without using processes or methods which could harm the environment and in particular without ...

(ii) causing nuisance through noise or odours.”

19.. The nature of the obligation imposed by [paragraphs 2 and 4 of Schedule 4](#) was considered by the *Court of Appeal in R (Thornby Farms Ltd) v Daventry District Council ; R (Murray) v Derbyshire County Council [2002] QB 503 [2002] EWCA 31* . Having reviewed the authorities, Pill LJ, with whom the other members of the court agreed, concluded in paragraph 53 of his judgment:

“An objective in my judgment is something different from a material consideration. I agree with Richards J that it is an end at which to aim, a goal. The general use of the word appears to be a modern one. In the 1950 edition of the *Concise Oxford Dictionary* the meaning now adopted is given only a military use: ‘towards which the advance of troops is directed’. A material consideration is a factor to be taken into account when making a decision, and the objective to be attained will be such a consideration, but it is more than that. An objective which is obligatory must always be kept in mind when making a decision even while the decision-maker has regard to other material considerations. Some decisions involve more progress towards achieving the objective than others. On occasions, the giving of weight to other considerations will mean that little or no progress is made. I accept that there could be decisions affecting waste disposal in which the weight given to other considerations may produce a result which involves so plain and flagrant a disregard for the objective that there is a breach of obligation. However, provided the objective is kept in mind, decisions in which the decisive consideration has not been the contribution they make to the achievement of the objective may still be lawful. I do not in any event favour an attempt to create an hierarchy of material considerations whereby the law would require decision-makers to give different weight to different considerations.”

20.. Thus, the question is whether the Committee kept the objective, of avoiding causing nuisance through noise or odours, in mind when deciding to grant planning permission. It is common ground that, in the absence of any evidence to the contrary, members approached these issues on the basis set out in the Report and Joint Report.

21.. The Report said this under “Noise”:

“Existing ambient noise levels have been measured at four sensitive noise locations around the proposed site boundary and a detailed analysis of the potential impacts has been submitted with the application. It shows the predicted noise impact to be within MPG 11 criterion at all properties. In the event of a grant of planning permission the Environmental Health Officer agrees that it would be appropriate to condition noise levels as above and to require ongoing monitoring.”

22.. Under the heading “Odour” the Report said this:

“There are two principal sources of odour from landfill sites; freshly deposited waste and landfill gas (LFG). Like dust, the generation and dispersal of odours is dependent on the wind speed, temperature and precipitation. The applicant is proposing to adopt a number of good working practices that can substantially reduce the generation and disposal of odour. These are:

- minimising the extent of the operating area;
- the daily application of cover materials, such as inert soils;
- progressive restoration;
- any waste previously identified with an odour problem should be deposited directly in pre-prepared trenches excavated into dry waste and immediately covered.

In the long-term, the applicant proposes that upon cessation of landfill operations, continued odour mitigation would be provided by the engineered containment liner and cap preventing the escape of odourous gases to the atmosphere and the active abstraction and burning/flaring of landfill gas.

Some objectors have raised odour as an issue and I acknowledge that some individuals may be more sensitive to smells than others. To minimise future odour impact I recommend that a detailed scheme for the control of odour should be submitted for approval if planning permission is granted and that the following are incorporated as agreed by the Environmental Health Officer:

- implementation of a monitoring scheme;
- results of smell monitoring to be submitted to the Council together with details of any remedial action taken and any complaints received by the operator about smell.

I am satisfied that, subject to rigorous adherence to the above practices and conditions that could be imposed as part of a planning permission, long term nuisance impacts associated with odour should not arise.”

23.. The Joint Report responded to the contention in the application for permission to apply for judicial review that the defendant had failed to give effect to the relevant Waste Framework Objectives in these terms:

“This ground of the challenge relates to the objectives under the ‘ Waste Framework Directive ’ relating to human health and harm to the environment. The claimant refers to an obligation on the part of the County Council to have had in mind the objective of avoiding impacts such as noise and dust, as explained by the *Court of Appeal in Thornby Farms v Daventry District Council ; Murray v Derbyshire County Council [2002] EWCA Civ 31* by refusing permission rather than just reducing them to below a threshold.

Your reporting officers consider that the report of 11 March does demonstrate that the Council did keep the relevant objectives in mind.”

24.. The officers recommended conditions in relation to noise and odour control which were included in the planning permission, as follows:

- “18) All plant and machinery shall be silenced at all times in accordance with the manufacturers' recommendations.
- 19) The noise levels arising from the developments, with the exception of temporary operations, shall not exceed 55dB(A)Leq (1hr) at any noise sensitive property.
- 20) Noise levels arising from temporary operations shall be minimised as far as is practicable, shall not exceed 70dB(A)Leq (1hr) measured at any noise sensitive property and shall not continue for more than eight weeks in any 12 month period. Any bund or mound constructed under this exemption shall be in accordance with a scheme that shall have received the prior approval of the Waste Planning Authority. The scheme shall provide for the minimum impact on the landscape and upon nearby residential property. The commencement of all temporary operations carried out in accordance with this condition shall be notified to the Waste Planning Authority before such works commence.
- 21) No development authorised by this permission shall take place until a scheme for noise monitoring at the site has been submitted to and approved by the Waste Planning Authority. The noise levels from the site shall be monitored in accordance with the approved scheme.”

25.. “Olfactory assessment” was dealt with in condition 22:

“22) A scheme for the monitoring of smells generated by the site shall be submitted to the Waste Planning Authority three months before the first deposit of waste. Monitoring and control of smells shall be undertaken in accordance with an approved scheme or as subsequently modified in writing by the Waste Planning Authority.
The scheme shall include: ...

- (vi) what would trigger remedial action;
- (vii) details of remedial action that would be taken ...”

26.. In my judgment it is plain from these references that the Committee, when granting planning permission, did keep the relevant objectives in mind. The objective is not to avoid noise or odours altogether. Such an objective would be wholly unrealistic in the context of a waste disposal operation. The objective is to avoid “causing nuisance through noise or odours”. Thus, an approach which seeks to reduce the impact of noise and smells so that they will not cause a nuisance is in accordance with the objectives. Dr Wolfe drew a distinction between an approach which merely sought to reduce noise below a threshold, and an approach which sought to minimise the impact of noise or smell. Provided the threshold is set with the objective of avoiding the creation of a noise or smell nuisance, I can see no objection to the former approach. That is the objective of the noise limits recommended in MPG 11, which was referred to in the Report. In effect, conditions 19 and 20 impose the noise limits recommended in MPG 11. Dr Wolfe points to the fact that MPG 11 explains that the recommended limits are not intended “to become the norm at which operations work. Operators are asked to take any reasonable steps they can to achieve quieter working wherever this is desirable and technically feasible having regard to the principle of BATNEEK [(Best Available Techniques

Not Entailing Excessive Cost)]” (paragraph 31). He contrasts condition 20, which follows this advice — “noise levels from temporary operations shall be minimised as far as practicable” — with condition 19 which contains no such requirement, merely an upper limit of 55dB(A)Leq (1hr). The difference between the two conditions is readily explained by the fact that noise levels at the upper limit set by condition 20 would be perceived as very noisy indeed. The purpose of the high upper limit is to enable such operations as the construction of baffle mounds around the perimeter of a landfill site. Temporary inconvenience is the price residents will have to pay for long term benefits (paragraph 61 of MPG 11). It is reasonable to expect that an operator will try to minimise such high levels of noise as far as practicable.

27.. As explained in paragraph 34 of MPG 11, the lower limit in condition 19 “is roughly equivalent to a noise made by a person talking normally, and is generally thought to be a tolerable noise level; above this level, continuous noise could well cause annoyance”. Limiting the noise of operations to such a threshold is wholly in accordance with the objective of not causing noise nuisance. Moreover, even if condition 19 was deficient in this respect, because it should have incorporated a requirement to minimise the noise levels arising from operations as far as practicable, the deficiency would not mean that members had not kept the objective in mind when deciding to grant planning permission. The fact that a decision taker has not imposed the most effective condition that might (with the benefit of hindsight) have been devised does not mean that he failed to keep the relevant objective in mind.

28.. The original claim form in these proceedings, to which the Joint Report responded, criticised the Report's treatment of noise and odour issues, but did not suggest any amendment to the proposed conditions. Nor is any such criticism made in the replacement claim form challenging the grant of planning permission on 23rd December 2002.

29.. So far as odour control is concerned, it is difficult to see what more could reasonably have been done by the defendant. It was submitted that the scheme required by condition 22 merely provided for monitoring, but that is clearly wrong. The scheme must cover not merely the monitoring but also the “control of smells”, and “shall include ... what would trigger remedial action” and “details of remedial action that would be taken”.

30.. In his skeleton argument Dr Wolfe referred to a “proof of the pudding test”. Applying such a test, the proof of the pudding under ground (2) is that the claimant has not cast any doubt on the conclusions in relation to noise and smell in the Report, and has not suggested any better conditions, save for the addition of a general requirement to reduce noise below the threshold set in condition 19. By no stretch of the imagination could such an omission indicate that there had been a failure to keep the relevant objectives in mind. Accordingly, I reject ground (2) of the challenge.

Ground (1) (Environmental statement)

31.. As mentioned above, the application for planning permission was accompanied by an environmental statement. The environmental statement was a lengthy document comprising 15 chapters and 7 technical appendices. It is not suggested that the environmental statement failed to mention the potential impact of the proposed development on groundwater and human health, rather it is submitted that the manner in which these issues were dealt with was inadequate. In summary, the assessment of likely impact and the description of the necessary mitigation measures were left over for subsequent determination.

32.. Where there is a document purporting to be an environmental statement, the starting point must be that it is for the local planning authority to decide whether the information contained in the document is sufficient to meet the definition of an environmental statement in [Regulation 2](#) of the Regulations:

“‘environmental statement’ means a statement—

- (a) that includes such of the information referred to in Part I of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but
- (b) that includes at least the information referred to in Part II of Schedule 4.”

33.. The local planning authority's decision is, of course, subject to review on normal Wednesbury principles: see [R v Cornwall County Council ex parte Hardy \[2001\] JPL 786](#), per Harrison J at paragraph 65, applying [R v Rochdale Metropolitan Borough Council ex parte Milne \[2001\] Env LR 416](#) at paragraph 106.

34.. Information cable of meeting the requirements of [Schedule 4](#) to the Regulations must be provided: see *Hardy* (ibid) and *R v Rochdale Metropolitan Borough Council ex parte Tew* [1999] 3 PLR 74 at 95G.

35.. [Part I of Schedule 4](#) requires the environmental statement to provide “a description of the likely significant effects on the environment ...” (paragraph 4) and “a description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment”. [Part II of Schedule 4](#) requires:

- “1. A description of the development comprising information on the site, design and size of the development.
2. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.
3. The data required to identify and assess the main effects which the development is likely to have on the environment.
4. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for his choice, taking into account the environmental effects.
5. A non-technical summary of the information provided under paragraphs 1 to 4 of this Part.”

36.. Dr Wolfe referred to the speech of Lord Hoffmann in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 at pages 615 to 616, which, he submitted, “emphasised the absolute nature of the requirement to produce an environmental statement in the correct form and to comply with the procedural requirements”. Lord Hoffmann's speech must be considered in its context. *Berkeley* was a case where there had been no environmental statement. Even in such a case the House of Lords was prepared to accept that “an EIA by any other name will do as well. But it must in substance be an EIA” (see page 617). If an application for planning permission has been accompanied by a document purporting to be an environmental statement, can it be said that that document falls outside the definition of environmental statement in [Regulation 2](#) (so that the local planning authority is unable to grant planning permission: see [regulation 3\(2\)](#)) because it has failed to describe a likely significant effect on the environment subsequently identified by the local planning authority, or a particular mitigation measure thought necessary by the local planning authority? The omission might have been due to an oversight on the part of those preparing the environmental statement, or to a deliberate decision because it was not considered by the author of the environmental statement that a particular environmental effect was likely, or, if likely, that it was likely to be significant, or because the author of the environmental statement was unfamiliar with the particular mitigation technique, or because he considered that mitigation was unnecessary.

37.. In my judgment, the fact that the local planning authority's consideration of the application leads it to conclude that there has been such an omission does not mean that the document is not capable of being regarded by the local planning authority as an environmental statement for the purposes of the Regulations.

38.. The Regulations envisage that the applicant for planning permission will produce the environmental statement. It follows that the document will contain the applicant's own assessment of the environmental impact of his proposal and the necessary mitigation measures. The Regulations recognise that the applicant's assessment of these issues may well be inaccurate, inadequate or incomplete. Hence the requirements in [Regulation 13](#) to submit copies of the environmental statement to the Secretary of State and to any body which the local planning authority is required to consult. Members of the public will be informed by site notice and by local advertisement of the existence of the environmental statement and able to obtain or inspect a copy: see [Regulation 17](#) of the Regulations and [Article 8 of the Town and Country Planning \(General Development Procedure\) Order 1995](#) .

39.. This process of publicity and public consultation gives those persons who consider that the environmental statement is inaccurate or inadequate or incomplete an opportunity to point out its deficiencies. Under [Regulation 3\(2\)](#) the local planning authority must, before granting planning permission, consider not merely the environmental statement, but “the environmental information”, which is defined by [Regulation 2](#) as “the environmental statement, including any further information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development”.

40.. In the light of the environmental information the local planning authority may conclude that the environmental statement has failed to identify a particular environmental impact, or has wrongly dismissed it as unlikely, or not significant. Or the local planning authority may be persuaded that the mitigation measures proposed by the applicant are inadequate or insufficiently detailed. That does not mean that the document described as an environmental statement falls outwith the definition of an environmental statement within the Regulations so as to deprive the authority of jurisdiction to grant planning permission. The local planning authority may conclude that planning permission should be refused on the merits because the environmental statement has inadequately addressed the environmental implications of the proposed development, but that is a different matter altogether. Once the requirements of [Schedule 4](#) are read in the context of the Regulations as a whole, it is plain that a local planning authority is not deprived of jurisdiction to grant planning permission merely because it concludes that an environmental statement is deficient in a number of respects.

41.. Ground 1 in these proceedings is an example of the unduly legalistic approach to the requirements of [Schedule 4](#) to the Regulations that has been adopted on behalf of claimants in a number of applications for judicial review seeking to prevent the implementation of development proposals. The Regulations should be interpreted as a whole and in a common-sense way. The requirement that “an EIA application” (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. As Lord Hoffmann said in *R v North Yorkshire County Council ex parte Brown [2000] 1 AC 397*, at page 404, the purpose is “to ensure that planning decisions which may affect the environment are made on the basis of full information”. In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the “full information” about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting “environmental information” provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations (*Tew* was an example of such a case), but they are likely to be few and far between.

42.. It would be of no advantage to anyone concerned with the development process — applicants, objectors or local authorities — if environmental statements were drafted on a purely “defensive basis”, mentioning every possible scrap of environmental information just in case someone might consider is significant at a later stage. Such documents would be a hindrance, not an aid to sound decision-making by the local planning authority, since they would obscure the principal issues with a welter of detail.

43.. Against this background, I turn to the manner in which this environmental statement dealt with the impact of the proposed development on groundwater and human health. Chapter 13 referred to human health in two paragraphs as follows:

“13.4.36. The potential health effects of landfill sites have been the subject of epidemiological studies, and the presentation of the findings of a recent study has caused some concern in respect of proposed new facilities. However, the evidence available does not support a causal link between the health effects studied and proximity to landfill sites.

13.4.37. The proposed landfill at Smiths Void would be operated to the highest environmental standards and the operation would be independently regulated by the Environment Agency. The management and regulation of the site would ensure that the potential risk to the site employees, local communities and the wider environment were minimised.”

44.. It is submitted on behalf of the claimant that the environmental statement did not provide any assessment of the potential health impacts arising out of the proposal. On the contrary, it is plain from paragraph 13.4.36 that the authors of the environmental statement considered that there were not likely to be any significant effects on human health. It was therefore unnecessary for them to describe mitigation measures in any detail. Those who disagreed with this assessment had an opportunity to put their views to the local planning authority in the consultation process. The Report summarised the responses of consultees. They included the North Derbyshire Health Authority, which raised no objection:

“A report subsequently amended to include congenital anomalies data has been produced on the impact of the proposal on the local population. It is held in the Environmental Services Department for Members' inspection and will be available at Committee. The covering response states:

“There are concerns in relation to the recent study from the Small Area Health Statistics Unit on health effects in people living adjacent to landfill sites. The results of this study, however, were not conclusive. Landfill sites could

potentially be harmful if toxic substances are released into the environment and ingested/absorbed (in toxic doses) by the local population. It is essential therefore that all landfill sites are engineered to a high standard with appropriate control and monitoring of any emissions (landfill gas/leachate).

If planning permission were granted, I would expect the applicants to undertake a health risk assessment as part of the Integrated Pollution and Prevention Control (IPPC) application process for a waste management licence. Any application would be scrutinised by our environmental toxicology advisors and us at this stage.

I do not feel there is sufficient evidence to object to landfill sites on health grounds. However, I would need to be satisfied by the proposed control measures detailed in a waste management licence application.”

The amended report indicates that “*from our routine data sets, there is no evidence that the local communities have suffered health effects from the existing landfill sites.*”

The Lancet has recently reported further findings from the Eurohazcon study relating to selected landfill sites in Europe.

Whilst this study relates to hazardous sites only and is therefore of marginal relevance in this case, I refer to it given the medial interest shown and renewed public concern about landfill sites.

The AHA has commended that the Study fails to demonstrate a statistically significant association between those living near a hazardous landfill site and chromosomal abnormalities and that further work is needed.

I address the question of the perception of risk associated with certain hazardous waste types and a method of providing some comfort to the local community in the Planning Considerations section of this report.”

45.. The Director dealt with “Health, Perception of Risk and the Living Environment Considerations” as follows:

“I accept that in this case fear regarding adverse health effects as expressed by objectors should not be viewed as baseless, since the possibility of risk to health cannot entirely be dismissed. Accordingly, it is appropriate to afford some weight to this genuinely held view. The Area Health Authority's (AHA) amended report and correspondence evaluates recent studies, takes account of specialist advice and examines rates of congenital anomalies in the electoral Wards adjacent to Glapwell compared to the North Derbyshire average. The results over a four year period from 1997 to 2000 illustrate no significant difference. The AHA's conclusions would not, in my view, support a rejection of the application on health related grounds.

I am also mindful of the fact that the ongoing ‘health’ debate has not led to health issues being accorded significance within national planning policy guidance relating to waste management facilities including landfill.

Notwithstanding the above, the AHA has pointed out that anxiety relating to operations at landfill sites can lead to a variety of health concerns. I would agree with its conclusion that this could largely be avoided if the local population have confidence in the site operator to maintain a clean and safe site. The early establishment of a Liaison Committee for the duration of the operations as agreed by the applicant can also be an effective way of alleviating concerns.

Additionally, I have raised with the applicant the possibility of a condition specifically restricting the deposit of hazardous waste as a means of providing assurance to the public. While I believe that there is general recognition of the meaning and character of municipal domestic waste, there is less public understanding of the terms commercial and industrial waste. There is also widespread concern that this is likely to involve toxic substances as evidenced by the objection notices displayed locally.

I have suggested a condition to the application the wording of which makes reference to the Hazardous Waste directive 91/689/EEC . As described in Article 6(c) of the Directive, only non-hazardous commercial and industrial waste would be acceptable at the site with the exception of stable, non-hazardous wastes that have for example been solidified or vitrified. I consider that a condition linking the range of waste coming to the site to the Landfill Directive's classification of waste

would be appropriate and would be warranted on planning grounds as a means of calming public fear. The applicant has agreed that such a condition would be acceptable to them.”

Condition 7 in the planning permission imposes a restriction on waste types as follows:

“In relation to commercial and industrial waste, the site shall be used for the landfill of only non-hazardous waste, except for stable, non-reactive hazardous wastes as described in article 6(c)(iii) and Annexe II of the Landfill Directive 1999/31/EC.”

46.. This was an eminently reasonable response to fears expressed by objectors which, while they did not raise any likely significant effect, nevertheless raised a possibility of risk to human health which “cannot entirely be dismissed”.

47.. Turning to the effect of the proposed development upon groundwater, the assessment of operational impacts and mitigation in chapter 12 of the environmental statement has to be considered against the background of the description of the proposals given in chapter 4. Under “Engineering”, paragraph 4.5 of the environmental statement said:

“4.5.1 On completion of the initial earthworks, the engineering of the landfill void would be carried out for Cell 1.

4.5.2 The formation below the lining system would be graded to falls of approximately 1 in 50, to ensure positive drainage. The proposed lining system, comprising a minimum of 1.0m of mineral liner, with a maximum permeability of 1×10^{-9} m/s, or equivalent, would then be installed. The installation would be the subject of a rigorous Construction Quality Assurance programme.

4.5.3 The clay would be excavated from the area of Cell 3, above the cell formation levels. During the landfilling of Cell 1, Cell 2 would be constructed, taking further clay from the area of Cell 3.

4.5.4 The construction of Cell 3 would comprise completion of the formation levels. The quantity of clay above the formation levels would be sufficient to construct the clay liner within the cell.

4.5.5 Each cell would be constructed independently, and would be separated from adjacent cells by internal bunds constructed to a similar standard to the basal lining.

4.5.6 The liner would be overlain by a comprehensive leachate collection system, comprising 300 mm of free draining material, within which would be situated a network of slotted pipes to collect leachate. The leachate would be directed via this system to leachate collection points situated at the low point of each cell.

4.5.7 Upon completion of landfilling in each cell, the waste would be capped. The capping system would include a stabilisation layer, overlain by a mineral liner or equivalent geosynthetic material to minimise rainfall infiltration and leachate generation within the waste mass.

4.5.8 Typical details of the proposed engineering systems are indicated on Figure 11; Typical Construction Details.”

48.. Figure 11 contained diagrams of a typical basal liner, typical capping liner, typical leachate collection point, and typical internal bund.

49.. Chapter 12 dealt with the effects of the proposed development under the heading of “Geology, Hydrogeology and Hydrology”.

50.. Under “Introduction” paragraphs 12.1 and 12.2 said:

“12.1.1 The landfilling of biodegradable wastes has the potential to cause environmental impact on the local water environment. The source of this potential impact is leachate produced through the percolation of rainwater through the waste mass. Leachate has the potential to pollute any adjacent water bodies it is able to reach.

12.1.2 In order to assess the potential impact, an examination of the geological, hydrogeological and hydrological conditions at the site has been undertaken.”

Against the background of that assessment, paragraph 12.3 described the Construction Impacts and Mitigation. They included:

“12.3.1 During the construction phase of the landfill, the principal potential impact would be the discharge of polluted surface water run-off to the local watercourses.

12.3.2 To mitigate the potential impact of polluted discharges, a system of perimeter cut-off ditches would be installed, to intercept polluted run-off and direct it to settlement facilities where suspended solids would be removed prior to discharge.

12.3.3 Such measures would be designed to ensure that surface water discharges complied with the requirements of a Consent to Discharge issued by the Environment Agency.”

Paragraph 12.4 described the Operational Impacts and Mitigation as follows:

“12.4.1 The potential impacts associated with the operation of the landfill would include those identified during the construction phase, and in addition potential impacts from the uncontrolled discharge of leachate from the site.

...

12.4.9 The uncontrolled discharge of landfill leachate has the potential to pollute any adjacent water it is able to reach. Given the position of the site in relation to surface watercourses, and the groundwater table, it is predicted that potential impacts would be low to medium.

12.4.10 To minimise the potential for such impacts, the following mitigation measures would be implemented:

- The installation of a full containment system, constructed within a rigorous Construction Quality Assurance regime, to prevent uncontrolled discharge of leachate.
- The provision of a comprehensive leachate collection system.
- Regular monitoring and removal of excess leachate

12.4.11 The design of the above measures would be finalised based upon the results of a quantitative Risk Assessment, in agreement with the Environment Agency.

12.4.12 With the implementation of the above measures, and good working practices, the operation of the site would be in accordance with Environment Agency policy, and the residual impact associated with the operation of the landfill would be low.”

51.. The Environment Agency was one of the consultees. It raised a number of matters in a letter dated 24th April 2001. The interested party sought to address the Environment Agency’s concerns in an addendum report dated July 2001. This gave further information in relation to the geological and hydrogeological setting of the proposal. The proposed development was described in paragraph 2.3:

“The site will be operated as a containment site with a liner equivalent to or better than a clay composite liner as required by the IPPC Regulations and Landfill Directive . The appropriateness of the lining system and the site design will be assessed as part of the assessment of emissions to groundwater ([Regulation 15 Risk Assessment](#)) as part of the PPC Permit application.

...

Leachate management systems at the site will result in the leachate levels being maintained at 1 m above the base of the site. This is approximately 1 m below the water levels within the made ground and consequently the site will be hydraulically contained with respect to the shallow groundwater.”

A conceptual design of the site was presented in a diagram.

52.. Chapter 4 described the historical contamination of the site and paragraph 4.2 described the remediation options available:

“The remediation options currently available which are considered suitable for the site include the interception of potentially contaminated groundwater adjacent to the development area and/or capping the area to reduce the infiltration and the production of contaminated groundwater.”

Paragraph 4.3 dealt with the effect of the development on remedial design, and concluded that:

“In summary by developing the site, the reduction in infiltration will improve the quality of the Stockley Brook by decreasing the impact from contaminated groundwater on the stream from that observed today and will not limit the application of future remediation operations.”

53.. The Addendum Report concluded in paragraph 5.0:

“Based on the conclusion that the contamination is disseminated throughout the colliery spoil the potential remediation options which could be implemented include the interception of groundwater and/or capping of the site to reduce the infiltration. By developing Smith's void as a landfill site, the groundwater quality would be improved by:

- Reducing the infiltration to the made ground and therefore the volume of contaminated groundwater;
- Decreasing the residence times of the groundwater within the made ground therefore potentially decreasing the contaminant loading.

In addition, the development would not impeded the interception of groundwater, should it be required at a later date.

The risks posed by the landfill development to the perched groundwater (and consequently surface water streams) and the groundwater in the Coal Measures will be assessed as part of the PPC application for the assessment of emissions to groundwater.”

54.. The Environment Agency responded to the Addendum Report in a letter dated 3rd July 2001. That said, in part:

“Generally speaking the report satisfies the majority of the matters raised.

The issues pertaining to managing existing contamination have been discussed but no final remediation strategy has been proposed.

The other outstanding matters that have not been addressed in this submission will need to be resolved through the IPPC authorisation application process.

The Agency has no objections, in principle, to the proposed development but recommends that if planning permission is granted the following planning conditions are imposed:

CONDITION: No development approved by this permission shall be commenced until:

- a) The application site has been subjected to a detailed desk study and site investigation, and remediation objectives have been determined through risk assessment, and approved in writing by the Local Planning Authority.
- b) Detailed proposals for the removal, containment or otherwise rendering harmless any contamination (the ‘Reclamation Method Statement’) have been submitted to and approved in writing by the Local Planning Authority.

REASON: To protect the environment and ensure that the remediated site is reclaimed to an appropriate standard.

...

CONDITION: There shall be no discharge of foul or contaminated drainage from the site into either groundwater or surface waters, whether direct or via soakaways.

REASON: To prevent pollution of the water environment.

CONDITION: No soakaway shall be constructed in contaminated ground.

REASON: To prevent pollution of groundwater.

INFORMATION

The waste disposal operations shall be subject to an IPPC permit under the Pollution Prevention and Control Regulations 1999 .”

55.. The Addendum Report and the Environment Agency's response were part of the environmental information considered in the Report. The claimant's solicitors had argued that the environmental statement was deficient in its treatment of the impact of the proposal on human health and hydrology. The Director commented in his report:

“I have received an ‘Addendum Report’ from the applicant dealing with ground water issues in response to a request from the Environment Agency. The Agency's observations upon it are referred to below. Additional ecological information to that contained in the Environmental Statement has also been supplied and, subject to conditions that could be required as part of a planning permission, the relevant statutory consultees are content with the development proposal. Further background noise assessment has also been submitted at the request of the District of Bolsover Environmental Health Officer. I am satisfied that, with the inclusion of the additional material referred to above, these issues have been thoroughly covered. My assessment of these issues is addressed with the Planning Considerations section of this report. The submission of additional information on these issues does not in any event detract from the adequacy of the Environmental Statement which I am satisfied meets relevant legal requirements.

The claimant's solicitors had complained:

“• The application does not deal adequately with ground water issues and this matter should be properly addressed as part of the planning process rather than being left to the Integrated Pollution Prevention Control Authorisation application.

Comment: The Environment Agency has confirmed that its Hydrology Section has examined the planning application and the Addendum Report requested by the Agency and has reiterated that it has no objections in principle to landfilling at this location. The Agency indicates that further detailed work will be required through the IPPC process to ensure that the requirements of the relevant legislation can be met. A ground water risk assessment will be required as part of this process, to address ground water protection issues in greater detail. Planning Policy Guidance (PPG) Note 23 gives advice to planning authorities on whether or not concerns about potential releases can be left for the pollution control authority or, in the case of wider impact of potential releases, may appropriately be considered unacceptable on planning grounds. PPG 23 also advises that planning authorities should work on the assumption that pollution control regimes will be properly applied and enforced. In this case I am satisfied that it would be appropriate for this issue to be addressed within any IPPC Authorisation application that would have to follow a grant of planning permission. Of course, planning permission would not pre-empt the Agency's proper consideration of an IPPC Authorisation application. If matters could not be resolved to the Agency's satisfaction then Authorisation would not be granted and the development could not proceed.”

56.. The claimant's concerns in relation to groundwater and human health were also addressed in the Joint Report. Under the heading “Groundwaters” the Joint Report said this:

“Chapter 12 of the Environmental Statement provides information relation to Geology, Hydrogeology and Hydrology. It identifies groundwater levels including those from ‘perched’ groundwater within the colliery spoil deposits at the site. It identifies the potential for impacts on local water resources. The proposed mitigation measures include a full containment system for the landfill cells.

Apart from the ES itself, the ‘Addendum Report’ that the applicant subsequently submitted to the Council gives further technical details in relation to, amongst other things, hydrogeology, groundwaters and mitigation measures. This report was not produced at the Council’s request, but was submitted following discussions between the applicant and the Environment Agency. The report made it quite clear that the leachate management system that was proposed would be designed to maintain leachate levels within the site below the groundwater levels in the colliery spoil. The proposals included a free draining groundwater drain and the hydraulic containment of the landfill by means of an impermeable liner system

The Council is always particularly mindful of the responses made by the Environment Agency (EA), which is a statutory consultee, on such matters. The Agency, after careful consideration of the geological and hydrogeological details, raised no objections to the application in principle and recommended a number of conditions to be included if planning permission was granted. The EA letter in response to this application confirmed that other outstanding matters which it had discussed with the application would be resolved through its Pollution Prevention and Control (PPC) authorisation application process. These matters would include a ‘groundwater risk assessment’. Your reporting officers understand this to be a reference to an assessment that would be carried out under the PPC process in order to ensure that the final detailed technical specifications for the liner system of the landfill cells would be adequate to fully contain the leachate as proposed in the planning application.

There is a specific allegation within this ground of the challenge that the ES did not provide any estimate of emissions to soil and water including, in particular, of leachate to groundwater, nor of the likely effect of the landfill on soil or groundwater of such emissions.

The ES did identify potential impacts of the proposed landfill on groundwaters. Measures are included in the proposals in order to ensure that any negative impacts are prevented from happening. Your officers have no reason to doubt that this will be achieved through the detailed PPC process referred to above. The ES’s estimate of the emissions to groundwater and soils is that there would not be any because the landfill cells would be fully contained.

The ES also identified potential benefits in reducing the impact on groundwaters of the site compared to that which would be expected to continue into the future if the site were to be left in its existing undeveloped state. The proposals include the continued monitoring of groundwater quality which is considered to be a sensible precautionary approach.

In our opinion the ES should not be regarded as deficient.”

The Report continued:

“[Regulation 19 of the Town and Country Planning \(Environmental Impact Assessment\) \(England and Wales\) Regulations 1999](#) requires a planning authority, if it considers that a submitted Environmental Statement should contain additional information in order to be an Environmental Statement, to so notify the applicant in writing ...

These circumstances did not apply in this case, the Council never has taken such a view on the ES and the submission of the Addendum Report was not in response to a notification by the Council. The Council nevertheless considered the contents of the Addendum Report once it was received, and duly forwarded it to consultees for their comments and it was placed on the planning register.”

57.. So far as conditions are concerned, the defendant accepted the Environment Agency’s suggestions. Under “Water Resources and Pollution Prevention” condition 29 provided:

“No part of the development shall be commenced until:

- (a) The application site has been subject to a detailed desk study and site investigation, and remediation objectives have been determined through risk assessment, and approved in writing by the Waste Planning Authority.
- (b) Detailed proposals for the removal, containment or otherwise rendering harmless of any contamination (the 'Reclamation Method Statement') have been submitted to and approved in writing by the Waste Planning Authority."

Condition 32 provided:

"There shall be no discharge of foul or contaminated drainage from the site into either ground water or surface waters, whether direct or via soakaways."

58.. It is against this background that the claimant submits that the assessment of the impact of the proposed development on groundwater was impermissibly left over to another decision maker (the Environment Agency) after the grant of planning permission, and that the environmental statement did not adequately describe the mitigation measures, because it left significant matters over for subsequent determination and proceeded on an assumption that remedial measures, whatever they might be, would work.

59.. In advancing these submissions Dr Wolfe relied on two decisions of the *Court of Appeal: Smith v Secretary of State for the Environment [2003] EWCA Civ 262* and *Gillespie v Secretary of State for the Environment [2003] EWCA Civ 400*. In *Smith*, Waller LJ distilled a number of principles from the authorities which he set out in paragraph 24 of his judgment. The first and second principles in paragraph 24 relate to the grant of outline planning permission. The planning permission in the present case, for engineering operations, is a detailed permission. The third and fourth principles are as follows:

"Third, the planning authority or the Inspector will have failed to comply with article 4(2) if they attempt to leave over questions which relate to the significance of the impact on the environment, and the effectiveness of any mitigation. This is so because the scheme of the regulations giving effect to the Directive is to allow the public to have an opportunity to debate the environmental issues, and because it is for those considering whether consent to the development should be given to consider the impact and mitigation after that opportunity has been given ...

Fourth, (and here it seems to me one reaches the most difficult area) it is certainly possible consistent with the above principles to leave the final details of for example a landscaping scheme to be clarified either in the context of a reserved matter where outline planning consent has been granted, or by virtue of a condition where full planning consent is being given as in the instant case."

Waller LJ continued in paragraph 33 of his judgment:

"In my view it is a further important principle that when consideration is being given to the impact on the environment in the context of a planning decision, it is permissible for the decision-maker to contemplate the likely decisions that others will take in relation to details where those others have the interests of the environment as one of their objectives. The decision-maker is not however entitled to leave the assessment of likely impact to a future occasion simply because he contemplates that the future decision-maker will act competently. Constraints must be placed on the Planning Permission within which future details can be worked out, and the decision-maker must form a view about the likely details and their impact on the environment."

60.. In *Gillespie* there was no environmental statement and Richards J quashed a planning permission granted by the Secretary of State on the basis that he had erred in concluding that no environmental statement was required. Part of the site was a former gas works, which was extensively contaminated. The Secretary of State had relied upon the imposition of a condition (condition (VI)) which required a detailed site investigation to be carried out. That investigation would have proposed a remediation scheme. Pill LJ rejected a submission that the Secretary of State, in deciding whether an environmental statement was required, was obliged to shut his eyes to the remediation scheme. In paragraph 37 he said this:

“The Secretary of State has to make a practical judgment as to whether the project would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location. The extent to which remedial measures are required to avoid significant effects on the environment, and the nature and complexity of such measures, will vary enormously but the Secretary of State is not as a matter of law required to ignore proposals for remedial measures included in the proposals before him when making his screening decision. In some cases the remedial measures will be modest in scope, or so plainly and easily achievable, that the Secretary of State can properly hold that the development project would not be likely to have significant effects on the environment even though, in the absence of the proposed remedial measures, it would be likely to have such effects. His decision is not in my judgment pre-determined either by the complexity of the project or by whether remedial measures are controversial though, in making the decision, the complexity of the project and of the proposed remedial measures may be important factors for consideration.”

He continued in paragraphs 40 and 41:

“40. In my judgment the Secretary of State erred in the test he has expressed in paragraph 19 of his final decision letter. I read the second part of paragraph 19 as including an assumption that Condition VI provides a complete answer to the question whether significant effects on the environment are likely. That is too narrow an approach. In the circumstances, it was necessary to consider the stage which the site investigation had reached (Condition VI requires a further site investigation in detail to be undertaken), the nature and extent of the scheme for remediation, including its uncertainties, the effects on the environment during the remediation and the likely final result. The condition is properly drafted but itself demonstrates the contingencies and uncertainties involved in the development proposal, as does the evidence of Mr Simmons already quoted.

41. When making the screening decision, these contingencies must be considered and it cannot be assumed that at each stage a favourable and satisfactory result will be achieved. There will be cases in which the uncertainties are such that, on the material available, a decision that a project is unlikely to have significant effects on the environment could not properly be reached. I am not concluding that the present case is necessarily one of these but only that the test applied was not the correct one. The error was in the assumption that the investigations and works contemplated in Condition VI could be treated, at the time of the screening decision, as having had a successful outcome.”

Laws LJ agreed, saying in paragraph 46:

“Where the Secretary of State is contemplating an application for planning permission for development which, but for remedial measures, may or will have significant environmental effects, I do not say that he must inevitably cause an EIA to be conducted. Prospective remedial measures may have been put before him whose nature, availability and effectiveness are already plainly established and plainly uncontroversial; though I should have thought there is little likelihood of such a state of affairs in relation to a development of any complexity. But if prospective remedial measures are not plainly established and not plainly uncontroversial, then as it seems to me the case calls for an EIA.”

Lady Justice Arden's judgment in paragraph 49 is to a similar effect.

61.. The facts of the present case are very different. Here there was an environmental statement which did contain a description of the effect of the operation of the landfill upon groundwater: the potential impacts of uncontrolled discharge of landfill leachate were described as “low to medium”. With the implementation of the mitigation measures described in the environmental statement the residual impact was described as “low”.

62.. The description was relatively brief, but it was open to the claimant and others to challenge it as inaccurate and/or inadequate in the consultation process. It is significant that having received the Addendum Report, the Environment Agency raised no objection. The environmental statement did describe the proposed mitigation measures. The claimant complains that the description was brief, and that the proposals are in effect purely standard, providing for no more in terms, for example of the permeability of the proposed lining system in the cell, than would be required by the [Landfill \(England and Wales\) Regulations 2002](#) in any event.

63.. That may well be so, but it was open to the claimant to argue that more stringent mitigation measures should be adopted. Although criticisms have been made in general terms of the adequacy of the mitigation measures proposed in the environmental

statement, no alternative mitigation measure, let alone a more effective mitigation measure, was advanced on behalf of the claimant during the consultation process.

64.. The measures were described in sufficient detail to enable informed criticism of them to be made. Dr Wolfe placed reliance on the words “The appropriateness of the lining system and the site design will be assessed ... as part of the PPC permit application” in support of his submission that the defendant had left over questions relating to the effectiveness of mitigation. That submission takes the words out of context. Reading the environmental statement and the Addendum Report as a whole, it is plain that a particular cell design, which is not in the least unusual, and a lining system were being proposed. The details of that system could be adjusted as part of the IPPC authorisation process. This case falls squarely within Waller LJ's fourth principle (above). The defendant had placed constraints upon the planning permission within which future details had to be worked out. Condition 6 provided:

“Except as may otherwise be required by conditions of this permission, the development shall be implemented in accordance with the submitted details and accompanying Environmental Statement dated 8 February 2001 as amended by letters dated 18 June 2001, 17 July 2001 and 29 August 2001 with enclosures and Addendum Report, provided that nothing otherwise required or prohibited by this condition shall prevent the making of any alterations to any detailed technical specifications and operations of waste management processes that the Environment Agency might require in accordance with the [Landfill Regulations 2002](#) .”

65.. The claim form did not criticise condition 29 (above). In his skeleton argument and submissions Dr Wolfe contended that the condition (which is concerned with the existing contamination on this former site) left over a significant environmental impact for future assessment and was, in this respect, similar to condition (VI) relied upon by the Secretary of State in the *Gillespie* case. It is clear from the letter dated 3rd July 2001 that the Environment Agency was initially concerned that existing contamination had not been adequately addressed in the environmental statement. The Addendum Report was the response to this concern. Having considered the Addendum Report the Environment Agency acknowledged that the issue had been discussed but said that “no final remediation strategy had been proposed” (my emphasis).

66.. If the Environment Agency had had any concern in the light of the geological and hydrogeological information provided in the Addendum Report as to the remediation proposals contained therein, then it would have said so. Against this background the defendant was fully entitled to leave the detail of the remediation strategy to be dealt with under condition 29.

67.. I therefore reject ground 1 of the challenge.

68.. I have dealt with it in some detail because it does illustrate a tendency on the part of claimants opposed to the grant of planning permission to focus upon deficiencies in environmental statements, as revealed by the consultation process prescribed by the Regulations, and to contend that because the document did not contain all the information required by [Schedule 4](#) it was therefore not an environmental statement and the local planning authority had no power to grant planning permission. Unless it can be said that the deficiencies are so serious that the document cannot be described as, in substance, an environmental statement for the purposes of the Regulations, such an approach is in my judgment misconceived. It is important that decisions on EIA applications are made on the basis of “full information”, but the Regulations are not based on the premise that the environmental statement will necessarily contain the full information. The process is designed to identify any deficiencies in the environmental statement so that the local planning authority has the full picture, so far as it can be ascertained, when it comes to consider the “environmental information” of which the environmental statement will be but a part.

Ground (3) (BPEO)

69.. Under the heading “Planning Considerations” the Report explained that planning policies were developed at national, regional and local levels. Having reminded members of the obligations imposed by [sections 70\(2\) and 54A of the Town and Country Planning Act 1990](#) identifying the plans comprising the Statutory Development Plan, the report stated that “It is also necessary to have regard to Government Policy on waste issues, planning guidance at national and regional level and objectives and requirements obtained in relevant EC Directives. The Report mentions [Council Directive 1999/31/EC on the landfill of waste](#) (The Landfill Directive) and refers to Waste Strategy 2000:

“Waste Strategy 2000, which is the current national waste strategy sets out the changes considered necessary to deliver more sustainable waste management. It sets a series of challenging targets to increase the value that is recovered from municipal waste and to reduce the amount of biodegradable municipal waste that is sent to landfill.

Waste Strategy 2000 expects planning decisions on suitable sites for treatment and disposal to be based on a local assessment of the ‘Best Practicable Environmental Option’ (BPEO) for each waste stream. However, the courts have held that, whilst BPEO is material to land use planning, it is for local planning authorities to decide how much weight to attach to it. The BPEO process was defined in the 12th Report of the Royal Commission on Environmental Pollution as:

“The outcome of a systematic and consultative decision-making procedure which emphasises the protection of the environment across land, sea and water. The BPEO establishes for a given set of objectives, the option that provides the most benefits or the least damage to the environment as a whole, at acceptable cost, in the long term as well as the short term.”

In determining the BPEO, decision-makers are expected to take account of three key considerations.”

Those three considerations are the Waste Hierarchy, the Proximity Principle and Self-sufficiency.

70.. Under “National Planning Policy Guidance” reference is made to PPG10:

“The document advises that Waste Planning Authorities should consider the provision of waste management facilities within the context of the following ...

the best practicable environmental option for each waste stream including consideration of the ‘Waste Hierarchy’ and ‘Proximity Principle’.”

71.. Under the heading “Regional Policy” reference is made to RPG8, which advises that waste planning authorities should adopt the targets for waste recycling and reduction set out in Waste Strategy 2000. Under “Local Policy” the report states that the Derby and Derbyshire Joint Structure Plan:

“... reflects national policies. In particular Chapter 10: Waste Management Policies, acknowledges the strategic principles set out in Waste Strategy 2000 and confirms that its policies accord with the framework established in national, regional and local waste strategies.

The principle policies that are relevant to consideration of this application are as follows:

Waste Management Policy 1: Waste Management Sites and Facilities states:

Provision will be made for sufficient sites and facilities to cater for the waste management needs of Derbyshire, having regard to the national, regional and local strategies for waste management. Particular account will be taken of:

- 1) The need to pursue objectives which further the aim of achieving sustainable waste management, such as to find the Best Practicable Environmental Option for individual waste streams.”

Waste Management Policy 2: Waste as a Positive Resource states that:

Where waste disposal activities are justified, preference will be given to proposals that assist the reclamation of derelict or spoiled land or mineral sites, subject to the environmental acceptability.

Waste Management Policy 3: Environmental Criteria states that:

Waste management sites and facilities will be permitted only where their impact on the environment is acceptable, in particular where:

- 1) in accordance with the proximity principle, they are well located to serve the main sources of waste, are well related to the transport network ...”

72.. The Report also refers to a non-statutory policy document, Derbyshire Waste Management Strategy (DWMS). That in turn refers to BPEO and the Report states that:

“The Strategy recognises that movement up the waste hierarchy will take time to achieve and, secondly, despite being at the bottom of the waste hierarchy, indicates that landfill will continue to be the best environmental option for some waste types. This is particularly likely to be so for municipal waste.”

73.. Having identified the relevant policies, the Director then set out his own Policy Assessment. He considered that the issues to be addressed included the relationship of the application to the policies in the Structure Plan, in PPG10 and in Waste Strategy 2000 for England and Wales.

74.. The applicant for planning permission had claimed that there was a shortfall in final disposal capacity in Derbyshire for non-inert wastes of approximately 4.1 million cubic metres for the remainder of the plan period in the DWMS to 2011. Perhaps as a consequence, the environmental statement did not address BPEO in terms. Under the heading “Need for the Development”, it was said in paragraph 3.2.1 that:

“The need for the development is two-fold; to deliver the comprehensive reclamation of the current despoiled site and to facilitate the disposal of wastes arising in the area.”

Having referred to the shortfall in the county as a whole, paragraphs 3.2.11 and 12 of the environmental statement said:

“3.2.11 The proposed development of a landfill site at Smiths Void is intended to address at least part of this shortfall and to provide continuity of waste disposal capacity at the locality. The proposed waste void has a capacity of approximately 850,000 m³, which represents 4 to 5 years life at an input rate of approximately 200,000 tonnes per annum. The capacity generated would be available during the plan period.

3.2.12 The development of the landfill would also enable Derbyshire Waste Ltd to fulfil its obligations under the long term contract with Derbyshire County Council in the surrounding area, ensuring that MSW [Municipal Solid Waste] arising continues to be disposed of locally, thus complying with the ‘proximity principle’.”

Having examined the figures provided by the interested party and the Environment Agency, the Director did not accept that there was a shortfall of capacity:

“Work that I am currently undertaking in connection with the production of a waste local plan, does not assume an increase in waste due to economic growth contrary to the DWMS. My calculations suggest that there may be a sufficiency of landfill within the county as a whole up to 2010 provided that there is no growth in waste and the Government's recovery targets are achieved. However, further work and refinement of figures is ongoing and as yet there is no published information. At that stage the methodology would be open to public scrutiny.

...

... given my preparatory local plan work and having regard to the degree of uncertainty on this issue, I can only conclude that the case in relation to need is, in my view, not proven although seems not to be in conflict with Waste Management Policy 1.”

The only passage in the Report that deals directly with the question whether the proposed development would be the BPEO for the waste stream in question is in the following terms:

“Glapwell 2 has, until its recent closure, taken waste including a large proportion of municipal solid waste, from Chesterfield, North-East Derbyshire and the Bolsover area. The applicant indicates that municipal waste from this area is currently deposited at the Hall Lane, Steveley landfill site and at Sutton Landfill in Nottinghamshire. As an extension of an existing disposal facility, this site would make an effective, albeit small, contribution to the facilities available. Notwithstanding the Sub-Area supply position, I am satisfied that the proposal is not large enough that it would transform the local supply situation and, of itself, create substantial excess capacity. Whilst the application site is particularly accessible from the north-east of the County, the site also has good connections to the M1 Motorway and A38 trunk route to serve the wider needs of Derbyshire and I am mindful of the imminent shortage of landfill space in the south-east of the county. Thus, I consider that landfilling at this site would be in accordance with the key considerations — Proximity Principle and Regional Self-sufficiency and technically suitable for landfilling as proposed thereby providing a Best Practicable Environmental Option for the disposal of waste in accordance with criteria 1 of this policy.”

75.. The Director's planning conclusions were:

“The case for additional landfill space within the County for the period specified in the Derbyshire Waste Management Strategy to 2011 is not proven although I am satisfied that the proposal is not of a sufficient size that it would transform the local supply situation and, of itself, create substantial excess capacity. Further, preparatory waste local plan works suggests that a shortage of landfill space in the county as a whole will arise by 2010 and in the south-east of Derbyshire, a shortage is imminent. This site could help meet that shortage.

Notwithstanding the availability of alternative sites both currently, and which may become available in the north-east of the County within the Waste Management Plan period referred to this report, I consider that there are compelling reasons to accept the infilling/land raising/restoration of the site as submitted to restore the site satisfactorily and conserve and enhance its ecology thereby providing a significant benefit. I consider that there is no realistic likelihood of an appropriate restoration being achieved without the importation of waste in the manner proposed.”

76.. The minutes of the meeting of the Planning and Control Committee on 11th March 2002 state that:

“The Director of Environmental Services written report referred to there being no shortage of landfill space within the County as a whole to 2010, provided that reduced waste production and landfill targets were achieved. If waste arisings increased due to economic growth as forecast by the applicant then a shortfall of landfill space would arise. There was some uncertainty on this issue but he was satisfied that the proposal was not large enough that it would transform the local supply situation and create substantial excess capacity. He was mindful that preparatory waste local plan work showed that a shortfall of landfill space was about to arise in the south east of the County and given its good accessibility, this site could assist in meeting the waste disposal needs of that area.

The officer also reported verbally that ongoing work in connection with the production of the waste local plan for Derby and Derbyshire now indicated that there was likely to be sufficient landfill space both in the North East Derbyshire Sub-Area and the plan area as a whole up to the end of the current Structure Plan period in 2011, but that an overall shortage was currently predicted to develop in the subsequent period up to 2015 (the year to which that plan would run).

In his report the Director of Environmental Services considered that there were compelling reasons to accept the infilling/landraising/restoration of the site as submitted, to restore the site satisfactorily and conserve and enhance its ecology thereby providing a significant benefit. He considered that there was no realistic likelihood of an appropriate restoration being achieved without the importation of waste in the manner proposed.

...

Members of the Committee commented on the proposal, and asked for clarification from officers on a number of issues raised, to which officers responded. Members, having considered the report and heard the comments made and explanations provided by officers, generally considered that there were not any substantial planning grounds for refusal of the application. It was felt that the site was in need of improvement but that it would be unlikely to regenerate in a satisfactory manner on its own. An officer explained that satisfactory restoration without use of waste was a technical possibility but was not feasible except at great expense and that no such alternative scheme was likely to be being promoted.”

77.. In the original claim form in the judicial review proceedings one of the grounds of challenge was that there was no proper BPEO assessment. The Joint Report responded as follows:

“Lack of a Compliant Best Practicable Environmental Option (BPEO) Assessment

The report to Committee of 11 March explained the concept of BPEO (ie the option that provides the most benefits or the least damage to the environment as a whole, at acceptable cost, in the long term as well as the short term), and analysed it in the context of this proposal.

The challenge essentially alleges that the Council's treatment of BPEO, as referred to in the Government's published Waste Strategy 2000, was insufficient. In particular, the level of detail that should be taken into account in determining a planning application, including the lack of identification of the specific BPEO for particular waste streams.

The Courts have held that in appropriate cases BPEO is an objective to which planning authorities should have regard as a material consideration. It is for local planning authorities to decide how much weight to attach to it. In this case the waste hierarchy and the proximity principle were considered and reference was made to the relevant Planning Policy Guidance, Waste Strategy 2000, Regional Planning Guidance and the Derbyshire Waste Management Strategy. The ES made reference to the applicant's own waste management strategy and proposed recycling rates. In particular, the report identified the waste hierarchy, the proximity principle and self sufficiency as considerations. It addressed the issues of the targets for reducing, re-using and recovering value from waste and the requirements for landfill capacity for the residual wastes. In the context of Structure Plan policies it identified the use of waste as a positive resource to reclaim this site.

Although extensive reference has been made under this ground of challenge to Chapter 3 in Part 2 of Waste Strategy 2000 (‘the decision making framework’), this Part of the Strategy appears to be concerned with waste management decisions by local authorities in general rather than with waste planning authority decision-making on particular planning applications.

Your reporting officers remain of the view that the relevant factors relating to the planning application in terms of BPEO were properly taken into account.”

78.. It would appear from the defendant's summary grounds of opposition to the claim and from Mr Evans' skeleton argument on its behalf that the words “the Courts have held” were a reference to the dicta of Carnwath J (as he then was) in *R v Bolton Metropolitan Borough Council ex parte Kirkman* [1998] JPL 787 at page 799, which were followed by Richards J in *R v Leicestershire County Council ex parte Blackfordby & Boothorpe Action Group* [2001] Env LR 2 , see paragraphs 46 to 49, whose dicta were in turn followed by Maurice Kay J in *R v Derbyshire County Council ex parte Murray* [2001] Env LR 26 , see paragraphs 13 to 15.

79.. Since *Murray* went to appeal, it is curious that reference was not made in this context to the conclusions of Pill LJ in paragraph 53 of his judgment given on 22nd January 2002 (see above).

80.. It is submitted on behalf of the claimant that the approach to be BPEO in the Report and the Joint Report — “BPEO is an objective to which local planning authorities should have regard as a material consideration. It is for local planning authorities to decide how much weight to attach to it” — does not accord with Pill LJ's conclusion that an objective is more than a factor to be taken into account, since it is an objective which is obligatory it must always be kept in mind when making a decision.

81.. It is further submitted that the weight to be given to BPEO has increased since the government implemented the 1999 [Landfill Directive](#) by making the [Landfill \(England and Wales\) Regulations 2002](#), which came into force on 15th June 2002. It should be noted that *Thornby Farms* was an incinerator, not a landfill, case and that the decision in *Murray* predated the implementation of the Directive, and did not consider Waste Strategy 2000 which had been published in May 2000. The pre-[Landfill Directive](#) position, which was that considered by the *Court of Appeal in Murray*, was as follows. The relevant objectives in [paragraph 4 of Schedule 4](#) to the 1994 Regulations included: “(b) implementing so far as material any plan made under the plan making provisions.” [Paragraph 1](#), as amended, defines the plan making provisions as follows:

“‘plan making provisions’ means [paragraph 5](#) below, [section 50](#) of the 1990 Act ... [Part II of the Town and Country Planning Act 1990](#) ... and [section 44A](#) of the Environmental Protection Act 1990 ...”

Section 44A, which was inserted by the [Environment Act 1995](#) makes provision for a national waste strategy:

“(1) The Secretary of State shall as soon as possible prepare a statement (‘the strategy’) containing his policies in relation to the recovery and disposal of waste in England and Wales.

(2) The strategy shall consist of or include—

(a) a statement which relates to the whole of England and Wales; or

(b) two or more statements which between them relate to the whole of England and Wales.

(3) The Secretary of State may from time to time modify the strategy.

(4) Without prejudice to the generality of what may be included in the strategy, the strategy must include—

(a) a statement of the Secretary of State's policies for attaining the objectives specified in [Schedule 2A](#) to this Act ...”

The objectives in [paragraphs 1 and 2 of Schedule 2A](#) are, in substance, the objectives in [articles 4 and 5 of the Waste Framework Directive](#).

82.. Waste Strategy 2000 for England and Wales is the national waste strategy prepared for the purposes of section 44A (see [paragraph 5.1](#) of the document). Thus, the defendant in the present case was obliged to keep in mind the objective of implementing, so far as material, the provisions of the strategy. BPEO is dealt with in the strategy as follows. Under the heading “Delivering Change” the second bullet point in the introduction to Chapter 4 states:

“Decisions on waste management, including decisions on suitable sites and installations for treatment and disposal, should be based on a local assessment of the Best Practicable Environmental Option.”

Under the heading “Making Good Decisions”, [paragraph 4.4](#) says:

“The right way to treat particular waste streams cannot be determined simply. The objective is to choose the Best Practicable Environmental Option, (BPEO) in each case. BPEO varies from product to product, from area to area and from time to time. It requires waste managers to take decisions which minimise damage to the environment as a whole, at acceptable cost in both the long and short term. A more detailed description of how decision makers can identify the BPEO is at [Chapter 3 section starting 3.3](#) in Part 2 of this strategy.”

83.. The three “key considerations”, namely the waste hierarchy, the proximity principle, and self-sufficiency are set out in [paragraph 4.5](#). [Paragraph 4.13](#) is concerned with the obligations of waste planning authorities. It says:

“Waste Planning Authorities are responsible for identifying suitable sites for waste treatment or disposal installations. The Government and the National Assembly look to Waste Planning Authorities to:

- take full account of the policies described in this strategy, in particular:

- the importance of establishing the BPEO ...”

Part 2 of the strategy complements Part 1 and should be read in conjunction with it (see paragraph 1.2).

84.. Having referred to the fact that the strategy is a waste management plan for the purposes of the [Framework Directive](#) and section 44A of the 1990 Act, paragraph 1.8 says:

“Furthermore, this waste strategy is an advisory document. The [1990 Town and Country Planning Act](#) requires local planning authorities in England and Wales to have regard to national policies in drawing up their development plans, and therefore this document will be an important source of guidance. These development plans will then provide a framework for individual planning decisions ...”

85.. Chapter 3 describes the decision-making framework in considerable detail. I do not propose to extend this already lengthy judgment by extensive citations from the chapter. Suffice it to say that paragraph 3.2 states in part:

“When taking waste management decisions on suitable treatment options, sites and installations, local authorities must follow the framework set out below. This framework should act as a guide for other decision makers, including business waste managers.”

The framework is set out under the heading “Determining the Best Practicable Environmental Option”. Paragraph 3.4 states:

“The process that should be used for considering the relative merits of various waste management options in a particular situation is the Best Practicable Environmental Option (BPEO). This was defined in the 12th Royal Commission on Environmental Pollution as ...”

The definition is then set out.

86.. The proximity principle — which suggests that waste should generally be disposed of as near to its place of origin as possible — is then amplified. A step by step approach is suggested:

“Identifying the most sustainable mix of waste management options, environmentally, economically and socially, can be a daunting task. However, the process can be simplified by breaking it down into smaller, more manageable tasks:

- Step 1: set the overall goals for making the waste management decision, subsidiary objectives and the criteria against which the performance of different options will be measured
- Step 2: identify all the viable options.
- Step 3: assess the performance of these options against the criteria.
- Step 4: value performance.
- Step 5: balance the different objectives or criteria against one another.
- Step 6: evaluate the rank the different options.
- Step 7: analyse how sensitive the results are to variations in the assumptions made or the data used.”

87.. Annex A deals with “Major Waste Facilities in England and Wales” and includes the following advice in paragraph A3:

“Under the Town and Country Planning legislation, planning authorities must have regard to national and regional policies, including policies on waste management, in drawing up their waste development plans. This waste strategy will be a material consideration for planning authorities in drawing up their development plans and for determining individual planning applications.”

88.. It is submitted on behalf of the claimant that while the Report mentions BPEO on a number of occasions, and indeed sets out the Royal Commission on Environmental Pollutions definition, it does no more, in effect, than pay lip service to the principle when it comes to applying it to the particular circumstances of this application for planning permission. BPEO could not have been kept in mind by the Committee because there was nothing recommending a step-by-step analysis of the kind recommended in Waste Strategy 2000.

89.. Having concluded that there was sufficient landfill space in the North-East Derbyshire Sub-Area and the plan area as a whole up to the end of the Structure Plan period in 2011, the Committee should have been invited to consider whether landfill at the application site was the best option to meet the objectives which this particular application was intending to meet.

90.. The objectives were not identified in any systematic way, but once it was acknowledged that there was sufficient capacity in the county as a whole and in the north-east of the county, they clearly included the objective of meeting an imminent shortage of landfill space in the south-east of the county. Whether landfill was the best option for such a waste stream, having regard to the waste hierarchy, and if it was whether landfill in the north-east of the county would be in accordance with the proximity principle, were not examined. The defendant was obliged to adopt the, not a, BPEO. There is considerable force in these criticisms of the way in which the Report and the Joint Report dealt with BPEO.

91.. I turn to consider the status of Waste Strategy 2000 post the Government's implementation of the [Landfill Directive](#).

92.. The background to the making of the Directive is set out in the recitals. Recital (18) explains:

“Whereas, because of the particular features of the landfill method of waste disposal, it is necessary to introduce a specific permit procedure for all classes of landfill in accordance with the general licensing requirements already set down in [Directive 75/442/EEC](#) and the general requirements of Directive 96/61/EC ...”

[Article 8](#) provides, so far as material:

“Member states shall take measures in order that:

(a) the competent authority does not issue a landfill permit unless it is satisfied that ...

(b) the landfill project is in line with the relevant waste management plan or plans referred to in [Article 7 of Directive 75/442/EEC](#).”

[Article 7 of the Waste Framework Directive](#) required the competent authorities to draw up as soon as possible one or more waste management plans. Waste Strategy 2000 is that plan for England and Wales. Who is to ensure that a landfill permit is not issued unless it is “in line with” the Strategy? As mentioned above, the [Landfill Directive](#) was implemented by the [Landfill \(England and Wales\) Regulations 2002](#), under which the Environment Agency is responsible for issuing landfill permits.

93.. DEFRA has published a note explaining how the main requirements of the [Landfill Directive](#) have been transposed in the 2002 Regulations. Under the heading “Conditions of the permit” the note explains that the requirement in [Article 8B of the Landfill Directive](#) “has already been transposed in the PPC Regulations 2000 through the duty placed on the Environment Agency not to issue a permit to any waste management activity unless it has already obtained planning permission”. Thus, it is clearly intended, at least by DEFRA, that local planning authorities will not grant planning permission for a landfill project unless they are satisfied that it is “in line” with Waste Strategy 2000.

94.. On behalf of the defendant, Mr Evans, whose submissions were adopted by Mr Barrett on behalf of the interested party, submitted that the combined effect of the [Landfill Directive](#) and Waste Strategy 2000 did not alter the approach to BPEO that was required to be taken by the local planning authority. It had to keep BPEO in mind as an objective. Both Mr Evans and Mr Barrett submitted that the strategy was merely advisory, no more than a material consideration to which the defendant was required to have regard as members were advised in the Joint Report. It was for the local planning authority to decide what weight to give to the Strategy, both in general and insofar as it gave advice in relation to BPEO in particular.

95.. So far as [Article 8 of the Landfill Directive](#) is concerned, Mr Evans submitted that the duties relating to issuing landfill permits were imposed by the 2002 Regulations upon the Environment Agency, not the local planning authority. Thus, the local planning authority was not under any duty to ensure that a planning permission was “in line” with the Strategy.

96.. He fairly accepted that this approach had two consequences. Firstly, if the local planning authority was not under any obligation to ensure that a grant of planning permission was in line with the Strategy, it might well be too late to recover the position when the Environment Agency came to consider the issue of a permit under the 2002 Regulations. That might cause the United Kingdom to be in breach of the [Landfill Directive](#) . Secondly, whatever may be the respective roles of the local planning authority and the Environment Agency, the practical effect of the submissions of the defendant and the interested party is that no greater weight need be placed by the decision taker upon the relevant waste management plan that has been drawn up pursuant to [Article 7 of the Waste Framework Directive](#) as implemented by section 44A .

97.. I am unable to accept Mr Evans' and Mr Barrett's submissions in this respect. In 1975 the [Waste Framework Directive](#) addressed all forms of waste management, including reduction, re-use, recycling, energy recovery and disposal (see [Articles 3 and 4](#)). Since it required member states to prepare waste management plans it could reasonably be expected that, once those plans had been prepared, arrangements would be made for them to be given additional weight in the decision-making processes of member states.

98.. The [1999 Landfill Directive](#) is concerned with a particular method of waste disposal, landfill, which is at the bottom of the waste hierarchy (that is to say, all other things being equal, it is the least preferred option). The purposes of the [Landfill Directive](#) included encouraging the prevention, recycling and recovery of waste and obviating the wasteful use of land (Recital (3)), and ensuring that, in future, only safe and controlled landfill operations should be carried out (Recital (2)). In short, it sought to discourage the unnecessary use of landfill as a method of waste disposal.

99.. To this end, [Article 8 of the Landfill Directive](#) is more prescriptive than the [Framework Directive](#) as implemented by [paragraphs 2 and 4\(1\)\(b\)](#) of the 1994 Regulations. In ordinary language an obligation to be satisfied that a proposed development is “in line with” a waste management plan, is more stringent than an obligation to keep the objective of implementing the plan, so far as material, in mind. The difference in wording between the two directives, requiring greater weight to be placed upon the waste management plan, is deliberate, having regard to the purposes of the later directive. The words “in line with” admit of some flexibility. They are perhaps less prescriptive than “in accordance with”. Moreover, given the complexity of the subject matter and the many factors that may have to be taken into account when taking individual waste disposal decisions, the waste management plan itself may well allow for a further degree of flexibility. Mr Evans submitted that, in this respect, the Strategy was no different from earlier policy guidance, which also referred to BPEO such as that contained in PPG10. He referred to paragraph 1.8 in Part 2 (above) and to the advice in paragraph A3 in Annex A to the Strategy.

100.. This is to take these paragraphs out of context. Both parts 1 and 2 of the Strategy must be read as a whole. It is true that it is an important source of guidance which must be taken into account by local planning authorities. But on its face it professes to be more than that: it “implements ... the requirement within the [Waste Framework Directive](#) ... as incorporated into law by section 44A of the Environmental Protection Act 1990 ” (see paragraphs 1.4 and 1.5).

101.. Fairly read, as a whole, the policies relating to BPEO in Waste 2000 are, and are intended to be, more prescriptive than earlier policy guidance. To give but a few examples from the extracts cited above: “Decisions on waste management, including decisions on suitable sites ... for disposal should be based on a local assessment of the BPEO”; “The right way to treat particular waste streams cannot be determined simply. The objective is to choose the BPEO in each case”; “The Government ... look(s) to Waste Planning Authorities to take full account of the policies described in this Strategy, in particular ... the importance of establishing the BPEO”; “When taking waste management decisions on suitable ... sites ... local authorities must follow the framework set out below”. As mentioned above, the framework describes how to determine the BPEO: “The process that should be used for considering the relative merits of the various waste management options in a particular situation is the BPEO”.

102.. On a fair reading, the Strategy does not simply maintain the status quo in policy terms, leaving local planning authorities free to give such weight as they choose to BPEO. One of the main objectives of the Strategy is to “deliver change” by placing greater emphasis on the need to choose the BPEO when making waste management decisions.

103.. It is true that Chapter 3 in Part 2 of the Strategy applies to waste management decisions by local authorities generally, but contrary to the advice given to members in the Joint Report (above) it applies with no less force to waste planning authorities when they are taking decisions on planning applications for waste disposal. Under the 2002 Regulations the Environment Agency is concerned at the landfill permit stage with the detailed regulation of landfilling operations that will already have been granted planning permission. It is for waste planning authorities when deciding whether or not to grant planning permission for landfill proposals to ensure that they are “in line” with Parts 1 and 2 of the Strategy.

104.. Mr Evans submitted that such an obligation might conflict with the waste planning authority's duty under [section 54A](#) : to determine an application for planning permission in accordance with the development plan unless material considerations indicate otherwise. Policies in the development plan might conflict with those in the Strategy. Since the Strategy will be a material consideration for local planning authorities when reviewing their development plans, the scope for conflict should reduce as policies in development plans “catch up” with those in the Strategy. Any conflicts in the short term should not present a practical difficulty because the policies in the Strategy will, at the very least, be material considerations for the purposes of [section 54A](#) which may indicate that an application for planning permission should be determined otherwise than in accordance with the (conflicting) policies in the development plan.

105.. Mr Barrett conceded that the Government might well have wished local planning authorities to give greater weight to the policies in the Strategy including BPEO, but he submitted that its intention was that this should be achieved through the incorporation of those policies into statutory development plans, thus giving them the added force of [section 54A](#) . He relied upon paragraph A3 of Annex A to the Strategy, but his submission ignores the concluding words of the paragraph A3 which make it clear that the Strategy is to be taken into account in both plan making and development control.

106.. For these reasons, I conclude that the defendant's approach to the status of the policies relating to BPEO in Waste Strategy 2000 was erroneous in principle because the Joint Report effectively relegated BPEO to a material consideration to be taken into account but to be given such weight as the defendant thought fit. Such an approach did not accord with Pill LJ's pre- [Landfill Directive](#) and Waste Strategy 2000 dicta in [Murray](#) . There was no recognition of the defendant's duty, post the publication of the Strategy and the implementation of the [Landfill Directive](#) , not to grant planning permission unless the proposed development was “in line with” the policies relating to BPEO in Waste Management 2000.

107.. But the defendant's consideration of BPEO was seriously flawed, regardless of the weight that should have been attributed to the policies in the Strategy. Mr Evans and Mr Barrett pointed to the number of places in the Report where BPEO was mentioned. I accept that there are frequent references to BPEO in the Report, but merely repeating the acronym, however frequently, and whether or not accompanied by the Royal Commission's definition, is not an adequate consideration of the issues raised by BPEO. If a material consideration is to be taken into account it must first be properly understood. What matters is not the letters BPEO, but the analysis of the issues raised by the concept: the application of the three key elements — the waste hierarchy, the proximity principle and self-sufficiency to the particular waste stream(s) which the development is intended to serve. So long as there was both a local (in the North-East Derbyshire Sub-Area) and county-wide shortage of capacity, it was relatively easy to see how the proximity principle might be met. It would appear that this must have been the assumption underlying the environmental statement, since it contained no discussion of BPEO whatsoever. However, once it had been concluded that there was capacity both locally and county-wide up to 2011, the question whether this particular application site would be the BPEO for meeting a shortage of landfill space in the south-east of the county had to be addressed in terms of the three key considerations, including the proximity principle. Beyond referring to the application site's good road connections, and stating that the Director was “mindful of the imminent shortage of landfill space” in the south-east of the county, the report did not address this issue at all. It may well be that this is why the Director did not feel able to conclude that the site was the BPEO in accordance with criterion 1 in Waste Management Policy 1 in the Structure Plan, merely that it was “a BPEO for the disposal of waste”.

108.. I accept that officers' reports should not be read in a legalistic or pedantic manner. If there had been a reasonable attempt to grapple with the issues raised by BPEO in the light of local spare landfill capacity and capacity county-wide for the structure plan period, the use of the indefinite rather than the definite article might well have been of little consequence, and reference to it dismissed as mere pedantry. Its use in this Report is, in my judgment, a reflection of the defendant's muddled approach to the BPEO issue. Unfortunately, the muddle was compounded, rather than clarified, by the advice given to members in the Joint Report as to the weight that they ought to give to BPEO. Given the importance attached to choosing the BPEO for a particular waste stream in Waste Strategy 2000, this was a significant flaw in the decision-making process.

109.. The defendant's failure to deal adequately with BPEO, whether it is regarded as a breach of its obligation to ensure that the grant of planning permission was in line with Waste Strategy 2000, or whether it is viewed more simply as a failure to have regard to a material consideration, does not mean that the planning permission must be quashed. The court has a discretion and I have anxiously considered whether it would be right in all the circumstances to exercise that discretion, given the two-fold justification for the development in the environmental statement: to reclaim a despoiled site and to facilitate the disposal of wastes arising in the area. It is clear from the Report and from the Minutes of Meeting on 11th March 2002 that the Director placed considerable weight upon the first justification: “there was no realistic likelihood of an appropriate restoration being achieved without the importation of waste in the manner proposed”. However, it was for members to determine the application. The minutes record that they “generally considered that there were not any substantial planning grounds for refusal of the

application. It was felt that the site was in need of improvement but that it would be unlikely to regenerate in a satisfactory manner on its own.”

110.. Given the manner in which BPEO was addressed in the Report and Joint Report it is not surprising that members concluded that there were no substantial planning grounds for refusing planning permission. Since there had been no proper BPEO analysis it is not possible to say whether there would or would not have been a substantial planning objection on this ground, for example because of failure to comply with the proximity principle. Thus it is simply not possible to tell what members' attitudes might have been if there had been a proper analysis of the BPEO issue, including both the weight to be given to, and the content of, the policies relating to BPEO in Waste Strategy 2000. In particular, Waste Management Policy 2 in the Structure Plan gives preference to waste disposal proposals that assist in the reclamation of derelict or despoiled land, “where waste disposal activities are justified” (see above). In deciding whether waste disposal activities are justified a BPEO assessment is, for the reasons set out above, a most material consideration.

111.. For these reasons, the application succeeds on ground (3) and the planning permission dated 23rd December 2002 must be quashed.

112.. MR PURCHASE: My Lord, I would ask for our costs from the defendant in this matter. The claimant has been funded by the Legal Services Commission so I would ask for the order to be the usual order in that regard and for an assessment of our publicly funded costs as well.

113.. MR JUSTICE SULLIVAN: Do you resist that, Mr Evans?

114.. MR EVANS: I cannot resist the principle of it. I think the most I can say, and I do say, is that perhaps 50 per cent of the time of the court was taken up on the BPEO point. It was one ground of three but I fairly recognise that it took up at least half the time of the court. So I would invite the court to make an order for costs against us but limited to 50 per cent of the costs incurred by the claimant.

115.. MR JUSTICE SULLIVAN: In effect, you say you should not have to pay for the time spent on considering the objectives and the IEI point?

116.. MR EVANS: That is effectively it, my Lord.

117.. MR JUSTICE SULLIVAN: The position is as I described in the judgment. There is no doubt that whilst BPEO was ground 3 in Dr Wolfe's skeleton, in his oral submissions before me he placed it in the forefront of those submissions, and certainly it probably took about half the time rather than just a third of the time, if that is a reasonable estimate. On that basis what do you want to say, Mr Purchase?

118.. MR PURCHASE: My Lord, on that basis I would say that we would ask for our full costs, that being the principal issue before the court.

119.. MR JUSTICE SULLIVAN: Yes. Thank you very much.

120.. I am satisfied that the defendant ought to pay part of the claimant's costs. I say “part of the claimant's costs” because a significant part of the court's time was occupied with the two quite discrete issues on which the claim has failed. Although the BPEO issue was third in order in the skeleton argument, it is true, as I indicated in the judgment, that Dr Wolfe placed it at the forefront of his oral submissions. Thus it would not be fair simply to apportion one third of the costs to each of the three grounds. I accept Mr Evans' submission that the proper apportionment, doing the best I can, would be to apportion 50 per cent of the costs to the BPEO point and I therefore order that the defendant pays the claimant 50 per cent of its costs, those costs to go for detailed assessment.

121.. You have asked for the usual order. You can have it.

122.. MR EVANS: My Lord, I would like to ask for permission to appeal on the BPEO ground, my Lord, simply on the basis that there would be a real prospect of success in relation to the issue of principle, although I have heard what your Lordship has said in relation to the factual position in any event, but, my Lord, I do ask for permission on that ground.

123.. MR JUSTICE SULLIVAN: You say that it can fairly be said that it is an important issue for waste planning authorities generally?

124.. MR EVANS: My Lord, yes.

125.. MR JUSTICE SULLIVAN: Yes. Do you want to say anything about that, Mr Purchase? I very much suspect that if it had gone the other way there might have been a similar application from you pointing out how important this issue was, I do not know.

126.. MR PURCHASE: Indeed.

127.. MR JUSTICE SULLIVAN: I will not pry.

128.. MR PURCHASE: All I will say is that I am not really in a position to resist that now. My clerk did speak to your Lordship's clerk yesterday about this point and your Lordship did seem minded to accept that perhaps written submissions on appeal would be appropriate given that Mr Wolfe has dealt with the case up until this time and I have had little time to be familiar with the issue.

129.. MR JUSTICE SULLIVAN: Yes. I did give that indication but I was cautious to do so in such a way as to not give any indication as to who might succeed and who might fail.

130.. MR PURCHASE: My Lord, yes.

131.. MR JUSTICE SULLIVAN: Certainly had you been in the position of having to apply for permission to appeal then I would have adjourned the matter for further submissions for you to have the opportunity to consider the matter further. Since the boot is, as it were, on the other foot, I think it is right to deal with that matter today. I appreciate that you may feel that it is difficult to assist a great deal further, but do you have anything more you wish to say?

132.. MR PURCHASE: My Lord, all I would say is that while we cannot deny that this is an important point of principle, we would say there is no reasonable prospect of success against your Lordship's reasoning on the facts.

133.. MR JUSTICE SULLIVAN: Yes. Do you want to say anything, Mr Barrett, or are you just keeping your head down?

134.. MR BARRETT: I would support the application made by Mr Evans for the very simple reason that it is a very important point of law that your Lordship has addressed in the course of the judgment in respect of whether BPEO, as a concept, is an elevated concept in the context of a planning application.

135.. MR JUSTICE SULLIVAN: I am satisfied that it is appropriate to grant permission to appeal not necessarily upon the first ground of real prospect of success, because it does seem to me that the facts are problematical, to say the least, from the defendant's point of view, but on the second limb there are other exceptional reasons, that is to say the relevance of the BPEO principle for waste planning authorities, and indeed for those involved in the process of waste disposal both as objectors and as applicants for permission. So I do give permission on the second limb. It is obviously for counsel to consider, in the light of my judgment on the facts, the realistic prospects of success.

Crown copyright

The Queen on the Application of Edward Bedford, Elizabeth Clare v London Borough of Islington v Arsenal Football Club Plc



Positive/Neutral Judicial Consideration

Court

Queen's Bench Division (Administrative Court)

Judgment Date

31 July 2002

CO/0529/2002

High Court of Justice Queen's Bench Division Administrative Court

Neutral Citation Number: [2002] EWHC 2044 Admin, 2002 WL 31476373

Before: Mr Justice Ouseley

Wednesday 31st July, 2002

Representation

Mr Robert McCracken, Mr Gregory Jones and Mr Jeremy Pike (instructed by Messrs Earthrights Solicitors, Essex CM22 6PJ) appeared on behalf of The Claimants.

Mr Robin Purchas QC and Miss Karen McHugh (instructed by London Borough of Islington Legal Services Department) appeared on behalf of The Defendant.

Mr David Elvin QC and Mr Daniel Kolinsky (instructed by Messrs Gouldens, London EC4M 7NG) appeared on behalf of the Interested Party.

JUDGMENT

Introduction

1.. In 1913 Arsenal Football Club ("Arsenal FC") moved from Woolwich to Highbury Stadium in the London Borough of Islington. The advent of all-seater stadia for Premiership clubs caused a dramatic fall in its ground capacity, the seat revenue from which is a vital part of its national and international success. It concluded that the existing stadium site could not be redeveloped for a stadium of appropriate size, nor could the existing stadium be expanded to give it a capacity comparable to that of the club's major national and international rivals. Accordingly it needed to relocate. Arsenal FC wished to remain close to what for nearly 90 years has been its home location and is the largest concentration of its supporters, albeit but a small percentage of the total.

2.. After consideration of a number of alternatives, it concluded that a site at Ashburton Grove, Highbury, near to its current ground, afforded it the best opportunity. The site is largely, but not wholly, owned by the London Borough of Islington.

3.. The Club's proposals emerged publicly and formally in 1999. The London Borough of Islington produced planning briefs for public consultation and a scoping opinion for the Environmental Statement which this development would need. The development would encompass not just the new stadium at Ashburton Grove, but redevelopment at nearby Lough Road to accommodate a waste recycling centre, to be displaced from Ashburton Grove and also the redevelopment of the existing Highbury stadium site. So three sites close to one another near Highbury were involved. The range of financially enabling or supportive development involved included housing, business and community uses. The combined proposals were to provoke controversy and division amongst residents near the three sites, and indeed amongst supporters of the club.

4.. The Environmental Statement produced by the Club is a lengthy document which was subject to extensive public consultation. Eventually Islington's officers recommended that, although the proposals did not comply in a number of respects with UDP policy, planning permission should be granted.

5.. Following a Council meeting on 10 December 2001, at which local residents on both sides and the developer were heard, Islington resolved to grant planning permission for all three developments. On 30 May 2002, following the conclusion of an agreement under [section 106 of the Town and Country Planning Act 1990](#), Islington granted the planning permissions.

6.. Although earlier threats of judicial review proceedings had not come to pass, judicial review proceedings which challenged the resolution of 10 December 2001 were launched by the Islington Stadium Communities Alliance (“ISCA”) and four individual local residents. Sullivan J refused permission on paper on 19 April 2002. The grounds before him were seen to have no merit and to amount to no more than a dispute about the planning merits which it was not for the court to resolve.

7.. A renewed application for judicial review was heard by Richards J. On 30 May 2002, he ordered that the applications for permission should be dealt with at the same time as the substantive hearing. He ordered consolidated grounds to be served which would cover both matters newly raised before him and those previously raised before Sullivan J insofar as they were still pursued.

8.. The matter now before me is brought by only two residents. The other claimants have fallen by the wayside. The consolidated grounds in part were not really pursued, notably to the extent that they raised human rights grounds, which were misconceived and unsupported by any evidence. A number of additional grounds were sought to be raised. The grounds raised were refined and altered in the skeleton argument, and before me, from those set out in the claimants' skeleton argument. No possible point or permutation of a point has been overlooked by counsel for the claimants. I hope I do justice to the variety and ingenuity of his multifaceted arguments. They have put the decision-making process of the London Borough of Islington through a demanding legal audit as if a roving commission were being conducted on behalf of all objectors. I have examined all of those points. In the end I have concluded that these applications fail. Most of the points raised are indeed unarguable.

The Background

9.. It is necessary in this case to set out a little of the process of the decision making in the light of the range of allegations which have been made, because one matter is clear. The London Borough of Islington has been concerned from the outset to consult very widely about this proposal at all stages and has been very open about its thought processes. Arsenal FC, too, has properly been concerned to consult widely in its own way. I take the following description of the processes briefly from the witness statement of Mr Harrington, the Council's Planning Officer who had overall responsibility for the three applications.

10.. Mr Harrington describes how he established the Ashburton Grove Highbury Review Group after the proposals emerged. This group comprised around twenty representatives of community and business groups, Council officers, councillors and representatives of Arsenal FC. It has met a total of 23 times. Regular participants included the first claimant, Mr Bedford, and a number of other representatives who were at one time part of the original proceedings.

11.. Mr Harrington describes the need to prepare supplementary planning guidance (“SPG”) in respect of the proposals so as to guide the anticipated applications and to provide a basis for engaging local people and businesses in the debate about the proposals. He describes the very extensive arrangements put in place for consulting on the draft SPG. Invitations were sent to residents and property owners within the Ashburton Grove area. A summary leaflet was sent to 15,000 addresses and was displayed elsewhere. Newspaper advertisements were published and posters were put up. Three public meetings were held and there were discussions in neighbourhood forums. The draft SPG and the results of consultation were considered by the Council and the SPG was adopted in August 2000.

12.. It was evident early on that an Environmental Statement would be required. In order to facilitate and inform the Council's approach, the scoping opinion which is envisaged by the Environmental Statement Regulations was initiated by the preparation of draft scoping reports in June and September 2000. Upon these reports the Council again consulted local community and business representatives and a variety of other interested parties. The June scoping report was also considered by the review group and the consultation responses were all taken into account when the scoping opinion for the Environmental Statement was adopted in October 2000.

13.. The main Environmental Statement was produced in May 2001. It dealt with all three sites and comprised a main report of 252 pages, 13 technical annexes and a non-technical summary. As the plans were revised, supplements to the Environmental Statement were produced. All the application documents and the Environmental Statement were placed on deposit for public inspection in a number of locations. The application material was placed on CD-Rom which was made available free of charge

to members of the review group and, subject to a nominal charge, to others living within a wide area around the three sites. The main report of the Environmental Statement and key planning application documents were posted on the Council's web site. The Council also instructed a number of consultants to provide it with further information in relation to this material. In addition, the Institute of Environmental Management and Assessment was asked to provide its appraisal of the calibre of the Environmental Statement, which it did. The Environmental Statement was said by the Institute to have sections that were good and sections that were satisfactory. None of the sections of the Environmental Statement as it finally stood was subject to significantly critical comment. The consultation responses were then considered by the Council.

14.. The planning applications themselves were the subject matter of a very extensive consultation. These included the review group, drop-in centres, internet information, public meetings, the leafleting of 45,000 local individuals, and various other projects. The Council received more than 2,000 comments in response to the first set of applications and nearly that number in response to the later variations. These were summarised in the reports to the Council meeting of 10 December 2001. The Council reports were also sent out to a number of statutory and other interested bodies, and were posted on the Council's web site and were made available on request at the same time. This was ten days before the meeting on 10 December 2001.

15.. It is plainly a very extensive process that has been carried out. There is further detail which supports the thrust of that summary in other witness statements before me. I do not go further into them, but for those who are interested in the history and evolution of the Environmental Statement, that can be found in the first statement of Mr Hepher, the Arsenal FC Planning Consultant.

A Public Inquiry

16.. From that background I turn to the first issue which is raised on behalf of the claimants. This is whether there should have been a public inquiry into the proposals. There were a number of bases upon which it was said that there ought to have been such an inquiry. The first basis concerned the way in which the proposals related to the UDP and to the UDP review. The point of law here was not entirely clear because this was not a challenge to the UDP or to the UDP review process on account of the failure of the UDP review to contain a proposal or policy for Arsenal FC to relocate to the Ashburton Grove site. The challenge is a challenge to the resolution to grant, and to the actual grant of planning permission. It is said that there was a failure to comply with a duty in relation to the UDP review. Mr McCracken said that the breach of that duty could lead to the quashing of the planning permission because were the law otherwise, the law would be a toothless tiger and the claimants would be without effective remedy for such a breach of duty as there was in the Council's failure to put the Arsenal FC proposal through the UDP review process.

17.. Mr McCracken recognised that that was a bold submission, but submitted that the statutory structure in relation to the UDP and [section 70](#) of the 1990 Act led to that conclusion. The starting point for that argument is the nature of the obligation on a local planning authority in relation to a UDP.

18.. [Sections 12 and 21](#) of the 1990 Act were referred to. [Section 12](#) so far as relevant provides:

“(1) The local planning authority shall, within such period (if any) as the Secretary of State may direct, prepare for their area a plan to be known as a unitary development plan.

(2) A unitary development plan shall comprise two parts.

(3) Part I of the unitary development plan shall consist of a written statement formulating the authority's general policies in respect of the development and use of land in this area.

....

(4) Part II of a unitary development plan shall consist of —

(a) a written statement formulating in such detail as the authority thing appropriate (and so as to be readily distinguishable from the other contents of the plan) their proposals for the development and ... use of the land in their area

....”

19.. Section 21 provides so far as relevant:

“(1) A local planning authority may at any time prepare proposals —

- (a) for alterations to the unitary development plan for their area; or
- (b) for its replacement.

....”

20.. Mr McCracken also relied on the decision of the *House of Lords in Great Portland Estates v Westminster City Council [1985] AC 66*, 674D–G, where Lord Scarman said:

“The statute requires that a local plan shall formulate in such detail as the council thinks appropriate their proposals for the development and use of land: section 11 and Schedule 4, paragraph 11(2) of the Act of 1971. If a local planning authority has proposals of policy for the development and use of land in its area which it chooses to exclude from the plan, it is, in my judgment, failing in its statutory duty. An attempt was made to suggest that the non-statutory guidance in this case went only to detail, as to which the council is given a discretion. But the council provides the answer to this point; it speaks in its guidelines of its non-statutory policies. In the Court of Appeal, Dillon LJ demonstrated by his quotations from paragraphs 3.2, 3.3 and 3.4 of the non-statutory guidelines that they do indeed, as the council itself says, contain matters of policy relating to the control of office development outside the central activities zone.

It was the duty of the council under Schedule 4 of the Act of 1971 to formulate in the plan its development and land use proposals. It deliberately omitted some. There was therefore a failure on the part of the council to meet the requirement of the Schedule. By excluding from the plan its proposals in respect of office development outside the central activities zone the council deprived persons such as the respondents from raising objections and securing a public inquiry into such objections.”

21.. Mr McCracken submitted that the upshot of all this was to impose a requirement on the local planning authority to include its proposals and policies in the UDP. Breach of that duty by a failure to put policies or proposals through a UDP could lead not just to the quashing of the UDP but also to the quashing of a planning permission in order that an effective remedy be provided for that breach in a case such as this. In support of that he relied on a passage from a decision of the *House of Lords in Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 97*, 1030B–D:

“It is implicit in the argument for the Minister that there are only two possible interpretations of this provision — either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.”

22.. Mr McCracken also referred to PPG12 entitled “Development Plans”. This deals with the plan led system and in paragraphs 2.22 and 2.23 deals with the importance of reviewing plans to make sure that they are up to date so that site allocations can be re-examined and alternative uses considered. It was expected that plans should be reviewed in full at least once every five years, but that partial or topic reviews could take place on a more frequent basis.

23.. In order to counteract arguments in relation to the UDP timescale, Mr McCracken referred to paragraphs 6.31 and 6.32 of PPG12. It says that where the plan is very close to adoption when new information becomes available, it may be preferable to adopt the plan and then to start an early review. “Close to adoption” meant where the modifications process had already been completed and where no further modifications were expected to be made. If a plan is adopted where it is too late to consider new information in the course of the plan, the guidance envisages that an early review could be instituted.

24.. In his criticism of the local authority's approach, Mr McCracken referred to an e-mail in which the question of whether the proposal by Arsenal FC should be dealt with through the UDP review was the subject matter of legal advice. The e-mail, which is dated 30 April 2001, reads:

“Thanks to Graham H for forwarding Richard Buxton's letter on behalf of ISCA threatening to Judicially Review the Ashburton Grove Planning Brief unless we revoke it in 14 days — on the grounds that the Brief is inconsistent with UDP policy (ie nature Conservation, Design and Employment policies for Ashburton Grove which may be breached by the proposals). RB points to PPG 12 which advises that Briefs should be consistent with the UDP, and he asserts that LBI used the Brief, rather than changes to UDP policy, to ‘promote’ the Arsenal relocation proposals in order to avoid public scrutiny.

I have prepared a draft response which I attach. I understand the point RB makes. Our Leading Counsel advised in Nov 1999 that ‘There is absolutely no doubt that proposals of this scale should normally evolve through the development plan process ... SPG is normally intended to supplement or elaborate on UDP policies — what is proposed here is wholly different’. However, bearing in mind the advanced stage of the UDP Review when the Arsenal relocation proposals emerged, and the fact that other arrangements for full public participation could be made, Counsel advised that the best course would be to proceed by way of a Planning Brief and planning application, not via the UDP. The UDP Inspector agreed with this approach when objectors raised Arsenal related issues during the UDP Inquiry (but he did not have much detail about the proposals or the UDP policies affected in reaching this conclusion). In the circumstances I think it is very unlikely that a JR seeking revocation of the Brief will succeed. Even if it does, it will not debar the Council from considering all the issues in the Brief in determining the applications, although they will carry less weight.

....”

25.. The question of whether Arsenal FC's proposal should be put through the UDP review was considered by the local planning authority and its explanation was given to the UDP Inspector. The UDP Review Plan Inspector also considered the issue. Islington said to the UDP Inquiry:

“This proposal presented a dilemma from the UDP point of view, particularly as the loss of employment land at Ashburton Grove would be a departure from the Plan. It was decided not to include Arsenal's proposals in the Plan for the following reasons.

- *inclusion of the proposal would amount to an endorsement of the scheme, and this would be premature without knowledge of full details of the club's proposals.
- *inclusion would tend to sideline consideration of other important planning issues, and would delay adoption of the new plan.
- *the best way to judge a scheme of this complexity is to carry out a comprehensive assessment of its benefits and disadvantages, as measured against the policies and objectives of the UDP. This will help the Council (or the Secretary of State if the scheme is called in) to make an informed decision.”

26.. At paragraph 17 the London Borough of Islington continued by making clear how it saw the UDP review relating to the proposal:

“LB Islington Response

The Council accepts that proposals of this scale should normally evolve through the development plan process, in accordance with advice in PPG1 and PPG12. However, AFC's proposals are unique for Islington, in terms of both their scale and complexity, and first emerged last November (after proposed changes were first put on deposit at the First Deposit Stage). The Council, therefore, took the view that it would be inappropriate to introduce these major proposals at such a late stage in the UDP process. In the circumstances, the only ways in which the proposals could emerge properly through the UDP process would appear to be by (a) abandoning the review and starting again or (b) incorporating AFC's proposals in the next review of the UDP. The Council takes the view that either of these courses of action would be highly undesirable. Abandoning the review would prevent the Council from having an up to date development plan. Waiting for the next review in five or six years time would be too late for the Club, which, as the Council understands, has a strong business case

for a larger stadium to be open by August 2004. Without knowledge of full details of the proposals, which are only now emerging, it would continue to be difficult for the Council to promote the proposals via the development plan process.”

27.. The Inspector's comment is set out in his report:

“A possible relocation of the Arsenal FC stadium to Ashburton Road and the associated ‘knock on’ effects that may have on the Lough Road/Eden Grove area would provide a common linking theme to those three parts of the larger area referred to as the ‘Holloway Transverse’. This possible relocation and associated development has not however been included in the review of the UDP for reasons set out in the Council's responses (see paragraphs 49–50 of IS/C/General/1, paragraphs 16–19 of IS/R/Proposals/2, paragraph 15 of IS/R/Implementation/2 and paragraph 20 of IS/O/Closing/3). Given the interim nature of the stadium relocation proposal, I concur with the approach the Council has taken on this matter in the review Plan.”

28.. It can be seen that the consideration given to this matter in the e-mail is consistent with what the local authority placed before the UDP Inspector, and consistent with the view to which he has come.

29.. The relationship between the two was also considered in the Overview Report, Report A, to the Council on 10 December 2001:

“7. Planning Policy

7.1 Unitary Development Plan

7.1 Islington's Unitary Development Plan (UDP) was adopted in 1994. It is the Council's development plan. [Section 54A of the Town and Country Planning Act](#) requires that planning applications shall be determined in accordance with the Plan, unless material considerations indicate otherwise.

7.1.1 The Council is currently reviewing its UDP. Arsenal's proposals emerged in the summer of 1999, after the proposed changes to the UDP were first placed on deposit for formal objection in June 1999. The Council did not know whether or not the proposals should be supported in principle. Furthermore, it was advised that should LBI have wanted to promote the proposals through the development plan process, it would have had to either abandon the review process and start again or wait for the next review of the UDP in around five years time.

7.1.2 Sometimes unexpected proposals emerge that are not provided for in the Plan, and in these cases the UDP provides the best (indeed, only) policy framework by which these proposals should be judged. Officers consider that, in the circumstances, the best way of responding to the Club's proposals is within the policy framework set by the UDP. This approach was endorsed by the Inspector who presided over the Local Public Inquiry into objections to the proposed changes to the UDP, when he accepted that the uncertainties that apply to the proposed development package justify not having made it a proposal of the Plan.

....

7.14 The review of Islington's UDP has reached an advanced stage, having had objections to the proposed changes considered at a Public Local Inquiry, and the subject of an Inspector's Report, which recommends further modifications to the Plan. The Environment and Conservation Committee agreed responses to the Inspector's report at its meeting on the 25th June 2001 and modifications were placed on deposit over the summer. The Policy Committee is being recommended to adopt the revised UDP at its meeting on the 13th December 2001 and it expected that the Council would adopt the revised UDP in mid January 2002.

....

7.16 A number of the UDP policies reflect the Council's corporate priorities and strategies. These strategies are referred to, as appropriate, throughout this and the other reports.”

30.. Mr Hepher, in his first witness statement at paragraphs 3.2(a) and (b), refers also to reasoning which would justify (at least on planning merits) the approach taken by Islington.

31.. I do not accept Mr McCracken's submission. First, the duty under [section 70](#) of the 1990 Act to determine applications made to a local planning authority is a significant part of the Act. Whilst by virtue of [section 54A](#) the adopted UDP is the plan in accordance with which decisions must be made in the absence of other material circumstances, the decision maker's obligation under [section 70](#) does not simply operate after the adoption of a development plan. It is not suspended while a review plan is in preparation; nor is it suspended in relation to some category of major development which does not comply with the plan for so long as a review plan is going through its statutory processes. There is no such statutory provision. It would be a perverse reading of the statutory duty to determine an application, to hold that that duty in such circumstances was either suspended or was one which could only lead to a refusal of permission. Although Mr McCracken submitted that the discretion to which the *Padfield* principle would apply was that contained in [section 70](#), the reality of his submission was that there would be no duty at all to determine an application by way of grant or refusal; there would simply be an obligation to do nothing or to refuse permission, notwithstanding any view that might be formed in relation to its merits.

32.. It would mean that no decision could be made, and certainly no grant of planning permission made, so long as the review process of a plan continued. This so-called 'discretion' in [section 70](#) is however a duty to form a planning judgment; it is not a discretionary power to decline to determine applications.

33.. Indeed, given the emphasis which Mr McCracken placed on the possibility of partial or topic reviews more frequently than the five-year cycle envisaged in PPG12, it is difficult to see how the effect of his submissions is confined to the period when the plan is in the process of being reviewed. It would be equally applicable where it could be said that a review or topic plan should be prepared and that a further review should have been under way. I do not consider that any such approach is warranted by the two related but distinct duties within the Act in relation to plan-making and planning application determination.

34.. Moreover, proposals which are omitted from a UDP when they should be in it do not become for that reason unlawful. They do not become proposals the existence of which is to be ignored. They might become a basis for a call-in; but it is important to remember that there are two duties, notwithstanding that there is an interaction between plan making and decision taking. Mr McCracken's submissions involve a misunderstanding of the effect of the duty to include policies and proposals in the plan.

35.. Second, there is no reason in law why a local planning authority cannot determine applications while a UDP is progressing. The fact that it might do so in a way which pre-empted the independent scrutiny which a UDP Inspector's views might provide is a relevant factor for the local planning authority to consider in relation to the exercise of its [section 70](#) powers. But it is perfectly clear on the authorities that even where an Inquiry Inspector is seized of the matter as a proposal, the local planning authority can nonetheless grant permission and so pre-empt any recommendation either way by the Local Plan Inspector. The mere fact that a UDP review is going through its processes does not mean that a major proposal, which, subject to timing, could form part of the UDP review, must be included in the plan or, failing that, that an inquiry must under some guise (statutory or non-statutory) be held into the proposal.

36.. I was referred to two authorities which deal with the interaction between decision making and plan making. In *Davies v London Borough of Hammersmith and Fulham* [1981] JPL 682, CA, Stephenson LJ said:

"That, he thought was common ground between counsel in this case, except that Mr Wilkie submitted that a local authority should never override an objection, that was to say, override or make impracticable the carrying out or enforcement of an objection to a development plan or part of it, except in circumstances of real urgent necessity. For instance, if this was a dangerous structure requiring to be pulled down for the safety of people, that would be a reason which would justify the council in doing what it did; but something of that sort it was argued, was required before a council acting in one capacity would deprive itself of the power to give effect to an objection made to it in another capacity.

However, Mr Ouseley had submitted for the respondent council that there was no such exception, no such special requirement and, for his part, he agreed with him. It could not be said that because this decision was not a requirement of urgent public safety, it could not be justified and must be so unreasonable that no reasonable authority could have come to it. The decision must be considered in the light of the existence of the objections being made at the local inquiry, but if those objections were considered it did not follow that the decision was perverse or unreasonable and, this decision

taken, as Woolf J had gone on to find, for economic reasons, was not unreasonable and he agreed with the learned judge's decision on that part of the case.”

37.. That decision is also supported by the decision of Woolf J in *Allen v City of London* [1981] JPL 685 .

38.. If it be the case that a local planning authority can grant permission for a proposal when the Local Plan Inspector is seized of an objection or proposal in the plan related to it, even more so can the local planning authority do it where the matter is not actually before the UDP Inspector.

39.. Third, in order for a complaint about the way in which a policy or proposal has been dealt with in the plan-making process, to constitute a basis upon which the grant of planning permission for it can be challenged, it is the discretion in relation to that latter decision-making process which has to be attacked; it would have to be shown that there was a failure to consider the possible advantages of the proposal first going through the UDP process, or that the only rational decision would have been a refusal of planning permission on the grounds of prematurity. There is no statutory obligation to reach that conclusion; the only issue is whether that material factor was considered. But no such basis has been shown for saying that the local planning authority's exercise of its [section 70](#) functions was unlawful. It was well aware of the position; it considered the relationship to the UDP; it reached a reasonable view on it. It was a view which the UDP Inspector supported. This was made clear to the councillors and they accepted it.

40.. Indeed the objectors to the proposal here have the advantage that the appraisal of the applications by the local planning authority was undertaken against the policy framework in the existing UDP which is less favourable to the proposal than an altered policy might have been. If the matter were considered at a UDP Inquiry, existing policy could have no added weight or be a primary determinant of the outcome of the consideration of the UDP Inspector.

41.. The suggestion that the Club or authority wished to avoid public independent scrutiny ignores both the extensive public consultation on the application, the scoping report for the Environmental Statement and the Environmental Statement itself, the investigation of all matters by the officers, the publicly available officers' Reports and the role of the Greater London Authority and the Secretary of State.

42.. The Inspector was content with the Council's approach, so the approach to the UDP at least had independent scrutiny.

43.. Fourth, in any event, it is far from clear that a proposal to the UDP by Arsenal FC would have aided the public. The London Borough of Islington would probably have decided at that stage that it could not support or oppose the proposal yet; see its response at the UDP. Local residents, as counter-objectors, might well have had merely a limited say. The Inspector's conclusion could easily be: this is a possible exception. Had that been said, it is difficult to see how in any way the objectors would have been advantaged.

44.. What would be the value of just saying, as a tail-piece to the relevant policies, that a possible exception to them could be made for Arsenal FC? It is clear anyway that exceptions are possible to policies and there is very limited value in identifying one, even if the potential grant of permission makes it more likely. A debate before the UDP Inquiry would not have provided the analysis of the proposal necessary at the application stage because the application itself would not have been the subject matter of debate. This is merely a peg upon which to hang the argument that there should be a public inquiry and that there should have been some device to achieve it.

45.. Moreover, fifth, there was no legal obligation on the Council to formulate a proposal. Until it reached its decision in December 2001, the proposal was clearly only Arsenal FC's. The recommendation to grant permission does not turn the proposal into a proposal of the Council's. An exception to policy arising on a resolution to grant planning permission on the application of a developer does not thereby become a policy or proposal of the Council. Arsenal FC could have objected to the omission from the UDP of its proposal but the absence of such an objection does not constitute a legal flaw on the part of the Council.

46.. The suggestion that there should have been a modification proposed to the UDP to include Arsenal FC's proposal shows how late in the day it was. The earliest the proposal could have been regarded as the Council's was when it reached the decision which is now challenged because it was not included in the UDP. It is fanciful to treat it as an error of law on the Council's part to fail to promote a modification to debate the development which after detailed consideration it had decided to support. This

argument is but a device to secure a public inquiry on the false assumption that major proposals which in some form could go through a UDP Inquiry must go through some public inquiry process and that some contrivance must be found to achieve that.

47.. I reject Mr McCracken's further argument that the Inspector was misinformed about when the proposals emerged and that his views should accordingly be discounted. It is difficult to know the exact moment when something can be described as having "emerged", but the public press notice of November 1999 to which the UDP Inspector refers was not an unreasonable point for him to take. The existence of informal discussions between Arsenal FC and Islington beforehand, whether out of courtesy or to test the water, does not mean that the Inspector was misinformed. Nor indeed would it alter the significance of the point he made for him to have known, if he did not, that there had been such prior private discussion.

48.. I reject Mr McCracken's further contention that the benefits of the proposal should have been ignored as a matter of law because they had not been through the testing process of a UDP Inquiry. This is just another attempt to say that there should have been an inquiry; the inevitable consequence of such an approach would have been a refusal of planning permission because there would have been nothing to outweigh the UDP policies.

49.. This illustrates the fundamental error of Mr McCracken's arguments. They all amount to this. The local planning authority should not have granted planning permission without an inquiry. There is no such statutory obligation in relation to Part 3 applications. None of the mechanisms for an inquiry applied, whether appeal against refusal or directed refusal by the Mayor of London, or call in. Mr McCracken's submissions amount to a simple and misconceived re-writing of the statutory duty in [section 70](#). In the guise of requiring a statutory power to be exercised according to law, it amounts to an obligation to ignore a duty to determine applications having regard to all the material considerations. Provided, as it did here, that the local planning authority does consider the status of the UDP, the progress of its review, the potential for the use of the UDP review process, the timetable implications for the latter and for the decision-making process on the application, no complaint can be made.

50.. I turn to the role of the SPG produced by the Council. Mr McCracken's contention is that the SPG here (that is the planning brief) had been unlawfully produced and should have been ignored. Mr McCracken says that it is inconsistent with the UDP, which in respect of many parts is true. He says that it is therefore something which should not have been produced without it going through the UDP process. It would on that basis have had more public scrutiny. This is the second basis upon which he says there should have been an Inquiry.

51.. Mr McCracken relied on the recent decision of the *Court of Appeal in The Queen on the application of J A Pye (Oxford) Ltd v Oxford City Council (CO2001/2494/QBACF, 25.7.2002)* in which at paragraph 32 Pill LJ said:

"Local planning authorities should, however, bear in mind, and I would respectfully underline, Lord Scarman's comments in *Westminster*, reflected in paragraph 3.17 of PPG 12, the effect of which is that SPG must not be used as a device to avoid legitimate public scrutiny of local planning policies in accordance with statutory procedures. It follows from the *Westminster* decision that what section 36 of the 1990 Act requires to be in a local plan must be in a local plan, and subject to the local plan review procedure. I consider this to be a continuing duty in the plan-led system and not one which applied only at the point of adoption, an expression used at one stage by the judge (paragraph 67). The definition of supplementary planning guidance in PPG 12, which has a statutory status by reason of Regulation 20(2) of the 1999 Regulations, supports that conclusion."

52.. Until the decision of the Court of Appeal had been received, Mr McCracken had also relied on the judgment of mine at first instance in that case [\[2001\] EWHC Admin 870](#), and in particular paragraphs 61 and 62. For reasons which will become apparent when I deal with the *Pye* case it is necessary to set out what I said at paragraphs 61–67:

"61. I do not accept Mr Holgate's submission, assuming for present purposes that the contentious parts of the SPG are policies to which section 36(2) applies. I accept that the Local Plan as altered or as replaced must satisfy the requirements in section 36(2) to 36(11) as to its content. I also accept that a requirement that the plan shall contain the planning authority's policies, carries with it necessarily the negative requirement that planning policies must not be omitted from the plan.

62. Of course the statutory procedures for deposit draft, objections and independent consideration of those objections at an Inquiry, the independent Inspector's Report on those objections, the consideration of his recommendations and the modification of the plan in consequence, indeed the adoption itself, all envisage that the plan at its various stages complied with the section 36(2) as to its contents, and that the planning authority did not have other policies kept away from that

scrutiny. The existence of such policies other than in the plan, would be the subject matter of legitimate objection during the plan making process. Where the council adopts a Local Plan but fails to include in it all of the council's policies, there is a breach of the statutory requirement contained in section 36(2) and the plan is liable to be quashed under section 287 as in the *Westminster City Council* and *Kingsley* cases.

63. It is the Local Plan to which the statutory duties and remedies apply: breach of those duties leads to the plan being quashed, not some other policy documents.

64. However, the power to alter or replace a plan, coupled with the statutory provisions as to its content, cannot be transmuted into a negative obligation to produce nothing else. The duty is to include those policies in the plan. It is not a duty to forswear the production of policies in another document, whether on an interim basis or in parallel with the Local Plan, or instead of a replacement or alteration Local Plan.

65. Where a plan has been adopted and an authority promotes new policies without adopting a statutorily reviewed plan, it does not breach any duty as such; rather it merely has policies to which section 54A does not apply and to which the Secretary of State may decide to attach little weight. There would otherwise be an extraordinary fetter on the ability of a local authority to formulate or express its planning policies: it could not meet changed circumstances, a change of political complexion bearing on planning policy or new government policy other than by a review or alteration of its plan, however long that would take or however urgent the need. A planning authority could not even rely on consultation deposit or yet more advanced draft versions of its plan as policies for development control purposes. The statutory provisions simply do not support such a position.

66. Although a council might in certain circumstances act unlawfully in its approach to the exercise of its statutory discretion to produce a review, it is not alleged here that the City Council has acted unlawfully in the exercise of its power under section 39(1), although it seems to me that that is where a remedy would lie if it is contended at this stage that a local authority is seeking to develop policies in such a manner as to evade public scrutiny.

67. I do not consider that those conclusions are inconsistent with the decisions in the *Westminster City Council* and *Kingsley* cases. Those cases concern the content of plans at the point of adoption. They do not purport to deal with any discretion to produce a review plan or with a power of an authority to produce policies in advance of a review or indeed instead of a review; they do not preclude the production of policies in non Local Plan documents. The focus of those cases is the duty to include those policies in plans when they are produced.”

53.. PPG 12 discusses supplementary planning guidance. In paragraph 3.15 it is said that SPG must be consistent with national and regional planning guidance as well as with the policies set out in the adopted plan. It has a role in supplementing plan policies and proposals. Paragraph 3.17 emphasises, however, that SPG must not be used to avoid subjecting to public scrutiny in accordance with the statutory procedures, policies and proposals which should be included in the plan. Plan policies should not attempt to delegate the criteria for decisions on planning applications to SPG or to Development Briefs.

54.. I do not accept Mr McCracken's contention. It is important to understand what the SPG documents actually were. They were planning briefs, that is to say they were designed to assist in providing the framework for assessing these applications, their advantages and disadvantages, examining what were the important issues for the authority and for local residents, and setting criteria for their resolution. They were adopted after extensive public consultation. They were not the more detailed or supplementary policies to the UDP, which PPG12 considers. Nor indeed were they a set of substitute policies for those in the UDP. Rather they were a basis for examining a proposal against the UDP and UDP review policies.

55.. In any event reliance on [section 12](#), *Great Portland Estates* and *Pye in the Court of Appeal* or at first instance, which I have already set out, does not help Mr McCracken. His argument is that the obligation to put policies and proposals in the plan, and the negative requirement that they should not be omitted from the plan amounts to an obligation not to produce other policy documents; if that argument is good whilst a plan is in preparation, its logic makes it good if any one of the possible forms of review, topic or early review could be undertaken instead. It amounts, as Mr McCracken acknowledged, to an obligation to produce a plan or SPG within the terms of PPG12 and a prohibition on anything else.

56.. Such an argument is simply misconceived. There is no such statutory prohibition. The statutory obligation on the Council is to put its policies or proposals in a plan if it has one. The plan can be challenged under statute on account of that omission.

If the duty to produce a plan or the discretionary power to review a plan has not been fulfilled, judicial review lies to enforce that duty, rather than to prohibit the production of other documents such as planning briefs. I refer to what I said in *Pye* at paragraphs 63–66.

57.. I should also refer to paragraph 67 in the light of what the Court of Appeal said in paragraph 32 of its judgment. I do not consider that Mr McCracken's arguments here are advanced by that comment. He submitted that the comment by the Court of Appeal in paragraph 32 together with its approach to the obligation to produce plans and not to evade that by the production of other documents reinforced his contention.

58.. Although it is obiter, that comment holds that the sentence referred to in paragraph 67 of my judgment was too narrow a view of both *Great Portland Estates* and of my own judgment in *Kingsley*. Elsewhere in my judgment I recognised a clear duty on the Council to put its policies and proposals in the plan and that that in effect applies through the plan-making process if the plan as adopted is to comply with the statutory obligations. My comment only deals with the specific point at which the breach of the duty leads to the quashing of a plan. Likewise, the judgment recognised that the power to review a plan is one which can be enforced by judicial review if it is being unlawfully evaded. The Court of Appeal's point in its comment in paragraph 67 is clearly dealing with a local authority which is deliberately evading its responsibilities in a manner which would lead to judicial review of its failure to produce a plan; thus the continuing duty to review a plan is enforced. That point is made in the context of the sluggish approach of Oxford City Council to its local plan review.

59.. I do not consider that the Court of Appeal with that one comment rejected the basic point which I had made over a number of earlier paragraphs. The statutory duty is to put the policies and proposals in the plan. If it does not have a plan, judicial review will lie to prevent evasion of that duty. Failure to put the policies and proposals in the plan will lead to its being quashed and to less weight being given to policies and proposals which have been omitted. That is the other real sanction.

60.. Mr McCracken's submissions would involve such an extraordinary fetter on the local authority's ability to deal with changes in policy or new circumstances that I would have expected the Court of Appeal to have clearly stated that, if that was its view and to have disagreed with much more of my judgment, but it did not. I accordingly see no support in what the Court of Appeal has said for the suggestion by Mr McCracken that a local planning authority is limited to producing a plan and supplementary planning guidance as defined by PPG12 coupled with a prohibition on producing anything else, regardless of what that something else might be called, or its role.

61.. Moreover, Mr McCracken's submission is inconsistent with the point made by the Court of Appeal that a local authority can have draft policies and can give weight to those draft policies, even though they are inconsistent with the existing statutory policies. That is not said to be because those draft policies have initiated the statutory process of local plan review. Often the first draft plan is a non-statutory consultative document anyway. The Court of Appeal recognised that if the SPG had been called a Draft Local Plan, account could be taken of it. The difference lay only in the terminology used to describe the SPG. The same point applies here: if the planning brief had been called a planning brief and no reference had ever been made to supplementary planning guidance, Mr McCracken's argument would fall by the wayside. This illustrates the fallacy in his case: the lawfulness of the consideration of documents other than the statutory plan and non-statutory SPG within PPG12 is asserted by the Court of Appeal. If its production amounts to the evasion of the plan-making duty, judicial review lies. If the plan is adopted but policies are omitted, a statutory challenge lies. If the role of the emerging plan is ignored when an application is determined, the decision can be quashed. But planning documents other than SPG within PPG12 are not immaterial considerations, unlawfully produced and to be ignored on that account however pertinent and valuable the content.

62.. The statutory provisions in [sections 54A and 70](#) contemplate decisions which are not in accord with the development plan. There is no basis at all in any statutory plan-making duty for contending that a framework for the consideration of a specific application cannot be produced outside the plan-making framework. Such an approach would be an utterly pointless inhibition to the coherent fulfilment of the duty to determine planning applications. Neither Parliament nor the Court of Appeal countenanced a restrictive approach which would have so inhibited public debate and rational decision making, pursuant to the obligation to determine an application having regard to all material considerations.

63.. Accordingly, I take the view that a local planning authority can produce a planning brief, whether or not it is called supplementary planning guidance and whether or not it is consistent with the statutory development plan. The weight it gives it is for the decision maker, whether planning authority or Secretary of State, who will so far as material be guided by PPG12. PPG12, it must be remembered, is not statute or law, but merely a material consideration.

64.. This is not a case where the concern of the Court of Appeal in relation to the evasion of a duty applies. If it did so, it would lead to judicial review of the plan-making decision and provide a good basis for quashing the planning permission. But one can get to that conclusion directly because one can quash a planning permission where the local planning authority has failed to take into account the material consideration that the process or substance of decision making might be enhanced if the principles of a development had gone through the independent scrutiny of the UDP process. That is the fundamental issue, but there is no warrant on the facts here for saying either that the local authority was seeking to evade its duty or had failed to consider the relationship of the UDP inquiry to the proposals when reaching its decision to grant planning permission.

65.. The last issue in relation to SPG is whether that SPG should have been treated as of little or no weight. The basis for that argument was PPG12 and the references to no weight being given to SPG where it was inconsistent with the UDP. Such an approach is to ignore the function of this so-called SPG, which is quite different from that which PPG12 contemplates. PPG12 is not contemplating a bar on all other types of documents. If the SPG here had been called “planning brief, preliminary framework for assessment” (which is what it was), no such complaint could be made.

66.. The local planning authority were fully aware from the very contents of the planning briefs and from the Overview Report that the briefs were in a number of important respects inconsistent with the UDP. If they had been wholly consistent with the UDP, there would have been rather less purpose in them. The advice in PPG12 was wholly irrelevant to this issue and there was no need to draw that to the local planning authority's attention. It would have been absurd if this considered document, upon which extensive public consultation had taken place, had not been given weight in deliberations and instead the local planning authority had been obliged to say that its consideration of the application could not start in that way, however helpful it might have been to do so, that the consultation response on the SPG had to be ignored, and that it had to go instead straight to the equivalent of the Overview and development specific reports.

67.. There is a real danger in construing the PPG as if it were a statute and requiring application of it as if it were law. It cannot itself determine weight. The fact that a statutory instrument makes it a material consideration does not mean that it has become a subsidiary form of law. It is advice to be noted. Departure from it is to be justified with reasons where it applies, but it does not apply here on a purposive and broad reading of its contents. There has been no error of approach by the local planning authority in relation to the planning brief and PPG12. The Council was in any event very well aware, as I discuss later, that the proposals did not accord with a number of UDP policies. The vice of some SPG is that it is used as a substitute for the statutory development plan. That was not the case here; it was used to guide a debate on what the Council fully appreciated would be an exception to the UDP in a number of respects.

68.. The last point raised in relation to this first topic was that the nature of the issues required there to be an inquiry. However, the mere fact that a proposal is complex or, as here, unique for a borough, does not mean that an inquiry is necessary or that a decision not to hold one is unlawful. No statutory provision requires a local planning authority to hold an inquiry. It is difficult to see how the statutory structure for decision making and appeals should rationally include some implied statutory obligation on an authority to hold an inquiry into a proposal which statute not merely does not require, but instead obliges the local planning authority to determine. If the Secretary of State wishes to call a proposal in for an inquiry and for his own determination, he can do so. It was referred to him as a departure application. He will look carefully at its relationship to the development plan and to the Council's interest as owner. He gave a reasoned decision as to why it would not be called in. If in Greater London the Mayor wants to direct a refusal which would lead to an inquiry, he can do so. He did not choose to do so here. It would be contrary to the statutory obligation in [section 70](#) for a local planning authority to have to refuse an application which it supported, so that objectors could put their case to someone else. It is difficult to conceive of an implied statutory obligation to hold a non-statutory inquiry.

69.. The fact that factual issues may have existed over the extent of, for example, the loss and the significance of the loss of private waste capacity does not generate any requirement for a public inquiry. Those are matters perfectly properly for consideration and weighing by the local authority.

70.. As I have said, no [Human Rights Act](#) point was pursued here. There was wholly inadequate evidence of either claimant's human rights, whether under Article 8 or Article 1, First Protocol, being engaged. There merely was evidence that they were tenants and the following:

“Both Claimants made representations to LBI, and supported those of others, opposing the development. Edward Bedford lives close to the proposed new stadium. He has particular concerns about the effects of crowds, congestion, noise and pollution on his own and neighbour's homes. He is Chairman of the Harvist Estate Residents and Tenants Association. He

is a lifelong supporter of Arsenal as are many of the residents of the Harvist Estate. Elizabeth Clare lives on the Ring Cross Estate, next to which the new waste transfer station is to be built.”

71.. It is also quite clear from the decision in *The Queen (on the application of Adlard) v Secretary of State for the Environment, Transport and the Regions [2002] EWCA Civ 737*, paragraphs 31, 32, 39 and 40, that major developments do not by their nature require an inquiry to be held in order for a local authority lawfully to grant planning permission for them. There was many an opportunity for written and a specific one for oral representation.

72.. I do not regard any part of this multi-faceted argument that there should have been a public inquiry, whether statutory, non-statutory or as part of a UDP inquiry, as seriously arguable. Insofar as any part of it is arguable, it is wrong.

The Disclosure and Relevance of the DTZ Report

73.. This report is described in the witness statement of Miss Ebanja, who is the Senior Corporate Adviser to Islington, having been interim Deputy Chief Executive at the relevant times. She describes in paragraphs 3 and 4 of that statement how the DTZ report came into existence. DTZ were appointed to assist the Council in its negotiations with Arsenal FC on land issues. Part of their instructions meant that they had to examine, therefore, the cost estimates relevant to the deliverability of the development. DTZ advised her, both orally and in writing, from time to time. They produced a draft report in November 2000 with various other updates. She said that DTZ, it was plain, had been given full access to Arsenal FC's business plan; that Arsenal FC's cost estimates and figures had been carefully scrutinised; and that DTZ had come to a view as to the robustness of what they had seen. In correspondence it was also said on behalf of Islington that that document was available to five officers only within the Council.

74.. An application for cross-examination was contemplated in relation to this matter, but it was not pursued. It would have been necessary to show that there was a factual issue which it was for me to resolve, which I could not fairly resolve without cross-examination, for such an order to be made. Mr McCracken recognised that he could identify no such issue.

75.. An application was contemplated for disclosure of the DTZ report, but it was not pursued. The purpose of its disclosure would have been to enable essentially unspecified questions to be asked to see if some ground of challenge arose. This was closely linked to the possible application to cross-examine witnesses which, rightly, was not pursued.

76.. In the original grounds, and in the consolidated grounds, the ground of challenge relating to the DTZ report was that it was unfair for the document not to have been disclosed to objectors. Mr McCracken before me developed a further argument, which I now deal with, relating to the [Local Government Act 1972](#). [Section 100D](#) deals with the disclosure of background papers. It provides so far as relevant:

“(1) Subject, in the case of section 100C(1), to subsection (2) below, if and so long as copies of the whole or part of a report for a meeting of a principal council are required, by section 100B(1) or 100C(1) above to be open to inspection by members of the public —

(a) those copies shall each include a copy of a list, compiled by the proper officer, of the background papers for the report or the part of the report, and

(b) at least one copy of each of the documents included in that list shall also be open to inspection at the offices of the council.

....

(4) Nothing in this section —

(a) requires any document which discloses exempt information to be included in the list referred to in subsection (1) above;

....

(5) For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which —

(a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and

(b) have, in his opinion, been relied on to a material extent in preparing the report,

but do not include any published works.”

77.. [Schedule 12A](#) of the 1972 Act provides in [Part I, paragraph 7](#) , an exemption in relation to that duty. The exemption covers:

“information relating to the financial or business affairs of any particular person (other than the authority).”

78.. But there is a qualification to that exemption set out in [paragraph 7 of Part II of Schedule 12A](#) :

“Information falling within any paragraph of Part I above is not exempt information by virtue of that paragraph if it relates to proposed development for which the local planning authority can grant itself planning permission pursuant to [regulation 3 of the Town and Country Planning General Regulations 1992](#) (SI 1992 No 1492).”

79.. [Regulation 3 of the Town and Country Planning \(General\) Regulations 1992](#) provides:

“Subject to [regulation 4](#) , an application for planning permission by an interested planning authority to develop any land of that authority, or for development of any land by an interested planning authority or by an interested planning authority jointly with any other person, shall be determined by the authority concerned, unless the application is referred to the Secretary of State under [section 77](#) of the 1990 Act for determination by him.”

80.. Mr McCracken submitted that the DTZ report was a document which should have been listed in the agenda for the meeting of 10 December 2001 and copies provided. As a matter of fact it was not listed as a background document in any agenda report. Mr Robin Purchas QC, for Islington, submitted that the document did not fall within the scope of [section 100D \(5\)](#) , because, I should infer, the officer had concluded that it was not a background document. No judicial review ground was raised to challenge that judgment which, he said, I should infer had been made. The matter cannot now be dealt with directly in the evidence. That is by itself a sufficient answer to the claim raised by Mr McCracken because, following the directions of Richards J in relation to revised consolidated grounds, no further grounds could be raised. No such grounds having been raised, it is a matter which could be dealt with in that short way. Had it been dealt with by evidence following grounds properly raised, I am not sure that Mr Purchas would have been correct in his submission in relation to action 100D, because of the references made to the document in [paragraph 5.1](#) of the Overview Report.

81.. However, it is quite clear from the witness statement of Miss Ebanja that the DTZ report was shot through with the confidential information of third parties, and fell within [Schedule 12A, Part I, paragraph 7](#) . It is perfectly obvious that it was assessed as confidential on a reasonable basis. Accordingly, [section 100D\(4\)\(a\)](#) operated so as to preclude the non-inclusion of that document in the list of background documents constituting a breach of duty.

82.. I do not accept Mr McCracken's convoluted argument that the effect of [Schedule 12A, Part II, paragraph 7](#) , together with [Regulation 3 of the 1992 General Regulations](#) , meant that [Part I, paragraph 7](#) , was disapplied. I note that the exemption in [Part I, paragraph 7](#) , is inapplicable to a local planning authority. The simple question is this: was this development for which the local planning authority can grant itself permission pursuant to [Regulation 3](#) ? The answer to that is: No. It was neither an application by an interested planning authority to develop any of its land, nor an application by an interested planning authority to develop any land, nor an application by an interested authority made with any other person. [Regulation 4](#) is of no application or assistance.

83.. Mr McCracken, as I understood it, submits in effect that it has to be supposed that the application for these purposes is made by an interested planning authority. If it were, it could grant itself permission because the larger part of Ashburton Grove and parts of Lough Road are its land (although it follows from that that that part of those sites are not Council owned). There is no warrant for such a supposition. If such a supposition were made, all applications to develop a site which included any local authority land would fall within [Regulation 3](#). But it is difficult, if one is making that supposition, to see why that would not also have to be made in respect of an application for development of any land, because on Mr McCracken's argument, it must be assumed to be an application by an interested planning authority. This would make a nonsense of the qualification to the exemption, and the exception to non-disclosure would in fact become a rule of disclosure.

84.. The same answer follows if the test for whether something falls within [paragraph 7 of Part II to Schedule 12A](#) was whether the application could be made by a local planning authority, which is another way of putting the same point. Nor is there a legislative justification for such an approach. The aim is to prevent a developer acting jointly with a local authority which can grant planning permission for the development, being able to avoid relevant financial scrutiny. The exemption does not apply to an authority's affairs anyway.

85.. In any event, here the desire to examine the DTZ report was not to ensure that the local authority had enough money for its land, nor to see whether there was a planning implication which might arise from the funding gap in terms of the ability of the local authority to obtain the planning benefits. Those are all dealt with by the [section 106](#) agreement. What the objector wanted disclosure of was information peculiar to Arsenal FC's financial and funding position which supports my view that Mr McCracken was misreading this section, in a search for material about an applicant which it would be very unusual for the public to see in the normal way.

86.. The alternative submission drew on common law fairness. It was said that this required the disclosure of the document by the local planning authority to objectors. Mr McCracken relied on a number of authorities. He referred to the decision of the *House of Lords in R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531, 560, where it was said:

“(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification; or both.

(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

87.. He also referred to the decision of Browne J in *Hibernian Property Co v Secretary of State for the Environment* (1974) 27 P&CR 197, 208, subsequently applied by the *Court of Appeal in R v Secretary of State for the Environment, ex parte Slot* [1998] JPL 692, 700–701. From it he drew the principles that the parties to an appeal or other proceedings must have a fair opportunity for correcting or contradicting any relevant statement prejudicial to their view, that a decision maker must not take into consideration extrinsic information from one party which a party with an opposing view has no opportunity of contradicting, and that a decision maker must not hear evidence or receive representations from one side behind the back of another.

88.. There are a number of other authorities, not surprisingly, to the same effect. He placed particular reliance upon the decision in *McMichael v United Kingdom* (1995) 20 EHRR 205, at paragraph 80. This was a case that was said to be important because the information of which Mr McMichael had been deprived, was said to be sensitive information relating to social work and care reports on his children. Mr McCracken pointed out the significance to this proposal of enabling development and said that economic benefits were being used to interfere with objectors' ECHR rights — a point which he had barely pursued and quickly abandoned. The development had been seen as a regenerating development but, if it could not be developed, the permission could be seen as having a blighting effect. The proposal might never be developed or, if developed, might not be finished. The deliverability of the proposal had been seen as a major benefit by Mr Hopher in his submissions in support of it. There was a funding gap of which he complained in other contexts, which supported Mr McCracken's concerns. Mr McCracken said that this might also mean that funds for transport works and for implementation of the measures required to achieve the high non-car modal split could be at risk, altering the basis of the approval by Islington. The planning authority should not have had this information without it being available to objectors.

89.. I do not accept Mr McCracken's arguments. For the reasons which I have already given, I do not accept that the two claimants have shown that their human rights are in any way engaged here. There was very little evidence about them at all. Apart from the fact that they had a tenancy, one near the new proposed ground and the other near the new proposed waste recycling centre, there was no evidence whatsoever as to any effect which the proposals might have on any right which they enjoyed. There was no more evidence than that they had certain concerns. That is wholly inadequate.

90.. However, the question of what is fair depends on the context and circumstances. So far as the Council is concerned, the existence of the DTZ report was clear from paragraph 5.1 of the Overview Report, as well as its conclusion and implications. It was produced, as Miss Ebanja makes clear, to deal with land values as between the Council and Arsenal FC and for those purposes DTZ had contact with Arsenal FC. Financing was also relevant to the issue as to whether Arsenal FC were providing too little for the transportation package and by way of affordable housing. Islington wanted as much as it could obtain and Arsenal FC was looking to reduce the funding gap between the value of the enabling development, the cost of development of the land, and what it and the institutions could raise and fund respectively. The GLA also examined carefully the extent of funding of commercial elements and planning benefits to ensure that there was no undue profit from those going to support the stadium rather than going to provide more planning benefits.

91.. Although the DTZ analysis was referred to in the Overview Report, no request was made for it on behalf of the claimant until 14 June 2002. An earlier request in April 2002 was made on behalf of ISCA, who have ceased to be claimants in these proceedings.

92.. The planning issues in relation to which the fairness or unfairness of non-disclosure has to be judged are the likelihood of the grant of planning permission itself causing blight, and the prospect of the package of benefits being delivered. But I was not shown any document in which, bearing in mind the conclusion of the Overview Report, concern was raised by either of these two claimants as to the potential for blight through the grant of planning permission. It was merely referred to briefly as a possible argument in the second witness statement of their solicitor, but essentially that was by way of submission after the event. If there were a grant of planning permission, but the proposal were not built, the objectors would be nearly as pleased as if the proposal were not permitted at all. This sort of point can be made in respect of any large complex development. It is very odd to suppose that Islington would refuse planning permission for what was a desirable development, with the benefits which it could bring, because it could not be certain that ultimately it would be started. There was no evidence that there would be any blighting effect were it not to go ahead; the claimants made no such point to the Council. The UDP would continue to provide policies for other developments.

93.. Mr McCracken's point could not be, and was not, that the development might start but not finish. It could not be his point because the very sequence of development told against it. The development of the new stadium could not proceed without the expensive removal of the existing uses on the Ashburton Grove site and the creation of a new waste recycling centre at Lough Road. This substantial expenditure could not rationally be committed without Arsenal FC being satisfied that it could then proceed with the new Ashburton Grove stadium, the very aim of the project. Once the stadium had been built, it would only be in its financial interest to bring about the agreed redevelopment of the existing stadium because that, too, would yield financial benefit.

94.. The second planning issue raised in Mr Dunkley's witness statement to which the unfairness of non-disclosure related, and again raised more by way of submission after the event, was whether the package of benefits would be delivered. That depends upon a view being taken in relation to the effectiveness of the [section 106](#) agreement, and the degree to which the requirements are indeed variable according to the financial position of Arsenal FC. To the extent that they are variable according to its financial position, this is a point which could have been made in response to both the planning application and the [section 106](#) agreement reports. But I have not had my attention drawn to any such representations or assertions that that is what the claimants wished to say.

95.. Moreover, as I later explain, the [section 106](#) agreement is reasonably regarded as satisfactory by Islington and the GLA in relation to the extent of affordable housing, after examination of the financial situation and the requirements of that agreement are now fixed. The public transport requirements are fixed and the degree of financial leeway is less than the claimants contended. There was public consultation on the content of the [section 106](#) agreement.

96.. There is no true parallel with *Doody* and *McMichael*. In both those cases the decision maker had, but one of the parties before him did not have, material of vital importance to the essence of the case, in the absence of which one of the parties' case could not be fairly presented.

97.. Here the councillors were not better off than the objectors. They, too, did not have the DTZ report because it contained references to Arsenal FC's confidential business plan. Only five officers saw the November 2001 report, one of several advices and reviews, oral and written, which DTZ provided. I infer, precisely because of its confidential references and Arsenal FC's desire to limit the risk of its becoming public property, that the number of people who had access to it were limited. The planning issues to which the DTZ report gave rise were sufficiently clear for comment on those issues to have been made by the claimants (or indeed by anybody). It is difficult to see that this document can equate in significance to the absent reasons and missing report in *Doody* and *McMichael* respectively.

98.. Further, I do not accept that councillors should be deemed to know what a handful of officers know and thus should be regarded as being in a different position from the objectors. In this context that point is artificial, especially as the number of officers was specifically limited and councillors were intentionally not provided with the document. The reliance by Mr McCracken on *Bushell v Secretary of State for the Environment [1981] AC 75* is misplaced. It would be quite wrong to attribute knowledge to the councillors in order artificially to create an unfairness which does not, in reality, exist.

99.. Moreover, fairness in the planning process is not confined to a consideration of the interests of the objectors. It also needs to respect the confidentiality of the applicant because it is to its figures rather than to DTZ's general appraisal that the claimants' point is addressed. It has the gist of the appraisal. It is this actual appraisal, and within that Arsenal FC's figures, that the claimants want. This is emphasised by their constant references to a £50 million funding gap drawn from an e-mail in which that is referred to. But it would be unfair to Arsenal FC for the local planning authority to be made to reveal what was handed to its advisers in confidence in the clear expectation that it would have a very carefully restricted circulation.

100.. A planning authority needs to be able to examine matters in a confidential manner with applicants, as was done here, and for that purpose to use independent consultants to whom disclosure of the relevant information is made in confidence. This is the same process that the GLA went through. If a local planning authority cannot do that, it will be hindered in its negotiations with developers over the content of publicly beneficial packages such as the extent of affordable housing and other legitimate benefits related to the value of the development and its funding. The public interest would be harmed.

101.. It is quite clear that the information is confidential and disclosure of it would be in breach of confidence. There is nothing unfair in the non-disclosure of that document, with the gist of the DTZ appraisal being available.

102.. Finally, I consider that [section 100D\(4\)\(a\)](#) provides for a local planning authority to be able to comply with its duties of openness without a breach of confidence. A specific statutory provision provides for non-disclosure of this document and is applicable in this context. Even if (which I doubt) there is scope for a common law duty of fairness to supplant rather than supplement that regime, that regime is a very powerful indicator as to the content of the common law duty of fairness. There is nothing arguably procedurally unfair here in the non-disclosure of that document.

Unfairness at the Council meeting

103.. It was also said that there was unfairness procedurally at the Council meeting of 10 December 2001, which it is convenient to pick up here. It is said that the conduct of that meeting was unfair. The contention was that the local residents should have had the last word rather than Mr Hepher, Arsenal FC's planning consultant. If that had happened, it was said that the residents could have rebutted factual errors which he made. If the developer lost, he could appeal against the refusal of planning permission; but no such procedure was available to local residents. The time allowed to local residents was too short and many could not speak. Councillor Leigh, the ward councillor for Ashburton Grove, had to speak in a different section of the debate. The summary report was presented too late and in too few a number for it fairly to be dealt with. I deal with that later. I observe merely at this stage that some 300–400 copies were available at the meeting.

104.. It needs to be borne in mind that this was not some run-of-the-mill public meeting. This was a Council meeting at which the public were permitted to speak. There was no entitlement on either side of the debate to speak. The meeting was conducted in accordance with standing orders and it was in accordance with those that the public were to be permitted to speak. The duration of their speaking and the order in which they spoke is a matter for the legitimate discretion of the Chairman applying standing orders. Three minutes was a reasonable time for each of the people who spoke, other than the developer. That is what the standing orders envisage. The meeting lasted from 1932 hours to 0015 hours. It was divided into three sections for the three applications. Fifty members of the public spoke, but it is obvious, if a meeting in relation to a matter as controversial as this is to be conducted within any sensible limits, that not everybody can speak for long or as long as they want to.

105.. Councillor Leigh did not speak in the section she wanted, but she was able to speak. Both the claimants in these proceedings spoke. It is legitimate for the developer to go last in relation to each section, but that is a matter for the discretion of the Chairman. If it was thought unfair to do that because the developer could appeal if unsuccessful, it might equally be said that it would have been unfair had the local residents gone last because they can take judicial proceedings, as they did, going first and last and taking two of three allocated days. The point is misconceived. It was obviously a fair meeting.

Unfairness and the late supply of information

106.. The next matter raised was the late supply of information. It was said that very significant information was supplied at the last minute or not supplied at all, so that objectors were unable to make the full, proper and meaningful representations which they were entitled to make. Mr McCracken drew upon the judgment of Ognall J in *R v Rochdale MBC, ex parte Brown [1997] Env LR 100*. In that case Ognall J cited from the judgment of McCullough J in *R v London Borough of Camden, ex parte Cran and others (1995) 94 LGR 8*:

“The process of consultation must be effective. Looked at as a whole it must be fair. This requires that consultation must take place while the proposals are still a formative stage. Those consulted must be provided with information that is accurate and sufficient to enable them to make a meaningful response. They must be given adequate time in which to do so. They had adequate time for the response to be considered. The consulting party must consider the response with a receptive mind and in a contentious manner when reaching its decision.”

107.. In each of those cases a very substantial amount of material was produced in such a way that the opportunity to make adequate representations did not exist. In the *Cran* case a volume of material was also accompanied by a very crowded agenda in relation to which it was said that councillors had inadequate opportunity to absorb the material.

108.. The documents that were said not to be available, and in respect of which complaint was made, are described by Mr Dunkley in his witness statement. They are: a document dated 29 October 2001 called “Matchday Pedestrian Crossing Capacity — Holloway Road” provided by Arsenal FC's Transportation Consultant; a response to Highbury Community Association by the same Consultant, dated 5 October 2001; a letter from Arsenal FC's planning consultants with enclosures dated 15 November 2001; a detailed report from Arsenal FC's acoustic consultants; a bundle of documents that have been described as “the November Bundle”; and it was also said that an Environmental Statement appendix entitled “Further Information regarding extended stays in stadia resulting from post-match entertainment” have never been provided.

109.. Miss Cluett, the Council's Planning lawyer, responds to this in her second witness statement at paragraph 47:

“Neither of the Claimants, nor any other person on their behalf, ever sought or requested to inspect the documents. Specific documents were made available on request where appropriate.

All documents required to be made available pursuant to Regulation 20 of the 1999 Regulations were made so available.

As indicated in my First Witness Statement, during the Council's scrutiny of the proposals, detailed debate and analysis quite properly took place, some of which involved correspondence and memoranda. These documents did not form part of the Environmental Information required to be available for public inspection, but formed part of officers working files.

At the request of Islington Stadium Communities Alliance, and in its wish to be open and transparent in the context of the legal challenge raised, parts of Council Officers' internal working files were made available for inspection on request, as soon as the file documents could be collated in good order.”

110.. Mr Harrington states in his second witness statement that he believed that the November bundle was available before 7 December 2001. He attributes some of the difficulties which may have been experienced to the access which the public had to the files, which meant that they were not always in proper order. He received a letter from Mr Scott of ISCA on 21 November 2001 complaining about that. He says that he checked that all the supplementary material received by the Council, which would

cover most of the material that has been referred to by Mr Dunkley, including the November bundle, was on public display. This issue was again raised by the review group on 6 December 2001. He checked the next day and the information was still there. There is therefore a clear factual issue underlying this ground of challenge.

111.. Even if Mr Dunkley were right in relation to the factual position, in the light of the absence of any representations from the claimants seeking those documents and in the light of the extensive material publicly available well beforehand, those positions could not possibly be considered to be equivalent to the obstacles placed in the way of the public in *Brown* or *Cran*. The public (including the claimants) had ample opportunity to comment on the applications. The comment made in relation to consultation in *R v North Devon Health Authority, ex parte Coughlan* [2000] QB 213, 258–259 (paragraph 108), is relevant here:

“It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.”

112.. Even if it were necessary for every piece of information from a developer to the Council to be put on public display, it is very important to bear in mind the practical reality of the effect of the desire of many to see these files. There was no common law unfairness here. Mr Dunkley's evidence does not deal with the claimants' involvement in, or interest in, or endeavours to obtain, the material or what they would have done with it if they had obtained it.

Unfairness and the Officers' Reports

113.. I turn now to the many criticisms made of the officers' reports. The relevant reports are comprised in two substantial volumes: an Overview Report with appendices and Development Specific Reports. They were supported by a guide to the report. They were available to councillors and to the public ten days before the committee meeting of 10 December. No breach of any statutory duty or standing order is alleged in relation to them. I do not accept the criticisms that they were confused reports, or that they were difficult to find their way around, or that they were poorly structured and difficult to follow, or that in consequence ten days was too little time for councillors to absorb them or for the public fairly to comment on them. This is not a case comparable, as I have said, to either *Cran* or *Brown*.

114.. To some extent this is a matter of impression, but my firm impression, having had the opportunity to read those reports at some length, is that they are clear, well-structured and straightforward, given the length and complexity of the subject matter. They follow a standard structure of a description of proposal, the setting out of policies, and the consultation response overall and then topic-related evaluation. The consideration of them is aided by the Overview Report with its indices and its coloured pagination to aid swift identification of relevant parts.

115.. As an illustration of the difficulties, Councillor Leigh complained that she could not find where the height of the stadium, which was said to be an important concern, was set out. I found it where I expected to find it. It was early on in the description of the relevant proposal, that is the stadium. It is also to be found elsewhere. I accept that Councillor Leigh could not find it, and found the subject matter too complex to absorb in ten days. But I do not consider that that demonstrates the legal error contended for.

116.. It is important to see all these submissions in the context of the discussion of this proposal over time and the extent of public involvement in these widely publicised proposals. I have already referred to the extent of that consultation. There is nothing in the period of time which the public had to comment on the officers' reports which is unfair. After all, that is not the focus of public consultation. The focus of public consultation is the planning brief, the scoping opinion, the Environmental Statement and, above all, the applications themselves. The report is essentially a report for councillors, to enable them to consider all matters, including the public consultation responses themselves.

117.. In any event, there was ample time for a very large number of people to prepare what they wished to say at the Council meeting. There is no evidence that the claimants had too little time. The various officer reports did in fact receive widespread dissemination. Ten days before the meeting the documents were sent out. People, including the claimants, commented orally upon them at the meeting and could, if they wished, have written in in relation to them. There was adequate time for conscientious

councillors to absorb the material set out in those reports. They did not come to them out of the blue. They knew that the proposals existed. The matter had been already the subject of widespread public consultation.

118.. Mr McCracken related that submission to his contention that a summary report, produced on the day of the meeting, was unfair and misleading and yet, because of the length and complexity of the full reports, he said it would, in reality, have been the basis of decision. He again referred to *Cran* in this context. He relied upon the evidence of Councillor Leigh.

119.. I reject that submission. The principles in *Cran*, when applied here, do not show that there was any defect in the main reports. They were inevitably complex. Members were warned that they would be coming so they could prepare themselves, and they were given longer than normal to absorb them, for a lengthy meeting of nearly five hours devoted to just that one agenda item. This was but one item on a crowded agenda with lots of material which there was no time to absorb.

120.. I also reject the application of the principles in *Cran* to the summary report. The basis of that submission was that the main reports were so complex that councillors inevitably would look to the summary reports. I see no factual basis for drawing any such conclusion so far as the generality of councillors is concerned.

121.. The summary report contains an executive summary drawn from the main report. It is the summary required by [Regulation 21 of the Town and Country Planning \(Environmental Impact Assessment\) Regulations 1999](#) in respect of the grant of planning permission for development subject to an Environmental Statement. This covers the main reasons and considerations on which the decision was based, and a description of the main measures to mitigate the major adverse impacts. It is not illegitimate to describe that as a summary, although it is not a summary of the content of the main reports.

122.. In that context, however, as a summary in relation to [regulation 21](#), no complaint is made of that report. It is true that the summary report does not deal with the development plan. It does not list disadvantages. It does not deal with a number of points about which criticism was later made by the claimants: for example, waste handling capacity, which was raised by others at the Council meeting. But the true answer to that point is that the summary report and the consideration by the Council is not unlawful for that reason. The summary report did not have to deal with all those matters. It was not, and did not purport to be, a substitute for the main reports. It was only available on the day of the meeting and could not, therefore have been, a substitute for reading the full reports. Miss Leigh's complaint is that she did not see one at the meeting, but many copies were provided, 300–400. Her task was to grapple with the meeting reports. This is not remotely comparable to the circumstances in *Cran*. It is quite inadequate just to point out that certain parts unfavourable to the development were not in that summary. It is an overall useful summary because it is the one required by statute to be provided and I see no reason why, in order to assist people, it should not have been produced, and made widely available at the meeting on the day.

123.. There was a complaint that the summary report was not available in time for local residents to comment on it, but that allegation misses several points. First, it was not the basis for consideration by councillors. Second, there is a very limited role for public comment on such reports because they are not the focus of consultation. Third, it was an aid to the public in dealing with complex issues, constituted by a statutorily required document, if planning permission were granted. Fourth, it was in any event already available as the executive summary in the main reports, and indeed also in the guide to the Arsenal reports which was produced with the main reports, if anybody had wished to comment on its substance. Fifth, There was no obligation whatsoever to make it available. The fact that at a crowded meeting not everyone received a copy is not a matter of legal error; 300–400 were distributed.

124.. It is entirely reasonable for the summary report not to deal with the UDP, given the extent to which it is analysed in the Overview Report and in the application specific reports.

Errors in the Officers' Reports

125.. Mr McCracken relied on a range of specific omissions and errors in the reports. It is important to recognise that these were reports to the Council. Councillors will also have knowledge derived from other occasions when the issues are considered: from the planning brief, the Environmental Statement and public debate (including debate at the meeting).

126.. In order for a judicial review challenge to succeed on the basis of defects in the reports, it would have to be shown that the omission was significant and not made good, or that the matter was presented in a significantly misleading way and was not made good. Courts are, rightly, very cautious about reading officers' reports other than in a broad and common sense way.

They are not contracts or statutes; they do not call for refined, let alone legalistic, analysis. With that in mind, I turn to the submissions actually made by way of specific criticism.

127.. First, it was said that there was no reference to whether the development would accord with the UDP. The importance of that derives from [section 54A](#) of the 1990 Act. The appropriate approach to such a question is to be found in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447 , 1459–1460:

“Counsel for the Secretary of State suggested in the course of his submissions that in the practical application of the section two distinct stages should be identified. In the first the decision-maker should decide whether the development plan should or should not be accorded its statutory priority; and in the second, if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration. But in my view it is undesirable to devise any universal prescription for the method to be adopted by the decision-maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. In the particular circumstances of the present case the ground on which the reporter decided to make an exception to the development plan was the existence of more recent policy statements which he considered had overtaken the policy in the plan. In such a case as that it may well be appropriate to adopt the two-stage approach suggested by counsel. But even there that should not be taken to be the only proper course. In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate.”

128.. I recognise that there is no use of the specific statutory words of [section 54A](#) . But the message that the development does not comply with the UDP is clear and unmistakable, as was the need for other factors to outweigh that non-compliance. It is unnecessary to provide all the references in that respect; the matter can be seen sufficiently clearly from paragraphs 7.1 in the Overview Report and paragraphs 7.1.8 and 7.1.9:

“7.1 Unitary Development Plan

“7.1 Islington's Unitary Development Plan (UDP) was adopted in 1994. It is the Council's development plan. [Section 54A of the Town and Country Planning Act](#) requires that planning applications shall be determined in accordance with the Plan, unless material considerations indicate otherwise.

....

7.1.8 Departures from Adopted UDP Policies

7.1.8 Arsenal's proposals raise a number of fundamental policy issues. These are a number of general policies where arguably it could be said that the proposals do not comply and there are assessed in this report and Reports B, C and D. However, officers consider that they depart from the specific adopted (ie 1994) UDP policies outlined in the table below.

....

7.1.9 Departures from Proposed UDP Policies

7.1.9 Government advice makes clear that where there is both an adopted plan and an emerging plan (as in this case), the decision whether an application is a departure must be considered against the adopted plan. Nevertheless, given the decision to assess AFC's proposals against the UDP as proposed to be adopted, officers wish to draw attention to those proposed policies which they consider the proposals would depart from. These are set out below.

....”

129.. Although the UDP in paragraph 7.1.8 is the plan directly engaged by [section 54A](#) , both the UDP and the draft UDP review references are followed by a list of policies which would not be complied with. Paragraph 7.1.10 deals with making decisions on departure applications:

“7.1.10 Making Decisions on Departure Applications

“7.1.10 The fact that the applications depart from the Plan does not mean that the Council could not make exceptions and resolve to grant planning permission for the proposals. However, before doing so, Members would need to satisfy themselves that other material planning considerations justified such a decision. If Members do resolve to grant planning permission, the departure applications would need to be referred to the Secretary of State for his consideration.”

130.. These were referred to the Secretary of State as such.

131.. As an instance (and there are others), the policy evaluation highlights the departures. For example, paragraph 17.11 of the Overview Report on employment states:

“Ashburton Grove Area

The stadium, Queensland Road and Northern Triangle proposals would change the use of the whole of the Queensland Road/Ashburton Grove Industrial Warehousing Area into a mixed commercial/residential area. This would represent a wholesale departure from UDP Policy E11. Proposals for this area also do not accord with UDP Policy E4 or the advice in the SPG on Business to Residential in that they would result in the loss of B1 (office/light industrial) floor space. Proposals for these development parcels, together with Drayton Park, are also not in accordance with UDP Policies E8 and E11 in that they would result in the loss of B2 (general industrial) and B8 (storage and distribution) uses.”

132.. The individual reports also set out policies and appraise them. For example, the Ashburton Grove Report (Report B), between pages 88 and 90, deals with the breach of UDP policy and concludes in paragraph 40.1.8–40.1.9:

“40.1.8 My conclusion is that the application fails to meet a number of the policy tests of the SPG and the UDP and to that extent I am in agreement with ISCA and the other objectors.

40.1.9 The applicants have, however, put forward a number of reasons, based on policy, as to why the failures are not significant in the circumstances of these cases. The first of these is that existing businesses are re-located.”

133.. It concludes that it would be a breach, but it would not be significant. I interject that Mr McCracken said that it was an error of law for the UDP appraisal to come after the SPG or planning brief appraisal. I regard that as a trivial point.

134.. One can also see the point in relation to height on page 108 of the Ashburton Grove Report:

“47.2.4 Four parts of this application break the UDP rule: the stadium itself, part of the northern Queensland Road blocks, the block to Benwell Road and the building at the northern triangle. I discuss these in turn but it is quite clear that each amounts to a departure from the UDP.

....

47.2.18 I am therefore satisfied that an exception to the Council's tall buildings policy is acceptable and, equally important, approval would not set a precedent for further tall buildings.”

135.. It is unnecessary to go through further citations in relation to other policies because those are the parts which might be said to have the greatest degree of non-compliance with UDP policies.

136.. There is a clear direction given in relation to the approach to and degree of non-compliance. It is non-formulaic, but the approach is plain. It was made clear finally (if there was any doubt hitherto) by what was said by officers at the meeting of 10 December 2001:

“Following discussions at the Arsenal Review Group meeting on 6th December, I would like to emphasise that the identified departures from policy in the proposed unitary development plan, which is set out in table A6 in the Overview Report, are in addition to the identified departures from the policies in the adopted UDP, so the two tables should be read together as an indication of where the proposals depart from both the adopted unitary development plan and the proposed revised unitary development plan.

These are large and complex proposals relating to three sites. Officers have carefully considered them, both in terms of the proposals for each site and their overall cumulative effect. The proposals depart from a number of policies in both the adopted UDP and the proposed, revised UDP, as outlined in tables A5 and A6, as I have just referred to.

[Section 54A of the Town and Country Planning Act](#) requires that planning applications shall be determined in accordance with the unitary development plan unless material considerations indicate otherwise. Hav[ing] considered all other material considerations, including the comments made from interested third parties, officers consider that there are material considerations that outweigh policy breaches.”

137.. Next it was said that there was irrationality and a misdirection in paragraph 59.2 on page 129 of Report B, where it was said:

“The objectors raise a large number of concerns but a number of their issues have kept coming time and time again. These are included in the Executive Summary at the head of the Report. This makes explicit the issues. What I should make clear here, however, is that whilst the scale of comment can be material consideration, this is not a referendum, not a simple count of numbers in favour or against. The Development Plan has primacy here.”

138.. It was said to be irrational to describe the Development Plan as having primacy when the Council officers were putting forward a proposal contrary to it, or else that the reports had misdirected members as to the degree of compliance of the proposals with the UDP. They did no such thing, in my judgment.

139.. In context, the putting of the Development Plan first was emphasised because the officer was seeking to counter any question that this was an issue to be resolved by means of a head count, given the large number of residents on both side of the debate. It was a perfectly proper comment in that context. It is clear in context that it is not suggesting that the proposal complied with the UDP. Such a conclusion would be a perverse reading of the reports as a whole. It is clear also that the reports are not inviting rejection of the proposal; it is clearly therefore seen as an exceptional development. This submission involved a level of textual criticism beyond what can properly be levelled at such a document.

140.. Nor is it irrational for Policy E8 in particular to be in the UDP, strengthened by modification in the UDP review through the removal of the word “normally” so that exceptions to it would be even less likely, whilst simultaneously proceeding with the ultimately favourable analysis of a proposal contrary to it. This is not irrational, first, because the Council would not know until the decision in December 2001, or indeed the grant of permission in May 2002, that planning permission would be granted. It is necessary to have a policy in force in case such exceptional development were not to be permitted or, if permitted, were perhaps not to be implemented, and other proposals or variations came along.

141.. Second, it is necessary in any event to have a policy in force against which an exceptional proposal can be judged. As I have said in another context, it scarcely advances the claimants' position to contend for a policy structure which on their logic could be generally permissive of this development, arrived at through a review of the merits of that policy, rather than to have an assessment carried out in a context in which the policy merit of E8 is a given fact and against which the proposal has to be justified as an exception.

142.. The third ground of criticism raised by Mr McCracken was that officers' views expressed in e-mails were not views that figured in the reports to Committee. The underlying theme was that councillors had been misled by the tone of the reports into thinking that the case for the development was clear and that the issues had been further resolved than in fact the officers thought they were. Mr McCracken gave six instances. First, he pointed to the e-mail dated 30 April 2001, to which I have already referred, and which shows the advice given in relation to the role of the UDP inquiry. That e-mail goes to the reasonableness of the approach adopted to the UDP inquiry. This is in substance set out in the reports and the approach was a reasonable one to follow.

143.. Second, Mr McCracken referred to an officer comment that the planning proposals were marginal. In an e-mail of 15 November 2001 it is said:

“Graham is also deeply concerned that it is yet another erosion of planning policy that will make what is already a marginal scheme (in planning terms) that much more marginal.”

144.. Mr McCracken issued a forensic challenge to his opponents to show where in the main reports any officer had said that the proposal was marginal. The challenge in those terms could not be met. The word does not appear in that way in the reports. But the challenge was amply disposed of by the description of the balance of policy, impacts and benefits as set out, for example, in the Overview Report at paragraph 17.24.3:

“The proposals do represent clear departures from the UDP (Policies E4, E8 and E13A). However, there are potential economic benefits associated with the proposals which, when considered along with the other benefits of the proposals, officers consider justify permitting the proposals.”

145.. It was also rebutted by the passage from the transcript of the Council meeting on 10 December 2001 which is set out above.

146.. Mr McCracken's argument needs to be tested against whether the reports are significantly misleading in relation to the views of officers. Manifestly the reports are not, and I say so having had the opportunity of reading these reports. Besides, it is to the Overview Reports and to the debate, that it is legitimate to look for the officers' final and considered view, rather than to prior e-mails passing internally in the course of a debate on a specific issue.

147.. Mr McCracken's third point under this head was that there was no reference in the officers' report to a £50 million funding gap. The source for that point is the two e-mails dated 15 November 2001 in which it is said:

“I believe that you are aware of much of the nuances and issues surrounding this application. In particular the current position whereby there is probably a £50 m funding gap based on the level of financing that can [be] secured for the new stadium and associated developments.

AFC frequently express their view that the gap can be reduced by minimising S106 requirements. Indeed it can be, but not to any significant level, unless one is prepared to reduce the ‘biggies’ which are Affordable Housing & Transport.”

“Can we please meet at 3.30 to discuss this. It has to be resolved in the next two days. Are Arsenal really going to potentially let this all unravel for want of an additional £2 million towards transport? (notwithstanding David Cooper's continuing mantra about the £50m ‘gap’).”

148.. The first e-mail discusses ways in which the funding gap might be reduced. Mr McCracken reinforces his contentions as to the significance of the omission by reference to the delay cost. He says that the timetable for development on page 7 of the Overview Report, with a new stadium operational by August 2004, was obviously impossible even in January 2002 because of the 33 month timetable as of that date. Failure to meet that opening date would add a cost of £20 million on Arsenal FC's own figures for a delay of one year, for which no funding had been identified. The gap was also increased by a further £2 million for the cost of various packages.

149.. I do not consider that the e-mails demonstrate the existence of a material factor of which the Council were unaware, or of an unaddressed concern. There is a comment in relation to these e-mails by Miss Cluett, which is true here as elsewhere, to be found in her first witness statement dated 27 May 2002:

“8. Officers were concerned to ensure that the planning evaluation was robust. They were also concerned to ensure that negotiations in respect of proposed planning obligations should deliver the most comprehensive obligations that could be properly sought from the developers, and obligations that would be compatible with the viability and deliverability of the project. The emails should also be read in the context of the Council's attempts to seek further concessions from the developer, which process required the Council to press its case as robustly as it could be argued. All outstanding concerns were resolved to the satisfaction of officers.”

150.. In her second witness statement dated 8 July 2002 she says:

“23. As indicated in my First Witness Statement, the contents of the emails to which the Claimants refer were not, in my view, material considerations which it was necessary or helpful to report to members. Rather, what was material to members was the advice of officers arrived at after those deliberations had taken place and after any issues of concern had been raised and satisfactorily resolved. In all instances the final views of officers were accurately reported to Members and all relevant considerations were before them when they made their decisions. Given the detailed and extensive scrutiny of the proposals, much of which took place at meetings and via e-mail exchanges, it would be wholly unworkable if Members were required to examine each and every detail of the entirely proper debate between applicants and officers, and every element of negotiations about planning obligations. It is officers' definitive views at the end of the evaluation and negotiation process which are important and relevant.”

151.. DTZ had examined the financial position, had reached a view in relation to it and had put it forward. The funding position was dealt with in the Overview report as follows:

“5.1 Inter-dependence

“5.1 The overall development of the three sites is inter-dependent. Building a stadium at Ashburton Grove is dependent on building replacement facilities for displaced services at Lough Road, and both these elements are dependent on money generated from the sale of land for housing at Highbury, Ashburton Grove and Lough Road. Indeed, in submitting its June 2001 applications, AFC make clear that it has sought to ensure that in combination, the proposals will provide sufficient resources to contain the financial losses of the scheme to a level which the Club is prepared and able to fund so that development will be achieved.

5.1.1 In other words, the proposed housing and other commercial uses at all three sites is, in financial terms, ‘enabling development’ in that funds secured from the sale of these development parcels would generate money which would be used to help fund other elements of the proposals. The Council's property consultants (DTZ) and the Mayor (GLA, TfL and LDA), after undertaking separate analysis of AFC's business case, agree that AFC needs to develop all three sites to ensure that the overall proposed development is deliverable and capable of being funded.”

152.. It is true that those paragraphs do not refer to £50 million or to any other figure. It is important to see the references to the funding gap and the figure of £50 million in the context of negotiations between Islington and Arsenal FC over land, and between Islington, the GLA and Arsenal FC over transportation and affordable housing which would naturally tempt an overstated position from Arsenal FC for negotiating purposes. In relation to that Miss Cluett continued at paragraph 23 of her second witness statement:

“The e-mails should also be read in the context of negotiations to ensure that the proposed S106 Agreement should deliver the most comprehensive obligations that could be properly sought from AFC and that would be compatible with the viability and deliverability of the project. The e-mails were written within the context of the Council's attempts to seek further concessions from AFC, which process required the Council to present its case as robustly as could be argued even if, in the course of negotiations, a modified final stance on some aspects was eventually adopted.”

153.. Both Islington and the GLA were satisfied in terms of the benefits, having gone through the analysis. It is not sensible to suppose that officers were of the view that there was a gap between costs on the one hand and enabling development, Arsenal FC's own resources and the money which it could raise on the other hand, such that the development had no probability of being built. There is no planning matter to which that risk could go in terms of the buildings being left half complete in view of the inter-dependent sequence of development which I have already described. The only possible relevance of that point is blight and deliverability of planning benefits, which I have dealt with already.

154.. It is also said that the true funding gap it revealed might also show that the authority had got less than it should have. There is a contradiction between that argument and the blight argument. Only one of those can be good. It is important also to remember that in November 2001, the [section 106](#) agreement package had yet to be finalised. The Council had expert input in relation to those matters and could judge later, as indeed could the GLA who had its own views, whether it was satisfied with what it was getting by way of package before granting permission.

155.. The fourth point raised under this head concerns noise. Mr McCracken referred to the following extracts from e-mails. The first, dated 1 November 2001, reads:

“If the EA had provided evidence that in the locality of the new stadium Sundays and bank holidays are no quieter than other days of the week (unlikely) there may have been a case to support use of the stadium on these days. However because the EA is so lightweight there is no such information or consideration of the impacts of use of the stadium on Sundays and bank holidays. Therefore we have insufficient information to be able to properly assess the impacts of use of the stadium on Sundays and bank holidays and therefore our advice is to refuse this request. If AFC come back with a proper EA study of the impacts of use of the stadium on Sundays and bank holidays for sports, pop concerts or other uses we can then re-assess the issues and come to an informed decision.

Again the EA does not address the issue of hours of operation for major non-sporting events/pop concerts etc, and little information is provided regarding noise impacts both from the stadium or crowds leaving late at night etc. Therefore we have insufficient information to be able to properly assess the impacts of use of the stadium late at night and therefore our advice is to refuse this request. If AFC come back with a proper EA study of the impacts of use of the stadium late at night for non-sports major events, pop concerts etc we can then re-assess the issues and come to an informed decision.”

156.. In an e-mail dated 7 November 2001 it is said:

“The noise and vibration impacts of use of the stadium on Sundays, bank holidays and in the late evening has not been adequately addressed in the ES accompanying the application. My view is that we should follow the advice of paragraph 51 of the DETR guidance note ‘Environmental Assessment — a guide to procedures: Nov 1999’ (copy attached) which states that

‘if the developer fails to provide enough information to complete the Environmental Statement, the application can only be determined by refusal’

Pointing the above out to AFC may motivate them to actually do something about the defects with the ES and provide us with the information we need to assess the impacts of use of the stadium on Sundays, bank holidays and in the late evening.”

157.. Finally, in an e-mail dated 12 November 2001 it is said:

“My view is we should not be preparing noise conditions for consent for the stadium whilst there are still major problems with the noise and vibration elements of the ES. We have repeatedly asked for extra information and AFC have chosen not to provide it. We therefore can not properly assess the noise and vibration impacts of the stadium (or WRC) development or draft meaningful conditions, and should therefore recommend refusal of planning permission. (see paragraph 51 of the attached DETR guide to EIA procedures)”

158.. The concerns related to bank holidays, Sundays, late nights and noise from non-sports events. There is criticism in the e-mails of the Environmental Statement for not addressing those issues. A conclusion is drawn that the Environmental Statement is deficient and that conditions are inadequate to deal with the position. In this context I am considering the question of whether the officers had views which were not properly represented to the Council in a way which meant that the Council was significantly misled.

159.. That criticism cannot stand in the light of the evidence of Mr Fiumicelli in his first witness statement dated 27 May 2002, in paragraphs 6–15, which I summarise as showing that there were discussions after the e-mails between the developer's consultant and the London Borough of Islington's own specialised acoustic consultant. Further information was provided which satisfied the consultant and which led to the matter being dealt with, to the satisfaction of Mr Fiumicelli, by a combination of conditions and the noise protocol.

160.. There are extensive conditions in relation to these matters, as can be seen in relation to Ashburton Grove in conditions 17–21, 24 and 26. They provide for extensive controls for music and other non-sporting events, sporting events and other measures in relation to the time of matches. The noise protocol forms part of the [section 106](#) agreement and deals with the PA system and the control of major non-sporting events in very considerable detail. The approach which was adopted in the main reports, for example the Ashburton Grove Report at pages 126–7, wholly reflects that. Mr Fiumicelli makes clear the extent of the noise controls in relation to this and other aspects of noise, for example video screens, crowd noise and the design of the stadium. This complaint is misconceived.

161.. The fifth matter under this head related to contaminated land surveys. Once again Mr McCracken founded his submissions on an e-mail dated 27 November 2001 in which it is said:

“I am therefore cautious of referring to the need for surveys in the conditions in case we are criticised for not requiring these up front. Perhaps we could just ask for protective schemes to be agreed — or if we really do need to ask for surveys, call them ‘further detailed surveys’.”

162.. It is said that the content of that e-mail was not drawn to the attention of councillors and the fact that a survey in relation to contaminated land was necessary was a great concern to the local residents.

163.. Mr McCracken pointed to the conditions in relation to contaminated land, which were amended in relation to Lough Road, where the requirement for surveys which originally had been in the draft conditions had subsequently been deleted so that there was no longer a requirement for surveys, but instead a requirement for a scheme of remedial works.

164.. Condition LR61, as originally drafted, said that land contamination investigation should be carried out for each portion of the application site and a scheme of remedial works agreed before commencement of the relevant portion of works. It was amended to delete the reference to investigation and went straight to a requirement for a detailed scheme of remedial works to be approved and implemented at the various relevant stages.

165.. Mr McCracken contrasted this with the references in the Environmental Statement expressing uncertainty over the location and type of different heavy metals and hydro-carbons, and to the problems of control over those during site ground preparation.

166.. I was referred by Mr Purchas to other parts of the Environmental Statement Technical Annex on land contamination and hydro-geology, which dealt with the low level of risks and the type of measures, removal or “encapsulation” to be undertaken.

167.. There was, it was said by Mr McCracken, a pre-occupation with site workers rather than with residents. In the light of the somewhat emotional comments which accompanied this submission, I point out that workers are more directly involved in the contaminated land while they work because they are closer to it and working on it. They are usually seen as those at greater risk. So if what is done protects them, what is done also protects those who live further away.

168.. There are extensive conditions in relation to contaminated land remediation. In relation to Ashburton Grove they are numbered 56 and 95–96, and there are ones in similar terms for Lough Road and Highbury. The scheme for remedial works will

show what surveys, if any, are necessary. The problem with this sort of site is that, until the works are started, it is not known, as the Environmental Statement makes clear, where all the problems are. The very fact of carrying out a survey would itself need a scheme of working in order that protective measures be instituted because of the disturbance that is created. It is perfectly sensible to require a scheme. There is no basis for saying that something was concealed because the reference to a survey has been omitted. The scheme would obviously include the necessary site investigation as the detail of the works required to be developed, unfolds with protective and remedial measures. As Mr Harrington in his witness statement dated 8 July 2002 says:

“30. While the ES variously identifies that further investigations are required prior to remediation (this point being made in the Witness Statement of John Dunkley), I do not consider that it was necessary for the planning conditions to explicitly require such investigations. Officers were simply concerned with the end result, and not the process necessary to achieve it. This is consistent with UDP police Env 16 of the 2000 UDP”

169.. It may be regrettable but a certain defensiveness in drafting conditions may be forgivable, and a desire to avoid offering hostages to the fortunes of litigation understandable, when judicial review had already been envisaged by Mr Richard Buxton who is a well-known and doughty environmental solicitor. Miss Cluett explains the position in her second witness statement at paragraph 25:

“In my e-mail of 27 November 2001 I advised of my concern that conditions on contamination should not require surveys, in case such conditions should give the erroneous impression that such surveys ought to have been provided at the Environmental Assessment stage. Following my e-mail, I was advised that all necessary initial assessments had been carried out by AFC in their Environmental Statement to the general satisfaction of the planning officers. (This view was reported to Members at paragraph 28.16 of the Overview Report.) AFC's assessment of Contamination issues together with the Council's own evaluation, was summarised in Appendix A5 of the Overview Report. In the light of that advice from officers, I took the view that the advice in my e-mail had been over-cautious, and the 1999 Regulations had been met.”

170.. There cannot sensibly be said to have been any material consideration omitted. The officer's e-mails do not betray a different view from that which was set out in the officer's report.

171.. The sixth point raised in this context related to Drayton Park. Drayton Park Station was of significance because it was thought by Islington to offer potential for additional rail capacity to reduce the demand on the three Piccadilly Line stations, and on Arsenal Station especially. Arsenal FC and LUL were more cautious. The capacity of those stations was linked to crowd control and to the operation of Holloway Road itself. The modal split aimed at a maximum of 20 per cent spectators by car, and preferably less. Again, Mr McCracken for this point relied on an e-mail dated 5 November 2001 disclosed on the public register after the decision, in which it was said:

“The situation at Holloway Road and other neighbouring underground stations could be somewhat easier if AFC were to accept the need for a major role for Drayton Park with regular services around major events. This station could be very important with respect to relieving pressure on the southbound Piccadilly Line and also provide for Northbound movements beyond Finsbury Park. Negotiations are continuing with the club but as yet there is no agreement with respect to funding for improvements at Drayton Park Station.”

172.. Mr McCracken also referred to what was said by Gibb's, Islington's transportation consultants, in a memo dated 14 November 2001:

“SDG have finally accepted that post-match southbound services from Drayton Park have a useful role to play, and can help to reduce the high level of demand for LUL stations.

....

.... A full development of Drayton Park would provide as much as 10% additional capacity and provide operational benefits to LUL. LUL could suffer by association if it claims that it can make the SDG demand scenario work. If the SDG demand

forecasts prove to be an underestimate and system is seriously overloaded, many will perceive only that LUL said that their station could cope.

SDG argue against Drayton Park that in the northbound direction spectators may not be able/ allowed to get on trains because they would be packed with commuters”

173.. Mr McCracken contrasted this with the Overview Report, Appendix 4, page 13 in which it is said:

“3.22. ... It is [the] officer's opinion that due to the station's proximity to the proposed stadium, Drayton Park could have a pivotal role in reducing spectator usage of other underground and surface rail stations

....

3.24. ... Such provision would provide as much as 25% of the required rail/ underground capacity required by the stadium in the post match hour if the Club's levels of crowd retention are accepted.”

174.. This was a new point and, in the light of Richards J's order that consolidated grounds be provided by 28 June, I was reluctant to consider it. However, Mr Purchas answered it adequately by pointing out the two different percentages to which Mr McCracken had drawn attention. As they were percentages of different matters, they could be reconciled adequately. The reference to 10% was a reference to capacity. The reference to 25% was a reference to the percentage of demand with which capacity of 10% additionally could cope. 10% was additional available rail/tube transportation capacity; 25% was a percentage of demand for the use of that capacity. Islington's consultant's view was properly reported.

175.. The second point made by Mr McCracken in relation to Drayton Park and the omission of what was said to be significantly different views held by the officers from the report, related to paragraph 4.14 of Appendix 4 to the Overview Report. This specifically draws to the Council's attention the fact that Gibb's and SDG (Arsenal FC's transportation consultants) did not agree on whether Arsenal FC can retain 25% of its crowd in the local area after the matches so as to reduce the peak post-match pressure on Holloway Road and the Piccadilly Line. But it was precisely Gibb's concern that Arsenal FC could not do this, which led it to seek more of a role for Drayton Park and finance from Arsenal FC for improvements to Drayton Park Station. This has been obtained. The reference to a requirement for 25% underground and rail capacity was a reference, as I have already identified, to a demand which included the use of Drayton Park. There have also been measures to reduce the demand for travel with a priority scheme for local residents to buy season tickets.

176.. Related to that is the assertion that councillors failed to consider as a material consideration the likelihood that an 80:20 non-car to car modal split would be achieved.

177.. The assertion that the local authority failed to consider the likelihood of that modal split being achieved is without foundation. The Overview Report in paragraph 26.13.1 and 26.13.2 makes it clear that the main mechanism for the achievement of that modal split would be the event day controlled parking zone, EDCPZ. The prospect of the achievement of that zone was considered. Public transport improvements would assist, but were not the main basis for the achievement of that level of non-car usage.

178.. The matter was also considered at length in Appendix 4, at paragraphs 1.7 and 1.8 especially, and indeed in subsequent paragraphs. There is no question of any misconception that the modal split depended on public transport provision. It was dependent upon controlling the use of the car by controlling the availability of parking spaces within reasonable walking distance of the stadium. Public transport was intended to deal with the consequences of success in that respect.

179.. I do not consider that Mr McCracken's fourth head of criticism of the Officers' Reports that all these very important matters — which undoubtedly they were — should not have been in an appendix to the report is a sound one. These are detailed matters and can sensibly be placed there without breaching any legal requirements as to fairness or as to the ability on the part of councillors to consider matters. Councillors Leigh and Hitchens obviously disagree about the ease with which the documents could be assimilated. As I have said, her difficulties evidence no point of law.

180.. Mr McCracken sought to illustrate his point by comparing Appendix 4, paragraph 3.18, stating that improvements at Holloway Road could not be guaranteed before the opening of the stadium, with paragraph 26.13.9 of the Overview Report. But there is nothing misleading in those paragraphs because the fall-back position of additional buses being required from Arsenal FC is set out in paragraph 3.18. It is also a fall-back obligation in [Schedule 1 to the section 106](#) agreement.

181.. He further illustrated his point by contrasting the improvements to Drayton Part and WAGN's attitude, as described in Appendix 4 of the Overview Report, paragraphs 3.19 and 3.20, with the Overview Report, paragraph 26.13.10, emphasising the key role of Drayton Park. But the conditional nature of the improvements has already been referred to. Appendix 4 deals with the assessment of capacity in the passages to which I have already referred.

182.. Nor do I see anything misleading in the contrast between paragraph 1.22 of Appendix 4 on the prospects of 75% completion of the EDCPZ delivering 20% modal split to car, and paragraph 26.13.2 of the Overview Report. They are expressed in very similar terms.

183.. The complaint that the view of LUL on the potential of Drayton Park had not been put in the report does not give rise to a point of law. Drayton Park is neither its station nor on its lines, and there is no obligation to refer to its view. The view of Gibb's and of London Transport was set out in the report and in Appendix 4.

184.. It is convenient also at this stage to pick up as fifth head of criticism the allegation that a material consideration was ignored in relation to the loss of the private waste-handling capacity from the Ashburton Grove site. The North London Waste Authority facility at Ashburton Grove was to be replaced with a more modern WRC at Lough Road. But there were two businesses at Ashburton Grove, Brewsters and McGovern, which provided private waste-handling facilities. The relocation and potential loss of the businesses as enterprises was discussed, it was accepted, but not the question of where any shortfall in waste-handling facilities might be met, nor at what environmental cost.

185.. Mr McCracken relied on this point although it had been raised not by the first or second claimant, nor indeed by the GLA, nor the NLWA, but by Mr Scott, whose organisation is no longer a claimant, at the 10th December meeting. Mr Scott criticised the response of the developers in relation to the location of other sites within three miles of Ashburton Grove. Mr Hepher, Arsenal FC's planning consultant, had responded at the meeting that the three sites to which he had made previous reference were all licensed and that, as much of the material came from outside the area, it could also be disposed of outside the area. Sites in Tottenham may have been in mind.

186.. There was no specific conclusion by the Council as to where the reduced private waste-handling capacity might be made good. The loss of the business was noted in the report on Ashburton Grove at pages 81 and 84 in Brewsters' and McGovern's own representations. Paragraph 13.7.2 of the Overview Report dealt with both the risk of the losses of business if there were no relocations and with the waste-handling implications:

“NLWA intend that the proposed WRC would be licensed to take commercial waste. However, they expect that municipal waste would consume all or nearly all of the expected licensed capacity (1,100 tonnes per day). AFC has yet to identify suitable alternative sites for the private sector waste management and skip hire operations currently based at Ashburton Grove (Brewsters and McGovern). Officers acknowledge that the loss to the Borough of these facilities would reduce overall waste transfer capacity and disadvantage some small businesses. However, AFC has submitted a plan as part of the November 2001 revisions which demonstrates that there are 7 private waste facilities/skip hire businesses within approximately 3 miles of the Ashburton Grove site. Whilst this would inconvenience some businesses that use the existing facilities and lead in some cases to longer journeys, it would appear that reasonable alternative provision is currently available.”

187.. The [section 106](#) agreement, [Schedule 1, section 3](#) , contains obligations on Arsenal FC in relation to the relocation of businesses which would assist in, but plainly do not and cannot guarantee, relocation.

188.. It is clear that the Council could not be sure and knew it could not be sure that there would be a specific convenient relocation of the waste-handling facility, or a suitable place found for the lost capacity. It is impossible to say that the Council ignored that point in the light of paragraph 13.7.2.

189.. However, the debate continued long after the meeting was closed, in the witness statements before this court. Mr Dunkley, in his first witness statement, at page 171, dealt with the issue with a mixture of fact and argument, seeking to show that there had been a factual misapprehension on the part of the Council. Mr Hepher, in his second witness statement (Volume 1, page 310, paragraph 2.32) disagreed, and he gave further evidence on the source of arisings and the availability of other facilities. Mr Dunkley responded to this in a second witness statement (Volume 1, page 1337), saying that Mr Hepher's evidence to the councillors was misleading and grossly inaccurate, to which Mr Purchas for the Council, and Mr David Elvin QC for Arsenal FC, say that what Mr Hepher said was correct in relation to licensed sites. It is not for me to resolve this factual issue, I am glad to say.

190.. There is a potential loss of private waste-handling capacity which may cause local businesses a degree of disruption if they have to travel further. London Borough of Islington were aware of that and took it into account with the Overview Report. They may or may not have been assuaged by Mr Hepher, and they may or may not have been more concerned by what Mr Scott had to say. There may have been some councillors on either side of the debate who may have been in their turn either more or less assuaged and taken a view in relation to that matter when reaching their overall conclusion. But the evidence does not support the conclusion that the Council was unaware that there was a risk of a loss of private waste-handling capacity.

191.. I note also that Mr Harrington in his second witness statement, at paragraphs 35 and 36, denies that there was any misleading of the members and explains his understanding of the information previously supplied by Mr Hepher in relation to other licensed sites, which is rather more extensive than the short comment made by Mr Hepher at the Council meeting, and was material available to support the comment made in the Overview Report.

192.. Finally, the complaint made of an error in relation to physical measures to control crowds can be seen to be false by reference to what the reports actually say. The impact of crowds from the football matches is dealt with very clearly in paragraphs 26.13 and 14 of the Overview Report, and in the appendix dealing with transportation at paragraphs 4.14–4.15. The criticism as to the detail of that in the summary report is quite unfounded.

The Environmental Statement

193.. This was a development which required an Environmental Statement. That was never in doubt. Mr McCracken contended that there were such deficiencies in the Environmental Statement that it could not be regarded as an Environmental Statement for the purposes of the [Town and Country Planning \(Environmental Impact Assessment\) \(England and Wales\) Regulations 1999](#) (SI 293). The relevant provisions are as follows. [Regulation 3\(2\)](#) provides:

“The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so.”

194.. “Environmental information” by [Regulation 2\(1\)](#) means the Environmental Statement including any further information and any representations made by anybody required to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development.

194.. [Part IV](#) of the Regulations deals with the preparation of Environmental Statements and scoping opinions. A scoping opinion was sought here and was formally given after extensive public consultation. The purpose of it is to enable the planning authority and the developer, with the benefit of public assistance, to identify those issues which it is necessary for an Environmental Statement to address.

195.. [Regulation 13\(1\)](#) deals with the procedure for submitting an Environmental Statement to the planning authority. But it is notable for the language which it uses:

“When an applicant making an EIA application submits to the relevant planning authority a statement which he refers to as an Environmental Statement”

196.. Similar language can be seen in [Regulation 19\(1\)](#) , which sets out the means whereby further information is to be obtained. [Regulation 19\(2\)](#) is also relevant. They provide:

“19 Further information and evidence respecting Environmental Statements

(1) Where the relevant planning authority, the Secretary of State or an inspector is dealing with an application or appeal in relation to which the applicant or appellant has submitted a statement which he refers to as an Environmental Statement for the purposes of these Regulations, and is of the opinion that the statement should contain additional information in order to be an Environmental Statement, they or he shall notify the applicant or appellant in writing accordingly, and the applicant or appellant shall provide that additional information; and such information provided by the applicant or appellant is referred to in these Regulations as ‘further information’.

(2) Paragraphs (3) to (9) shall apply in relation to further information, except in so far as the further information is provided for the purposes of an inquiry held under the Act and the request for that information made pursuant to paragraph (1) stated that it was to be provided for such purposes.”

197.. An Environmental Statement is defined in [Regulation 2\(1\)](#) as follows:

“‘Environmental Statement’ means a statement —

(a) that includes such of the information referred to in Part I of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but

(b) that includes at least the information referred to in Part II of Schedule 4.”

198.. [Schedule 4 of Part I](#) deals with the information which is to be included in Environmental Statements. [Schedule 4, Part I, paragraphs 4 and 5](#) are of most note here. They provide:

“4. A description of the likely significant effects of the development on the environment which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from:

(a) the existence of the development;

(b) the use of natural resources;

(c) the emission of pollutants, the creation of nuisances and the elimination of waste,

and the description by the applicant of the forecasting methods used to assess the effects on the environment.

5. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.”

199.. The Environmental Statement, therefore, is not just a document to which the developer refers as an Environmental Statement; it is that document plus the other information which the local planning authority thinks that it should have in order for the document to be an Environmental Statement. Accordingly, it is the local planning authority which judges whether the documents together provide what [Schedule 4](#) requires by way of a description or analysis of the likely significant effects: see, for example *R v Rochdale MBC, ex parte Milne* [2001] *Env LR* 406 , paragraphs 104–106 (Sullivan J), and *R (on the application of Barker) v Bromley LBC* [2001] *EWCA Civ* 1766, [2002] *PLCR* 8 , paragraphs 32, 33 and 65.

200.. It is quite clear from the material before this court that Islington did conclude that the documents which it received enabled it to say that it had before it an Environmental Statement. The Mayor of London was also satisfied with the Environmental Statement.

201.. I have already identified, in short form, the process whereby the Environmental Statement was produced, the IEMA review of the statement and the consultations which took place upon it.

202.. Paragraphs 28.15 and 28.16, and Appendix 5, of the Overview Report set out the Council's overall view of the Environmental Statement, the fact of and the nature of the disagreements between the Council and the developer over some of its contents, and in the Appendix detail its views in relation to significant effects.

203.. Whilst one should not be over-impressed by the volume or weight of documents — and even very lengthy documents can omit significant factors — I confess to approaching Mr McCracken's submissions with a degree of doubt as to whether the deficiencies to which he drew attention could be such as to mean that Islington could not reasonably regard the material as constituting an Environmental Statement. It is inevitable that those who are opposed to the development will disagree with, and criticise, the appraisal, and find topics which matter to them or which can be said to matter, which have been omitted or to some minds inadequately dealt with. Some or all of the criticism may have force on the planning merits. But that does not come close to showing that there is an error of law on the local planning authority's part in treating the document as an Environmental Statement or that there was a breach of duty in [Regulation 3\(2\)](#) on the local authority's part in granting planning permission on the basis of that Environmental Statement.

204.. The first complaint related to the fact that there was no assessment in the Environmental Statement of the impact of an 80:20 modal split to car. The Environmental Statement approached the impact of traffic, of crowds on Tube and rail, and on the pavements through the areas of concern to local residents, on the basis that there would be an 88:12 percentage modal split, non-car to car modes. It did not assess it on the basis of 80:20, that is to say a larger number of cars with fewer public transport or walk modes. There is no doubt that the Council did consider transport impact on an 80:20 modal split basis.

205.. Mr McCracken says that the Council must always have thought that an 80:20 assessment was required because it was the scenario viewed as likely by the decision maker. An e-mail of 19 October 2001 discussed this issue and the risk that not having an 80:20 Environmental Statement assessment could lead to the quashing of any planning permission. It is convenient here to set out extracts from the e-mails which deal with other points in relation to the 80:20 split upon which Mr McCracken relies. The relevant part of the first, dated 19 October 2001 reads:

“Environmental Statement

Agreed there is a risk that if approval is recommended on the basis that it is likely/ highly likely that 80:20 will be achieved, the ES will be challenged as having failed to assess the impact of 80:20 (it assesses the impact of 88:12).

Agreed that on the basis that the risk is accepted, LBI could accept the current ES and proceed to determine the application using the above formula for assessing traffic modal split issues, without a further supplement to assess the impacts of 80:20.

Agreed that the risk of proceeding without an ES supplement on the 80:20 impacts would be reduced if it was considered by SW that the 88:12 was likely to be achieved albeit not immediately and without prejudicing the CPZ consultation exercise or prejudging committee's decision on the CPZ (this is because the ES Regs require the ‘likely’ env effects be assessed, not the ‘worst case’ env effects. However, the Regs also require the ‘short, medium and long term effects’ to be assessed, and it may be that the effects of 88:12 are only likely to occur in the long term.)

Timetable

The upshot is that if AFC are not prepared to provide a supplement to the ES to assess the effects of other likely mode splits, LBI need not insist on this, but this gives rise to a risk of any decision being quashed on the basis of a flawed ES. This is a risk LBI could decide to take.”

206.. The relevant extracts of the e-mail dated 18 February 2002 read:

“However, to summarise my concern and assist our thinking about the acceptability of ‘reasonable endeavours’ in relation to achieving the 80:20 modal split, I have tried to do an audit trail as to how we reached the ‘best endeavours’ obligation which Graham H and I thought we were recommending to ctee. My recollection is as follows:

We originally prepared the S.106 on the basis that the Stadium would not open until Holloway tube improvements and Match Day Parking Zone were in place. This was based on Leading Counsel's advice, and was the only fireproof way of securing the traffic restraint measures we all want and without which the 80:20 cannot be achieved. This is important because any more car use than 20% pushes the traffic impacts to an unacceptable level. This is important because any more car use than 20% pushes the traffic impacts to an unacceptable level. We reluctantly agreed to modify this for commercial reasons to assist AFC funding — and replaced it with the ‘best endeavours’ clause.

....

At no stage has the possibility that 80:20 cannot be achieved, nor the impacts of failing to achieve this, been assessed. This is why it is so important (in order to defend the planning evaluation) that AFC go beyond the normal ‘reasonable endeavours’ in relation to achieving the threshold of acceptability in relation to the modal split”

207.. Mr McCracken's point is not answered by showing the reasonableness of the local planning authority's view that an 80:20 split would occur as from the date of opening of the stadium, which I conclude the local authority have considered and assessed. The complaint is not that there was no assessment of a modal split with a yet higher percentage than 20 coming by car. The complaint is about the Environmental Statement.

208.. Miss Cluett in her second witness statement referred to the October e-mail. She said:

“26. As stated in my first Witness Statement:

*‘In my e-mail of 19 October 2001 headed ‘AFC Traffic Issues’ I summarised the common ground which had been identified between Arsenal Football Club (‘AFC’) and the Council following a telephone conference with Leading Counsel. I had concerns, at that stage, whether sufficient information had been made available to evaluate the traffic impacts of the proposals.

*I was particularly concerned that AFC's assessment of traffic impacts had assessed those impacts on the basis that only 12% of visitors to the stadium would travel by car, whereas the Council's traffic consultants were concerned that a higher proportion of visitors to the stadium might travel by car (20%), at least initially, with more travelling by sustainable models in the long term.

*A further evaluation was carried out by both AFC and the Council's traffic engineers and consultants. The Council's Head of Planning and Transportation, Graham Loveland, explains in his Witness Statement how that evaluation was carried out and what conclusions were reached. Following that Review, the Council's Head of Planning and Transportation took the view (which I considered reasonable) that the environmental assessment carried out was sufficiently robust to satisfy all statutory requirements, and to identify all significant impacts.

*In the light of the analysis carried out by the Council and explained in the Witness Statement of Graham Loveland, I was satisfied that my concerns had been met.

27. The e-mail exchange referred to represents a part of the consideration and not the final view reached by officers after proper scrutiny. I would in particular confirm that in the light of the further examination that I supported the view of officers that the environmental impact assessment provided in this respect, was sufficient information to identify the key environmental impacts for their consideration.”

209.. The thinking was also set out by Mr Loveland in his first witness statement. He says at paragraph 14:

“Council officers considered whether an assessment based on the 80:20 mode split should also be carried out. However, having considered the matter further with AFC and its consultants I was satisfied that the environmental assessment did in fact identify the likely environmental impacts.”

210.. He explains in paragraph 15:

“In reaching this judgment I had regard to the fact that a 20% mode share for car travel to the proposed new stadium would equate to 5000 cars, this being equal to the numbers of vehicles currently driving to the existing stadium. Given that an Event Day Parking Scheme (albeit incomplete) would be operational by the time of Stadium opening, vehicles seeking access to the Stadium would be expected to be more widely dispersed, than with the limited Match Day Parking Scheme currently in operation.”

211.. Appendix 4 of the Overview Report, in paragraphs 1.6 and 1.24, draws attention to the basis of the Environmental Statement and to the way in which the [section 106](#) agreement would require Arsenal FC to work towards a modal split of 88:12 compared to 80:20. In effect, Islington argues that SDG have assessed the worst case in terms of non-car modes, ie 88%. So that aspect has been covered in terms of pedestrian impact and bus and tube travel. The [section 106](#) agreement, as the EDCPZ is extended and public transport improvements are implemented, will reduce the car split in the longer term to 12%. In effect, therefore, it would be said that a likely effect in the short to medium term, namely the extra 8% car split, has not been assessed. However, the Council was entitled to take the view which, as I understand it, it did, that the anticipated medium term continuance of the same level of traffic in the same area, equivalent to 20% split to car, but with a greater degree of dispersion, could not a “likely significant effect” of the development and that the Environmental Statement did cover therefore the likely significant effects. An absence of significant change is not a significant effect which requires assessment. That in effect is an aspect which has been assessed as the baseline or existing condition. I cannot regard that as irrational.

212.. This stance had been flagged up in the officer's report and was obvious from the Environmental Statement; and I have been shown no complaint by the claimants in relation to it (I emphasise by the claimants) before the resolution to grant permission or the grant itself. It may be of some relevance in judging the significance of Mr McCracken's point that that is what has happened. The comments made by officers in relation to likely significant effects are consistent with Appendix 5 of the Overview Report dealing with comments on pedestrian effects, crowd movements and public transport, which are significant.

213.. The second aspect complained of was that there was no assessment in the Environmental Statement of the loss of waste-handling capacity through the relocation or demise of Brewsters and McGovern at Ashburton Grove. This argument depends on a view being taken as to the significance of that aspect. A view was taken. It is expressed by Mr Harrington in his second witness statement at paragraph 34:

“Whilst the potential loss of waste handling capacity in the area was not specifically addressed, I should add here that my main concern, and that of other officers, related to the capacity for waste handling of the public facilities run by the North London Waste Authority and the Council. Further, with respect to the private waste companies (as with all other directly affected private businesses that provide a useful service to other businesses and the public) the Council was concerned to ensure that appropriate relocation arrangements were put in place. In this context, I consider the information that was provided in the ES to be reasonably sufficient to enable the Council and others to come to a view on the loss of these private businesses. It is relevant that neither the North London Waste Authority nor the Greater London Authority raised concerns about the potential loss to the area of the waste management capacity provided by these firms. Similarly, the Islington Chamber of Commerce did not raise concerns on behalf of businesses within the Borough.”

214.. This demonstrates that this aspect was considered but not considered to be a significant effect; that conclusion cannot be said to be unreasonable.

215.. The third aspect complained of related to noise. Mr McCracken relied on Mr Fiumicelli's e-mails, to which I have already made reference, in relation to Sunday, bank holiday and late night operation of the stadium, and also in relation to the air-handling equipment noise which Mr McCracken said had the potential to be a continual nuisance to residents [Volume 2, pages 111–112]. There was indeed a further e-mail on 7 November 2001. I have already dealt with this in part in relation to whether a material consideration had been ignored. However, what is apparent from Mr Fiumicelli's witness statements is that the e-

mails, as Miss Cluett said in her second witness statement (the extract from which I have already cited), represented no more than internal discussions and not a final view.

216.. The final view on the likely significant effects is not in those e-mails but is set out in the Overview Report which led to the range of conditions, including those dealing with air-handling equipment at Lough Road. It is not necessary for me to set those out, but I identify them by number: LR2, 3, 4 and 28.

217.. This is reflected in the evidence of Mr Fiumicelli as well as in the evidence of other officers involved. I draw attention specifically to (but it is unnecessary to set them out) paragraphs 8 and 14 of Mr Fiumicelli's first witness statement, and paragraph 8 of his second. These deal with discussions that took place between consultants, and the further information provided, which enabled him, with the advice of expert consultants acting for the Council, to be satisfied that conditions would deal with those issues. The new information is identified in paragraph 28.10 of the Overview Report.

218.. The fourth aspect was contaminated land. It is quite clear from the material to which I have already referred, including the Environmental Statement itself, that this was not seen as a likely significant effect and the requirement for a scheme of working, which in reality may include a survey as the work proceeds, was considered sufficient to protect health or amenity.

219.. Moreover, I do not consider that it can be said that it was thought surveys were necessary in order to reach that assessment, but that necessity was concealed revealing a view that there was a disguised but likely significant effect. The foundation for Mr McCracken's suspicions is flimsy. The e-mail merely shows a desire to avoid offering an unnecessary hostage to fortune.

220.. The fifth aspect concerns dust at Lough Road and methods for dealing with it. This was said to be a significant concern to residents arising from the unknown method of preparation of the site. It is difficult to see the justification for the legal criticism in the light of the coverage of this aspect in the Environmental Statement main report, paragraph 10.14 and 10.15, which deal with construction, and 10.20, which deals with the operation of the WRC.

221.. That is but a sample of material which I have seen. It is quite clear from the Council's and Arsenal FC's skeleton arguments that that is not comprehensive. Mitigation is also referred to. I have also seen a part of the Land Contamination and Hydro-Geology Technical Appendix, at paragraph 7.3. Odour in operation is dealt with at paragraphs 10.22 10.23 of the Environmental Statement main report. Mitigation is covered. It cannot rationally be said that this material was so obviously insufficient that the Environmental Statement was no Environmental Statement at all.

222.. Conditions are imposed which cover dust in construction (LR9), odour (LR10), construction and contamination, and also relevant to dust is condition LR61(a) and (b).

223.. The way in which the significance of dust and noise are described in Appendix 5 to the Overview Report, together with the comments made by Islington in relation to them, also bear noting.

224.. The absence of analysis of alternatives beyond the M25 was effectively abandoned as a criticism because Mr McCracken recognised that he had no basis for saying that Islington could not rationally decline to require that to be studied: fans' home addresses dispersed all around the M25 and beyond. In any event, the Regulations are quite clear. What needs to be covered in the Environmental Statement are the alternatives which the developer has considered. This the Environmental Statement did. The Regulations do not require alternatives which have not been considered by the developer to be covered, even though the local planning authority might consider that they ought to have been considered.

225.. It is also said that there that there was a missing document forming part of the Environmental Statement which was never available publicly. Mr Dunkley deals with this in paragraph 67 of his first witness statement. He says that the document entitled "Further Information Regarding 'Extended Stays' in Stadia Resulting from Post-Match Entertainment" was never received and remained missing in paper copies of the Environmental Statement and on the CD Roms. He said that the error was acknowledged by Mr Hepher.

226.. Islington says that this was not part of the Environmental Statement; it was merely additional material which Arsenal FC, through SDG, had passed to Islington in early October 2001 and which Arsenal FC had not treated either as part of the Environmental Statement. Mr Spencer of SDG describes this in paragraph 35 of his affidavit (Volume 1, page 328).

227.. I see no reason to doubt Mr Dunkley when he says that it was not with the Environmental Statement documents, but I cannot sensibly resolve what may be a dispute of fact as to its availability on a point arising in that way. I find it difficult to see

how its absence could mean that the Environmental Statement was not an Environmental Statement, which was the only way it was put in relation to Mr McCracken's submissions on the Environmental Statement. There is some dispute about it in terms of its availability to the public, but a lack of availability to the public does not alter the fact that if it was available to the Council, as it was, the Environmental Statement was not in that respect deficient. As I say, the only point raised was that the absence of it meant that the Environmental Statement was not an Environmental Statement.

228.. It is also clear that the local planning authority had the document and were able to take it into account as a relevant factor.

The Section 106 Agreement

229.. A range of issues was raised under this head. First, it was said that there was an absence of public consultation on it. It was said that the public had no opportunity to comment on it and that that was unfair. Mr McCracken relied on the decision in *R (on the application of Lichfield Securities) v Lichfield District Council* [2001] EWCA Civ 303, [2001] PLCR 519 . At paragraph 12 Sedley LJ said:

“It is fundamental to section 106 that it must be used only for legitimate planning purposes. A variety of people may have an interest in these — not only a potential financial beneficiary such as LSL but, for example, local people who want to be sure that their community is going to benefit appropriately from a development. It is only in the run-up to the entry into the section 106 obligation that these interests can have any worthwhile say, for they have no right of appeal if the authority's eventual resolution adopts an unsatisfactory agreement.”

230.. It is unnecessary to deal with Islington's submission that the decision in *Lichfield* is irrelevant because it concerned fairness as between two developers rather than fairness towards resident objectors, save to observe that the comment of Sedley LJ appears to be wider than that.

231.. The problem with Mr McCracken's submission is that it is factually incorrect. The heads of terms for the [section 106](#) agreement were set out in Appendix 7 to the Overview Report and could be commented on by the public both at the Council meeting and at any time subsequently. This was a publicly and widely available report. The public consultation in relation to the [section 106](#) agreement is described by Miss Cluett in her second witness statement at paragraph 22:

“The Overview Report was made available on request by a Press Notice which appeared in the local paper and which invited interested parties to contact the committee clerk for copies of the Reports. It was available on the Council's web-site, from the Planning Enquiries office, and was sent to all Review Group members including the First Claimant. The Report to February 2002 Planning Committee reporting the main settled terms was also available on request. While there is no requirement to consult on the detailed terms, nevertheless on 14th February 2002 the Planning Committee Report was sent under cover of an explanatory letter to Members of the Review Group, including the First Claimant. A copy of the covering letter and circulation list is exhibited at ‘DC4’. The Report to 19th February Planning Committee was also available on the Council's web-site. Comments on the s106 Agreement were made by interested parties, including individuals and Members of the Review Group, and Members at the Planning Committee meeting. These were noted and, where appropriate, the final form was amended to reflect them. It is therefore wrong to suggest that there has been no opportunity for the Claimants and other interested parties to comment on the s106 Agreement.”

232.. The circulation list for the report to Committee in February 2002 included the first claimant. No complaint can justifiably be made of any omission to consult on what for these purposes appear to be the non-controversial changes on 23 April 2002. The claimants had plenty of time to say whatever it was they wanted to say.

Unlawfulness of the Involvement of an Expert

233.. The complaint originally raised in the grounds by Mr McCracken was that [Schedule 1 to the section 106](#) agreement contained a number of obligations on Arsenal FC to do things in accord with various plans, but no provision for the production of such plans or for the resolving of disputes. That point was expressly abandoned by Mr McCracken before me as incorrect. But he developed a new point which does not appear in the grounds. This was that the mechanism for the resolution of the issues

involved the use of an independent expert and accordingly the task of resolving issues or approving plans had been passed by Islington to him, something which Islington had no power to do. [Clauses 3.5 and 5.1 of the section 106](#) agreement impose an obligation on Arsenal FC to carry out the terms of [Schedule 1](#) which contain clauses dealing with the Stadium Travel Plan, to take the chief example relied on, in particular clauses 9.1–10.1. They read:

“9.1 All reasonable endeavours shall be used to work with LBI to work towards achieving the Modal Split Target.

9.2 The Stadium shall only be used in accordance with the Stadium Travel Plan and the approved Stadium Travel Plan shall be complied with.

9.3 The Monitoring Programme shall be implemented and funded.

9.4 All reasonable endeavours shall be used to ensure that upon commencement of use of the Stadium for a Major Event no more than 20% of all visitors attending a Major Event shall travel to the Locality of the Stadium by private car and measures intended to achieve this figure in the event that this figure is not met shall be secured.

9.5 Until completion of the proposed Holloway Road Underground Station Improvement Works on the occasion of a Major Event sufficient travel capacity shall be provided to ensure that no more than 20% of all visitors attending a Major Event shall travel to the Locality of the Stadium by private car including for example the provision of an additional sufficient number of coaches and buses.

10. Retention of Visitor Measures

10.1 The Retention of Visitors Measures shall be complied with in accordance with the Stadium Travel Plan.”

234.. The modal split target, which is referred to in clause 9.1, is the 88:12 split. The Stadium Travel Plan is dealt with in [Schedule 11 to the section 106](#) agreement. It sets out the purpose of the STP and the obligations to take measures to ensure that the purpose is fulfilled. The measures are described. The flavour of the point upon which Mr McCracken relies can be seen from this extract from the Stadium Travel Plan requirement in [Schedule 11](#) :

“Purpose: To identify measures to be taken by AFC to achieve the Modal Split Target for Major Events and to ensure that Retention of Visitors Measures are effective.

Measures: AFC shall liaise with all relevant bodies, including LBI (Planning & Transportation functions), Transport for London, London Underground Limited, relevant Train Operating Companies, the Metropolitan Police and British Transport Police to ensure that the purposes of the Stadium Travel Plan are achieved and implement such reasonable measures as may be required to achieve those purposes following consultation with the Liaison Committee.

In addition to the funding of an Event Day Parking Scheme (as set out in Clause 11), such measures may include:

- (a) an approved ‘Car Part Management Agreement’ for the stadium car park;
-”

235.. [Schedule 12 to the section 106](#) agreement deals with monitoring in the same vein. [Clause 8.1 of the section 106](#) agreement provides for the role of the single expert. It reads:

“Save for matters of construction (which shall be matters for the Courts) any dispute or disagreement arising under this Agreement including questions of value or any question of reasonableness may be referred at the instance of any Party for determination by a single expert whose decision shall be final and binding on the Parties PROVIDED THAT nothing in this Clause shall fetter LBI in exercising its discretion in carrying out its functions.”

236.. Thus, submits Mr McCracken, it is the single expert, not Islington, who ultimately would decide whether Arsenal FC were making “all reasonable endeavours” to achieve the 88:12 modal split target contained in [clause 9.1 of Schedule 12](#) , or the immediate 80:20 requirement in [clause 9.4](#).

237.. It is undoubtedly true that the single expert would ultimately have that role; but I cannot see why that provision for dispute resolution is unlawful. There is no doubt but that those matters are capable of giving rise to dispute. It is lawful to postpone the resolution of those issues until after planning permission has been granted and until after dispute has arisen as the process of negotiation subsequently continues. It is unnecessary for all those matters to be resolved in order to decide whether or not to grant planning permission. Some dispute resolution is necessary because if it were merely a matter for Islington to decide, there might be no agreement at all, or less strict restrictions with a less happy outcome. It is for the planning authority to decide if it wants to deal with matters in that way. Once it has decided that it does not want to deal with matters in that way, a dispute resolution provision is necessary. Where a planning authority is in dispute over the reasonableness of requirement, I see nothing unlawful in an expert resolving that matter. This is not a question of the exercise of a statutory discretion being devolved. It is in the exercise of the statutory power of the decision maker to grant or refuse planning permission and in relation to that decision it is a material consideration that there is an agreement in existence with this dispute resolution procedure within it. There has been the exercise rather than the abdication or unlawful delegation of power. It is difficult to see how the decision as to what it is reasonable to require, where there is a dispute, can be regarded as itself the exercise of a specific statutory discretion any more than the position would be with any other arbitration or dispute resolution provision. In any event, the proviso to [clause 8.1](#) recoups any power which it might be said that the local planning authority has unlawfully devolved or passed away so as to fetter its discretion. That submission by Mr McCracken is untenable.

Reasonable Endeavours

238.. Mr McCracken criticised this aspect, particularly in relation to [section 9 of Schedule 1](#) dealing with the Stadium Travel Plan, from two related angles. First, he said that the planning officer had altered the terms recommended in February 2002 from those recommended in December 2001, when it was “best endeavours” which were required. Accordingly, the December resolution was passed on a basis which was later falsified.

239.. Second, he submitted that the concept of reasonable endeavours was weaker than best endeavours and enabled account to be taken of the financial position of Arsenal FC, which made its financial position, the DTZ Report and the funding gap relevant in planning terms.

240.. As to the first point, Mr McCracken relied again on e-mails. There was one dated 18 February 2002 in which this issue was discussed, and which is set out above in this judgment. The Overview Report Appendix A7 at page 6 sets out the Heads of Terms for the December 2001 meeting. It proposed the use of “best endeavours” to secure the 80:20 modal split and the use of “all reasonable endeavours” to improve on that towards 88:12. In the [section 106](#) agreement, as approved, “all reasonable endeavours” are required to be used in relation to both aspects. This specific change was highlighted in the Report to Committee for 19 February 2002 and the reason given:

“The Heads of Terms (No 9) required AFC to use ‘best endeavours’ to ensure that no more than 20% of all visitors coming to a Major Event at a new stadium travel to it by car. AFC is not willing to commit to this and the Director of Law and Public Services has advised that it would be unreasonable to insist that the Club uses ‘best endeavours’ and that ‘all reasonable endeavours’ is acceptable.”

241.. The basis for the acceptability of this change was spelt out more fully in Miss Cluett's second witness statement at paragraphs 18.2–18.3:

“18.2 In fact it became apparent that the key mechanism for achieving the 80:20 mode split lay with the Council: that is the Council could implement an Event Day Parking Zone. AFC had agreed to fully fund this as a planning obligation. I subsequently took the view that it would be unreasonable for the Council to insist on a ‘best endeavours’ covenant. This view was reported to Members in a Report seeking authority for the terms of the [s106](#) Agreement to Planning Committee of 19th February 2002 .

18.3 The views expressed during the consideration of the applications by officers referred to by the Claimants did not represent the final view of officers. The Report accurately reflected the final view of officers arrived at after careful and proper deliberation, as fully explained in my First Witness Statement.”

242.. In essence this explanation does not alter the basis of the December 2001 resolution because it is quite clear from paragraph 26.13.1 of the Overview Report and Appendix 4, paragraphs 1.7–1.8, to which I have already referred, that the EDCPZ was the main basis for reaching the view that an 80:20 split was probably achievable from the outset of the operation of the new stadium. In any event, even if there had been a change, it is clear that the local planning authority was aware of the fact of change and of its basis. It was a perfectly proper basis upon which to make the change as well.

243.. As to the second and related aspect, Mr McCracken referred to the difference between “best endeavours” and “reasonable endeavours” in terms of the relevance of the financial implications arising from Arsenal FC's financial position. Mr McCracken relied on the decision of the *Court of Appeal in IBM (UK) Limited v Rockware Glass Ltd [1980] FSR 335*. In relation to “best endeavours”, Buckley LJ said at page 343:

“In my judgment the test must be: what would an owner of the property with which we are concerned in this case, who was anxious to obtain planning permission, do to achieve that end? The formula which has been suggested and which would commend itself to me is that the plaintiffs as convenors are bound to take all those steps in their power which are capable of producing the desired results, namely the obtaining of planning permission, being steps which a prudent, determined and reasonable owner, acting in his own interests and desiring to achieve that result, would take, and I would favour making a declaration in answer to question 2 in those terms.”

244.. Mr McCracken contrasted this with the approach to “reasonable endeavours” adopted by the *Court of Appeal in Phillips Petroleum Co UK Ltd & Ors v Enron Europe Ltd [1997] CLC 329* at pages 339 and 342 in the judgment of Kennedy LJ:

“In *P & O Property Holdings Ltd v Norwich Union (1994) P&CR 261* a developer and head lessor had each contracted to use ‘reasonable endeavours to obtain’ lettings of units in a shopping centre. The head lessor contended that in the circumstances the developer should have been prepared to pay to a tenant a reverse premium if a hypothetical reasonable landlord would regard such a premium as good estate management in current conditions, but the House of Lords, upholding the decision of the Court of Appeal, rejected that contention. In the Court of Appeal Steyn LJ said at p16A of the transcript:

‘The concepts of (a) “reasonable endeavours” obligation placed on both parties, and (b) the judgment of the “reasonable landlord” are inherently in tension. As a matter of ordinary commonsense they convey different ideas. The “reasonable endeavours” obligation necessarily imports the idea that the endeavours of the parties may fail to result in a letting, but neither is necessarily in breach. The judgment and approach of the parties may be at odds, but measured against a yardstick of reasonableness neither may be in breach of the “reasonable endeavours” obligation. The reality is that the position of each party may be reasonably defensible. On the other hand, the standard of the “reasonable landlord” results in a single vindicated position.’

Similarly, in the House of Lords Lord Browne-Wilkinson trenchantly rejected the submission that by agreeing to use reasonable endeavours the parties intended to impose an objective standard as to what terms it would be reasonable to agree to obtain a letting. Mr Kentridge submits that precisely the same line of reasoning can be applied to the case with which we are concerned.

....

When the critical words in article 2.2 are read in their contractual setting, and with regard to the ensuing fall-back provision, I find it impossible to say that they impose on the buyer a contractual obligation to disregard the financial effect on him, and indeed everything else other than technical or operational practicality, when deciding how to discharge his obligations to use reasonable endeavours to agree to a commissioning date prior to 25 September 1996.”

245.. I accept that there is a real distinction between “best endeavours” and “reasonable endeavours”, but it is not as stark in principle nor as stark in its relation to the provisions of the [section 106](#) agreement as Mr McCracken suggests. I do not consider that cost is irrelevant to the use of “best endeavours”, as set out in the *IBM* case; nor is “all reasonable endeavours” simply an empty phrase. First, it is “[all reasonable endeavours](#)”; in [paragraph 9.4 of Schedule 12](#) the obligation is to “ensure” that 20% car mode, which is the key provision, is met, and this is stronger than the provision in clause 9.1 which is “to work towards” 12%. Second, the fall-back obligation in clause 9.5, which until Holloway Road Station is improved, requires Arsenal FC to provide sufficient public transport travel capability probably by bus or coach in order to achieve the 20% is not qualified. Nor, third, is it irrelevant that [Schedule 11](#), which deals with the Stadium Travel Plan, does require the implementation of such reasonable measures as may be required to achieve the purposes of the Stadium Travel Plan. As both *IBM* and *Phillips Petroleum* show, the contractual setting matters. This also has to be read in the context of the monitoring requirements in [Schedule 10](#). Fourth, I accept that the financial considerations of Arsenal FC will be a relevant factor in judging reasonableness, but I do not consider that this analysis shows any falling away by Islington from the approach adopted in December 2001 at the resolution stage so as to negate its then thinking. Nor does it show that financial considerations loom so large in the achievement of the planning aims that the councillors ought to have required more information or that the public ought to have been provided with more as to Arsenal FC's financial position in order to reach a sensible conclusion on such planning issues to which those aspects may relate.

246.. There was a specific criticism of [clause 7.2 of the section 106](#) agreement as constituting an unlawful fetter on the local authority's discretion. Clause 7.2 reads:

“For the avoidance of doubt after the Stadium shall have opened nothing shall thereafter prevent the Stadium from operating at its full capacity of 60,000 spectators for a Major Event for football and operating as a Stadium permanently providing only that a Safety Certificate issued pursuant to the Football Licensing Act 1989 (as may be replaced or amended) is in full force and effect.”

247.. The effect of the agreement by the Council not to use such powers as it might have, other than safety powers to restrict numbers, is said to preclude a restriction on the capacity of the stadium as a means of ensuring that the modal split to car does not exceed 20% or reach 12%. It is difficult to see what other discretion is in reality fettered. The 60,000 seating capacity still requires the operation of the Stadium Travel Plan. The clause is obviously included because at one time Islington officers, with the advice of their then leading counsel, were contemplating using a restriction on seating capacity as a means of enforcing a modal split of 20% — a restriction on capacity naturally feared and resisted by Arsenal FC. This possible restriction ceased to be relevant once Islington realised, as set out in the Overview Report, that the key control was the extension of the EDCPZ. That controls car usage. The aim of the 20% restriction was to restrict the numbers of cars to the number of cars now attending Highbury with its much smaller capacity. Islington accepted that ground capacity was not a useful tool of control in relation to car numbers. The key control for that is controlling car demand and the availability of parking space. That is an entirely reasonable view for the London Borough of Islington to take. There is no fetter on Islington's discretion. The provision is there for the avoidance of doubt lest there be a resurgence of the idea now accepted as mistaken. Mr McCracken said that no lawful basis had been shown for the Council not to act in accordance with the advice given by leading counsel that the restriction on stadium capacity should be retained for that purpose. There is no obligation in law to follow the advice of leading counsel. An ample planning reason was provided as to why that counsel's view did not effectively address the planning issue which the Council and its consultants had to address.

248.. A further criticism by Mr McCracken was that the [section 106](#) agreement did not prevent both new and old stadia being used at the same time. The Heads of Terms for the [section 106](#) agreement in the Overview Report, Appendix 7, item 37, said:

“Future Use

*A new stadium at Ashburton Grove shall have opened before commencement of development pursuant to the Highbury consent.

*Once a new stadium at Ashburton Grove opens, (other than for a limited trial period to be agreed) Highbury shall not be used as a sports stadium.”

249.. In the [section 106](#) agreement the obligation appears in [Schedule 1, clause 38.2](#) as follows:

“The stadium at the Highbury Site shall not without LBI's prior consent which it may give at its absolute discretion taking all material circumstances into account be used as a sports stadium after the date that the Stadium is open for permanent use of which date AFC and HHL shall give LBI 7 days previous notice in writing.”

250.. This is said by Mr McCracken to be somewhat wider than and again different from what was envisaged in December 2001. This change was not identified in the report to Committee for 19 February 2002. Rather no change was envisaged. In Report D, paragraph 18.1, it was stated that the [section 106](#) agreement would mean that the use of the existing stadium would cease. It was also said that the implications of both being in use at the same time had not been assessed in the Environmental Statement.

251.. The reality is that the Heads of Terms in the report envisage, and the [section 106](#) agreement does not preclude, the use of Highbury Stadium for sport once the new stadium is open. They are not in conflict. But the language in the actual agreement reflect the aim which originally was loosely expressed in the Heads of Terms; indeed the language of the actual agreement gives a greater degree of control to Islington, and does so without providing a role for the intervention of the single expert. It was always envisaged by the Heads of Terms that there could be teething problems once the new stadium had opened, which might mean that it could not be used; or that if it opened mid-season, perhaps with its opening being triggered by minor community use, Arsenal FC might wish to wait until the end of the season before transferring to it. That thinking is still what is reflected in the [section 106](#) agreement, but in language which gives the local planning authority greater control. Miss Cluett sets these matters out clearly in her second witness statement at paragraph 17. As she says, it is inconceivable that in reality there would be two stadia operating.

252.. The last criticism made by Mr McCracken was that the [section 106](#) agreement contained no provision for contaminated land to be investigated. There is nothing in this point which I have not already considered in relation to other aspects of contaminated land.

Conclusion

253.. It will be apparent that there are a large number of points where I do not consider that Mr McCracken has raised an arguable case. Taking a generous view of what is arguable, it could be said that his points in relation to whether or not there should be a public inquiry in its various facets, the disclosure of the DTZ Report and whether an 80:20 modal split should have been considered in the Environmental Statement, constitute arguable points. If I were to be particularly precise I would give permission for those to be argued and dismiss them on their substantive merits. The other points I do not consider to be arguable and I would not give permission for them. It may be, however, that that overall is too refined an approach. Unless specific representation is made in relation to that, I would propose simply to grant permission and refuse relief on its merits.

254.. MISS McHUGH: My Lord, I am grateful. My Lord, I would seek costs o behalf of —

255.. MR JUSTICE OUSELEY: Do you want to say anything about that?

256.. MISS McHUGH: I do not, my Lord.

257.. MR JUSTICE OUSELEY: Mr Elvin?

258.. MR ELVIN: My Lord, I would have invited that course of action.

259.. MR JUSTICE OUSELEY: Mr Pike, I grant permission without differentiating between the points, but I refuse your applications on the merits.

260.. MR PIKE: Thank you, my Lord.

261.. MISS McHUGH: My Lord, I somewhat jumped the gun then.

262.. MR JUSTICE OUSELEY: That is all right.

263.. MISS McHUGH: My Lord, I seek costs on behalf of the local authority. My Lord, I would say that your judgment on the merits in this matter has been emphatic. In my submission, there was no justification for this claim to be brought and the local authority is entitled to its costs. May I ask for my costs, not to be enforced save in accordance with [section 11 of the Access to Justice Act](#), for the period after 29 April 2002. That was the point at which the grant of Legal Services Funding was provided — and I have seen a note in respect of that certificate. But, my Lord, in respect of the period before that, the claim having been originally lodged by these claimants and others on 1 February —

264.. MR JUSTICE OUSELEY: Sorry, what was the date of the Legal Services Funding?

265.. MISS McHUGH: 29 April 2002, and the claim was originally lodged on 1 February. I would ask for my costs in the normal way. I would simply draw your Lordship's attention to the fact that this claim has been persisted, notwithstanding the very detailed responses that are set out in the witness statements originally served by my clients in respect of the original claim, and indeed persisted in even after the even more detailed responses provided in the second set of witness statements provided, and indeed in our response and the detailed acknowledgement of service.

266.. MR JUSTICE OUSELEY: Yes.

267.. MISS McHUGH: Unless I can assist your Lordship further?

268.. MR JUSTICE OUSELEY: No.

269.. MR ELVIN: My Lord, firstly, can I thank your Lordship for taking the trouble for giving such a detailed and careful judgment over a period of time from the end of the argument, which must have left your Lordship little time for anything else. Secondly, can I make a *Bolton* application for a second set of costs? My Lord, can I hand up *Bolton* and just remind your Lordship —

270.. MR JUSTICE OUSELEY: You are going to have a long, hard road on that one.

271.. MR ELVIN: My Lord, I am instructed to pursue it, if your Lordship would bear with me.

272.. MR JUSTICE OUSELEY: Yes.

273.. MR ELVIN: Your Lordship will be familiar with the general rule. Can I just draw your Lordship's attention to the reason why two sets of costs were actually awarded in the *Bolton* case?

274.. MR JUSTICE OUSELEY: Yes.

275.. MR ELVIN: It is page 1179, the last page in the judgment of Lord Lloyd of Berwick. Three reasons are given: first, the case raised different questions of principle and if the decision had been quashed there would have been a clear difference of position between the Secretary of State and the developer. Secondly, the scale of the development and the importance of the outcome for the developers were of an exceptional size and weight and it was an unusual case in relation to where the objectors came from. My Lord, point 3 is irrelevant for current considerations. What I do say in this case is that there are a whole series of issues of principles where, had your Lordship been against the grant of planning permission, clearly referring matters very much back into the melting pot as between AFC and Islington, and this could not be regarded as other than an exceptional development both in terms of Islington and of Arsenal. Arsenal's interest is obvious. Your Lordship is aware of the level of development for both and the level of commitment, and the amount of time and effort put into it by Arsenal and its advisers.

276.. Secondly, your Lordship is aware of the considerable importance of the proposals in terms of the Borough as a whole. Your Lordship has already made ample reference to those matters in his judgment. I do not propose to take your Lordship to them specifically, but your Lordship will recall the comments in the transcripts of the meeting. My Lord, this is not by any reasonable description an exceptional case as far as the development is concerned and as far as the position of the developers is concerned.

277.. So, my Lord, firstly, I draw upon those clear analogies with the reasons given by Lord Lloyd for awarding two sets of costs. Secondly, my Lord, we have contributed significantly to this case in terms of the evidence. Your Lordship has drawn, in part, on the evidence from Mr Hopher and Mr Spencer and that evidence has been provided consistently to assist the court in a way which the court has clearly found of some help during the course of argument and in your Lordship's judgment.

278.. Thirdly, if I might say so, your Lordship has also taken points on board that were run by us specifically, in addition to those run by my learned friends Mr Purchas and Miss McHugh for the authority. Can I remind your Lordship that it was Arsenal that raised the *Davies* and *Allen* points and the detailed issues of relationship between the UDP and section 70, the range of mechanisms which did not require an inquiry, the *City of Edinburgh* case, the approach to section 54A, the *Coughlan* case, aspects of the consultation proposals and certain aspects of the 106, and other arguments. So, my Lord, there were a number of the issues which your Lordship has adopted in his judgment on matters raised by us specifically rather than by the London Borough of Islington, albeit that they were additional matters to those raised by Islington.

279.. My Lord, given those factors, I would respectfully submit that this is a genuine exception to the normal presumption that there should only be one set of costs, and I would ask your Lordship to make that order.

280.. MR JUSTICE OUSELEY: Thank you. Mr Pike, deal, first of all, with Miss McHugh.

281.. MR PIKE: My Lord, yes. Firstly, my Lord, it is the case that Islington forced in essence ISCA — Islington Stadium Community Alliance — to lodge an early claim because it was against the resolution. Since *Burkett*, my Lord, it is accepted that we may challenge the grant. So, in my submission, my Lord, it would be unfair to require costs against the claimants individually.

282.. Secondly, my Lord, the claimants were different when these proceedings commenced. To impose a liability for costs on them in a joint and several manner once some of them dropped out and some of them stayed in, in my submission, would be punitive and unfair. Those are my submissions on Miss McHugh's point.

283.. MR JUSTICE OUSELEY: So you are not taking issue with the general point in relation to costs? You are taking issue with the point in relation to costs before —

284.. MR PIKE: Before 22 April, my Lord, yes. I cannot resist any application for costs since then, my Lord, no.

285.. MR JUSTICE OUSELEY: No.

286.. MR PIKE: As regards my learned friend Mr Elvin's submission, my Lord, firstly, in my submission, this is no different from any other application where planning permission is granted and the decision is challenged, when the planning permission may or may not be overturned. The effect of overturning the planning permission may be different for Islington and Arsenal in that it could be said it is different in every single case where planning permission is challenged — whether that challenge is successful or not.

287.. MR JUSTICE OUSELEY: I do not think, Mr Pike, I need trouble you in relation to Mr Elvin.

288.. MR PIKE: Thank you, my Lord. Those are my submissions on costs, my Lord.

289.. MR JUSTICE OUSELEY: I shall deal with the costs matters in reverse order. Miss McHugh, I should give you a chance. Do you want to come back?

290.. MISS McHUGH: My Lord, perhaps just on one matter. As to the suggestion that Mr Pike has made that his clients were forced into making an application. I am sure your Lordship will be aware how the matters arose.

291.. MR JUSTICE OUSELEY: Well, remind me.

292.. MISS McHUGH: My Lord, what occurred is that we received a letter from the Islington Stadium Community Alliance and the solicitors on their behalf, indicating that they had woken up to the fact that there might be a delay point raised against them if they did not proceed to make their application. We indicated, quite properly, that we did not take the view that they had acted promptly in accordance with the rules and therefore a delay point might well be taken against them and it was as a result of that that they proceeded to make their application. That is not a matter that can be blamed on the local authority; it is a matter for the claimants whether they decide they wish to make an application at all. I simply address that point. I do not think I have anything to say on the question as to whether or not it would be punitive.

293.. MR ELVIN: My Lord, may I make one further submission? I believe at that time it was because that the application was subject to a direction which would account for the delay, or at least the timescale and the timetable.

294.. MR JUSTICE OUSELEY: The application for costs by Islington in relation to the period covered by the grant of Legal Services Commission Funding is granted. They are not to be enforced other than in accordance with [section 11 of the Access to Justice Act](#).

295.. So far as the costs incurred before the grant of Legal Services Commission Funding, I see no reason why the costs should not follow the event in the normal way. I appreciate that because of uncertainty it has now been resolved in favour of the claimants. It would now be possible for them to have delayed the issue of proceedings, but it is for claimants to decide what proceedings to issue and in what form. If they issue proceedings and some withdraw and some lose them, then that is a matter which they must bear in mind when they initiate proceedings. The costs before that date therefore will be paid by the claimants, including the claimants who have ceased their proceedings. That cannot obviate the costs obligation which they incur.

296.. I do not propose to make an order in favour of Arsenal FC. This is a case in which of course Mr Elvin's presence was something to which Arsenal FC were entitled. He does have a separate interest, but it was not at the time a conflicting interest. But the entitlement to separate representation, and an interest separately to protect, does not of itself warrant the grant of a second set of costs. It is, if I might say so, almost inevitable that the interested party, in instructing counsel in relation to these matters, will be able to make a significant contribution to the argument and that the interested party will be able to make significant contribution to the evidence. I am grateful for Mr Elvin's contributions. It would be a matter of speculation as to whether, had he not attended and had Mr Purchas had an extra hour or so, Mr Purchas might not also have made those points as opposed to leaving them for others to make.

297.. Although I accept that this is an exceptional, large-scale development with a significant commitment, the key, in my judgment, to the award of a second set of costs is a separate interest with separate arguments that have to be promoted. There has not been so much of a difference between the interested party and the defendant that I consider it would be appropriate to make a second order of costs in this case. Accordingly, that application is refused.

298.. MR McHUGH: My Lord, I am sorry, I get to my feet once more. My learned friend Mr Elvin has very kindly assisted me by indicating that what I should have asked for was the order to be determined in accordance with the [Access to Justice Act](#). I think I simply said "not to be enforced".

299.. MR JUSTICE OUSELEY: That is very helpful. Thank you very much. I am afraid I still have not learnt what the proper order actually is, Miss McHugh, and I am always interested to hear counsel's various renditions of it.

300.. MR ELVIN: My Lord, can I raise two short matters by way of correction? My Lord, your Lordship erroneously referred to Richards J's judgment as being 7 June. It was actually 30 May.

301.. MR JUSTICE OUSELEY: Why did I think that?

302.. MR ELVIN: Perhaps because the order was sealed on 7 June.

303.. MR JUSTICE OUSELEY: Thank you.

304.. MR ELVIN: My Lord, having cited from *Milne* and *Barker* when dealing with the Environmental Statement issues, your Lordship then mentioned scrutiny by the Mayor of London and the Secretary of State. My Lord, as a matter of fact the Secretary of State did not say he was satisfied. The Secretary of State specifically said that he had not considered the Environmental Statement.

305.. MR JUSTICE OUSELEY: I am sorry, but I did not make that mistake without having had it put in front of me in that way, but I will note it.

306.. MR ELVIN: I am obliged, my Lord.

307.. MR JUSTICE OUSELEY: I do not think it alters the substance of the point. Thank you, Mr Elvin.

308.. MR PIKE: My Lord, there is the matter of permission to appeal, my Lord. I appreciate the lateness of the hour, and I do not wish to detain the court but —

309.. MR JUSTICE OUSELEY: No, no, you must make it.

310.. MR PIKE: — but I must ask for permission, my Lord. I ask for permission, my Lord, on three grounds: firstly, on the basis of the EDP inquiry issue; secondly on the basis of the 80:20 modal split in the Environmental Statement —

311.. MR JUSTICE OUSELEY: What, the ones I specifically thought might be arguable? I was being as generous as I could.

312.. MR PIKE: You were being generous, my Lord. The third is the DTZ report, my Lord. I was going to ask for a fourth, but in the light of what your Lordship said I shall not be pursuing that.

313.. Firstly, my Lord, as regards the EDP issue, the planning brief itself characterises itself as SPG once adopted. Now, in my submission, my Lord, supplementary planning guidance is just that. It is planning guidance detail and it should not offer an alternative —

314.. MR JUSTICE OUSELEY: But it does not matter what it is called. If it had not called itself supplementary planning guidance, would you have had a case?

315.. MR PIKE: My Lord, it is what that purports to do, in my submission. It purports to be an alternative to policies in the development plan. My Lord, in my submission, the *Court of Appeal decision in Pye* is, respectfully, against your Lordship in his decision this afternoon.

316.. MR JUSTICE OUSELEY: Well, it may be, but I wondered just reading the passage to which they draw attention, one sentence, without being too picky about what they say, I can see why they take that point, although I am not sure that it is an entirely accurate understanding of that paragraph. But on the assumption that I can see, looking at that sentence, that it might be thought that that is too narrow an approach, if they disagree with the basic thrust of the point, I would have expected them to make that clear and to have come out with something which says you cannot have anything other — rather like Mr McCracken says, you are allowed SPG in the PPG12 sense, and nothing else. But once they said, as they do, that you can have a draft UDP — a draft plan which obviously has real potential to be different — and you are allowed to give that weight, it does not seem to me that that is consistent at all with his argument.

317.. MR PIKE: Well, my Lord, my submission is not that you cannot have anything outside, it is that when you purport to introduce policies, that they must be SPG and that, my Lord, is what the Court of Appeal is saying. My Lord, my submission is this: that it is trite law that the Planning Acts are a comprehensive code and that the sections must refer to each other. Now, your Lordship said that there is no duty in [section 17](#) which arises for determination of planning permission and that these factors must be taken into account in relation to SPG — well, essentially [section 36](#). My Lord, in our submission, that is not the case. It is a comprehensive code. One must look to sections such as [section 36](#) when seeking to determine a planning application, and that the Court of Appeal — the principle and policy of the judgment in *Pye* leads towards that. In our submission, my Lord, that is why there is a real prospect of success in an appeal on this point.

318.. MR JUSTICE OUSELEY: Well, Mr Pike, it has only been with the most generous view that I thought you had an arguable point in a number of respects. I do not think any of them has a reasonable prospect of success. If you want to say I am wrong in relation to that, you will have to persuade the Court of Appeal. I am not going to grant you permission.

319.. MR PIKE: My Lord, there are two other points. Does your Lordship not wish me to —

320.. MR JUSTICE OUSELEY: Well, that is your best one. What is the next one?

321.. MR PIKE: Merely on the 80:20 modal split, my Lord. The point is a short one. It is this: the London Borough of Islington saw 80:20 as the likely effect. They did not provide an assessment of it and your Lordship has sought, in my respectful submission, to draw inferences from parts of the reports that they were satisfied that 88:12 or 80:20 would be the likely ([inaudible](#)) of different parts, but the e-mail of 19 October of last year, my Lord, at 103, Volume 2, clearly says that the Council considered that 80:20 was the likely split and that Arsenal refused to do it on that basis, my Lord.

322.. MR JUSTICE OUSELEY: Yes. That is the one point, if I were being strict about it, in analysing where I would grant you permission to apply for judicial review, I would have said: yes, you would be able to argue that point, if I was going through a strict analysis of what I thought was properly to be granted permission to argue. But I do not consider it to be a point that has a reasonable prospect of success on appeal, once the basis of that point is understood.

323.. The modal split has two areas of impact. The first is the pedestrian crowds, tubes, crowding and so on. That is considered, if you like in the worst case, if you have an 88:12 modal split. The car aspect is the other side of the coin. But the car aspect is a continuance of the same on a 20% modal split, and that has not been at issue either. So it does seem to me very difficult, when the point is properly understood, to see why it should be said that the approach of the local authority, which as I understand it, was to see — I appreciate not in the e-mails, but when they subsequently thought about the point in the way which appears from the analysis that then followed with SDG and their own officers thinking about how you actually got to a 20% modal split. They appreciated that they did not actually need it in order to look at the likely environmental effects. It was either effectively base line or existing, or the worst case had been examined. I cannot see how you get round that, and your submissions have not addressed that, which is the point I am perhaps making.

324.. MR PIKE: Well, you have made it clear, my Lord.

325.. MR JUSTICE OUSELEY: Yes.

326.. MR PIKE: My Lord, our submission is that that is not, with respect, a correct analysis.

327.. MR JUSTICE OUSELEY: That is a point you will have to argue. I do not think that is a reasonably arguable point.

328.. MR PIKE: The last point, my Lord — I will make it brief — is the DTZ Report. Simply this: members did not have a chance to assess for themselves the basis for the —

329.. MR JUSTICE OUSELEY: That is a matter for Islington. It is not a matter for you.

330.. MR PIKE: My Lord, when the viability of the project is a material consideration —

331.. MR JUSTICE OUSELEY: You never demonstrated it was a material consideration. Your clients never raised the point at all that you were able to demonstrate to me about materiality. Mr Dunkley putting argument in his witness statement does not make it so.

332.. MR PIKE: My Lord, off the top of my head I can at the very least recall the GOA Report which states in terms that it is a material consideration. I do not have, I am afraid, at my fingertips the other appropriate references but —

333.. MR JUSTICE OUSELEY: I was waiting for it throughout your argument.

334.. MR PIKE: It is the appearance of fairness which is important in a situation like this.

335.. MR JUSTICE OUSELEY: Yes.

336.. MR PIKE: And if the officers themselves have not — your words, my Lord, were that they had “the gist” of the appraisal. Well, the gist, my Lord, in my submission, is more than just a conclusion and the officers only had the conclusion and members of the public — and the claimants only had the conclusion.

337.. MR JUSTICE OUSELEY: Yes.

338.. MR PIKE: And that, in my submission, is not the gist.

339.. MR JUSTICE OUSELEY: No.

340.. MR PIKE: Those are my submissions, my Lord. I shall not trouble you further.

341.. MR JUSTICE OUSELEY: Yes. I think all of the points you raise have to be taken beyond a theoretical legal level, and this is one of the problems I have had with Mr McCracken's arguments. They had to be taken beyond a theoretical level and

applied to the actual circumstances of this case. When applied to the actual circumstances of this case, it seems to me that they are points that have no reasonable prospect. So I refuse permission.

342.. MR ELVIN: Your Honour, can I trespass on your patience with one last matter?

343.. MR JUSTICE OUSELEY: Yes.

344.. MR ELVIN: My Lord, there are two matters. Firstly, your Lordship is well aware of the critical time so far as Arsenal is concerned with these matters.

345.. MR JUSTICE OUSELEY: Yes.

346.. MR ELVIN: Could I ask your Lordship for an indulgence that the order be drawn up immediately? It is important that Arsenal has the order if at all possible within the next few days.

347.. MR JUSTICE OUSELEY: I am told it will go out before the end of the week.

348.. MR ELVIN: I am very grateful. My Lord, the second point is, anticipating that an application may be made to the Court of Appeal, and given the urgency of the matter, your Lordship has power under [Part 52.4](#) to prescribe the time within which an application for permission is made to the Court of Appeal. The lower court may direct the appropriate time limit. The normal time period is fourteen days from the date of your Lordship's judgment. Given the urgency of the matter, this is a case in which, I would respectfully suggest, the claimants, if they are going to go further, ought to deal with the matter straight away and I would ask your Lordship to abridge time for making an application to the Court of Appeal to seven days, that time, if it is necessary to specify, to run during the vacation.

349.. MR PIKE: My Lord, it is, as you will be aware, a long decision of your Lordship's. It is a very detailed and very closely reasoned decision. A transcript will not be available for several days. In my submission, it would certainly be unsuitable and inappropriate to abridge that time to seven days from today's date.

350.. MR JUSTICE OUSELEY: I am not going to abridge time. There seems no point in relation to that. I appreciate that it is important for Arsenal, but I find it difficult to see that seven days in this context is going to be critical and I am aware, as you say, that it was a long judgment. You have to consider matters carefully. I am not going to abridge time.

Crown copyright

Case No: C1/2003/0212, Neutral Citation No: [2003] EWCA Civ 1408

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
(Mr Justice Richards)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 16th October, 2003

B e f o r e:

LORD JUSTICE LAWS,
LORD JUSTICE DYSON
AND
LORD JUSTICE CARNWATH

THE QUEEN ON THE APPLICATION OF JONES

Appellant

- v -

MANSFIELD DISTRICT COUNCIL AND ANOTHER

Respondent

(Transcript of the Handed Down Judgment of
 Smith Bernal Wordwave Limited, 190 Fleet Street
 London EC4A 2AG
 Tel No: 020 7421 4040, Fax No: 020 7831 8838
 Official Shorthand Writers to the Court)

Mr David Wolfe of Counsel (instructed by Public Interest Lawyers) for the Appellant
 Mr John Steel QC and Ms Sarah Jane Davies of Counsel (instructed by Messrs Brown Jacobson)
 for the Respondent

J U D G M E N T
As Approved by the Court
 Crown Copyright ©

Lord Justice Dyson :

Introduction

1. Dawn Jones lives adjacent to a 28.4 hectare site which at the present time is open countryside. On 5 November 2001, Mansfield District Council, the local planning authority ("the council"), determined to grant outline planning permission for the use of the site as an industrial estate. By a claim form dated 17 December 2001, Ms Jones challenged the legality of this decision on the basis that it had been reached without proper consideration of whether an Environmental Impact Assessment ("EIA") was required before permission could be granted. The council agreed to reconsider the question of whether an EIA was needed. On 25 February 2002, its planning committee considered two reports from the Head of Planning and Building Controls. These were (a) a report again recommending that an EIA was not required ("the first report"); and (b) a report recommending that outline planning permission be granted for the industrial estate ("the second report"). At its meeting of 25 February 2002, the planning committee determined that an EIA was not required and that planning permission should be granted. By these proceedings, Ms Jones challenges both decisions, contending that the second was unlawful by reason of the flaw in the first. In a judgment delivered on 20 January 2003, Richards J dismissed her application for judicial review. He concluded that the council's decision not to require an EIA was reasonable and lawful, so that the challenge to the grant of planning permission also failed. Ms Jones appeals with the permission of Laws LJ.

Legal framework

2. The application for planning permission was made on 15 October 1998. Accordingly, the relevant regulations are the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 ("the Regulations"). The Regulations implement Council Directive 85/337/EEC of 17 June 1995 on the assessment of the effects of certain public and private projects on the environment ("the Directive").
3. The summary of the legal framework that follows is substantially based on that given by the judge. Regulation 4(2) of the Regulations provides:

"The local planning authority or the Secretary of State or an inspector shall not grant planning permission pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration and state in their decision that they have done so."
4. The question in this case is whether the application was one to which regulation 4 applied. Regulation 4(1) provides that regulation 4 applies inter alia to any "Schedule 2 application", which is defined by regulation 2(1) in these terms:

"Schedule 2 application means × an application for planning permission × for the carrying out of development of any description mentioned in Schedule 2, which is not exempt development and

which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location."

5. It is common ground that the development in this case is of a description mentioned in Schedule 2, namely "an industrial estate development project" (Schedule 2, paragraph 10(a)), and that it is not exempt development. Regulation 4 therefore applies to it if, but only if, it "would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location".

6. Regulation 2(2) provides:

"Where the Secretary of State gives a direction which includes a statement that in his opinion proposed development would be likely, or would not be likely, to have significant effects on the environment by virtue of factors such as its nature, size or location, or includes such a statement in a notification under regulation 10(1), that statement shall determine whether an application for planning permission for that development is, or is not, a Schedule 2 application by reason of the effects the development would be likely to have; and references in these Regulations to a Schedule 2 application shall be interpreted accordingly."

7. Where it is decided that an application for planning permission is a Schedule 2 application so that regulation 4 applies to it, the obligation in regulation 4(2) is, as indicated, to take the "environmental information" into consideration. "Environmental information" is defined in regulation 2(1) as "the environmental statement prepared by the applicant or appellant ×, any representations made by any body required by these Regulations to be invited to make representations or to be consulted and any representations duly made by any other person about the likely environmental effects of the proposed development".

8. An "environmental statement" is defined as such a statement as is described in Schedule 3, which provides so far as material:

"1. An environmental statement comprises a document or series of documents providing, for the purpose of assessing the likely impact upon the environment of the development proposed to be carried out, the information specified in paragraph 2 (referred to in this Schedule as "the specified information").

2. The specified information is -

(a) a description of the development proposed, comprising information about the site and the design and size or scale of the development;

(b) the data necessary to identify and assess the main effects which that development is likely to have on the environment;

(c) a description of the likely significant effects, direct and indirect, on the environment of the development, explained by reference to its

possible impact on: human beings; flora; fauna; soil; water; air; climate; the landscape; the interaction between any of the foregoing; material assets; the cultural heritage;

(d) where significant adverse affects are identified with respect to any of the foregoing, a description of the measures envisaged in order to avoid, reduce or remedy those effects;

(e) a summary in non-technical language of the information specified above."

9. Although they were not directly invoked in this case, it is relevant to note the provisions of regulation 5 concerning the giving of "screening" opinions in advance of an application for planning permission. By regulation 5(1), a person who is minded to apply for planning permission may ask the local planning authority to state in writing whether in their opinion the proposed development would be within a description mentioned in Schedule 1 or Schedule 2 and, if so, (a) within which such description and (b) if it falls within a description in Schedule 2, whether its likely effects would be such that regulation 4 would apply. By regulation 5(2), such a request must be accompanied by inter alia (a) a plan sufficient to identify the land and (b) a brief description of the nature and purpose of the proposed development and of its possible effects on the environment. By regulation 5(3) the authority shall, if they consider that they have not been provided with sufficient information to give an opinion on the questions raised, notify the person making the request of the particular points on which they require further information. Regulation 5(4) provides that the authority shall respond to a request within three weeks or such longer period as may be agreed in writing with the person making the request. Regulation 6 contains corresponding provisions as to the giving of pre-application directions by the Secretary of State.

10. So far as material, the Directive provides as follows. By its recitals:

"Whereas the 1973(4) and 1977(5) action programmes of the European Communities on the environment×..stress that the best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects;

Whereas they affirm the need to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes; whereas to that end, they provide for the implementation of procedures to evaluate such effects;

×..

Whereas general principles for the assessment of environmental effects should be introduced with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment;

Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out×"

11. Article 2 provides:

"1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an assessment with regard to their effects. These projects are defined in Article 4."

12. Article 4 provides:

"2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Article 5 to 10, where Member States consider that their characteristics so require. To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10."

The facts

13. In view of the comprehensive statement of the relevant facts given by the judge at paragraphs 16–29 of his judgment, I do not propose to venture a summary of my own. It is sufficient that I append his summary of the facts as an appendix to this judgment.

The role of the court

14. The judge said (para 7) that the question whether the development "would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location" was a matter for decision by the local planning authority, subject to review on *Wednesbury* grounds. The correctness of this proposition does not seem to have been in issue before the judge, and it was not challenged in the grounds of appeal. During the course of oral argument, Carnwath LJ raised the point with counsel, and suggested that the question might be one for the court to decide as a question of primary fact. In the course of his reply, Mr Wolfe embraced this suggestion, and submitted, but very briefly and without developing the point, that the decision of the council was not subject to a *Wednesbury* review, but to a full appeal on the facts and the law. It is unfortunate that the point was the subject of only the most exiguous argument. In these circumstances, I do not propose to deal with it at any great length.
15. In my judgment, the judge was right. The decision of the highest authority that he cited in support of his view was *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, at 610G–H and 614G–615A. It is true that neither of these passages provides explicit support for the judge's conclusion. In the first, Lord Hoffmann said that, in the absence of a direction by the Secretary of State pursuant to regulation 2(2), the question whether an application is or is not a Schedule 2 application "is left to be determined in the first instance by the opinion of the local planning authority". In the second passage, he said in relation to a direction under regulation 2(2): "if no reasonable Secretary of State could have considered

that the club's application was a Schedule 2 application, the judge would of course have been entitled to rule that no EIA could have been required". As I have already stated, regulation 2(2) provides that "Where the Secretary of State gives a direction which includes a statement that in his opinion proposed development would be likely×.", that statement is determinative. There is no corresponding express reference to the role of the local planning authority. But as Lord Hoffmann said, in the absence of a direction by the Secretary of State under regulation 2(2), it is for the local planning authority to determine whether an application is a Schedule 2 application.

16. It is right to say that Lord Hoffmann did not deal specifically with the role of the court in any challenge to a decision by a local planning authority. But it would be very surprising if the nature of the court's reviewing function were to differ according to whether the decision as to whether the application is a Schedule 2 application is made by the local planning authority or the Secretary of State. The question that is left to be determined in the first instance by the local planning authority is the same as the question that is determined by the Secretary of State pursuant to regulation 2(2). I do not consider that the use of the word "opinion" in regulation 2(2) indicates that there is any difference. The fact that the decision of the local planning authority may be overridden by a formal direction of the Secretary of State does not justify or require a different role for the court in the two cases. Accordingly, I would hold that what Lord Hoffmann said in relation to challenges to decisions by the Secretary of State applies equally to challenges to decisions by local planning authorities.
17. Whether a proposed development is likely to have significant effects on the environment involves an exercise of judgment or opinion. It is not a question of hard fact to which there can only be one possible correct answer in any given case. The use of the word "opinion" in regulation 2(2) is, therefore, entirely apt. In my view, that is in itself a sufficient reason for concluding that the role of the court should be limited to one of review on *Wednesbury* grounds.
18. I note that in *Aannemersbedrijf P K Kraaijeveld v Gedeputeerde Staten Van Zuid-Holland* [1997] 3 CMLR 1, the ECJ said:

"[59] The fact that in this case the Member States have a discretion under Articles 2(1) and 4(2) of the directive does not preclude judicial review of the question whether the national authorities exceeded their discretion (see, in particular, VERBOND VAN NEDERLANDSE ONDERNEMINGEN).

[60] Consequently where, pursuant to national law, a court must or may raise of its own motion pleas in law based on a binding national rule which were not put forward by the parties, it must, for matters within its jurisdiction, examine of its own motion whether the legislative or administrative authorities of the Member State remained within the limits of their discretion under Article 2(1) and 4(2) of the directive×"

It seems to me that this passage (particularly the reference to administrative authorities having a "discretion") supports the view that I have just expressed. I take the word "discretion" to mean an exercise of judgment, rather than discretion in the strict sense.

What is the correct approach to the question whether the development would be likely to have a significant effect on the environment?

19. On the face of it, the language of Schedule 2 to the Regulations is clear. The words "and which would be likely to have significant effects on the environment" reappear in regulation 2(2), and they reflect precisely the language of Article 2(1) of the Directive. There is, therefore, no apparent conflict between the Regulations and the Directive which requires resolution in favour of the Directive: see *Marleasing* [1990] ECR I - 4135.

20. The judge summarised his interpretation of the relevant words in the following way:

"51. In my view it is important not to over-complicate the analysis of this issue, as Mr Wolfe seemed to me on occasion to do by, for example, his references to a "bounding principle" and to "bounded uncertainty" and "unbounded uncertainty". In any event I reject the contention that an authority is subject to a "bounding principle" whereby it must require an EIA unless confident or positively satisfied that the proposed development will not have significant effects on the environment, and that any uncertainty must be resolved in favour of requiring an EIA. I also reject the contention that there is a low gateway or threshold for the application of the EIA regime. Of course it is important, in view of the objectives of the Directive, that a lawful decision is made as to whether an EIA is required; but I do not think that any gloss is required on the provisions of the 1988 Regulations.

52. The straightforward position is that under the regulations an EIA is required if a non-exempt development of a Schedule 2 description "would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location". It is only significant effects that bring a development within the scope of the EIA regime; minor environmental effects do not do so, though all such effects may fall to be taken into account in the normal way as material considerations (cf. the observations of Sullivan J in *Milne* e.g. at para 113, in relation to the details to be included in an environmental statement where an EIA is required). It is for the authority to judge whether a development would be likely to have significant effects. The authority must make an informed judgment, on the basis of the information available to it and having regard to any gaps in that information and to any uncertainties that may exist, as to the likelihood of significant environmental effects. The gaps and uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effects. Everything depends on the circumstances of the individual case."

21. Mr Wolfe submits that the Directive and the Regulations should be construed so as to give effect to the broad scope and purpose of the Directive stated in the recitals, including, in particular, the objective of taking into account environmental information at the earliest possible stage, ie before planning permission is granted. Accordingly, he submits that Schedule 2 projects which may have significant environmental effects must be the subject

of an EIA; a conclusion that a development would be unlikely to have significant effects can be properly reached only after a comprehensive assessment; and a comprehensive assessment must leave no uncertainties unresolved or impacts to be assessed after the grant of planning permission. In short, where there is any uncertainty about the environmental effects of a development, it cannot be said that it would be unlikely to have significant effects on the environment, and an EIA will be required.

22. Mr Wolfe relies on a number of authorities. In *R v Cornwall County Council ex p Hardy* [2001] 2001 Env LR 473, the council granted planning permission although its planning committee had decided that further surveys should be carried out to ensure that bats would not be adversely affected by the proposed development. This was a case governed by the 1999 Regulations, but there is no material difference between them and the 1988 Regulations. The case was concerned with the adequacy of information provided pursuant to Schedule 3 (where an EIA had been required), rather than the initial decision whether an EIA was required at all. But it is common ground that the issue raised in *Hardy* was substantially the same as that which arises here.
23. As Richards J pointed out (para 62), the key point in that case was that the planning committee had decided that further surveys should be carried out to ensure that bats would not be adversely affected by the development. Harrison J held that, since those surveys might reveal significant adverse effects on bats, it was not open to the committee to conclude that there were no significant nature conservation issues until they had the results of the surveys. The surveys might have revealed significant adverse effects on the bats or their resting places. Without the results of the surveys, they were not in a position to know whether they had the full environmental information required by Regulation 3 before granting planning permission. It was not permissible to defer to the reserved matters stage consideration of the environmental impacts and mitigation measures.
24. Since Richards J gave judgment in the present case, there have been two decisions of the Court of Appeal to which our attention has been drawn. The first is *Smith v Secretary of State for the Environment, Transport and Regions* [2003] EWCA Civ 262. This is another Schedule 3 case. At paragraphs 24–28, Waller LJ distilled four principles which he derived from earlier authorities. He said that it is at the outline consent stage that the planning authority must have sufficient details of any impact on the environment and of any mitigation to enable it to comply with its regulation 4(2) obligation; and there will be a failure to comply with regulation 4(2) if questions relating to the significance of the impact on the environment and the effectiveness of any mitigation are left over. But it is consistent with these principles to leave final details of, for example, a landscaping scheme, to be clarified in the context of a reserved matter or by virtue of a condition.
25. In *Bellway Urban Renewal Southern v Gillespie* [2003] EWCA Civ 400, the question was whether an EIA should be required for a development which fell within Schedule 2 of the Regulations. The site was heavily contaminated. Planning permission was given by the Secretary of State for redevelopment of the site. It was accepted by all parties that a substantial amount of work would be required to deal with the contamination. The Secretary of State decided that the development was unlikely to cause significant effects to environment because satisfactory remediation work could be required by the imposition of suitable conditions. The question in that case was to what extent (if at all) the Secretary of State was entitled, when deciding whether an EIA was required, to take into account the remediation measures that could be imposed as a condition of the planning permission.

This court held that, remedial measures could be taken into account, but only to a limited extent: see paras 39,46 and 49 of the judgments of Pill, Laws and Arden LJJ respectively. The court held that the Secretary of State had erred. Pill LJ said that the error lay in "the assumption that the investigations and works contemplated in Condition VI could be treated, at the time of the screening decision, as having had a successful outcome" (para 41). Laws LJ said: "In the result, in my judgment the Secretary of State has deployed Condition VI effectively as a surrogate for the EIA process. That is illegitimate." (para 48). Arden LJ agreed that the Secretary of State had proceeded on the wrong basis for the reasons given by Pill and Laws LJJ (para 49).

26. I can find nothing in any of these three decisions which undermines or is inconsistent with the judge's analysis.
27. I should now refer to two decisions of the European Court of Justice on which Mr Wolfe relies. The first is *Kraaijeveld*. There were a number of issues before the court. The first was the interpretation of the phrase "canalisation and flood-relief works" in paragraph 10(e) of Annex II to the Directive, and whether it included dykes along waterways. The ECJ held that it did. At para 21 of his Opinion, Mr Advocate General Elmer referred to the purpose of the Directive as being to ensure that there is a prior assessment of the likely environmental effects of projects, and said that this purpose means that "in the interpretation of Annex II significant importance must in cases of doubt be attached to the actual effects on the environment which may be regarded as bound up with various categories of projects". Applying such an approach to the question of interpretation, he decided that question in the way that I have described.
28. The next issue was whether the duty to undertake an EIA applied not only to the construction of new dykes, but also to the modification of existing ones. The court held that it applied to both. In the course of his discussion of this issue, the Advocate General made "one or two comments on the question of how the modification to Annex II projects should be carried out for the project in question" (para 39). What followed included the following:
- "39×.Thus as far as modifications to both Annex I and Annex II projects are concerned specific consideration *must* be given to whether the modifications *may* have a significant effect on the environment, so that where necessary an environmental impact assessment must be undertaken in pursuance of Article 5–10 of the directive.
40. The purpose of the directive, according to which projects *may* have significant effects on the environment *must* be subject to a prior environmental impact assessment militates decisively in favour of that interpretation×.." (emphasis added).
29. In my judgment, the observations of the Advocate General in para 21 of his Opinion do not cast light on the correct approach to determining whether a project would be likely to have significant effects on the environment. They are directed to the proper interpretation of

classes of development in the Directive. The Advocate General was not considering the question that arises on this appeal.

30. Mr Wolfe also relies on the passage at paras 39 and 40, and in particular the use of the word "may". At one stage of his argument, Mr Wolfe submitted that the relevant test as to whether a project is *likely* to have significant environmental effects is whether it *may* have such effects. But he later disavowed the suggestion that "likely" means "may". At all events, the Advocate General was plainly not addressing the question of what is required before an authority can be satisfied that a project "would be likely to have significant environmental effects". He did not purport to interpret that phrase. It is to be noted that he repeated the phrase "likely to have significant environmental effects" (without elaboration) at paras 46, 47, 51 and 52. I do not consider that the comments of the Advocate General support the proposition that, if there is any doubt as to whether the development is likely to have significant effects on the environment, an EIA must be required.
31. The second decision of the ECJ is *World Wildlife Fund (WWF) v Autonome Provinz Bozen* [2000] 1 CMLR 149. This case concerned the project for converting Bolzano airport in Italy from military to civilian use. The national law did not require the project to be subject to an EIA. The question was whether the national law conformed to the Directive. The questions for the court included whether Article 4(2) of the Directive could be interpreted as meaning that certain classes of the projects listed in Annex II may from the outset, in the absolute discretion of the Member States, be excluded in their entirety from the obligation to carry out an EIA, or whether the margin of discretion enjoyed by Member States is limited by the obligation in Article 2(1) to subject those projects likely in any event to have significant effects on the environment to an EIA.
32. The court held that, in relation to entire classes of projects, the discretion conferred by Article 4(2) is subject to "the obligation set out in Article 2(1) that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment" (para 36). At para 38, the court said:
- "[38] The Court also held in paragraph [53] of its judgment in *KRAAIJEVELD*, cited above, that a Member State which established criteria or thresholds at a level such that, in practice, an entire class of projects would be exempted in advance from the requirement of an impact assessment would exceed the limits of its discretion under Articles 2(1) and 4(2) of the Directive unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment."
33. The second issue raised by the national court was whether, "taking into account the fact that an airport is the only airport in the region in which it is located that can be restructured, Articles 4(2) and 2(1) of the Directive nevertheless confer on the Member State the power to exclude from the assessment procedure established by the Directive a specific project as not being likely to have significant effects on the environment either under national

legislation or on the basis of an individual examination of the project" (para 41). The court said:

"[43] Consequently, the Directive confers a measure of discretion on the Member States and does not therefore prevent them from using other methods to specify the projects requiring an environmental impact assessment under the Directive. So the Directive in no way excludes the method consisting in the designation, on the basis of an individual examination of each project concerned or pursuant to national legislation, of a particular project falling within Annex II to the Directive as not being subject to the procedure for assessing its environmental effects.

[44] However, the fact that the Member State has the discretion referred to in the previous paragraph is not in itself sufficient to exclude a given project from the assessment procedure under the Directive. If that were not the case, the discretion accorded to the Member States by Article 4(2) of the Directive could be used by them to take a particular project outside the assessment obligation when, by virtue of its nature, size or location, it could have significant environmental effects.

[45] Consequently, whatever the method adopted by a Member State to determine whether or not a specific project needs to be assessed, be it by legislative designation or following an individual examination of the project, the method adopted must not undermine the objective of the Directive, which is that no project likely to have significant effects on the environment, within the meaning of the Directive, should be exempt from assessment, unless the specific project excluded could, on the basis of a comprehensive assessment, be regarded as not being likely to have such effects.

[46] It should be added, with regard to the exclusion of the project at issue in the main proceedings from the assessment procedure under Law 27/92, that, even if that project concerns the only airport in the province which can be restructured and it has actually been specified by the legislature, the latter cannot in any event exempt the project from the assessment obligation unless, on the date when Law 27/92 was adopted, it was able to assess precisely the overall environmental impact which all the works entailed by the project were likely to have.

[47] As for the exclusion of the project on the basis of an individual examination carried out by the national authorities, the file shows that the contested measures were preceded by an environmental impact study carried out by a team of experts, that information was communicated to the municipalities concerned and that the public was informed by press notices. In addition, the environmental agency and the Amsterdirektorenkonferenz were consulted.

[48] It is for the national court to review whether, on the basis of the individual examination carried out by the competent authorities which resulted in the exclusion of the specific project at issue in the main proceedings from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment.

[49] In view of the foregoing considerations, the answer to the first and second questions must be that Articles 4(2) and 2(1) of the Directive are to be interpreted as not conferring on a Member State the power either to exclude, from the outset and in their entirety, from the environmental impact assessment procedure established by the Directive certain classes of projects falling within Annex II to the Directive, including modifications to those projects, or to exempt from such a procedure a specific project, such as the project of restructuring an airport with a runway shorter than 2,100 metres, either under national legislation or on the basis of an individual examination of that project, unless those classes of projects in their entirety or the specific project could be regarded, on the basis of a comprehensive assessment, as not being likely to have significant effects on the environment. It is for the national court to review whether, on the basis of the individual examination carried out by the national authorities which resulted in the exclusion of the specific project at issue from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment."

34. Mr Wolfe relies on this passage, and, in particular on para 45, and submits that it shows that an EIA is required in relation to an individual project pursuant to the Directive unless it can be shown "on the basis of a comprehensive assessment" that the project would not be likely to have significant effects on the environment.
35. I have not found this passage, and in particular para 45, altogether easy to interpret. It is important to emphasise, however, that the court is dealing with the question of interpretation of the second sentence of Article 4(2) of the Directive, read with Article 2(1). Article 4(2) gives Member States a discretion to specify certain types of projects which will be subject to an assessment or to establish the criteria and/or thresholds to determine which of the Annex II classes of projects are to be subject to an assessment. I have already referred to what the court said at para 38 in relation to entire classes of projects. Paras 36–40 identify the limitations on the ability of a Member State to exclude Annex II classes of projects from the EIA process altogether. There is nothing in these paragraphs which indicates what test should be applied, or what approach should be adopted in determining whether a particular project is one which is likely to have significant effects on the environment within the meaning of Article 2(1).

36. Paras 41–48 deal with the question whether, and if so in what circumstances, a Member State can exclude a specific project from the EIA procedure. In my view, the court is not here seeking to define the steps that have to be taken before the authority of a Member State can be said to have discharged the Article 2(1) obligation to ensure that all projects likely to have significant effects on the environment are made subject to an EIA. It is dealing with the rather unusual situation of a Member State seeking to exclude a specified individual project from the assessment process altogether. The court held that, just as in the case of entire classes of projects, so too in the case of a specified individual project, a Member State cannot exclude the project from the assessment process unless it is satisfied that the project could be regarded as not being likely to have significant effects on the environment.
37. It follows that I do not consider that the *Bozen* case casts light on whether the council adopted the correct approach to the question whether the development in the present case would be likely to have a significant effect on the environment.
38. Following this review of the authorities relied on by Mr Wolfe, I can now say why I would respectfully adopt paras 51 and 52 of Richards J's judgment (see para 20 above) as a clear and adequate statement of what is required. It is clear that a planning authority cannot rely on conditions and undertakings as a surrogate for the EIA process. It cannot conclude that a development is unlikely to have significant effects on the environment simply because all such effects are likely to be eliminated by measures that will be carried out by the developer pursuant to conditions and/or undertakings. But the question whether a project is likely to have significant effect on the environment is one of degree which calls for the exercise of judgment. Thus, remedial measures contemplated by conditions and/or undertakings can be taken into account to a certain extent (see *Gillespie*). The effect on the environment must be "significant". Significance in this context is not a hard-edged concept: as I have said, the assessment of what is significant involves the exercise of judgment.
39. I accept that the authority must have sufficient information about the impact of the project to be able to make an informed judgment as to whether it is likely to have a significant effect on the environment. But this does not mean that all uncertainties have to be resolved or that a decision that an EIA is not required can only be made after a detailed and comprehensive assessment has been made of every aspect of the matter. As the judge said, the uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effect. It is possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further surveys are to be undertaken. Everything depends on the circumstances of the individual case.

The judge's conclusions

40. The judge started by recording that it was common ground before him that the central question that the planning committee had to decide was whether the proposed development was likely to have significant effects on the environment, a decision that called for an exercise of judgment on the part of the members of the committee. He then addressed what he characterised as the logically prior question of whether the committee had sufficient

information to enable it to form a sensible judgment as to the likelihood of significant environmental effects. He concluded that the committee was reasonably entitled to regard the information available to it as sufficient to enable it to form such a judgment.

41. Next, he turned to the central question whether the committee's judgment that the proposed development was not likely to have significant effects on the environment was impeachable.

42. In relation to golden plovers, he referred to the third report of the developer's consultants dated February 2001, which was prepared on this specific issue in response to the concerns that had been expressed, and which found that there was no reason to presume that the overwintering golden plover population would suffer significant harm as a result of the development. The judge also referred to the comments by English Nature quoted at para 21 of his judgment that it was "far from clear whether the proposed development would have a measurable impact upon the current Golden Plover numbers within the wider area available to this species in Nottinghamshire". Mr Wolfe relied strongly on this passage in the report by English Nature in support of his submission that the committee could not reasonably have concluded that the development was not likely to cause significant impact on the golden plover population. The judge said that if the comments of English Nature were read as a whole, it was "perfectly reasonable for the committee to conclude that the development was unlikely to have significant effects as regard golden plovers" (para 54). He said that the writer of the first report:

"..was right about the underlying point that, despite the one uncertainty referred to, English Nature was effectively accepting that the development was not likely to have a significant impact on golden plovers. It was no part of English Nature's representations that further investigations might reveal the likelihood of a significant impact" (para 55).

43. That the development was likely to have some impact on golden plovers was not in dispute. It was the likelihood of a significant impact that was not accepted. Thus there was no inconsistency in the planning officer referring in the second report to the loss of the land as a roosting/feeding site for golden plovers, which was still a material consideration. Nor was the acceptance of the developer's unilateral undertaking to carry out further survey work inconsistent with the Council's approach to the question whether an EIA was needed. As the planning officer's second report recorded, the purpose of the further survey in relation to golden plovers was "in order to gain a better understanding of the Golden Plovers movements in the locality, which could then be used generally to assess the impact of this and other developments in the area". The judge said (para 57):

"Although it was no doubt appropriate for the council to accept that unilateral undertaking and to impose conditions concerning further survey work with a view to gaining a better understanding and possibly minimising any adverse effect, such further work was plainly not considered necessary for the purposes of an informed decision on an EIA; and in the absence of the results of that work the committee could nonetheless reasonably proceed to a decision on an

EIA and could reasonably decide that the development was unlikely to have significant effects in relation to Golden Plovers".

44. As to bats, the judge noted that there was a considerable amount of material before the committee. The first report from the developer's consultants, dated November 1998, reported no signs of any protected species, including bats, on the site. The second report, dated July 2000, reported that all mature trees and buildings had been checked for potential roost sites for bats. Potential sites had been identified, but no absolute evidence of the presence of bats had been found. As the judge pointed out, there was no evidence from any source that bats were present on the site. Accordingly, he held that on the basis of the material before them, it was reasonable for the committee to conclude that the development was unlikely to have significant effects in relation to bats (para 58).
45. As for the unilateral undertaking and conditions in respect of additional survey work in relation to bats, the judge saw no inconsistency between them and the committee's approach to an EIA. Having regard to the information already available, it was reasonable to conclude that the development was unlikely to have significant effects in relation to bats; but it was still appropriate to adopt further measures to ensure that, if there were any bats on the site, account was taken of them in the timing of the work carried out and by way of other mitigation (para 59).
46. Having dealt with the issue of an EIA in relation to golden plovers and bats, the judge said that there was nothing in relation to any other environmental issues raised in the course of representations that made it unreasonable for the committee to proceed to decision on an EIA or to conclude that there was no likelihood of significant environmental effects. He concluded, therefore, that the Council's decision not to require an EIA was reasonable and lawful.

The appellant's case on the facts

47. The case advanced on behalf of Ms Jones on appeal is essentially the same as that which was advanced before the judge and rejected by him. Mr Wolfe submits that there was considerable controversy and uncertainty about the potential impact of the proposed development on birds (in particular golden plovers) and bats. Consultees, such as the Nottinghamshire County Council Rural Development Environment Group, RSPB, Nottinghamshire Wildlife Trust and North Notts Bat Group were calling for further surveys before an assessment was made as to the impact of the development. The Council could not lawfully decide that the impact of the scheme would not be likely to be significant until an assessment was made in order to resolve the uncertainties identified in the reports.
48. Mr Wolfe draws attention to the fact that (a) the second report recorded that the developer had offered a unilateral undertaking to carry out further studies in order to gain a better understanding of the golden plover movements; (b) the same report also referred to a

criticism of the ecological survey that it did not give a full annual assessment of the site (see para 8 of the appendix to this judgment); (c) the notes to the conditions subject to which planning permission was granted included a note advising that any survey must include all species of birds and bats; and (d) the unilateral undertaking promised a full ecological survey "to establish all ecological interests on the site" including "all fauna and flora elements". These features amount, in effect, to an admission that there were serious shortcomings in the information available to the Council to enable it to decide whether the project would be likely to have a significant effect on the environment.

49. Mr Wolfe also makes a number of detailed points about the adequacy of the information that was available to the Council at the time it made its decision. I do not think it necessary to deal with these individually. In short, he submits that the Council did not have sufficient material to enable it to reach an informed decision on the question whether the project would be likely to have a significant effect on the environment.

50. He contends that it was not legitimate for the council to permit the developer to resolve these uncertainties by granting planning permission and to rely on the developer's unilateral undertaking to carry out a full ecological survey and submit details of "appropriate mitigation measures and aftercare measures". In deciding that an EIA was not required and in granting planning permission without an EIA, the Council fell into the same error of approach as did the Secretary of State in *Gillespie*. Specifically, the Council relied on assessments that were to be undertaken pursuant to a condition or undertaking after the grant of planning permission as a substitute for the assessment that needed to be undertaken as part of an EIA. In this way, the Council was subverting the statutory scheme. The Council deployed the condition as a surrogate for the EIA process. That was illegitimate: see per Laws LJ in *Gillespie* (para 48).

51. Mr Wolfe submits that the Council resolved the uncertainty about impacts on the environment by concluding, impermissibly in the face of manifest uncertainty, that there were not likely to be significant impacts. Rather, it should have required it to be positively and comprehensively shown that there would not be significant impacts before dispensing with the need for an EIA. It acted unlawfully in that (a) it failed to ask itself whether there might be significant impacts, which would necessitate an EIA, but instead (b) left the resolution of uncertainties until after approval had been given, rather than requiring a comprehensive assessment before giving approval.

My overall conclusion

52. I have earlier (paras 14–18 above) given my reasons for holding that the judge explained the approach correctly, and that the role of the court is to conduct a *Wednesbury* review of the decision of the council. In my judgment, the judge also reached the correct conclusion in his review of the decision. Since I have set out his reasoning in some detail, I can state my own reasons shortly.

53. This was plainly not a *Gillespie* case. The committee had a great deal of information about the likely effects of the development on the environment. It had representations from various consultees. It also had a number of ecological reports from the developer's consultants which described the various surveys that had been undertaken; and it had two comprehensive reports by the Head of Planning and Building Controls. The committee did not rely on the conditions and undertaking in order to arrive at its conclusion that the development was unlikely to have an environmental effect in relation to bats, golden plovers or birds generally. The judge was right to say that the imposition of conditions with regard to surveys, and the acceptance of the undertaking, did not preclude the council from being satisfied that it was unlikely that the project would have a significant effect on the environment. Having regard to the information already available, it was reasonable for the committee to decide that the development would be unlikely to have significant effects in relation to birds and bats. I would respectfully adopt what the judge said at paras 57 and 59 of his judgment (see paras 43 and 45 above).
54. The judge was also right to say that the comments by English Nature (referred to at para 6 of the Appendix to this judgment) were important. The Officer was right to say, as he did in the first report, that these comments enabled him to advise the committee that the development would not have a significant environmental impact on the golden plover habitat. As the judge pointed out, English Nature did not suggest, still less request, that further investigations be carried out which might reveal the likelihood of a significant impact.
55. The members of the committee had to make a judgment on the material that was before them as to whether the proposed development would be likely to have a significant effect on the environment. For the reasons that I have given, which are substantially the same as those expressed by the judge, I am satisfied that they were entitled to conclude as they did. I would dismiss this appeal.

Lord Justice Carnwath :

56. I agree. I would add two comments. First, the protracted procedural history of this planning application gives cause for some concern. The site of the proposed development is large (28 ha), but not unusual. It consists of ordinary but attractive arable land, with some trees and hedgerows. The principle of its use for industry, to meet a need identified in the 1996 structure plan, was established by its allocation in the local plan adopted in November 1998 (presumably following public consultation). An application for outline planning permission was made in October 1998 (proposing that 40% should be used for strategic landscaping). Since then, the authority has had the benefit of advice from a variety of expert consultees, as well as ecological studies commissioned by the applicants. Only two points of particular note have emerged: first, that the site is a small part of a much wider area of importance for wintering Golden Plover; and, secondly, that there are some potential roost sites for bats, although there is no evidence of their presence.
57. The appellant (who is publicly funded) lives near the site, and shares with other local residents a genuine concern to protect her surroundings. However, as far as we have been told, she has no special interest in, or knowledge of, golden plovers or bats. With hindsight it might have saved time if there had been an EIA from the outset. However, five years on, it is difficult to see what practical benefit, other than that of delaying the development, will

result to her or to anyone else from putting the application through this further procedural hoop.

58. It needs to be borne in mind that the EIA process is intended to be an aid to efficient and inclusive decision-making in special cases, not an obstacle-race. Furthermore, it does not detract from the authority's ordinary duty, in the case of any planning application, to inform itself of all relevant matters, and take them properly into account in deciding the case.
59. We have not been asked to dismiss the appeal on discretionary grounds; nor has the developer been represented. We have accordingly heard no argument on that issue, in the light of the apparently narrow view taken by the House of Lords in *Berkeley v Secretary of State* [2001] 2 AC 603. I note, however, the publication (since the hearing) of a comprehensive and expert study of the law relating to EIA (Tromans and Fuller: *Environmental Impact Assessment - Law and Practice*). The authors comment that "the fundamental principle" established in *Berkeley* has been "modified in subsequent cases where the circumstances are less clearcut" (para 8.44). This echoes what I said, with the agreement of the other members of the Court, in *Bown -v- Secretary of State* [2003] EWCA Civ 170, para 47 (a challenge to orders authorising a new bypass for Barnstaple, alleged to be in conflict with the European Wild Birds Directive):

"The speeches (in *Berkeley*) need to be read in context. Lord Bingham emphasised the very narrow basis on which the case was argued in the House. The developer was not represented in the House and there was no reference to any evidence of actual prejudice to his or any other interest. Care is needed in applying the principles there decided to other circumstances such as cases where as here there is clear evidence of a pressing public need for the scheme which is under attack."

The principles for the exercise of the court's discretion are well-established (see the discussion in Wade, *Administrative Law*, 8th Ed p 688ff, a passage cited with approval by Lord Steyn in *R(Burkett) v Hammersmith and Fulham LBC* [2002] 1 WLR 1593; examples are collected in Fordham *Judicial Review Handbook*, 3rd Ed. Para.24.3).

60. Secondly, as explained by the European Court in *Bozen* (see Dyson LJ para 31ff) responsibility for the "discretion" given by the Directive to "Member States" is shared by the legislative, administrative and judicial authorities. Having myself raised a doubt on the point, I agree with Dyson LJ that, within the statutory framework set by the legislature, determination of "significance" (for Annex II projects) is a matter for the administrative authorities, subject only to judicial review on conventional "*Wednesbury*" grounds.
61. Quite apart from the legal analysis, that view clearly makes practical sense. It enables an authoritative decision as to the procedure to be made at the outset, without risk of subsequent challenge except on legal grounds. Furthermore, the word "significant" does not lay down a precise legal test. It requires the exercise of judgment, on technical or other planning grounds, and consistency in the exercise of that judgment in different cases. That is a function for which the courts are ill-equipped, but which is well-suited to the familiar role of local planning authorities, under the guidance of the Secretary of State.

Lord Justice Laws:

62. I agree with both judgments.

Order: Appeal Dismissed. Order as per draft order.

(Order does not form part of the approved judgment)

APPENDIX

The facts

1. The Planning Committee on 25 February 2002 had before it two reports prepared by the Council's Head of Planning Control, one dealing with environmental assessment and the other with the grant of planning permission if the committee decided that environmental assessment was not required.
2. The first report advised that an environmental assessment was not required, but sought a decision from the committee on that question. It reminded members of the background and then explained the two basic steps involved in determining whether an assessment was required: first, to determine whether the proposed development fell within a description of a development in Schedule 1 or Schedule 2 (which, as the committee was told, it did); secondly, to determine whether the development was likely to have significant effects on the environment.
3. On the question of significant effects, the report referred to relevant parts of Circular 15/88 which I have mentioned above. As regards the indicative advice in paragraph 13 of Appendix A to the circular, it stated that "[a]s this site is 28.4 hectares in area and there a number of houses in proximity to the site, guidance would in the first instance seem to suggest that Environmental Assessment is required". It went on, however, to point out that the number of dwellings within 200 metres of the site was significantly less than the figure of 1,000 dwellings referred to in the circular, and to cite the further advice in paragraph 31 of the circular that thresholds are only indicative and that the fundamental test to be applied in each case is the likelihood of significant environmental effects.
4. The evidence that had led the planning officer to conclude initially that environmental assessment was not required was stated to be as follows:
 - "1. The concept behind the Abbot Road scheme is for a low density development of employment buildings with significant areas of strategic planting. Indeed the Local Plan Inspector recommended about 40% of the site should be landscaped. Accordingly the developed area of the site is

likely to be significantly below the 20 hectare threshold referred to in the Circular.

2. The Local Plan Inspector drew comparison with another proposal and referred to the '*far less significant intrusion into open countryside*' of the proposal as it would be bounded by the Western Bypass.
3. Finally in his report the Local Plan Inspector found that Abbot Road could accommodate the traffic generated without causing significant environmental harm.
4. I am of the opinion that the project is a local project and not of wider significance.
5. I am of the opinion that the location is not a particularly sensitive or vulnerable location.
6. I am of the opinion that the project is not unusually complex.

These points are relevant for the Council to bear in mind in its determination of whether EA is required against the criteria of the 1988 Regulations."

5. After referring to the provisions of the 1999 Regulations, on which nothing turns for present purposes, the report proceeded to inform the committee of the substance of representations by third parties. I shall quote a few passages from the several pages of the report that set out those representations:

"Nottinghamshire County Council Rural Environment Group

×.

It is acknowledged that the site is intensively farmed arable land with little conservation value, but there are other areas of concerns raised and these are summarised as follows:

- (a) although there are no designated statutory or non-statutory wildlife areas on the site, there may be some species or habitats that could be of conservation concern;
- (b) the proposal may lead to the loss of hedgerows which are valuable habitats and wildlife corridors;
- (c) the ecological value of the site has not been adequately assessed, not being comprehensive due to when the surveys were carried out;

×

- (g) no details of what would happen to the trees identified on the site, which can provide important wildlife habitats;

- (h) insufficient information to determine the application;
- (i) the site is considered important as a roosting site for Golden Plovers and it is felt that not enough information has been provided on alternative sites available in the area, if this site is developed ×.

RSPB

Object to the proposal the reasons being summarised as follows:

- (a) the loss of the site for use by Golden Plovers should be a material consideration;

×

- (d) further studies should be carried out over a wider area to establish the likely impact of the development on the Plover population;

- (e) the argument that birds will move to other areas is not sustainable;

- (f) landscaping of the site would not be suitable for the Golden Plovers

×

Nottinghamshire Wildlife Trust

Several comments have been made by this organization at different periods during the processing of this application raising various concerns and objections and these can be summarised as follows:

×

- (g) It is believed that there are bats in the vicinity and as they are protected under the Wildlife and Countryside Act, a comprehensive bat survey should be undertaken of the area including trees, farm buildings and outhouses to ascertain their status and distribution, to assess the potential effects from the development and put forward measures for their protection;

- (h) several birds of high conservation concern have been seen at the site, therefore a full bird breeding survey should be carried out at the appropriate time of year to evaluate the status and distribution of protected and common birds on the site, potential impact, and measures for their protection and enhancement. The surveys and studies undertaken by the applicants fail to offer adequate assessments or appropriate mitigation measures, specifically in respect of the Golden Plovers for which this is a regionally important winter migration site ×.

North Notts Bat Group

Although there are no records of the farm itself, there are records of bats within a few miles of the site. The ecological survey identified that the site and the farm buildings may be important for bats. A full survey of the building should be carried out before any works are commenced and if it is established that there are bats using the buildings for a roost, the appropriate licence from the Department of the Environment, Transport and Regions must be applied for."

6. The report informed members that all the representations were available for inspection. The view was expressed that in general terms most of the objections raised were matters of planning judgment and did not raise issues of fact which would alter the officer's assessment of the need for an environmental assessment. The report went on to deal specifically, however, with the concerns expressed in relation to Golden Plovers:

"The Golden Plovers

One issue to emerge as a consequence of public consultation has been the significance of the development upon the habitat of Golden Plovers. Evidence concerning this was not before me at the time that I made my determination in 1998 that Environmental Assessment was not required.

Nevertheless a request was made to the applicant to undertake an ecological study to assess the potential impact of the development on the site and the surrounding area was made and the applicant has provided a report of the ecological study and additional information specifically relating to Golden Plovers.

Once the relevant information was received English Nature were consulted and they have the following observations.

'Golden Plover in the context of this development proposal is protected only in so far as intentional killing and injuring under Part I of the Wildlife and Countryside Act 1981 (as amended). However it is unlikely that operations associated with the development will cause offences under this legislation. Consequently, paragraph 47 of PPG9 may therefore not apply to Golden Plover in this case.

Golden Plover is, however, listed on Annex 1 of the European Birds Directive 79/409/EC and the number of birds wintering around Penniment Farm, Mansfield are at least of local importance in a Nottinghamshire context. Even so, it is far from clear whether the proposed development would have a measurable impact upon the current Golden Plover numbers within the wider area available to this species in Nottinghamshire. The amount of Golden Plover wintering habitat that would be lost is also relatively small in terms of the amount available to the species within Nottinghamshire. In addition, it is likely that farming practices have far greater influence on wintering Golden Plovers than the loss of land to development. It is on this basis that English Nature considers that there are no

substantiated grounds of a statutory nature on which we could object to this application.'

I consider that the highlighted comment of English Nature about the lack of clarity of any measurable impact enables me to advise that the development will not have a significant environmental impact upon the Golden Plover habitat" (original emphasis).

7. Finally, the committee was advised that it must consider all the information in the report and go through the requisite steps to reach a determination on whether an environmental statement was required.
8. In the second report, prepared for the purposes of the committee's consideration of the application for planning permission in the event that environmental assessment was not required, there was a lengthy section dealing with ecological issues. Again it is necessary to quote parts of it:

"There are certain conditions on the site that are important, in particular those which encourage its use by Golden Plovers and to a lesser extent by Lapwings. Information received from the applicant and various consultees, suggests that the site is an important roosting/feeding site for Golden Plover. It is important to the Plovers due to the character of the site, with its large open arable fields and few hedgerows or other features that could conceal potential predators. As with many rural habitat situations, this environment has been created by farming practices, over which the Local Planning Authority has little control and which could easily change without notice, negating any value the site currently has for the Golden Plovers. It is clear from the information received, and comments made, the full impact on the Golden Plovers by the development of the site cannot be accurately assessed, as it is considered as being only a small part of a much wider area used by them. It is also difficult to address the loss of this site to development ×.

It is clear in this instance that there would be unavoidable loss of the fields used by the Golden Plovers and that it would not be possible to recreate the particular character of the site to compensate the loss. The applicant has offered in the form of a unilateral undertaking, to carry out further studies in and around the area of the proposed development site, in order to gain a better understanding of the Golden Plovers movements in the locality, which could then be used generally to assess the impact of this and other developments in the area. They have also suggested other initiatives to protect and enhance the Golden Plover habitats, but these would involve third parties playing an active role. The nature conservation bodies are of the opinion that this is not an appropriate approach ×.

Other ecological issues raised include the loss of hedgerows, bat roosts and habitats/feeding sites for various other species of birds and animals of conservation concern ×.

Although there is no clear evidence that bats use either the farm buildings or trees in the area, there is every possibility that they could. Even if this is the case there is no reason why the site cannot be developed subject to activities affecting possible bat habitats and roosts being carried out at the appropriate time of year. Further to this, various measures can be carried out to encourage their establishment in the locality.

A criticism of the ecological survey submitted, is that it does not give a full annual assessment of the site and there may be species of flora and fauna that may be present which have not been recorded. Since the application was first considered, the applicants have commenced some additional survey works, so that all species and habitats including the river catchment area, can be considered, in the preparation of appropriate mitigation measures that will be required. A commitment to the additional ecological survey work is also given in the unilateral undertaking.

×

Although it is acknowledged that the Golden Plovers may be affected by this proposal, I am of the opinion that there will be some benefits for wider nature conservation and that there are other overriding material factors, which support the proposal to develop this site."

9. The report recommended the grant of outline planning permission subject to conditions and completion of section 106 agreements.
10. Owing to the brevity of references to them in the planning officer's report, I should also note that the material before the council included three reports on ecological surveys carried out by consultants on behalf of the developer. The first, dated November 1998, related to a full ecological survey and reported that the value of the land to wildlife was relatively low and that there was no evidence of any protected species on site. Recommendations for further work were subsequently received from Nottinghamshire Wildlife Trust and others. This led to the commissioning of a second report, dated July 2000, which dealt inter alia with birds and bats (identifying potential bat roosts but no absolute evidence of the presence of bats). Following the expression of further concerns about golden plovers, a third report, dated February 2001, provided an assessment of the significance of the site with regard to over-wintering golden plovers. The report concluded that there was no reason to presume that the over-wintering golden plover population would suffer significant harm through development of the site. Although the site was one of a number of favoured roost/rest sites, it was not a significant food resource.
11. At the meeting on 25 February the committee first resolved, in line with the officer's first report, that the proposed development was not a development likely to have significant effects on the environment and therefore did not require an environmental statement, and then resolved to grant planning permission in accordance with the recommendation in the officer's second report.
12. The conditions on which planning permission was granted included the following:

- "(12) No development shall take place until there has been submitted to and approved in writing by the Local Planning Authority a scheme of landscaping×
- (13) A landscape management plan × shall be submitted to and approved in writing by the Local Planning Authority prior to the occupation of any development on site or any phase of the development, whichever is the sooner ×.
- (14) Site clearance shall not take place during the bird breeding season March–July unless otherwise agreed in writing by the Local Planning Authority.
- (15) Demolition of buildings on site shall only be undertaken in the months of September–October unless otherwise agreed in writing by the Local Planning Authority.
- (16) Any trees to be removed from the site shall be felled in sections and lowered to the ground by ropes. These works shall only take place in the months of September and October in accordance with details which shall be submitted to and approved in writing by the Local Planning Authority."

13. Conditions 12 and 13 were expressed to be in the interests of visual amenity, Conditions 14 to 16 in the interests of nature conservation. In addition to the conditions there were a number of Notes, including the following:

- "(9) The applicant is advised that the landscaping of the site must be undertaken in a manner which will encourage nature conservation and bio–diversity in the locality ×.
- (11) The applicant is advised that any survey must include all species of birds and bats that may be using the existing buildings, trees and hedges on the site. The mitigation measures must also include a programme of management for existing trees and hedges on the site ×.
- (14) × English Nature must be notified if the proposal is likely to destroy or disturb bat roosts."

14. A unilateral undertaking entered into by the developer provided in the third schedule that:

"Prior to the Commencement of Development of the Land (including tree felling, demolition works or rubbish clearance), a full ecological survey shall be undertaken to establish all ecological interests on the site and must include all fauna and

flora elements. Any such survey shall cover a period of one calendar year and include details of all the trees and hedges, including type, position and condition, a bat survey to establish the level of occupancy and use, following which, the results of that survey and any details of appropriate mitigation measures and aftercare measures (including details of implementation phasing of new plant and animal habitat creation) to protect and/or replace/relocate/enhance habitats, ecosystems or any other elements important for nature conservation shall be submitted to and approved in writing by the Council. Thereafter the scheme shall be implemented as approved."

Case No: C1/2011/2986

Neutral Citation Number: [2012] EWCA Civ 321
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(HIS HONOUR JUDGE STEWART QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 18 January 2012

Before:
LORD JUSTICE LAWS
LORD JUSTICE TOMLINSON
and
LORD JUSTICE KITCHIN

Between:
BOWEN-WEST

Appellant**- and -**

**SECRETARY OF STATE FOR COMMUNITIES AND LOCAL
GOVERNMENT**

**1st
Respondent**

NORTHAMPTONSHIRE COUNTY COUNCIL

**2nd
Respondent**

AUGEAN PLC

**3rd
Respondent**

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Richard Drabble QC and **Ms Zoe Leventhal** (instructed by Richard Buxton Environment and Public Law) appeared on behalf of the **Appellant**.

Mr Rupert Warren (instructed by the Treasury Solicitor) appeared on behalf of the **First Respondent**

The Second Respondent did not appear and was not represented.

Mr Robert McCracken QC and **Ms Annabel Graham Paul** (instructed by Dickinson Dees) appeared on behalf of the **Third Respondent**.

Judgment

(As Approved by the Court)

Crown Copyright

Lord Justice Laws:

1. This is an appeal with permission granted by Carnwath LJ against the judgment of His Honour Judge Stephen Stewart QC (sitting as a deputy High Court judge) by which on 3 November 2011 he dismissed the appellant's application brought under section 288 of the Town and Country Planning Act 1990 for an order to quash a decision of the Secretary of State set out in a decision letter dated 24 May 2011. By that decision, the Secretary of State granted to the third respondents, Augean plc, a permission to dispose of low level radioactive waste ("LLW") in addition to hazardous waste ("HW") which was already permitted, at a hazardous waste landfill site known as the East Northamptonshire Resource Management Facility.
2. The grant of permission enures until expiry of the existing permission on 31 August 2013. The appeal requires the court to revisit obligations arising under the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the Regulations"), which transpose the requirements of Council Directive 85/337/EEC (the Directive").
3. The appellant is a local resident, a member of a group called King's Cliffe WasteWatchers, which participated in the inquiry which was to inform the Secretary of State's decision to grant planning permission. Consent for the disposal of HW at the site had been granted in 2006. That consent allowed for the annual deposit of 249,000 metric tons of such waste, together with the emerged materials.
4. On 21 July 2009 the third respondents applied for permission to fill certain parts of the site, referred to as Phases 4B, 5A and 5B with LLW. The application was refused by the local waste authority (the second respondent), but granted by the Secretary of State on 24 May 2011 after a public inquiry conducted in October and November 2010 by an inspector appointed by the Secretary of State.
5. The principal issue in this appeal has its genesis in the fact that, before the refusal of planning permission by the second respondents, the third respondents had decided that they would seek permission to extend the period for completion of the proposed works to 2016 and that in 2011 they would also seek a major extension of the landfill site to accommodate one million cubic metres of waste by 2026 with a maximum permitted input rate of 249,999 cubic metres per annum.
6. According to the Inspector's report (paragraph 7.73, to which I will return), it had not been decided by the time of the inquiry whether only HW was to be disposed of in this extended facility or LLW was to be included. But the prospective application for permission for this larger scheme would clearly

allow for the disposal of LLW (see paragraph 9.10 of the witness statement of Dr Gene Wilson prepared on behalf of the third respondents for the enquiry).

7. There is no contest but that the third respondents' application of 21 July 2009 was for Environmental Impact Assessment (EIA) development, so that an Environmental Statement was required under the regulations. An Environmental Statement was accordingly prepared, but it addressed the environmental effects of the current proposal in isolation. The central question we have to decide is whether the Secretary of State deciding on appeal whether to allow the July 2009 application was bound to treat the intended further proposals as involving or constituting "indirect, secondary or cumulative effects" of the existing proposal within the meaning of paragraph 4 of Part I of Schedule 4 to the Regulations. An Environmental Statement has to include (see paragraph 2.1(a) of the Regulations):

“...such of the information referred to in Part I of Schedule 4 as is reasonably required to assess the environmental effects of the development.”

8. Paragraph 4 of Part I of Schedule 4 stipulates:

“description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from:

(a)the existence of the development...”

9. Mr Drabble QC for the appellant also seeks to put an alternative case, namely that the "project" which the Inspector and Secretary of State had to consider was in fact the larger scheme not yet applied for by the third respondents; and for that reason the larger scheme's effects had to be considered. This argument is raised in a supplementary skeleton and I will return to it.
10. The appellant's principal case, in briefest outline, is that the current development for which planning permission was granted by the Secretary of State in May last year is "demonstrably but Phase 1 of a much larger scheme and will lead to a 'foot in the door' for major further planning permissions on the same site for the same use" (see paragraph 1 of the appellant's principal skeleton). That being so, the appellant says that the deputy judge ought to have concluded that the Secretary of State had erred in failing to treat the intended further proposals as involving "indirect secondary or cumulative effects" and ought, accordingly, to have held that those effects should have been assessed within the EIA process.
11. There is a further ground of appeal. The appellant says that the deputy judge was also in error in applying the conventional Wednesbury standard of review (Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1

QB 223) as a test of the legality of the Secretary of State's view as to the proper scope of the required EIA. It is submitted that the law of the European Union requires a more intensive judicial scrutiny.

12. I should first say a little about the consideration given to the case by the Inspector and the Secretary of State. The second respondent authority was alive to the intended further proposals when they considered the July 2009 application. They had been informed of them in June 2010. On 27 July 2010, they approved "initial reasons for refusal" of the application, which included this:

“(a) The application is for piecemeal development of a project that should be the subject of a comprehensive application.

(b) The Environmental Statement submitted with the application assessed the application proposal in isolation, whereas it is in reality part only of a more substantial development: the application cannot be determined without assessment of the cumulative effects of the totality of the project.”

It will be apparent from this that the second respondents are, so to speak, in the same camp as the applicant.

13. The third respondents and second respondents both made representations as to the adequacy of the Environmental Statement to the planning inspectorate. The inspectorate issued a response on 1 October 2010 as follows:

“In the run-up to the inquiry it has emerged that the appellant also desires both to achieve an extension to the ENRMF site, and to achieve an extension to the life of the currently permitted site. Neither of these intentions forms part of the current appeal proposal. Northamptonshire County Council (NCC) and the appellant dispute the extent to which these intentions have previously been made evident to the Council and to the public...

In the Planning Inspectorate's view, the matters raised in relation to a future planning application for extension of the currently permitted site are not in themselves sufficient to support or to justify a requirement for further environmental information to be submitted under Regulation 19 of the [Regulations].”

14. The issue of the appropriate scope of the EIA in the case was, however, revisited by the Inspector and the Secretary of State. In discussing the second respondent's reasons for refusing planning permission in his report, the Inspector said this:

“7.73. NCC was able to deal with the application that led to this appeal on the basis of the information that it had including the Environment Statement (ES). Augean advises that it only decided in May 2010, after the preparation of the ES, that it will seek to extend the use for hazardous waste until 2026 and, even now (at the time of the inquiry), states that it has not yet decided whether that application will include LLW. The current appeal is not part of a piecemeal proposal or an integral element of a comprehensive scheme; consequently, there would be no cumulative impacts of concern deriving from any future application that might include LLW. This appeal is for a stand-alone proposal which can be and is being considered on its own merits and, no doubt by reason of the precedent arguments outlined above, the appeal decision to be made could be a factor in any decision by Augean about a future application. It is not unusual for applications to be made to alter or extend the life of a temporary permission; at present, there are no details of any future proposals. I see no reason why the current appeal should not be dealt with on its own merits...

7.74. As to the ES, I find nothing to support NCC's claim that a permission in this case would frustrate the aims of the Environmental Impact Regulations and the Directive. As the current proposal is not part of a comprehensive scheme from which there would be a cumulative impact, I find nothing to support the claim that an assessment of cumulative impact would be deferred to be examined by an ES at the stage of the second application.”

15. In the decision letter, the Secretary of State said this:

"In reaching this position the Secretary of State has taken into account the Environmental Statement (ES) which was submitted under the Town and Country Planning (Environmental Impact Assessment)(England and Wales) Regulations 1999 and the Inspector's comments at IR1.17 and IR7.72-7.75. Like the Inspector, the Secretary of State sees

no reason why the current appeal should not be dealt with on its own merits (IR7.73) and that there is nothing to support the Council's claim that permission in this case would frustrate the aims of the Environmental Impact Regulations and the Environmental Impact Assessment Directive, or the claim that an assessment of cumulative impact would be deferred to be examined by an ES at the stage of the second application (IR7.74). In conclusion, the Secretary of State is content that the Environmental Statement complies with the above regulations and that sufficient information has been provided for him to assess the environmental impact of the appeal.”

16. It is also material to note that both the Inspector and the Secretary of State accepted that grant of permission in respect of the July 2009 application would have some precedent effect as regards future disposal of MLW at the site. The Inspector said this:

“7.69. Would a permission for this appeal create a precedent? To a significant degree, yes, if the new application is for or includes the landfilling of LLW. In general terms, the greater the similarity between proposals, the greater the potential precedent. I acknowledge that any new application would involve a change of circumstances from those pertaining now, in part from the passage of time or perhaps from proposals to construct new cells and develop the restoration proposals and landforms...

7.70. However, any new application would be on the same site now being considered or on an adjacent site and many other circumstances would remain the same or be little changed. And, as the new application is expected to be submitted in 2011, possibly shortly after the decision on this appeal, there will have been limited time for change with regard to matters such as policy or the development of competing facilities, which would affect the consideration of the proximity principle, BAT, need and so on. In the same way that appeal decisions elsewhere have been quoted here on the 'perception of harm' issue, I have no doubt that any conclusions that the SOS reaches on this appeal that are favourable to the appellant on actual harm, perception of harm, need, transport, highway safety, localism, economic effects and the like would be

quoted by the appellant where relevant in support of a new application for the landfilling of LLW...

7.71. If this appeal is allowed, the chances of permission for a future proposal for the landfilling of LLW at or adjacent to the cells to be filled in this case would be enhanced. “

17. The Secretary of State for his part said this:

“30. The Secretary of State agrees with the Inspector's reasoning and conclusions regarding localism at IR7.67, and regarding whether permission for this appeal would create a precedent at IR7.69-7.70. He accepts that, in allowing this appeal, the chances of permission for a future proposal for a future landfilling of LLW at or adjacent to the cells to be filled in this case would be enhanced (IR7.71). However each application needs to be considered on its merits and having regard to the material circumstances at the time.”

18. Now I may turn to the argument. First, some observations by way of introduction.

19. The appellant did not originally suggest that the third respondent was in some way obliged to give effect to their overall aspirations for the site by making a single application for planning permission for the whole scheme for three million cubic metres up to 2026. She accepted that the Secretary of State was entitled to treat the July 2009 application as a "stand alone" proposal in the sense that it represented a proper application for planning permission for a distinct project. But she asserted that, as regards the EIA obligations in the Regulations, the fact that the proposal was plainly a much larger scheme required the Environmental Statement to cover the effects of the latter.

20. In this regard, she relied on authority of the Court of Justice of the European Union as showing that the EIA Directive has a wide scope and a broad purpose: Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland [1996] ECR I/0430, p31, Commission v Spain [2004] ECR I-8253, Ecologistas en Accion-CODA v Ayuntamiento de Madrid. [2009] PTSR 458. The appellant also prayed in aid what is common ground, namely, as the deputy judge put it at paragraph 32(i) of his judgment:

"The Directive requires that account be taken of the effects on the environment of the development in question at the earliest possible stage in the decision-making process.”

See, for example, Barker v London Borough of Bromley [2006] UKHL 52 per Lord Hope at paragraph 22 to which reference was made yesterday.

21. In the supplementary skeleton argument, as I have indicated, the appellant now suggests, and Mr Drabble has submitted, that the "project" which fell to be assessed under the Directive obligations was the whole scheme up to 2026. It is elementary that an EIA must cover the whole of a project for which authorisation is sought.
22. I will deal with this argument first, albeit quite briefly. In my judgment, the true thrust of this case is the appellant's original submission as to indirect secondary or cumulative effects.
23. The term "project" appears in the Directive where it is defined by Article 1(2) as including "the execution of construction works or of other installation of schemes". I do not accept that the relevant project here was the whole prospective scheme up to 2026. My reasons for so concluding are relevant also to the question whether, assuming the project to consist only in the July 2009 proposal, its context as part of the intended larger scheme meant that the latter had to be considered by a way of an assessment of the July 2009 proposal's "indirect secondary or cumulative effects". I should note that the argument as to the scope of the project was put by the second respondents at the inquiry and rejected both by the Inspector and the Secretary of State.
24. My reasons for concluding as I do are briefly as follows. First, I see no reason to disagree with the Inspector's conclusion (IR 7.73) that the July 2009 proposal was "a stand alone proposal which can be and is being considered on its own merits" or the Secretary of State's likely conclusion at paragraph 4 of the decision letter. This is so notwithstanding the fact (see paragraph 4 of the appellant's principal skeleton) that the third respondent's intention has been to achieve a continuing facility for waste disposal effective, without interruption, until 2026.
25. Secondly, the judge was clearly right in my view to hold at paragraph 40 that:

“In the present case, the permitted developments can go ahead irrespective of the future proposals. That was the finding of the Inspector, who said that this was a "stand-alone proposal". It is not in truth one integrated development such as the Carlisle Airport development in Brown; [That is Brown v Carlisle City Council [2010] EWCA Civ 523] or the Madrid ring road project in the Ecologistas case; or the Mediterranean Corridor rail project in Commission v Spain...”

Thirdly, the Inspector stated (again IR at 7.73) that "at present, there are no details of any future proposals". This was challenged before the deputy judge: see paragraph 58 of the judgment. Clearly there was a degree of information about the overall intended scheme given in Dr Wilson's evidence to the

enquiry. But, in my judgment, the Inspector was perfectly entitled to state that there was a want of detail.

26. All these considerations in my judgment point to the conclusion, which I regard as inescapable, that the "project" in this case is only the proposal contained in the July 2009 application. And I would so conclude whether the issue is one of law or one of judgment for the Secretary of State and in the latter case whatever the appropriate standard of review.
27. I turn then to what I regard as the main question: whether the Secretary of State should have concluded that the largest scheme involved indirect, secondary or cumulative effects of the July 2009 proposal?
28. First and foremost, this is, in my judgment, an issue of fact. Whether it is such or not has been at the centre of the argument to which we listened yesterday and today. But it is clear, as I see the matter, that it is indeed a matter of fact or of judgment: clear from the judgment of Sullivan LJ with whom Jacob LJ and Sir Mark Waller agreed in the case of Brown v Carlisle County Council: see paragraph 21. Sullivan LJ said in terms:

The answer to the question -- what are the cumulative effects of a particular development -- will be a question of fact in each case."

It is clear also from the words of the regulation itself: "such information as it reasonably required" and "a description of the likely significant effects". These formulations import, as it seems to me, the application of a measured judgment to the evidence. This is not contradicted by the learning, of which Mr Drabble reminded us yesterday, which shows that the term "likely" in the regulation means "possible": see R(Bateman) v South Cambs DC & Ors [2011] EWCA Civ 157.

29. Whether or not the appellant is right to submit that European Union law requires a more intrusive judicial scrutiny of the Secretary of State's assessment of the matter than is given by the conventional Wednesbury approach (Ground 2) -- and I will return to that -- it must surely be the case that the views of the Inspector and the Secretary of State as the primary judges of fact are entitled to very considerable weight.
30. More deeply perhaps, Mr Drabble submitted on this part of the case that the question whether the effects of the larger scheme are cumulative effects of the smaller is itself one of law. This, with respect to Mr Drabble, is in my judgment a mistake. It entails a suggested rule to the effect, broadly, that in any case where it is intended to continue or supplant a limited scheme with a larger one, the effects of the latter are to be treated as the cumulative effects of the former. There is in my judgment nothing in the Regulations nor indeed the Directive to suggest that the European legislature or domestic legislature implementing the Directive contemplated an approach that could be categorised by so rigid a rule. It seems to me that the texts are all consistent

with the proposition that what are and what are not indirect, secondary or cumulative effects is a matter of degree and judgment.

31. Relying on R(Goodman) v LB Lewisham [2003] Env.LR 644, paragraph 8, Mr Drabble submitted yesterday that the Secretary of State has to get the legal meaning of "cumulative effects" right. If this is anything more than a statement of the obvious proposition that the meaning of a text is for the court to ascertain, then it is to restate the supposed rule: which, in my judgment, is no rule.
32. I should next point up the fact that some of the principal authorities relied on by the appellant as demonstrating the breadth of the EIA provisions are not about the scope of the EIA to be undertaken in a case where, as here, an Environmental Statement admittedly falls to be made. Rather, they address the question whether an EIA is required at all. They are "screening" rather than "scoping" positions. This is so of Kraaijeveld, Commission v Spain, Ecologistas and also Swale Borough Council ex parte RSPB [1991] 1 PLR 6, to which reference was made in the written argument. It is in this type of case, screening cases, that the courts have been concerned, energetically concerned, to put a stop to the device of using piecemeal applications as a means of excluding larger developments from the discipline of EIA. That approach cannot simply be read across to a case which is not about screening at all, but rather about the appropriate scope of an EIA.
33. At the heart of this case, it seems to me, is the proposition that the issues arising here are not comparable with those that arose in these screening decisions. In a case such as the present as I have indicated, we are dealing with what is quintessentially a matter of judgment, just as Sullivan J (as he then was) held was the case in relation to whether a park and ride scheme was an integral part of a larger scheme: see R(Davies) v SSCLG [2008] EWHC (Admin) 2223. A like question as regards the relation between a specific proposal for a freight distribution centre and the overall proposed development of Carlisle Airport arose in Brown's case to which I have already referred. There, there was an inextricable link between the two by virtue of the effect of an agreement made under section 106 of the Town and Country Planning Act 1990. The deputy judge in our case cited Sullivan LJ's judgment in Brown extensively. For present purposes, it is enough, with respect, to set out the holding from the headnote in the Environmental Law Reports as follows. This is to be found at page 47 of the appeal bundle:

“It was difficult to see how the commitment in the s.106 agreement to bring forward the "airport works" could, on the one hand have been adequate to ensure that the "development as a whole" could be regarded as policy compliant for the purposes of the Development Plan, but on the other hand, insufficient to make the airport works part of the cumulative effects of the development for the purposes of the EIA Regulations. Whilst submissions had been made that the airport works

were 'inchoate', and so were not required to be assessed at that stage, the difficulty was that they had been sufficiently detailed for assessment of the economic and other advantages which would result. The grant of planning permission had been unlawful as there had been a failure to comply with reg.3(2) of the 1999 Regulations.”

I agree with the observations of the deputy judge distinguishing Brown. At paragraphs 39 and 40 of his judgment (to which I have already referred) he said this:

“39. There is no doubt that the Brown decision (whilst clearly a scoping case) is distinguishable on its facts, since (paragraph 21) the s.106 Agreement ensured that the Freight Distribution Centre could not lawfully be developed in isolation; it could only be developed if its cumulative effects included the carrying out of the airport works. In other words, the airport works were integral to the permitted development; hence the question (paragraph 25), which had not been addressed, and to which there was only one rational response.
40. In the present case, the permitted developments can go ahead irrespective of the future proposals. That was the finding of the Inspector, who said that this was a "stand-alone proposal". It is not in truth one integrated development such as the Carlisle Airport development in Brown..”

Then the deputy judge referred to Ecologistas and Commission v Spain.

34. I should next say a word about the effect of the grant of the present planning permission as a precedent, a "foot in the door": an expression used by Sullivan LJ in Brown: see paragraph 39 of the judgment in that case. It is said it was a foot in the door for the larger intended scheme. As I have shown, the Inspector and the Secretary of State accepted that there would be some precedent effect.
35. The grant of planning permission may, in my judgment, be said to concede the principle of disposing of LLW on this site or adjacent to it, but only to the extent or on the scale allowed by the permission. If the larger application proceeds, the issue of disposal of LLW of the magnitude thereby contemplated will be open and undecided. It will certainly not be foreclosed nor in my judgment prejudiced by the current permission. It seems to me that the Secretary of State was entitled to conclude at paragraph 4 of the decision letter (which I have read) that:

"There is nothing to support the Council's claim that permission in this case would frustrate the aims of

the Environmental Impact Regulations and the Directive.”

It is noteworthy that if the larger scheme is in due course applied for, it will as a whole (including that part of it which is in effect the present scheme) be the subject of an EIA; and thereby it seems to me the purpose of the Directive will be fulfilled. In Commission v Spain, the court said this (paragraph 47):

“...the Directive's fundamental objective is that, before consent is granted, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location should be made subject to a mandatory assessment with regard to their effects.”

That is precisely what will happen if the larger scheme is in due course applied for. The third respondent's case to the inquiry moreover included this passage accepted by the Inspector:

"2.5 The appeal proposal is not piecemeal development or a development which can only properly be considered as part of a larger whole, as alleged in NCC's additional reasons for refusal (a) and (b)... both of which have been rejected in the PINS ruling. It is not inevitably part of a more substantial development. If permitted, the development will be implemented regardless of the outcome of any further planning application. There is no cumulative or in-combination situation that would arise between the two proposals, even if any implementation of a subsequent permission occurred prior to the expiry in 2013 of the one now sought, which seems unlikely. In any event, the subsequent application would require assessment on the full effects of the extension to the landfill area and the extension of time for the already permitted area so that any cumulative effects would be considered then. At present, it is not possible to carry out that exercise."

36. Given all these considerations and for these reasons, I for my part would acquit the Secretary of State of any Wednesbury error in judging that the EIA here need not encompass the third respondent's wider prospective scheme. I do not accept that the Inspector and the Secretary of State made, as is suggested, an impermissible leap from the view that this was a stand-alone project to the conclusion that, therefore, no EIA of the larger scheme was necessary. Account was taken of the relationship between the scheme in hand and the larger scheme; of the relevance of precedent; of the want of detail of the future scheme; of the fact that the current scheme could properly be dealt with on its own merits.

37. If one looks for a meaning of the term "indirect, secondary or cumulative effects", it is perhaps worth emphasising that the grant of a further planning permission -- here for the larger scheme -- surely cannot of itself be such an effect. The putative "cumulative effects" on Mr Drabble's argument can only be what are the direct effects of the larger scheme itself or perhaps some effect factually arising from the current and larger scheme together. But all such effects would be examined if the larger scheme is gone into.
38. Thus I would not merely acquit the Secretary of State of a Wednesbury error. I consider, so far as the facts of the matter appear to me, that his conclusion was correct.
39. I turn to Ground 2. It is in the circumstances (if my Lords agree with my conclusions on the first ground) strictly unnecessary to embark upon the debate about the appropriate intensity of review. I will deal with it shortly. R(Goodman) v LB Lewisham [2003] EWCA Civ 140, paragraph 9; Jones v Mansfield DC [2004] ELR 391, paragraphs 14 to 15 and R(Blewett) v Derbyshire CC [2003] EWHC Admin 2775, paragraphs 32 and 33, all indicate, as it seems to me, that the conventional Wednesbury approach applies to the court's adjudication of issues such as arise here, if I am right in holding that such issues are a matter of fact and judgment.
40. In R(BugLife) v Medway Council and Ors [2011] EWHC Admin 746, His Honour Judge Thornton QC opined that the courts might visit the question whether European Union law required them to apply a proportionate standard. For my part, I do not see that there is any true question of proportionality arising in the present case. We are not concerned with the exercise of a discretion and therefore we are not concerned with assessing whether a response to a particular aim is or is not proportionate. We are concerned with a fact-finding exercise. There is nothing, as it seems to me, in the jurisprudence of the Court of Justice to show that the conventional English law approach is inapt. Paragraph 48 of Ecologistas perhaps suggests, though I accept it does not state, the contrary. Paragraph 39 of Abraham & Ors, C-2/07, which is a screening not a scoping decision, does not in my judgment assist the appellants. Mr Drabble has relied in a supplementary skeleton argument on other authority of the Court of Justice. However Commission v Germany C-431/92 and Commission v Spain are infringement cases in which the Court of Justice must inevitably make all judgments of fact and law. Kraaijeveld in the circumstances takes the matter no further.
41. I am inclined to accept Mr McCracken's submission for the third respondents that the Court of Justice is of course concerned to see that the law is properly applied in the Member States, but in the present context that is achieved by the Wednesbury standards.
42. In the circumstances, I see no reason, even assuming if it were open to us to do so, to seek to move the law from where it presently stands in this area. This, in any case, would not be the case in which to do so.

43. Lastly at the beginning of his reply this morning Mr Drabble handed in a draft question which he submitted this court should ask the Court of Justice in the event that we are inclined to dismiss the appeal. The draft is quite complex, containing a series of sub-questions. The possibility of a reference was raised in the appellant's skeleton argument before the High Court. It was in the form at that stage of a single straightforward question. No submissions were made about a reference in this court before Mr Drabble rose to reply. I have to say that I deprecate the invitation to refer being made at so late a stage and in a complex form.
44. The essence of the draft question asks: what is the correct approach to the appreciation of the facts and evidence in a case like the present for the purpose of making good the EIA policy of the Directive? I will not set out the whole text of Mr Drabble's draft, which is of course before us.
45. In my judgment, and for the reasons I have given, the merits issues in this case are for the factual judgment of the Secretary of State whose conclusions upon them, again for the reasons I have given, are not impeachable on any legal ground. In those circumstances, I do not consider that there is any legal issue as regards which this court should seek the assistance of the Court of Justice by way of a reference.
46. As necessary, I would conclude that the proposition that the issues here are matters of fact before the primary decision-maker is sufficiently clear to absolve us of any duty that we might otherwise have owed to make a reference. I would therefore decline to make one.
47. In all these circumstances and for all these reasons, for my part I would dismiss this appeal.

Lord Justice Tomlinson:

48. I agree.

Lord Justice Kitchin:

49. I also agree.

Order: Appeal dismissed

ABRAHAM v WALLONIA

EUROPEAN COURT OF JUSTICE (SECOND CHAMBER)

(CASE C-2/07)

(C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, K. Schiemann, P. Kūris, and J.-C. Bonichot (Rapporteur), JJ.; J. Kokott, Advocate General): February 28, 2008

[2008] Env. L.R. 32

Ⓛ Agreements; Airports; Belgium; Development; EC law; Environmental impact assessments; Statutory interpretation

H1 *Environmental impact assessment—Directive 85/337/EEC as unamended by Directive 97/11/EC—modifications to infrastructure of airport with runway more than 2,100m long—increase in size of aircraft and number of flights but no increase in length of runway—whether agreement between public authorities and private undertakings relating to modifications a “project” within meaning of Art.1 of the directive—whether a “development consent” within the meaning of Art.1*

H2 The claimants (A) lived near to Liège-Bierset Airport in Belgium and claimed that noise pollution, often at night, had resulted from the restructuring of the former military airport and its use since 1996 by air freight companies. An agreement between the defendant (W) and the airport in 1996 had provided for certain modifications to the infrastructure of that airport in order to enable it to be used 24 hours per day and 365 days per year. In particular, the runways were restructured and widened and a control tower, new runway exits and aprons were also constructed. The length of the runway of 3,297m was not altered, however. A made claims for compensation and in that context the national court referred the following questions to the Court of Justice for a preliminary ruling:

“(1) Does an agreement between public authorities and a private undertaking, signed with a view to having that undertaking become operational at an airport with a runway more than 2 100 metres in length, featuring an exact description of work on the infrastructure to be carried out in relation to the adaptation of the runway, without its being extended, and the construction of a control tower with a view to permitting large aircraft to fly 24 hours per day and 365 days per year, and which provides for both nighttime and daytime flights with effect from the date on which the undertaking becomes operational at that airport constitute a project within the meaning of . . . Directive 85/

337 . . . , as applicable before its amendment by . . . Directive 97/11 . . . ?

- (2) Do works to modify the infrastructure of an existing airport with a view to adapting it to a projected increase in the number of night-time and daytime flights, without extension of the runway, correspond to the notion of a “project”, for which an impact assessment is required within the terms of Articles 1, 2 and 4 of . . . Directive 85/337 . . . , as applicable before its amendment by . . . Directive 97/11 . . . ?
- (3) Since a projected increase in the activity of an airport is not directly referred to in the annexes to Directive 85/337 . . . , must the Member State in question nevertheless take account of that increase when examining the potential environmental effect of modifications made to the infrastructure of that airport with a view to accommodating that increase in activity?”

H3 **Held:**

H4 1. An agreement such as the one at issue was not a “project” within the meaning of Directive 85/337, it being apparent from the wording of Art.1(2) that the term referred to works or physical interventions. An agreement could not, therefore, be regarded as a “project”, irrespective of whether it contained a more or less exact description of the works to be carried out. It was, however, for the national court to determine, on the basis of the applicable national legislation, whether such an agreement constituted a “development consent” within the meaning of Art.1(2). It was necessary, in that context, to consider whether that consent formed part of a procedure carried out in several stages involving a principal decision and implementing decisions and whether account was to be taken of the cumulative effect of several projects whose impact on the environment had to be assessed globally.

H5 2. The Court had frequently pointed out that the scope of the directive was wide and its purpose very broad. It would be contrary to its very objective to exclude works to improve or extend the infrastructure of an existing airport from the scope of Annex II on the ground that Annex I covered the “construction of airports” and not “airports” as such. Such an interpretation would indeed allow all works to modify a pre-existing airport, regardless of their extent, to fall outside the obligations resulting from Directive 85/337/EEC and would, in that regard, thus deprive Annex II of all effect. That interpretation was in no way called into question by the fact that Directive 97/11/EC had replaced point 12 of Annex II with a new point 13, which expressly designated “any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed . . .” as a “project” subject to Art.4(2), whereas point 12 had merely referred to “modifications to development projects included in Annex I”. The new wording merely set out with greater clarity the meaning to be given here to the original wording of the directive. Point 12 of Annex II, read in conjunction with point 7 of Annex I, in their original versions, also encompassed works to modify the infrastructure of an existing airport, without extension of the

runway, where those works may be regarded, in particular because of their nature, extent and characteristics, as a modification of the airport itself. That was the case in particular for works aimed at significantly increasing the activity of the airport and air traffic. It was for the national court to establish that the competent authorities had correctly assessed whether the works at issue in the main proceedings were to be subject to an environmental impact assessment.

H6 3. The competent authorities had an obligation to take account of the projected increase in the activity of an airport when examining the environmental effect of modifications made to its infrastructure with a view to accommodating that increase in activity and so determining whether a project covered by point 12 of Annex II had to be made subject to an assessment of its impact on the environment.

H7 **Legislation referred to:**

EC Treaty Art.174(2).

Chicago Convention on International Civil Aviation 1944 Annex 14.

Directive 85/337/EEC (Environmental Assessment) Arts 1, 2, 3, 4, 5, 6, 7, 8 and 9, and Annexes I, II and III.

Directive 97/11/EC (amending Directive 85/337/EEC).

Directive 2001/42/EC (Strategic Environmental Assessment).

H8 **Cases referred to:**

Barker (Case C-290/03) [2006] Q.B. 764; [2007] Env. L.R. 2; [2006] J.P.L. 1688
Commission v Germany (Großkrotzenburg) (Case C-431/92) [1995] E.C.R. I-2189

Commission v Ireland (Case C-392/96) [2000] Q.B. 636; [1999] 3 C.M.L.R. 727; [2000] 2 W.L.R. 958; [2000] Env. L.R. D 15

Commission v Italy (Case C-83/03) [2005] E.C.R. I-4747

Commission v Italy (Case C-486/04) [2006] E.C.R. I-11025; [2007] Env. L.R. D10

Commission v Portugal (Case C-117/02) [2004] E.C.R. I-5517; [2004] Env. L.R. 47

Commission v Spain (Case C-227/01) [2004] E.C.R. I-8253; [2005] Env. L.R. 20

Commission v Spain (Case C-121/03) [2005] E.C.R. I-7569

Gedeputeerde Staten van Noord-Holland (Case C-81/96) [1998] E.C.R. I-3923; [1999] Env. L.R. D 7

Kraaijeveld (Case C-72/95) [1997] All E.R. (EC) 134; [1997] 3 C.M.L.R. 1; [1997] Env. L.R. 265

Linster (Case C-287/98) [2000] E.C.R. I-6917; [2003] Env. L.R. D3

Tissier (Case 35/85) [1986] E.C.R. 1207

United Kingdom v Commission (Case T-178/05) [2005] E.C.R. II-4807; [2006] Env. L.R. 43

Wells (Case C-201/02) [2004] E.C.R. I-723; [2004] Env. L.R. 27

WWF (Case C-435/97) [1999] E.C.R. I-5613; [2000] Env. L.R. D 14

- H9 *L. Misson, L. Wysen, X. Close, L. Cambier, M. t'Serstevens, and A. Lebrun*, avocats, and *A. Kettels*, Rechtsanwältin, appeared on behalf of the applicants.
F. Haumont, avocat, appeared on behalf of the respondent.
P. Ramquet, P. Henfling, V. Bertrand and F. Haumont, avocats, and *A. Hubert, C. Pochet, T. Boček, M. Konstantinidis and J.-B. Laignelot*, acting as Agents, appeared on behalf of the interested parties.

OPINION OF ADVOCATE GENERAL KOKOTT delivered on November 29,
 2007 Case C-2/07 Paul Abraham v Region of Wallonia

¹Reference for a preliminary ruling from the Cour de Cassation (Belgium)
 (Directive 85/337/EEC—Assessment of the effects of a project on the
 environment—Airport with a runway more than 2,100m in length)

I— Introduction

- 1 This reference for a preliminary ruling concerns Council Directive 85/337/EEC of June 27, 1985 on the assessment of the effects of certain public and private projects on the environment² in its original version (the EIA directive). It relates to works at Liège-Bierset Airport which are alleged to have promoted its use for air freight services and to have caused an increase in night flights. The issue is essentially under what conditions modifications to the infrastructure of an airport require an environmental impact assessment, and in particular whether an intended increase in air traffic is to be taken into consideration.

II— Legal framework

- 2 Article 1 of the EIA directive defines the subject-matter of the directive and some terms:
- “1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.
2. For the purposes of this Directive:
- ‘project’ means:
- the execution of construction works or of other installations or schemes,
 - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;
- ‘developer’ means:
- the applicant for authorisation for a private project or the public authority which initiates a project;
- ‘development consent’ means:
- the decision of the competent authority or authorities which entitles the developer to proceed with the project.

¹ Original language: German.

² [1985] OJ L175, p.40.

3. . . .”

3 Article 2(1) defines the objective of the EIA directive:

“1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.”

4 Article 3 describes the subject-matter of the environmental impact assessment:

“The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and indirect effects of a project on the following factors:

- human beings, fauna and flora,
- soil, water, air, climate and the landscape,
- the inter-action between the factors mentioned in the first and second indents,
- material assets and the cultural heritage.”

5 Article 4 defines which projects are to be assessed:

“1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.”

6 Airports are listed in point 7 of Annex I:

“Construction of motorways, express roads³ and lines for long-distance railway traffic and of airports⁴ with a basic runway length of 2,100 m or more.

. . .

7 Annex 14 to the Chicago Convention on International Civil Aviation contains standards for the whole area in which aircraft operate at an airport and when taking off and landing, that is to say for runways, taxiways and the air space at the airport. It also governs signals for the use of the airport by aircraft.

8 Point 10(d) of Annex II mentions inter alia airfields:

³ This description should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project.”

⁴ For the purposes of this Directive, “airport” means airports which comply with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organization (Annex 14).”

“Construction of roads, harbours, including fishing harbours, and airfields (projects not listed in Annex I).”

- 9 Modifications to projects are covered by point 12 of Annex II:
 “Modifications to development projects included in Annex I and projects in Annex I undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than one year.”
- 10 Article 5 specifies what information is to be supplied in connection with an environmental impact assessment:
 “1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:
 (a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;
 (b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.
 2. The information to be provided by the developer in accordance with paragraph 1 shall include at least:
 — a description of the project comprising information on the site, design and size of the project;
 — a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;
 — the data required to identify and assess the main effects which the project is likely to have on the environment;
 — a non-technical summary of the information mentioned in indents 1 to 3.
 3. . . .”
- 11 The information referred to in Art.5(1) is specified in Annex III:
 “1. Description of the project, including in particular:
 — a description of the physical characteristics of the whole project and the land-use requirements during the construction and operational phases,
 — a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used,
 — an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed project.

...

4. A description⁵ of the likely significant effects of the proposed project on the environment resulting from:

- the existence of the project,
- the use of natural resources,
- the emission of pollutants, the creation of nuisances and the elimination of waste;

and the description by the developer of the forecasting methods used to assess the effects on the environment.

...

- 12 According to the referring court, the directive was transposed largely verbatim into national law.

III— Facts, procedure and questions referred for a preliminary ruling

- 13 The main proceedings concern an action brought by individuals who live near Liège-Bierset Airport in Belgium. For some time that airport has had a runway well over 2,100m in length. Following an economic study carried out by a third party, the Region of Wallonia decided to develop air freight activity at the airport which would take place 24 hours a day.

- 14 The Region of Wallonia and the Société de développement et de promotion de l'aéroport de Liège-Bierset (Liège-Bierset Airport Development and Promotion Company; SAB) entered into agreements with air freight undertakings. No further information has been conveyed to the Court regarding the contract concluded with Cargo Airlines Ltd (CAL) on an unspecified date. However, the agreement entered into with the express courier company TNT on February 26, 1996 (the agreement) is set out in detail.

- 15 The parties who live near the airport submit that the agreement provided, *inter alia*, that:

- the entire length of the main runway (23L/05R) of the airport was to be fully operational and equipped with a landing system;
- parallel runway (23R) was to be equipped by March 1, 1996 at the latest;
- parallel runway 23L/05 was to be widened to 45m and comply with standards sufficient to enable an Airbus 300 to manoeuvre;
- runway 23ML was to be equipped with two additional high-speed exits and the Air Traffic Control (ATC) tower was to be moved;
- a new apron of 18ha was to be sited directly opposite TNT's main sorting centre;
- the apron was to be extended towards the aircraft maintenance hangar and linked to the new high-speed exit;

⁵ This description should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project."

— a control tower was to be erected, and a refuelling centre with a minimum capacity of one million litres was to be retained, with TNT having the option of requiring it to be enlarged;

— the airport was to be open 24 hours a day, 365 days a year, and an appropriate power source was to be available for TNT's operations (approximately 2,000amps) with a back-up system enabling an uninterrupted supply of energy to be maintained, which required permission to be granted for the construction of two 15kV high-tension electricity substations.

16 The first night flights were carried out in 1996 by CAL. TNT began its own night flights in March 1998.

17 The individuals who live nearby complain of very serious noise pollution, mostly at night, and of its effects on sleep and health. They have instituted civil proceedings, seeking compensation for the damage suffered by reason of the use of the infrastructure referred to in the agreement and a ban on the use of those infrastructure.

18 They argue that no environmental impact assessment was carried out prior to the grant of the planning consent and operational authorisation necessary for carrying out the works referred to in the agreement; as a result of the lack of impact assessment, the consents necessary for the implementation of the agreement and, therefore, also the infrastructure covered by those consents and the use thereof are unlawful.

19 The Tribunal de première instance de Liège (Court of First Instance, Liège) granted the application partially; on appeal, the Cour d'appel de Liège (Court of Appeal, Liège) dismissed it. The Cour d'appel stated inter alia that the EIA directive contemplates and defines the notion of an airport by reference to the length of its runway and not by reference to the installations connected with the runway, such as hangars or a control tower. However, the runway was not substantially modified. The Cour d'appel added that Annex I to the directive refers to the 'construction' of an airport and Annex II applies to modifications to a project included in Annex I, that is to say modifications to the construction.

20 In the appeal to the Cour de cassation (Court of Cassation), the individuals who live nearby challenge the interpretation by the Cour d'appel of the notion of a "project".

21 The Cour de cassation has therefore referred the following questions to the Court of Justice for a preliminary ruling:

1. Does an agreement between public authorities and a private undertaking, signed with a view to having that undertaking become operational at an airport with a runway more than 2,100m in length, featuring an exact description of work on the infrastructure to be carried out in relation to the adaptation of the runway, without its being extended, and the construction of a control tower with a view to permitting large aircraft to fly 24 hours per day and 365 days per year, and which provides for both nighttime and daytime flights with effect from the date on which the undertaking becomes operational at that airport constitute a project

within the meaning of Council Directive 85/337/EEC of June 27, 1985 on the assessment of the effects of certain public and private projects on the environment, as applicable before its amendment by Council Directive 97/11/EC of March 3, 1997?

2. Do works to modify the infrastructure of an existing airport with a view to adapting it to a projected increase in the number of nighttime and daytime flights, without extension of the runway, correspond to the notion of a “project”, for which an impact assessment is required within the terms of Arts 1, 2 and 4 of Directive 85/337, as applicable before its amendment by Directive 97/11?
3. Since a projected increase in the activity of an airport is not directly referred to in the annexes to Directive 85/337, must the Member State in question nevertheless take account of that increase when examining the potential environmental effect of modifications made to the infrastructure of that airport with a view to accommodating that increase in activity?

22 For the individuals who live near the airport, the parties Abraham and Others, Beaujean and Others and Descamps and Others took part in the written procedure and in the oral procedure, each making separate submissions, as did the respondents SAB and TNT, the Member States Belgium and the Czech Republic, and the Commission.

IV— Legal assessment

23 Under Art.4(1) of the EIA directive and point 7 of Annex I, development consent for the construction of airports with a basic runway length of 2,100m or more is necessarily subject to an environmental impact assessment.

24 Under Art.4(2) of the EIA directive and points 10 and 12 of Annex II, modifications to such projects and the construction of airfields are not made subject to an assessment on a mandatory basis, but only where the Member States consider that their characteristics so require. To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment.

25 The Court has consistently held that Art.4(2) of the EIA directive confers on Member States a measure of discretion, the limits of which are to be found in the obligation set out in Art.2(1) of the EIA directive that projects likely to have significant effects on the environment by virtue inter alia of their nature, size or location are made subject to an assessment with regard to their effects.⁶

26 Against this background, the questions asked by the Cour de cassation relate, first of all, to the significance of the agreement regarding the adaptation of the

⁶ Case C-72/95 *Kraaijeveld* [1996] ECR I-5403, [50]; Case C-392/96 *Commission v Ireland* [1999] ECR I-5901, [64]; Case C-117/02 *Commission v Portugal* [2004] ECR I-5517, [82]; Case C-83/03 *Commission v Italy* [2005] ECR I-4747, [19]; and Case C-121/03 *Commission v Spain* [2005] ECR I-7569, [87].

airport to the requirements of freight traffic and, secondly, to whether modifications to an airport which do not affect the runway may be regarded as a project subject to an assessment and whether the airport's activity is to be taken into account in assessing its effects on the environment.

27 Since the interpretation and application of the EIA directive must be guided by the objective laid down in Art.2(1) that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location should be made subject to an assessment with regard to their effects,⁷ the questions should be answered in reverse order.

28 I will therefore first examine, under A, whether an airport's activity or an increase in its activity is to be taken into account in assessing its effects on the environment. In the light of the answer to that question, the second question will then be considered, under B, regarding the extent to which modifications to an airport are to be regarded as a project subject to an assessment for the purposes of the EIA directive. Lastly, under C, I will look at the first question, which concerns a specific feature of the contested works, namely that they were first laid down in an agreement. The question therefore arises as to how the agreement is to be classified in the EIA directive's assessment system, in particular whether the effects of agreed works on the environment should possibly have been assessed.

A— The third question

29 By the third question, the referring court seeks to ascertain whether under the EIA directive air traffic at an airport or an increase in traffic is to be taken into account among the effects on the environment. The basis for the question is the claim that the modifications to the infrastructure of Liège-Bierset Airport have resulted in an increase in activity at the airport.

30 The doubts of the Cour de cassation are based on the fact that an increase in an airport's activity is not expressly mentioned in the EIA directive. Nevertheless, it is clear from the directive's provisions that it is to be taken into account.

31 Under Art. 3 of the EIA directive the environmental impact assessment extends to the direct and indirect effects of a project. The rules on the information to be provided by the developer under Art.5(1) of the EIA directive show that the notion of indirect effects is to be construed broadly and in particular includes the effects of the operation of a project. Thus, the footnote to point 4 of Annex III states that the description of the effects should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project. Under the third indent of point 1 of Annex III, the estimate of effects includes, by type and quantity, expected residues and emissions resulting from the *operation* of the project, that is to say from the activity that takes place.

32 It is true that the information under Art.5(1) and Annex III is necessary only where the Member States consider that the information is relevant and that a

⁷ Case C-486/04 *Commission v Italy* [2006] ECR I-11025, [36]. See also the judgments cited in fn.3.

developer may reasonably be required to compile that information. However, the discretion thus conferred on the Member States is not unlimited.⁸

33 In the case of an airport, the type and extent of the proposed air traffic and the resulting effects on the environment are relevant. The developer can also as a rule be expected to provide that information. Failure to require information on air traffic or on the effects of increased air traffic would therefore be incompatible with the EIA directive.

34 The information thus to be provided on an intended increase in air traffic is to be taken into account in the development consent procedure pursuant to Article 8 of the EIA directive.

35 The answer to the third question must therefore be that the effects of modifications to the infrastructure of an airport on the environment for the purposes of the EIA directive include the increase in the airport's activity which is thereby sought.

B— The second question

36 The second question seeks to ascertain whether modifications to the infrastructure of an existing airport require an environmental impact assessment if they do not include any extension of the runway. It therefore concerns the criteria for determining whether modifications to the infrastructure of an airport require an environmental impact assessment.

The construction of an airport under point 7 of Annex I to the EIA directive

37 Under Art.4(1) of the EIA directive and point 7 of Annex I, the construction of airports with a basic runway length of 2,100m or more requires an environmental impact assessment.

38 Although Liège-Bierset Airport already existed before the contested works were agreed and carried out, Beaujean and Others take the view that those works constitute the construction of an airport. The proposed renovation of the main runway, the introduction of a landing system for it and the widening of the parallel runway to 45m amount to the construction of a new runway. They add that the works allowed a significant increase in freight volume at the airport (by a factor of 464 between 1994 and 1998). Descamps and Others take the same view and also stress that the works were required for night operation of the airport, which had previously been used in the daytime.

39 A judgment on a Spanish railway project suggests that a new project may exist even if there are existing installations.⁹ In that judgment, the Court held that improving an already existing railway line by doubling the original single track was not to be regarded as merely modifying an earlier project for the purposes of point 12 of Annex II to the EIA directive, but as the construction of a line for long-distance railway traffic under point 7 of Annex I. It based its position on the likely significant effects of that project on the environment.

⁸ Case C-287/98 *Linster* [2000] ECR I-6917, [37].

⁹ Case C-227/01 *Commission v Spain* [2004] ECR I-8253, [46] et seq.

40 In principle this idea may be applied to airport projects. Whilst point 7 of Annex I to the EIA directive does mention only the length of the runway as a criterion for the definition of airports, an airport's effects on the environment, which are the decisive issue in accordance with the directive's objective, also depend on other factors.

41 The length of the runway determines the types of aircraft that are able to use the airport and thus the likely effects of individual takeoffs and landings. Larger aircraft require longer runways.

42 However, the number of possible aircraft movements is dependent on other infrastructure elements, for example on the installation of electronic takeoff and landing support systems, and on aircraft handling facilities, available parking bays and air space capacity.

43 How much an airport is actually used, that is to say demand for air transport services, also depends on its links with the relevant demand markets and on the competitive position in relation to other comparable service providers.

44 Nevertheless, construction of an airport can include only works which at least concern parts of the airport. The elements which form part of an airport can be seen primarily from the definition contained in Annex 14 to the Convention on International Civil Aviation, to which point 7 of Annex I to the EIA directive refers.

45 Since that legal instrument does not, however, concern the effects of airports on the environment, but their safety, the notion of an airport for the purposes of the EIA directive must also include installations with environmental relevance which are not covered in Annex 14 to the Convention but are inseparably linked with the core elements defined therein. In this respect, regard should be had above all to passenger and freight terminal buildings.

46 On the other hand, installations which might have been attracted by the air traffic, but have a stronger link to other project categories, such as ground transport connections, hotels, and office and commercial space, should not be attributed to the airport.

47 A distinction must also be drawn vis-à-vis *modifications* to the construction of an airport under point 12 of Annex II. Works in connection with an existing airport can therefore be regarded as the construction of an airport only where they are equivalent to the construction of a new airport in terms of their effects on the environment.

48 Consequently, significant extensions to runways which make the airport useable by types of aircraft with much greater effects on the environment, or realignments of runways which result in different takeoff and landing flight paths, might, in particular, be works in connection with existing airports which are to be regarded as the construction of an airport.

49 However, it cannot be ruled out either that in exceptional cases works which do not relate directly to the length and alignment of runways increase the airport's capacity so much that they are equivalent to the construction of a new airport. If the airport was originally jammed for a long time by a few incoming flights because of insufficient handling capacity and parking bays, additional capacity in those areas may give rise to a significant increase in traffic volume. This

could be the case in particular with works to convert former military airfields with long runways for civil use.

50 It cannot be assessed on the basis of the information available to the Court whether the contested works at Liège-Bierset Airport were, in extent, a new construction. The decisive factor is whether the works increased the airport's capacity so much that the effects of the expansion on the environment are to be treated as equivalent to the construction of a new airport.

51 Consideration must be given in particular to the claim that as a result of these works alone the freight volume increased by a factor of 464 and night operation was made possible. In particular, an extension of operating times can have significant effects on the environment.

52 It must be stated in summary that modifications to the infrastructure of an existing airport with a basic runway length of 2,100m or more are to be regarded as the construction of an airport within the meaning of point 7 of Annex I and are therefore necessarily to be made subject to an environmental impact assessment if they are equivalent to the construction of a new airport in terms of their effects on the environment.

Modifications to an airport under point 12 of Annex II and point 7 of Annex I to the EIA directive

53 If the contested works are not to be regarded as the construction of an airport within the meaning of point 7 of Annex I to the EIA directive, an obligation to carry out an environmental impact assessment may follow from Art.4(2) of the EIA directive in conjunction with point 12 of Annex II. This presupposes, first of all, that the works are to be regarded as modifications to a project under Annex I.

54 However, Belgium, SAB and TNT stress the view that modifications to existing airports are not covered by the EIA directive. The wording of point 7 of Annex I and point 12 of Annex II—modifications to the construction of an airport with a basic runway length of 2,100m or more—shows that only modifications in the course of the original construction process would be covered. If modifications to the completed airport were also meant, point 7 of Annex I would refer not to the construction of an airport, but only to the airport, as in the case of the other types of project mentioned in Annex I, for example refineries, thermal power stations or waste-disposal installations.

55 Nevertheless, this interpretation, which is not supported by the Commission, the Czech Republic and the individuals living near the airport, is not compelling. The spirit and purpose of the EIA directive require, rather, the use of the term "construction" to be understood as referring to the fact that, in accordance with the definition of project under Art.1(2), a project within the meaning of the EIA directive includes the execution of installations or other interventions

in the natural surroundings and landscape, but not mere changes in the use of existing installations.¹⁰

56 Under Art.1(1) and Art.2(1) and the first, fifth, sixth, eighth and eleventh recitals, the fundamental objective of the directive is that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to an assessment with regard to their effects.¹¹

57 That objective would not be achieved if in the case of the transport infrastructure projects mentioned in point 7 of Annex I, in particular airports, assessment were restricted exclusively to the original construction process. Works following the construction of an airport can also have significant effects on the environment.

8 The Court thus not only takes the general view that the EIA directive has a very wide scope and a very broad purpose,¹² but it also specifically gives a broad interpretation to the notion of modifications to a project under point 12 of Annex II. It has extended it to projects included in Annex II, even though point 12 of Annex II refers expressly only to projects included in Annex I.¹³

59 In the judgment in *WWF*, it applied that case-law to the restructuring of an airport which did not reach the necessary dimensions for a mandatory impact assessment under point 7 of Annex 1 either before or after modification. The restructuring of the airport could not be excluded from the scope of the EIA directive from the outset, irrespective of the likely effects on the environment.¹⁴

60 Therefore, as even modifications to smaller airports in principle fall within the scope of the EIA directive, the directive must—as the Commission argues—be applied *a fortiori* to modifications to larger airports whose construction would necessarily be subject to an assessment.

61 In contrast to the works to which the judgment in *WWF* relates, however, no runways were extended in the present case. The runway-related works evidently amounted only to making the runway operational, the installation of a landing system, the widening of a parallel runway and the construction of two exits.

62 The question referred therefore expressly seeks to ascertain whether a project is subject to an assessment even where runways are not extended. Belgium, SAB and TNT consider this to be ruled out because the EIA directive refers only to the criterion of the length of an airport's runway.

63 However, as the Commission also argues, that criterion serves only to distinguish between larger projects, which must be assessed in any event, and smaller projects, which are subject to an assessment only if they are likely to

¹⁰ In principle the effects of possible uses on the environment should have been assessed when an installation was constructed so that the results of that assessment can be used in decisions on subsequent changes of use.

¹¹ See *Linster* [2000] ECR I-6917, [52]; *Commission v Spain* [2004] ECR I-8253, [47]; and the judgments cited in fn.3.

¹² *Kraaijeveld* [1996] ECR I-5403, [31] and [39], and *Commission v Spain* [2004] ECR I-8253, [46].

¹³ *Kraaijeveld* [1996] ECR I-5403, [40], and Case C-435/97 *WWF* [1999] ECR I-5613, [40].

¹⁴ *WWF* [1999] ECR I-5613, [49]. This is made even clearer in the Opinion of Advocate General Mischo in that case, point 43.

have significant effects on the environment.¹⁵ It is therefore such likely effects and not the extension of a runway that determine whether an assessment is required. An extension of the runway is only an important—in some cases even compelling—indication of significant effects on the environment. Other aspects of a project should not be disregarded, however.

64 In summary it should be stated that modifications to the infrastructure of an existing airport with a basic runway length of 2,100m or more which are not to be treated as equivalent to the construction of a new airport must be assessed with regard to their effects on the environment pursuant to Art.4(2) of the EIA directive and point 7 of Annex I and point 12 of Annex II thereto if they are likely to have significant effects on the environment by virtue of their nature, size or local factors.

C— The first question

1. The agreement as a project

65 According to the wording of the first question, the referring court seems to want to know whether an agreement may be regarded as a project within the meaning of the EIA directive.

66 However, as the parties rightly agree, an agreement as such cannot be treated as equivalent to the execution of construction works or of other installations or schemes or to other interventions in the natural surroundings and landscape, as required by the definition of project under Art.1(2) of the EIA directive, nor are agreements referred to in Annexes I and II as projects. Whilst an agreement may relate to such projects, its conclusion is not a project.

2. The agreement as development consent

67 Nevertheless, some of the parties debate whether the agreement is the development consent for a project. If a project's effects on the environment must be assessed under the EIA directive, that assessment must, under Art.2(1), be conducted before consent is given.

68 The Czech Republic and the Commission believe that it is possible to regard an agreement as development consent if under national law it has the effect of development consent. In accordance with Art.1(2) the agreement would therefore have to contain the decision of the competent authority or authorities which entitles the developer to proceed with the project.

69 According to Descamps and Others, TNT, SAB and Belgium, however, the agreement does not grant any right to build. The projects described required official consents, which is even expressly acknowledged in the agreement.

70 On the other hand, the Commission in particular points out a further possibility which may in principle lead to an agreement being regarded as development consent. The Court has inferred from the scheme and the objectives of the EIA directive that a decision on development consent may involve several stages,

¹⁵ See point 23 et seq. above.

which are capable in turn of giving rise to a requirement for an impact assessment.¹⁶ The need for further consents does not therefore necessarily mean that an environmental impact assessment does not have to be carried out at an early stage, even possibly at the first stage.¹⁷ As is clear from the first recital in the preamble to the EIA directive, the competent authority is to take account of the environmental effects of the project in question at the earliest possible stage in the decision-making process.¹⁸

71 In accordance with this case-law, the EIA directive also covers acts which fall within the scope of Directive 2001/42/EC of the European Parliament and of the Council of June 27, 2001 on the assessment of the effects of certain plans and programmes on the environment.¹⁹ The argument put forward by Belgium, SAB and TNT that the possible applicability of Directive 2001/42 *ratione materiae* precludes the application of the EIA directive to the agreement cannot therefore hold.

72 Consequently, it must be examined whether the agreement is to be regarded as part of a consent procedure carried out in several stages.

3 The Court has hitherto accepted a consent procedure for the purposes of the EIA directive that is carried out in several stages where several successive decisions are necessary under national law in order to approve a project.²⁰ However, Belgium explains in another context that the agreement is not a legal requirement for the planned works. If that submission is correct, the agreement is not part of a consent procedure carried out in several stages within the meaning of the previous case-law.

74 The question therefore arises whether decision-making stages for which no provision is made in law can also form part of a consent procedure carried out in several stages.

75 The aim of environmental impact assessment is for the decision on a project to be taken with knowledge of its effects on the environment and on the basis of public participation. Investigation of the environmental effects makes it possible, in accordance with the first recital in the preamble to the EIA directive and the precautionary principle under Art.174(2) of the Treaty, to prevent the creation of pollution or nuisances where possible, rather than subsequently trying to counteract them. The requirement of public participation implies that the participation can still influence the decision on the project.²¹

76 Although the EIA directive does make a formal link between the environmental impact assessment and the notion of development consent, it would not be able to achieve its aim if the decision on a project were *de facto* already taken before any formal consent procedure was initiated.

¹⁶ Case C-290/03 *Barker* [2006] ECR I-3949, [45].

¹⁷ Case C-201/02 *Wells* [2004] ECR I-723, [52].

¹⁸ *Wells* [2004] ECR I-723, [51].

¹⁹ [2001] OJ L197, p.30.

²⁰ *Wells* [2004] ECR I-723, [52].

²¹ Cf. Case T-178/05 *United Kingdom v Commission* [2005] ECR II-4807, [57], on Directive 2003/87/EC of the European Parliament and of the Council of October 13, 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC ([2003] OJ L275, p.32).

77 The agreement should therefore be regarded as the first stage of a consent procedure carried out in several stages if and in so far as it limits the discretion of the competent national authorities in subsequent consent procedures.

78 It cannot therefore only matter whether the discretion is formally unimpaired, as several of the parties claim. It is questionable whether an independent and impartial administrative decision taking full account of any environmental impact assessment and of public participation can be made if the bodies with political responsibility have decided clearly in favour of the project. Liability for damages as a result of failure to obtain consents—as might be provided for under cll.8(c) or 9 of the agreement—may also limit discretion.

79 The question whether the agreement in that form restricts the decision of the competent authorities, as is claimed in particular by Abraham and Others and Beaujean and Others, is one of national law which the national courts with jurisdiction must examine.

3. The agreement as a link between subprojects

80 If the agreement does not impair the discretion of the authorities competent to grant consent, it may nevertheless have a function in the context of an environmental impact assessment which is at least intimated in the order for reference and is highlighted in the submissions made by Abraham and Others in particular. According to the referring court, the carrying out of a series of works is involved, entailing large-scale modifications to the structure of an airport, the runway of which is longer than 2,100m.²²

81 The question of taking a series of individual projects as a whole is therefore of interest because the individual works which were agreed apparently did not separately reach the threshold which would have made an environmental impact assessment necessary. Nevertheless, the individuals who live near the airport argue that, taken together, those works have significant (detrimental) effects on the environment.

82 The Court has already stated that it would not be compatible with the EIA directive to consider several similar projects or different sections of a track in isolation only, without taking into account their cumulative effect.²³ This is consistent with Art.5(1) and point 4 of Annex III, which require a description of cumulative effects on the environment. Those cumulative effects are, under Art.8, to be taken into consideration in the decision on the project.

83 The present case involves several different subprojects which are, however, linked together as an overall project by the agreement with the aim of enabling Liège-Bierset Airport to be used for certain forms of freight traffic. Even if the subprojects are not the subject of a joint decision on development consent, this does not mean that the subprojects can be considered in isolation. In each decision regard must be had and due consideration given to the cumulative effects of the subprojects in the context of the overall project.

²² See p.154 of the order for reference.

²³ *Commission v Ireland* [1999] ECR I-5901, [76], and *Commission v Spain* [2004] ECR I-8253, [53].

84 Lastly it must be pointed out that if an environmental impact assessment were required, it would not necessarily have to relate expressly to the agreement or the subprojects. It cannot be ruled out that the effects on the environment of an increase in air traffic, including the use of Liège-Bierset Airport at night, had already been adequately assessed in other procedures. The parties and the lower court mention various planning decisions and programmes in this regard. If these were based on an adequate study of the effects on the environment with public participation, no new assessment would have been required later.²⁴

4. Interim conclusion

85 In summary, it must be held with regard to the first question that an agreement between public authorities and a private undertaking, signed with a view to having that undertaking become operational at an airport with a runway more than 2,100m in length, featuring an exact description of work on the infrastructure to be carried out in relation to the adaptation of the runway, without its being extended, and the construction of a control tower with a view to permitting large aircraft to fly 24 hours per day and 365 days per year, and which provides for both nighttime and daytime flights with effect from the date on which the undertaking becomes operational at that airport:

- does not constitute a project within the meaning of the EIA directive,
- may, however, as the first stage in a consent procedure carried out in several stages, require an environmental impact assessment if and in so far as it limits the discretion of the competent national authorities in subsequent consent procedures, and
- links together the subprojects included as an overall project whose effects are to be taken into consideration as a whole in the context of the development consents for parts thereof.

V— Conclusion

86 I therefore suggest that the Court give the following answers:

The third question:

The effects of modifications to the infrastructure of an airport on the environment for the purposes of Council Directive 85/337/EEC of June 27, 1985 on the assessment of the effects of certain public and private projects on the environment include the increase in the airport's activity which is thereby sought.

The second question:

Modifications to the infrastructure of an existing airport with a basic runway length of 2,100m or more are to be regarded as the construction of an airport within the meaning of point 7 of Annex I to Directive 85/337 and are therefore necessarily to be made subject to an environmental impact assessment

²⁴ See Case C-431/92 *Commission v Germany* (Großkrotzenburg) [1995] ECR I-2189, [41] et seq., and *Commission v Spain* [2004] ECR I-8253, [56].

pursuant to Art.4(1) of that directive if they are equivalent to the construction of a new airport in terms of their effects on the environment.

If modifications to the infrastructure of an existing airport with a basic runway length of 2,100m or more are not to be treated as equivalent to the construction of a new airport, they must be assessed with regard to their effects on the environment pursuant to Art.4(2) of Directive 85/337 and point 7 of Annex I and point 12 of Annex II thereto if they are likely to have significant effects on the environment by virtue of their nature, size or local factors.

The first question:

An agreement between public authorities and a private undertaking, signed with a view to having that undertaking become operational at an airport with a runway more than 2,100m in length, featuring an exact description of work on the infrastructure to be carried out in relation to the adaptation of the runway, without its being extended, and the construction of a control tower with a view to permitting large aircraft to fly 24 hours per day and 365 days per year, and which provides for both nighttime and daytime flights with effect from the date on which the undertaking becomes operational at that airport:

- is not a project within the meaning of Directive 85/337,
- may, however, as the first stage in a consent procedure carried out in several stages, require an environmental impact assessment if and in so far as it limits the discretion of the competent national authorities in subsequent consent procedures, and
- links together the subprojects included as an overall project whose effects are to be taken into consideration as a whole in the context of the development consents for parts thereof.

JUDGMENT OF THE COURT (SECOND CHAMBER) 28 FEBRUARY 28, 2008

²⁵(Directive 85/337/EEC—Assessment of the effects of projects on the environment—Airport with a runway more than 2,100m in length)

In Case C-2/07,

REFERENCE for a preliminary ruling under Art.234 EC from the Cour de cassation (Belgium), made by decision of December 14, 2006, received at the Court on January 4, 2007, in the proceedings

Paul Abraham v Région wallonne, Société de développement et de promotion de l'aéroport de Liège-Bierset, T.N.T. Express Worldwide (Euro Hub) SA, Société nationale des voies aériennes-Belgocontrol, État belge, Cargo Airlines Ltd.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, K. Schiemann, P. Kuris and J.-C. Bonichot (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: M.-A. Gaudissart, Head of Unit,

²⁵ Language of the case: French.

having regard to the written procedure and further to the hearing on October 18, 2007,

after considering the observations submitted on behalf of:

- Mr Abraham and Others, by L. Misson, L. Wysen and X. Close, avocats, and A. Kettels, Rechtsanwältin,
- Mr Beaujean and Others, by L. Cambier and M. t'Serstevens, avocats,
- Mr Dehalleux and Others, by L. Cambier, avocat,
- Mr Descamps and Others, by A. Lebrun, avocat,
- Région wallonne, by F. Haumont, avocat,
- Société de développement et de promotion de l'aéroport de Liège-Bierset, by P. Ramquet, avocat,
- T.N.T. Express Worldwide (Euro Hub) SA, by P. Henfling and V. Bertrand, avocats,
- the Belgian Government, by A. Hubert and C. Pochet, acting as Agents, assisted by F. Haumont, avocat,
- the Czech Government, by T. Bocek, acting as Agent,
- the Commission of the European Communities, by M. Konstantinidis and J.-B. Laignelot, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on November 29, 2007, gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Council Directive 85/337/EEC of June 27, 1985 on the assessment of the effects of certain public and private projects on the environment ([1985] OJ L175, p.40; Directive 85/337), in the version existing prior to Council Directive 97/11/EC of March 3, 1997 ([1997] OJ L73, p.5; Directive 97/11), and in particular point 7 of Annex I and point 12 of Annex II thereto.
- 2 The reference was made in proceedings between numerous individuals who live near Liège-Bierset Airport (Belgium) and the Région wallonne (Region of Wallonia), Société de développement et de promotion de l'aéroport de Liège-Bierset, T.N.T. Express Worldwide (Euro Hub) SA (TNT Express Worldwide), Société nationale des voies aériennes-Belgocontrol, the État belge (Belgian State) and Cargo Airlines Ltd regarding the noise pollution brought about by the establishment of an air freight centre at that airport.

Legal context

Community law

- 3 Pursuant to Art.1(1) thereof, Directive 85/337, applicable here in its original version, concerns the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.
- 4 Article 1(2) of Directive 85/337 states:

“ . . .

‘project’ means:

- the execution of construction works or of other installations or schemes,
- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

‘developer’ means:

the applicant for authorisation for a private project or the public authority which initiates a project;

‘development consent’ means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.”

5 Under Art.2(1) of the directive, “Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an assessment with regard to their effects. These projects are defined in Article 4”.

6 Article 3 sets out the subject-matter of the environmental impact assessment: “The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

- human beings, fauna and flora,
- soil, water, air, climate and the landscape,
- the interaction between the factors mentioned in the first and second indents,
- material assets and the cultural heritage.”

7 Article 4 distinguishes two types of project.

8 Article 4(1) requires that, subject to Art.2(3), projects of the classes listed in Annex I to the directive are to be made subject to an assessment in accordance with Articles 5–10. The projects which fall within Art.4(1) include the “construction . . . of airports with a basic runway length of 2,100 m or more”, referred to in point 7 of Annex I.

9 Footnote 2 to point 7 states that “for the purposes of this Directive, ‘airport’ means airports which comply with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organisation (Annex 14)”.

10 As regards other types of projects, Art.4(2) of Directive 85/337 provides:

“Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.”

11 In respect of those projects which fall within Art.4(2) of the directive, point 10(d) of Annex II refers to the “construction of . . . airfields (projects not listed in Annex I)’ and point 12 of that annex refers to ‘modifications to development projects included in Annex I’”.

12 Articles 5–9 of Directive 85/337, to which Art.4 of that directive refers, essentially state the following: Article 5 specifies the minimum information to be provided by the developer, Art.6 imposes, inter alia, the developer’s obligation to inform the authorities and the public, Art.8 refers to the obligation of the competent authorities to take into consideration the information gathered in the assessment procedure, and Art.9 imposes an obligation on the competent authorities to inform the public of the decision taken and any conditions attached to it.

National law

13 In the Region of Wallonia, the assessment of the effects of projects on the environment was governed, until October 1, 2002, by a decree of September 11, 1985 and by the decree implementing it of October 31, 1991.

14 Those decrees provided that the projects listed in Annex I to the Decree of September 11, 1985, which adopted the list in Annex I to Directive 85/337, and in Annex II to the Decree of October 31, 1991 were automatically subject to an environmental impact assessment. Other projects, for which an impact assessment was not automatically required, only had to be the subject of a prior notice regarding assessment of their impact on the environment.

15 In accordance with Annex I to the Decree of September 11, 1985, the construction of airports with a runway length of at least 2,100m had to be subject to an environmental impact assessment. In addition, pursuant to Annex II to the Decree of October 31, 1991, the construction of airports with a runway length of 1,200m or more, including the extension of existing runways beyond that threshold and leisure airports, also had to be subject to an environmental impact assessment.

The dispute in the main proceedings and the questions referred

16 The individuals who live near Liège-Bierset Airport complain of noise pollution, often at night, resulting from the restructuring of the former military airport and its use since 1996 by air freight companies.

17 An agreement signed on February 26, 1996 between the Region of Wallonia, Société de développement et de promotion de l’aéroport de Liège-Bierset and TNT Express Worldwide provided for certain modifications to the infrastructure of that airport in order to enable it to be used 24 hours per day and 365 days per year. In particular, the runways were restructured and widened. A control tower, new runway exits and aprons were also constructed. The length of the runway of 3,297m was not altered however.

18 Planning consents and operational authorisations were also granted so that the works could be carried out.

19 The dispute pending before the Belgian national court concerns liability: the claimants in the main proceedings have sought compensation for the harm suffered, in their view, by them as a result of the nuisance—which they claim to be serious—linked to the restructuring of the airport.

20 It is in that context that an appeal on a point of law was brought before the Cour de cassation (Court of Cassation) against a judgment delivered on June 29, 2004 by the Cour d’appel de Liège (Court of Appeal of Liège).

21 Considering that the dispute before it raised questions of interpretation of Community law, the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- “(1) Does an agreement between public authorities and a private undertaking, signed with a view to having that undertaking become operational at an airport with a runway more than 2,100 metres in length, featuring an exact description of work on the infrastructure to be carried out in relation to the adaptation of the runway, without its being extended, and the construction of a control tower with a view to permitting large aircraft to fly 24 hours per day and 365 days per year, and which provides for both nighttime and daytime flights with effect from the date on which the undertaking becomes operational at that airport constitute a project within the meaning of . . . Directive 85/337 . . . , as applicable before its amendment by . . . Directive 97/11 . . . ?
- (2) Do works to modify the infrastructure of an existing airport with a view to adapting it to a projected increase in the number of nighttime and daytime flights, without extension of the runway, correspond to the notion of a “project”, for which an impact assessment is required within the terms of Articles 1, 2 and 4 of . . . Directive 85/337 . . . , as applicable before its amendment by . . . Directive 97/11 . . . ?
- (3) Since a projected increase in the activity of an airport is not directly referred to in the annexes to Directive 85/337 . . . , must the Member State in question nevertheless take account of that increase when examining the potential environmental effect of modifications made to the infrastructure of that airport with a view to accommodating that increase in activity?”

The questions

The first question

22 By its first question the national court asks whether an agreement such as the one at issue in the main proceedings is a ‘project’ within the meaning of Directive 85/337.

23 That question calls for a negative answer. It is apparent from the very wording of Art.1(2) of Directive 85/337 that the term “project” refers to works or physical interventions. An agreement cannot, therefore, be regarded as a project within

the meaning of Directive 85/337, irrespective of whether that agreement contains a more or less exact description of the works to be carried out.

24 However, in order to provide a satisfactory answer to a national court which has referred a question to it, the Court of Justice may also deem it necessary to consider provisions of Community law to which the national court has not referred in the text of its question (see, *inter alia*, Case 35/85 *Tissier* [1986] ECR 1207, [9]).

25 In the present case, it should be pointed out to the national court that it is for it to determine, on the basis of the applicable national legislation, whether an agreement such as the one at issue in the main proceedings constitutes a development consent within the meaning of Art.1(2) of Directive 85/337, that is to say a decision of the competent authority which entitles the developer to proceed with the project (see, to that effect, Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, [20]). Such would be the case if that decision could, under national law, be regarded as a decision of the competent authority or authorities granting the developer the right to proceed with construction works or other installations or schemes or to intervene in the natural surroundings and landscape.

26 In addition, where national law provides that the consent procedure is to be carried out in several stages, the environmental impact assessment in respect of a project must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment (see Case C-201/02 *Wells* [2004] ECR I-723, [53]). Thus, where one of those stages involves a principal decision and the other involves an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of the latter procedure (*Wells*, [52]).

27 Finally, the national court should be reminded that the objective of the legislation cannot be circumvented by the splitting of projects and that failure to take account of their cumulative effect must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Art.2(1) of Directive 85/337 (see, to that effect, Case C-392/96 *Commission v Ireland* [1999] ECR I-5901, [76]).

28 Consequently, the answer to the first question must be that, while an agreement such as the one at issue in the main proceedings is not a project within the meaning of Directive 85/337, it is for the national court to determine, on the basis of the applicable national legislation, whether such an agreement constitutes a development consent within the meaning of Art.1(2) of Directive 85/337. It is necessary, in that context, to consider whether that consent forms part of a procedure carried out in several stages involving a principal decision and implementing decisions and whether account is to be taken of the cumulative effect of several projects whose impact on the environment must be assessed globally.

The second question

- 29 By its second question the national court asks, in essence, whether works relating to the infrastructure of an existing airport whose runway is already more than 2,100m in length fall with the scope of point 12 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, in its original version.
- 30 Pursuant to point 12 of Annex II in the version prior to Directive 97/11, “modifications to development projects included in Annex I” constitute projects subject to Art.4(2). Point 7 of Annex I refers to the “construction . . . of airports . . . with a basic runway length of 2,100 m or more”.
- 31 Société de développement et de promotion de l’aéroport de Liège-Bierset, TNT Express Worldwide and the Kingdom of Belgium submit that it necessarily follows from that wording that only modifications to the ‘construction’ of an airport with a runway length of 2,100m or more are covered and not modifications to an existing airport.
- 32 The Court has frequently pointed out, however, that the scope of Directive 85/337 is wide and its purpose very broad (see, to that effect, Case C-72/95 *Kraaijeveld* [1996] ECR I-5403, [31], and Case C-435/97 *WWF* [1999] ECR I-5613, [40]). It would be contrary to the very objective of Directive 85/337 to exclude works to improve or extend the infrastructure of an existing airport from the scope of Annex II on the ground that Annex I covers the “construction of airports” and not “airports” as such. Such an interpretation would indeed allow all works to modify a pre-existing airport, regardless of their extent, to fall outside the obligations resulting from Directive 85/337 and would, in that regard, thus deprive Annex II to Directive 85/337 of all effect.
- 33 Consequently, point 12 of Annex II, read in conjunction with point 7 of Annex I, must be regarded as also encompassing works to modify an existing airport.
- 34 That interpretation is in no way called into question by the fact that Directive 97/11 has replaced point 12 of Annex II to Directive 85/337 with a new point 13, which expressly designates “any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed . . .” as a project subject to Art.4(2) of Directive 85/337, as amended by Directive 97/11, whereas point 12 of Annex II merely referred to “modifications to development projects included in Annex I”. The new wording adopted by Directive 97/11, the fourth recital in the preamble to which makes reference to experience acquired in environmental impact assessment and stresses the need to introduce provisions designed to clarify, supplement and improve the rules on the assessment procedure, merely sets out with greater clarity the meaning to be given here to the original wording of Directive 85/337. The Community legislature’s amendment cannot, therefore, warrant an a contrario interpretation of the directive in its original version.
- 35 In addition, the fact that the works at issue in the main proceedings do not concern the length of the runway is not relevant to the question whether they fall within the scope of point 12 of Annex II to Directive 85/337. Point 7 of Annex I to Directive 85/337 makes a point of defining the term ‘airport’ by reference to the definition given in Annex 14 to the Chicago Convention of December 7,

1994 on International Civil Aviation. Under that annex, an aerodrome is “a defined area on land or water (including any buildings, installations and equipment) intended to be used either wholly or in part for the arrival, departure and surface movement of aircraft”.

36 It follows that all works relating to the buildings, installations or equipment of an airport must be considered to be works relating to the airport as such. For the application of point 12 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, that means that works to modify an airport with a runway length of 2,100m or more thus comprise not only works to extend the runway, but all works relating to the buildings, installations or equipment of that airport where they may be regarded, in particular because of their nature, extent and characteristics, as a modification of the airport itself. That is the case in particular for works aimed at significantly increasing the activity of the airport and air traffic.

37 Finally, it is appropriate to remind the national court that, although the second subparagraph of Art.4(2) of Directive 85/337 confers on Member States a measure of discretion to specify certain types of projects which will be subject to an assessment or to establish the criteria and/or thresholds applicable, the limits of that discretion are to be found in the obligation set out in Art.2(1) of the directive that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment (*Kraaijeveld*, [50]).

38 Thus, a Member State which establishes criteria and/or thresholds taking account only of the size of projects, without also taking their nature and location into consideration, would exceed the limits of its discretion under Arts 2(1) and 4(2) of Directive 85/337.

39 It is for the national court to establish that the competent authorities correctly assessed whether the works at issue in the main proceedings were to be subject to an environmental impact assessment.

40 The answer to the second question must therefore be that point 12 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, in their original version, also encompasses works to modify the infrastructure of an existing airport, without extension of the runway, where they may be regarded, in particular because of their nature, extent and characteristics, as a modification of the airport itself. That is the case in particular for works aimed at significantly increasing the activity of the airport and air traffic. It is for the national court to establish that the competent authorities correctly assessed whether the works at issue in the main proceedings were to be subject to an environmental impact assessment.

The third question

41 By its third question the national court asks, in essence, whether the competent authorities have an obligation to take account of the projected increase in the activity of an airport in determining whether a project covered by point 12 of Annex II to Directive 85/337 must be made subject to an assessment of its impact on the environment.

42 As stated at [32] of this judgment, the Court has frequently pointed out that the scope of Directive 85/337 is wide and its purpose very broad. In addition, although the second subparagraph of Art.4(2) of Directive 85/337 confers on Member States a measure of discretion to specify certain types of projects which will be subject to an assessment or to establish the criteria and/or thresholds applicable, the limits of that discretion are to be found in the obligation set out in Art.2(1) that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment. In that regard, Directive 85/337 seeks an overall assessment of the environmental impact of projects or of their modification.

43 It would be simplistic and contrary to that approach to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works.

44 Moreover, the list laid down in Art.3 of Directive 85/337 of the factors to be taken into account, such as the effect of the project on human beings, fauna and flora, soil, water, air or the cultural heritage, shows, in itself, that the environmental impact whose assessment Directive 85/337 is designed to enable is not only the impact of the works envisaged but also, and above all, the impact of the project to be carried out.

45 The Court has thus held, in relation to a project to double an existing railway track, that a project of that kind can have a significant effect on the environment within the meaning of Directive 85/337, since it is likely to produce, inter alia, significant noise effects (Case C-227/01 *Commission v Spain* [2004] ECR I-8253, [49]). In that case, the significant noise effects were brought about not by the works involved in doubling the railway track but by the foreseeable increase in rail traffic permitted precisely by the works involved in doubling the track. The same must apply to a project, such as the one in dispute in the main proceedings, which seeks to enable an increase in the activity of an airport and, consequently, in the intensity of air traffic.

46 Therefore, the answer to the third question must be that the competent authorities have to take account of the projected increase in the activity of an airport when examining the environmental effect of modifications made to its infrastructure with a view to accommodating that increase in activity.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

Order

On those grounds, the Court (Second Chamber) hereby rules:

1. While an agreement such as the one at issue in the main proceedings is not a project within the meaning of Council Directive 85/337/EEC of June 27, 1985 on the assessment of the effects of certain public and private projects on the environment, it is for the national court to determine, on the basis of the applicable national legislation, whether such an agreement constitutes a development consent within the meaning of Art.1(2) of Directive 85/337. It is necessary, in that context, to consider whether that consent forms part of a procedure carried out in several stages involving a principal decision and implementing decisions and whether account is to be taken of the cumulative effect of several projects whose impact on the environment must be assessed globally.

2. Point 12 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, in their original version, also encompasses works to modify the infrastructure of an existing airport, without extension of the runway, where they may be regarded, in particular because of their nature, extent and characteristics, as a modification of the airport itself. That is the case in particular for works aimed at significantly increasing the activity of the airport and air traffic. It is for the national court to establish that the competent authorities correctly assessed whether the works at issue in the main proceedings were to be subject to an environmental impact assessment.

3. The competent authorities have to take account of the projected increase in the activity of an airport when examining the environmental effect of modifications made to its infrastructure with a view to accommodating that increase in activity.

JUDGMENT OF 16. 9. 2004 — CASE C-227/01

JUDGMENT OF THE COURT (Second Chamber)

16 September 2004 *

In Case C-227/01,

ACTION under Article 226 EC for failure to fulfil obligations,

brought on 7 June 2001,

Commission of the European Communities, represented by G. Valero Jordana,
acting as Agent, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an
address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

COMMISSION v SPAIN

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann, J.N. Cunha Rodrigues, R. Schintgen (Rapporteur) and F. Macken, Judges,

Advocate General: L. Poiares Maduro,

Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 February 2004,

after considering the observations submitted by the parties,

after hearing the Opinion of the Advocate General at the sitting on 24 March 2004,

gives the following

Judgment

- 1 By its application the Commission of the European Communities has brought an action for a declaration that in failing to carry out an assessment of the effects on the environment of the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor', the Kingdom of Spain has failed to fulfil its obligations

under Articles 2, 3, 5(2) and 6(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

Legal framework

Community legislation

- 2 According to the first and sixth recitals in its preamble, Directive 85/337 seeks to prevent pollution and other damage to the environment by making certain public and private projects subject to prior assessment of their environmental effects.
- 3 As is clear from the fifth recital in the preamble, to that end the Directive introduces general principles for the assessment of environmental effects with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment.
- 4 The eighth and eleventh recitals in the preamble to Directive 85/337 state that certain types of projects have significant effects on the environment and must as a rule be subject to systematic assessment in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life.

5 The provisions of Directive 85/337 relevant in this case, in their wording prior to Council Directive 97/11/EC of 3 March 1997 amending that directive (OJ 1997 L 73, p. 5), are as follows.

6 Article 1 of Directive 85/337 reads:

- '1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

- 2. For the purposes of this Directive:

- "project" means:

- the execution of construction works or of other installations or schemes,

- other interventions in the natural surroundings and landscape ...'.

7 Article 2 of the Directive states:

'1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter

alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.

...

3. Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In this event, the Member States shall:

- (a) consider whether another form of assessment would be appropriate and whether the information thus collected should be made available to the public;

- (b) make available to the public concerned the information relating to the exemption and the reasons for granting it;

COMMISSION v SPAIN

- (c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where appropriate, to their own nationals.

The Commission shall immediately forward the documents received to the other Member States.

...'

- 8 Article 3 of the Directive provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and indirect effects of a project on the following factors:

- human beings, fauna and flora,
- soil, water, air, climate and the landscape,
- the inter-action between the factors mentioned in the first and second indents,
- material assets and the cultural heritage.'

- 9 Article 4 of Directive 85/337, to which the second subparagraph of Article 2(1) thereof refers, states:

'1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

...'

- 10 Point 7 of Annex I to that directive refers, among other projects, to 'construction of ... lines for long-distance railway traffic'.

- 11 Point 12 of Annex II to the Directive refers, *inter alia*, to 'modifications to development projects included in Annex I'.

12 Article 5(1) and (2) of Directive 85/337 state:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:

- (a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

- (b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.

2. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

- a description of the project comprising information on the site, design and size of the project,

14 Article 12 of Directive 85/337 provides:

'1. Member States shall take the measures necessary to comply with this Directive within three years of its notification.

2. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.'

15 The Directive was notified to the Member States on 3 July 1985.

National legislation

16 The Spanish legislation which implements point 7 of Annex I to Directive 85/337 lists, among the projects which must be made subject to an environmental impact assessment procedure, 'long-distance railway lines which involve a new route'.

The pre-litigation procedure

- 17 Following receipt of a complaint in May 1999 and an exchange of letters between the Commission and the Spanish authorities, the Commission gave the Kingdom of Spain formal notice by letter of 13 April 2000 to submit its observations within two months. It took the view that those authorities had incorrectly implemented Directive 85/337 by not subjecting to a prior environmental impact assessment the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor'.
- 18 Since it was not satisfied with the explanations provided by the Spanish Government, the Commission sent a reasoned opinion to the Kingdom of Spain on 26 September 2000, requesting that it adopt, within two months from the notification of that opinion, the measures necessary to comply therewith.
- 19 After the Spanish Government replied to that reasoned opinion by a letter of 2 January 2001 in which it repeated its earlier arguments, the Commission decided to bring the present action.

The application

- 20 The Commission complains that the Spanish Government failed to fulfil its obligations under Articles 2, 3, 5(2) and 6(2) of Directive 85/337 by not carrying out an assessment of the effects on the environment of the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of

the project known as the 'Mediterranean corridor' linking the Spanish region of Levante to Catalonia and the French border.

Admissibility

- 21 At the hearing, the Spanish Government challenged the admissibility of the action on the ground that the application was based on a complaint different from that relied on during the pre-litigation procedure.
- 22 That Government maintains that during the pre-litigation procedure, the subject-matter of the dispute was clearly limited to a 13.2-km-long section of the railway line which separates Las Palmas from the town of Oropesa. At that stage of the proceedings the Commission complained more particularly that the Spanish Government had not complied with the requirements of Directive 85/337 as regards a 7.64-km-long part of that section, where the route was moved a maximum of 800 m to the west in order to bypass the town of Benicasim. The Commission did not, however, in either the letter of formal notice or the reasoned opinion, refer to the doubling of the track on the rest of the section, which is 13.2 km in length; in particular, it at no point stated that the doubling of existing track falls within the scope of the Directive.
- 23 In its application, the Commission insists that such a doubling of the track of an existing railway line should be held to be subject to the requirements of the Directive. In addition, it refers to the entire length of the Valencia-Tarragona line, which is 251 km.

24 Under those conditions, the subject-matter of the dispute has clearly been expanded.

25 First of all, in this case, the Court notes that the validity of the reasoned opinion and of the procedure which preceded it is not in dispute. Nevertheless, the Spanish Government maintains that the complaint put forward in the application differs from that contained in the letter of formal notice and the reasoned opinion.

26 It is settled case-law that the subject-matter of proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure provided for by that provision and that, consequently, the Commission's reasoned opinion and the application must be based on the same complaints (see, inter alia, Case C-139/00 *Commission v Spain* [2002] ECR I-6407, paragraph 18).

27 In the present case, however, it cannot be maintained that the subject-matter of the dispute as defined during the pre-litigation procedure has been expanded or modified.

28 First, in response to a question by the Court, the Commission confirmed that the subject-matter of the present action is limited to a 13.2-km-long section between Las Palmas and Oropesa and that, contrary to the Spanish Government's assertion, it in no way extends to the whole of the route of the Valencia-Tarragona line, which is 251 km in length.

- 29 Secondly, both the letter of formal notice and the reasoned opinion sent by the Commission to the Kingdom of Spain refer, as does the application, to the 'Las Palmas-Oropesa section', which the defendant Government does not deny is 13.2 km in length. Moreover, the defence lodged by the Spanish Government shows unambiguously that it in no way misunderstood the scope of the proceedings, since it itself considers that the project at issue concerns the 13.2 km section which separates the towns of Las Palmas and Oropesa, on which the existing track is doubled and adapted for speeds of up to 220 km/h, a 7.64-km-long section of which constitutes a new route intended to bypass the town of Benicasim.
- 30 Consequently, the present action is admissible.

Substance

Arguments of the parties

- 31 In support of its action, the Commission states that it is common ground that the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor', was not made subject to the environmental impact assessment procedure laid down in Directive 85/337.
- 32 According to the Commission, such an assessment was mandatory in the present case, since it involved one of the projects mentioned in point 7 of Annex I to the Directive, to which Article 4(1) thereof refers.

- 33 The Commission infers from this that Directive 85/337 was incorrectly implemented in respect of the project in question and that the Kingdom of Spain has therefore infringed Articles 2, 3, 5(2) and 6(2) of the Directive.
- 34 In the opinion of the Commission, none of the reasons relied on by the Spanish Government to justify its method of proceeding in the present case can be accepted.
- 35 The line of argument put forward by that Government conflicts with the letter of Directive 85/337, and in particular the actual wording of point 7 of Annex I thereto, and is incompatible with the spirit and purpose of that directive.
- 36 The Spanish Government admits that the project at issue was not formally made subject to the environmental impact assessment procedure laid down by Directive 85/337, but it takes the view that that procedure was not necessary in the present case.
- 37 That directive was not applicable since the work undertaken merely consisted in improving an already existing railway line by doubling the original single track without constructing a new railway line and with no need for a new long-distance route.

- 38 That view is supported by the wording of the national legislation transposing point 7 of Annex I to Directive 85/337 into Spanish law, which the Commission at no time claimed was incompatible with the requirements of the Directive. Moreover, as regards the wording of point 7, the English-language version also uses the term 'lines' rather than the term 'tracks'.
- 39 In addition, the project at issue is not intended for long-distance traffic within the meaning of point 7, since it links two towns which are only 13.2 km distant from one another.
- 40 Moreover, the doubling of the tracks does not in fact have environmental effects beyond those caused by the construction of the original line and, in any event, the Commission has not furnished evidence of the existence of such effects.
- 41 The Spanish Government adds, in the alternative, that the requirements of the Directive have in the present case been complied with in substance, since the revision of the general development plan for Benicasim, which took place in 1992, was preceded by an impact assessment submitted to a public inquiry and an environmental impact declaration. Since the subject-matter of that revision was precisely the setting aside of an area for construction of the loop line around the town of Benicasim, a new study on the effects of the work undertaken for that purpose was not required.

- 42 Finally, the competent national authorities acted in good faith in the present case and demonstrated their cooperative spirit by accepting the Commission's position as regards the part of the project where it was still possible to do so, since they submitted 'modification No 3' of that project, which in essence relates to the construction of a 754.5-m-long viaduct, to a public inquiry before completion of the works.

Findings of the Court

- 43 Given the line of argument of the defendant Government, in order to assess the merits of the Commission's action it is appropriate to establish whether Directive 85/337 and, in particular, the obligation which it lays down to carry out an environmental impact assessment, apply to the project in question and, if so, whether that project was carried out in compliance with the rules set out in that directive.
- 44 As regards the first point, the argument put forward by the Spanish Government that point 7 of Annex I to the Directive refers only to the construction of a new line in the sense of a new railway connection between two towns and therefore does not apply to a doubling of existing tracks cannot be upheld.
- 45 While it is not necessary in the context of these proceedings to give a ruling on whether all the language versions of point 7 of Annex I to Directive 85/337 use a

term equivalent to the term 'tracks' ('vias' in the Spanish-language version) or on the compatibility with the Directive of the Spanish legislation adopted to implement that provision inasmuch as it uses the term 'lines' ('líneas'), it is clear from the Court's case-law that the need for a uniform interpretation of Community law requires, in the case of divergence between different language versions of a provision, that it be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see, inter alia, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 28).

46 The Court has already held that the wording of Directive 85/337 indicates that its scope is wide and its purpose very broad (*Kraaijeveld and Others*, cited above, paragraphs 31 and 39).

47 In particular, Articles 1(1) and 2(1) and the first, fifth, sixth, eighth and 11th recitals in the preamble make clear that the Directive's fundamental objective is that, before consent is granted, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to a mandatory assessment with regard to their effects (see to that effect Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 52).

48 On the basis of those considerations alone, point 7 of Annex I to Directive 85/337 must be understood to include the doubling of an already existing railway track.

49 A project of that kind can have a significant effect on the environment within the meaning of that directive, since it is likely to have lasting effects on, for example, flora and fauna and the composition of soil or even on the landscape and produce significant noise effects, inter alia, so that it must be included in the scope of the Directive. The objective of Directive 85/337 would be seriously undermined if that type of project for the construction of new railway track, even parallel to existing track, could be excluded from the obligation to carry out an assessment of its effects on the environment. Accordingly, a project of that sort cannot be considered a mere modification to an earlier project within the meaning of point 12 of Annex II to the Directive.

50 Moreover, that conclusion is all the more obvious when, as in the present case, the execution of the project at issue involves a new track route, even if that applies only to part of the project. Such a construction project is by its nature likely to have significant effects on the environment within the meaning of Directive 85/337.

51 The argument of the Spanish Government that the conditions for applying point 7 of Annex I to the Directive are not fulfilled, since the project in question does not relate to long-distance traffic within the meaning of that provision but rather only to a 13.2 km section between neighbouring towns, is also without substance.

52 As the Commission rightly maintains, the project in question is part of a 251-km-long railway line between Valencia and Tarragona, which forms part of the project known as the 'Mediterranean corridor', linking the Spanish region of Levante to Catalonia and the French border.

- 53 If the argument of the Spanish Government were upheld, the effectiveness of Directive 85/337 could be seriously compromised, since the national authorities concerned would need only to split up a long-distance project into successive shorter sections in order to exclude from the requirements of the Directive both the project as a whole and the sections resulting from that division.
- 54 In the light of all those considerations, the project which is the subject of the Commission's action, which concerns laying a supplementary 13.2-km-long railway track, a 7.64 km section of which covers a new route in order to bypass the town of Benicasim, and which is part of a 251-km-long railway line, belongs in one of the categories listed in Annex I to Directive 85/337 which must in principle be made subject to a mandatory systematic assessment pursuant to Articles 4(1) and 5(1) of the Directive.
- 55 As to whether that project was carried out in compliance with the rules set out in Directive 85/337, it should be noted that the Spanish Government admits that the project as such was not made subject to the requirements of the Directive as regards assessment of its effects on the environment. Moreover, that Government does not claim that the conditions laid down in Article 2(3) of the Directive are fulfilled in this case.
- 56 Next, as regards the Spanish Government's argument that the 1992 revision of the general development plan for Benicasim was preceded by an impact assessment submitted to a public inquiry and an environmental impact declaration, it must be pointed out that even if that plan included all the information necessary to fulfil the

minimum conditions set by Directive 85/337 it could not, in any event, be considered adequate since, as the Commission claims without being seriously contradicted on that point by the defendant Government, the plan involves only the territory of the town of Benicasim and, more specifically, the bypass around that town, while the parties agree that the contested project is far broader. It follows that, at least for the remaining part of that project, the Directive's requirements have not been correctly applied.

57 Nor is the Spanish Government's assertion that the competent authorities complied with the requirements of that directive as regards 'modification No 3' of the project justified. First, according to the defendant Government, the information intended for the public was published only after work on the project had begun. Such a method of proceeding is clearly contrary to the requirements of Article 6(2) of Directive 85/337, which states that the public concerned is to be given the opportunity to express an opinion before the project is initiated. The fact, invoked by the Spanish Government, that the public inquiry took place before the work was completed is therefore wholly irrelevant. Secondly, that procedure related to only one part of the section in question, which is 13.2 km in length, namely 'modification No 3', relating essentially to the construction of a viaduct of some 750 m in length.

58 Moreover, the fact that the national authorities acted in good faith is also irrelevant. It is settled case-law that an action for failure to fulfil obligations is objective in nature and the fact that a failure to fulfil obligations results from a Member State's incorrect interpretation of the Community-law provisions in question cannot preclude the Court from declaring that there has been such a failure (Case C-73/92 *Commission v Spain* [1993] ECR I-5997, paragraph 19).

59 Finally, as regards the Spanish Government's contention that the Commission failed to provide a proper statement of reasons for the alleged infringement since it did not furnish evidence that the doubling of an existing track has effects on the environment beyond those produced by the construction of the original line, suffice it to point out that the relevant criterion for the implementation of Directive 85/337 is the significant effect that a particular project is 'likely' to have on the environment (see, in that regard, Article 1(1) of the Directive and the fifth and sixth recitals in the preamble thereto). Under those conditions, it is not for the Commission to establish the concrete negative effects that a project in fact has on the environment. On the other hand, the Commission has in the present case proved to the requisite legal standard that the project in question falls within the scope of one of the provisions of Annex I to that directive and must therefore be made subject to a mandatory environmental impact assessment. Moreover, it is indisputable that a project of this type is such as to create significant new nuisances, even if only as the result of the adaptation of the railway line with a view to traffic which can attain a speed of 220 km/h.

60 In the light of all the foregoing considerations, the Commission's application must be considered well-founded.

61 Consequently, it must be held that by failing to carry out an assessment of the effects on the environment of the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor', the Kingdom of Spain has failed to fulfil its obligations under Articles 2, 3, 5(2) and 6(2) of Directive 85/337.

Costs

- 62 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Spain has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that by failing to carry out an assessment of the effects on the environment of the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor', the Kingdom of Spain has failed to fulfil its obligations under Articles 2, 3, 5(2) and 6(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment;**

2. **Orders the Kingdom of Spain to pay the costs.**

Signatures.

R. (on the application of Plan B Earth) v Secretary of State for Transport v Heathrow Airport Ltd., Arora Holdings Ltd., WWF-UK

R. (on the application of Friends of the Earth Ltd.) v Secretary of State for Transport v Heathrow Airport Ltd., Arora Holdings Ltd., WWF-UK

R. (on the application of London Borough of Hillingdon Council, London Borough of Wandsworth Council, London Borough of Richmond upon Thames Council, Royal Borough of Windsor and Maidenhead Council, London Borough of Hammersmith and Fulham Council, Greenpeace Ltd., Mayor of London) v Secretary of State for Transport v Heathrow Airport Ltd., Secretary of State for the Environment, Food and Rural Affairs, Transport for London, Arora Holdings Ltd., WWF-UK



Negative Judicial Consideration

Court

Court of Appeal (Civil Division)

Judgment Date

27 February 2020

Case Nos: C1/2019/1053, C1/2019/1056, C1/2019/1145

Court of Appeal (Civil Division)

[2020] EWCA Civ 214, 2020 WL 00930400

Before: Lord Justice Lindblom Lord Justice Singh and Lord Justice Haddon-Cave

Date: 27 February 2020

On Appeal from the Queen's Bench Division Divisional Court

Lord Justice Hickinbottom and Mr Justice Holgate

[2019] EWHC 1070 (Admin)

Hearing dates: 17, 18, 22 and 23 October 2019

Further written submissions: 1 and 6 November 2019

Representation

Mr Tim Crosland , Director of Plan B Earth for the Claimant.

Mr James Maurici Q.C. , Mr David Blundell , Mr Andrew Byass and Ms Heather Sargent (instructed by The Government Legal Department) for the Defendant.

Mr Michael Humphries Q.C. and Mr Richard Turney (instructed by Bryan Cave Leighton Paisner LLP) for the First Interested Party.

Mr Charles Banner Q.C. (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the Second Interested Party.

Ms Helen Mountfield Q.C. and Mr Raj Desai (instructed by WWF-UK) for the Intervener.

Mr David Wolfe Q.C. , Mr Peter Lockley and Mr Andrew Parkinson (instructed by Leigh Day) for the Claimant.

Mr James Maurici Q.C. , Mr David Blundell , Mr Andrew Byass and Ms Heather Sargent (instructed by The Government Legal Department) for the Defendant.

Mr Michael Humphries Q.C. and Mr Richard Turney (instructed by Bryan Cave Leighton Paisner LLP) for the First Interested Party.

Mr Charles Banner Q.C. (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the Second Interested Party.

Ms Helen Mountfield Q.C. and Mr Raj Desai (instructed by WWF-UK) for the Intervener.

Mr Nigel Fleming Q.C. , Ms Catherine Dobson and Ms Stephanie David (instructed by Harrison Grant) for the First, Second, Third, Fourth, Fifth and Sixth Appellants.

Mr Ben Jaffey Q.C. , Ms Catherine Dobson , Ms Flora Robertson and Ms Stephanie David (instructed by Transport for London Legal) for the Seventh Appellant.

Mr James Maurici Q.C. , Mr David Blundell , Mr Andrew Byass and Ms Heather Sargent (instructed by The Government Legal Department) for the Respondent.

Mr Michael Humphries Q.C. and Mr Richard Turney (instructed by Bryan Cave Leighton Paisner LLP) for the First Interested Party.

The Second and Third Interested Parties did not appear and were not represented.

Mr Charles Banner Q.C. (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the Fourth Interested Party.

Ms Helen Mountfield Q.C. and Mr Raj Desai (instructed by WWF-UK) for the Intervener.

Judgment Approved

Lord Justice Lindblom, Lord Justice Singh and Lord Justice Haddon-Cave:

Introduction

1. This is the judgment of the court.

2. Heathrow is a major international airport – the busiest in Europe, and the busiest in the world with two runways. Each year it handles about 70% of the United Kingdom's scheduled long-haul flights, 80 million passengers, and up to 480,000 air traffic movements. Gatwick is the busiest single runway airport in the world and each year handles about 11% of the United Kingdom's scheduled long-haul traffic. If the United Kingdom is to maintain its status as a leading aviation "hub", it is argued that its aviation capacity must increase. Whether this increase in capacity should be supported in national policy, and in particular whether it should involve the construction of a third runway at Heathrow, has long been a matter of political debate and controversy, intensified by concerns over the environmental cost of achieving it, and more recently by the concerted global effort to combat climate change by reducing carbon emissions. These judicial review proceedings, which have reached us in the form of an appeal from the Divisional Court (Hickinbottom L.J. and Holgate J.) and two applications for permission to appeal, do not draw us into that political debate. They do not face us with the task of deciding whether and how Heathrow should be expanded. That is not the kind of decision that courts can make, and is ultimately a political question for the Government of the day. Rather, we are required to consider whether the Divisional Court was wrong to conclude that the Government's policy in favour of the development of a third runway at Heathrow was produced lawfully. That is the question here. It is an entirely legal question.

3. The policy is contained in the "Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England" ("the ANPS"), designated by the Secretary of State for Transport ("the Secretary of State") under [section 5 of the Planning Act 2008](#) ("the Planning Act") on 26 June 2018.

4. There were originally five claims for judicial review challenging the designation decision. Four of them came before the Divisional Court in March 2019 at a "rolled-up" hearing over seven days – as applications for permission to apply for judicial review, together with the claim itself if permission were granted. The fifth (Claim No. CO/3071/2018), brought by Heathrow Hub Ltd. and Runway Innovations Ltd., which raises issues of a different kind from the other four, is also the subject of an appeal before us. That appeal is dealt with in a separate judgment, also handed down today. One of the other four claims (Claim No. CO/2760/2018), brought by Mr Neil Spurrier, is no longer pursued. The three claims we are dealing with here are these: Claim No. CO/3089/2018 brought by seven claimants, five of them local authorities – the London Borough of Hillingdon Council and the councils of four adjacent London boroughs – Greenpeace Ltd. ("Greenpeace") and the Mayor of London ("the Hillingdon claimants"); Claim No. CO/3147/2018 brought by Friends of the Earth Ltd. ("Friends of the Earth"); and Claim No. CO/3149/2018 brought by Plan B Earth.

5. Under the [Greater London Authority Act 1999](#) ("the GLA Act") the Mayor of London is required to have in place a London Environment Strategy that contains provisions dealing with climate change ([sections 361A, 361B and 361D of the GLA Act](#)), air quality ([sections 362 to 369](#)) and noise ([section 370](#)). He is subject to a specific "duty to address climate change, so far as relating to Greater London" ([section 361A\(1\) and \(2\)](#)). Greenpeace and Friends of the Earth are both non-governmental organisations concerned with the protection of the environment. Plan B Earth is a charity promoting efforts to arrest climate change.

6. In each of the three claims in these proceedings, and in the claim brought by Heathrow Hub and Runway Innovations, the defendant or respondent is the Secretary of State. In the Hillingdon claimants' proceedings, Transport for London ("TfL") is an interested party. TfL has responsibility, under [section 154 of the GLA Act](#) , for implementing the Mayor of London's strategy for transport in London. In all three claims Heathrow Airport Ltd. ("HAL") and Arora Holdings Ltd. ("Arora") are interested parties. HAL is the airport operator at Heathrow, and is promoting a scheme for the north-west runway. Arora represents a group of companies that own land within the boundary of that development and intend to build and operate a new terminal constructed as part of it.

7. The Divisional Court dismissed all four claims. Its reasons for doing so are lucidly set out in a judgment handed down on 1 May 2019 ([2019] EWHC 1070 (Admin)), which is fairly described as a "tour de force". In Mr Spurrier's claim the court refused permission to apply for judicial review on all grounds. In the Hillingdon claimants' challenge, it granted permission to apply for judicial review on five grounds but dismissed the claim on each of those grounds, and refused permission on the others. In the Friends of the Earth's claim and in Plan B Earth's, it refused permission on all grounds.

8. The Hillingdon claimants, Friends of the Earth and Plan B Earth all appealed. On 22 July 2019 Lindblom L.J. granted permission to appeal in the Hillingdon claimants' case, and in both the Friends of the Earth and Plan B Earth proceedings ordered that the application for permission to appeal and, if permission to apply for judicial review were granted on that application (under [CPR r.52.8\(5\)](#)), the claim itself (under [CPR r.52.8\(6\)](#)) would be heard together with each other and with the Hillingdon claimants' appeal. Lindblom L.J. also made case management directions, which, among other things, required the parties in all three cases to agree the main issues for the court.

9. On 18 September 2019, the court received an application by WWF-UK ("WWF") for permission to intervene by the making of oral or written submissions on the significance of the UN Convention on the Rights of the Child to the Secretary of State's duty in [section 10\(2\) of the Planning Act](#) when exercising its functions with the objective of achieving "sustainable

development". That application was opposed by the Secretary of State. On 4 October 2019 Lindblom L.J. granted WWF permission to intervene by written representations only and gave the parties permission to respond in writing, with a deadline later extended – by an order dated 8 October 2019 – to 1 November 2019. By a further order dated 15 October 2019 he gave permission for all other parties to reply to the responses to WWF's submissions by 6 November 2019.

The main issues before us

10. The main issues for us to decide, as agreed by the parties, fall into four groups: first, issues on the operation of [EC Council Directive 92/43/EEC](#) on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive"); second, issues on the operation of [EC Council Directive 2001/42/EC](#) on the assessment of the effect of certain plans and programmes on the environment ("the SEA Directive"); third, issues relating to the United Kingdom's commitments on climate change; and fourth, relief.

11. The issues on the operation of the Habitats Directive are:

- (1) what standard of review the court should apply when considering whether there has been a breach of the requirements of [article 6\(4\) of the Habitats Directive](#) ;
- (2) whether the Secretary of State breached the Habitats Directive in deciding that the scheme for a second runway at Gatwick was not an alternative solution to the scheme for the north-west runway at Heathrow on the basis that it would not meet the "hub objective";
- (3) whether the Secretary of State breached the Habitats Directive in deciding to exclude the Gatwick second runway scheme as an alternative solution to the north-west runway scheme at Heathrow because it would potentially harm a Special Area of Conservation ("SAC") in which a priority species was present, and that an opinion of the European Commission might be required;
- (4) whether the Divisional Court erred:
 - (i) in distinguishing between the obligation to consider "alternative solutions" in [article 6\(4\) of the Habitats Directive](#) and the obligation to consider "reasonable alternatives" under the SEA Directive; and
 - (ii) in determining that the Secretary of State could lawfully rule out the Gatwick second runway scheme as an alternative solution under the Habitats Directive while also treating it as a reasonable alternative for the purposes of the SEA Directive; and
- (5) whether the court should refer the following questions to the Court of Justice of the European Union under [article 267 of the Treaty on the Functioning of the European Union](#) ("TFEU"):
 - (i) Is the identification of an "alternative solution" under the Habitats Directive to be approached differently from the identification of a "reasonable alternative" under the SEA Directive? And what test should be applied?
 - (ii) Is it compatible with EU law for the court to limit its role to considering whether a process of identifying alternative solutions was not irrational?

12. The issues on the operation of the SEA Directive are:

- (1) what approach the court should take when considering whether an environmental report complies with the SEA Directive, and in particular, whether or not it should apply the approach indicated in *R. (on the application of Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin); [2004] Env. L.R. 29 ;
- (2) whether, in deciding to designate the ANPS, the Secretary of State breached [article 5\(1\) and \(2\)](#) of, and [Annex 1\(a\) to, the SEA Directive](#) by failing to provide an outline of the relationship between the ANPS and other relevant plans and programmes;
- (3) whether, in deciding to designate the ANPS, the Secretary of State breached [article 5\(1\) and \(2\)](#) of, and [Annex 1\(c\) to, the SEA Directive](#) by failing to identify the environmental characteristics of areas likely to be significantly affected by the ANPS; and
- (4) whether the Secretary of State breached the SEA Directive by failing to consider the Paris Agreement.

13. The issues relating to the United Kingdom's commitments on climate change, in addition to issue (4) on the operation of the SEA Directive, are:

- (1) whether the designation of the ANPS was unlawful because the Secretary of State, in breach of [section 10\(3\)\(a\) of the Planning Act](#), failed to have regard to the desirability of mitigating, and adapting to, climate change in the light of the United Kingdom's commitment to the Paris Agreement, the non-carbon dioxide ("non-CO2") climate impacts of aviation, the effect of emissions beyond 2050, and to the ability of future generations to meet their needs;
- (2) whether the Divisional Court erred by failing to give reasons for rejecting Friends of the Earth's argument on the non-CO2 climate impacts of aviation and the effect of emissions beyond 2050, having regard to the ability of future generations to meet their needs;
- (3) whether the Divisional Court erred in treating the then extant 2050 target of a reduction in greenhouse gas emissions of at least 80% (against the 1990 baseline) as precluding any consideration of government policies and commitments, implying a more stringent level of protection;
- (4) whether the Divisional Court erred in holding that neither the "Paris Temperature Limit" nor "the Government's policy commitment to introducing a net zero target" formed any part of relevant government policy within [section 5\(8\) of the Planning Act](#), and that both were otherwise irrelevant;
- (5) whether the Divisional Court erred in holding that the 2°C temperature limit was a relevant consideration; and
- (6) whether the Divisional Court erred in treating as irrelevant the Secretary of State's "failure to explain to Parliament the basis of his decision".

14. The issue on relief is whether any remedy, and what, should be granted if any of the grounds of claim is made out.

The origins and genesis of the ANPS

15. The Divisional Court set out a full and clear account of the events leading to the formulation and designation of the ANPS (in paragraphs 42 to 85 of its judgment, under the heading "The Factual Background"). We gratefully adopt that account. For the hearing before us, the parties provided an agreed narrative. In setting the scene for what follows, we confine ourselves to the most salient events in that history. We shall describe the relevant circumstances in more depth, and refer to the relevant content of the ANPS, as we deal with the issues we have to consider.

16. On 16 December 2003, the Government published a White Paper, "The Future of Air Transport", which proposed a new runway at Heathrow (Cm. 6046, [section 11](#)).

17. On 26 November 2008, both the [Climate Change Act 2008](#) ("the Climate Change Act") and the [Planning Act](#) received Royal Assent. The Climate Change Act established the Committee on Climate Change ([section 32](#)). It also set a "carbon target" for the United Kingdom to reduce its greenhouse gas emissions by 80% from their level in 1990, by 2050 ([section 1](#)). This was consistent with the global temperature limit in place at the time, which was 2°C. However, on 27 June 2019 [article 2\(2\) of the "Climate Change Act 2008 \(2050 Target Amendment\) Order 2019"](#) (SI 2019/1056) amended the target figure in [section 1 of the Climate Change Act](#) from 80% to 100%.

18. On 7 September 2012, the Government established the Airports Commission to "examine the scale and timing of any requirement for additional capacity to maintain the UK's position as Europe's most important aviation hub", and to "identify and evaluate how any need for additional capacity should be met in the short, medium and long term" (paragraph 1.3 of the Airports Commission's Final Report, published in July 2015). The Airports Commission duly considered 58 different proposals for delivering additional airport capacity in the South East of England by 2030 (paragraph 10.4.14 of the Habitats Regulations Assessment for the ANPS). It recognized that increasing airport capacity would have "significant impacts on the environment and local communities" (paragraph 3.49 of the ANPS). Its terms of reference required it to look at the

environmental impact of meeting the need for additional capacity, and to provide a final report, recommending credible options by "no later than summer 2015" (paragraph 1.3 Airports Commission's Final Report).

19. In March 2013, the Secretary of State issued an Aviation Policy Framework, setting out the Government's long-term policy for aviation. The Aviation Policy Framework included a climate change strategy for aviation, which concentrated on action at a global level (paragraphs 12 to 20). It emphasized the important role to be played by the Airports Commission (paragraphs 21 to 24). On 17 December 2013, the Airports Commission published an interim report, which assessed the evidence on "the nature, scale and timing of the steps needed to maintain the United Kingdom's status as an international hub for aviation" (paragraph 5). In the context of the United Kingdom's "hub status", it explained that the strength of Heathrow's route network was underpinned by the airport's transfer passengers, a third of its total passenger traffic (paragraph 3.88). Three options were selected for further consideration: first, the Heathrow north-west runway scheme proposed by HAL – a new runway, 3,500 metres in length, constructed to "the north-west of the airport" (paragraph 6.67 of the Airports Commission's Interim Report); second, the Heathrow extended northern runway scheme proposed by Heathrow Hub – extending the existing northern runway to at least 6,000 metres to allow it to operate as two separate runways (*ibid.*); and third, the Gatwick second runway scheme – a new runway over 3,000 metres in length, south of the existing runway (*ibid.*).

20. In January 2014, the Airports Commission consulted on a draft Appraisal Framework, entitled "Airports Commission: Appraisal Framework", which included "appraisal modules" on noise, air quality, biodiversity and carbon (Appendix A, sections 5 to 8). It appointed an Expert Advisory Panel "to help [it] to access, interpret and understand evidence relating to [its] work, and to make judgements about its relevance, potential and application" (Annex A to its Final Report). It adopted the Appraisal Framework in April 2014. Between November 2014 and February 2015, it undertook a consultation on the short-listed schemes (paragraph 1.16), whose main purpose was to "test the evidence base, to identify any concerns stakeholders may have as to the accuracy, relevance or breadth of the assessments undertaken, and to seek views on the potential conclusions that might be drawn" (paragraph 4.12). It also held public discussion sessions in the local areas around Heathrow and Gatwick to hear the views and concerns of local people, MPs and councillors, community groups and business organisations (paragraph 4.15).

21. On 1 July 2015, the Airports Commission published its Final Report. It highlighted the consolidation of the airline industry and the rise of alliances within the industry, which had led to the expansion of "hub-and-spoke" networks run by major carriers at the world's largest airports – in which traffic is routed through local airports ("hubs"), with feeder traffic from other airports in the network ("spokes"). It emphasized the strength of competition from European and Middle-Eastern "hubs" (Executive Summary). It acknowledged that there was a need for additional runway capacity in the South East of England by 2030 and that all three short-listed schemes were "credible" (Executive Summary and paragraph 16.62). It concluded that the Heathrow north-west runway scheme was the most appropriate way to meet the need, if combined with measures to address environmental and community impacts, including "[incentivisation] of a major shift in mode share for those working at and arriving at the airport"; a requirement that additional operations at an expanded Heathrow "must be contingent on acceptable performance on air quality"; a ban on all scheduled night flights in the period between 11.30 p.m. and 6 a.m.; and the ruling out of a fourth runway at Heathrow (paragraph 13.3). It also concluded that the Heathrow north-west runway scheme performed "most strongly" in the "Strategic Fit appraisal module" because "[it] would deliver the greatest increase in connectivity, particularly with regard to strategically important long-haul connections, [and] would provide a world-class passenger experience and support growth in airfreight more effectively than expansion at Gatwick" (paragraph 6.91). Conversely, it concluded that the Gatwick second runway scheme was directed more towards "short-haul European travel, with significant changes in industry structure needed to see a substantial increase in long-haul connectivity" (paragraph 6.92). At the same time the Airports Commission published a Business Case and a Sustainability Assessment to provide a foundation for an Appraisal of Sustainability.

22. Between July and December 2015, the Airports Commission's conclusions were subjected to a number of reviews undertaken on behalf of the Secretary of State. One of these was conducted by a Senior Review Panel chaired by Ms Caroline Low, the Aviation Capacity Programme Director at the Department for Transport. In October 2015, on behalf of the Mayor of London, TfL published a response to the Airports Commission's Final Report, entitled "Mayor of London's response to

the Airports Commission recommendation for a three-runway Heathrow". In [section 7](#), "Summary", it expressed concerns about noise, NO2 levels, the increase in freight traffic and the lack of rail infrastructure.

23. In December 2015, the Paris Agreement was concluded as an agreement within the United Nations Framework Convention on Climate Change ("the UNFCCC"), but outside the Kyoto Protocol. It was adopted by consensus following the 21st Conference of the UNFCCC on 12 December 2015, by all 195 participating member states and by the European Union. It brought about a stronger international commitment to mitigating climate change. It enshrines a firm commitment to restricting the increase in the global average temperature to "well below 2°C above pre-industrial levels and [to pursue] efforts to limit the temperature increase to 1.5°C above pre-industrial levels" ([article 2\(1\)\(a\)](#)), as well as an aspiration to achieve net zero greenhouse gas emissions during the second half of the 21st century – a "balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century" ([article 4\(1\)](#)). It requires each state to determine its own contribution to this target ([article 4\(2\) and \(3\)](#)).

24. On 14 December 2015, in an oral statement to Parliament, the Secretary of State announced that the Government accepted the case for airport expansion; that it agreed with, and would further consider, the Airports Commission's shortlist of options; and that it would use a national policy statement under the [Planning Act](#) to establish the policy framework within which to consider an application for development consent. The Secretary of State also stated that further work had to be done on environmental impacts, particularly those relating to air quality, noise, carbon emissions and local communities (Hansard Columns 1306 and 1307). The decision to make the announcement had been agreed at a Cabinet Economic and Industrial Strategy (Airports) Sub-Committee meeting on 10 December 2015.

25. In March 2016, WSP Parsons Brinkerhoff ("WSP"), the consultants retained by the Secretary of State to advise on the environmental issues involved in the preparation of the ANPS, produced the "Appraisal of Sustainability: Airports NPS Scoping Report", which was to be sent to the consultation bodies – Natural England, Historic England and the Environment Agency – under [regulation 12\(5\) of the Environmental Assessment of Plans and Programmes Regulations 2004](#) ("the SEA Regulations"). The scoping report was formally issued to the consultation bodies on 9 March 2016. The period of consultation ran to 18 April 2016.

26. In mid-2016, the process of "appropriate assessment" began under [regulation 61 of the Conservation of Habitats and Species Regulations 2010](#) – later replaced by [regulation 63 of the Conservation of Habitats and Species Regulations 2017](#) ("the Habitats Regulations"). Throughout this process WSP consulted Natural England. The Habitats Regulations Assessment produced for the shortlisted options in June 2018 stated that the Gatwick second runway scheme would result in "fewer types of impact at fewer European sites" than either of the two Heathrow schemes (paragraph 9.2.11). However, changes to air quality caused by nitrogen oxide ("NOX") could not be discounted at the Mole Gap to Reigate Escarpment SAC, which contained a priority natural habitat type – for a rare species of wild orchid (*ibid.*).

27. On 13 October 2016, the Committee on Climate Change published "UK climate action following the Paris Agreement", which considered the implications of the Paris Agreement and made recommendations for action by the United Kingdom. The Executive Summary stated (on p.7):

"Do not set new UK emissions targets now. The UK already has stretching targets to reduce greenhouse gas emissions. Achieving them will be a positive contribution to global climate action. In line with the Paris Agreement, the Government has indicated it intends at some point to set a UK target for reducing domestic emissions to net zero. We have concluded it is too early to do so now, but setting such a target should be kept under review. The five-yearly cycle of pledges and reviews created by the Paris Agreement provides regular opportunities to consider increasing UK ambition."

The report said that "[the] UK 2050 target is potentially consistent with a wide range of global temperature outcomes" (p.16).

28. On 25 October 2016, the Secretary of State announced that the Government's preferred option was the north-west runway scheme at Heathrow. This decision had been agreed at the Cabinet's Economy and Industrial Strategy (Airports) Sub-Committee meeting on that day.

29. On 17 November 2016, the United Kingdom ratified the Paris Agreement.

30. In December 2016, the Hillingdon claimants issued a claim for judicial review of the preference decision made on 25 October 2016. On 30 January 2017, that claim was struck out by Cranston J.. He concluded that the court had no jurisdiction to hear it because, under [section 13 of the Planning Act](#), the matters it raised could only be pursued during the six-week period following the adoption or publication of a national policy statement, and the policy statement under challenge had not yet been adopted or published (*R. (on the application of London Borough of Hillingdon Council) v Secretary of State for Transport* [2017] EWHC 121 (Admin); [2017] 1 W.L.R. 2166, at paragraphs 4 and 5).

31. In February 2017, WSP produced a Scoping Consultation Responses Report, which explained how responses from the consultation bodies had been taken into account in the preparation of the Appraisal of Sustainability. On 2 February 2017, the Department for Transport launched a consultation on the draft ANPS for a period of 16 weeks. Alongside the draft ANPS, the Secretary of State published for consultation several draft documents, including the Appraisal of Sustainability and the Habitats Regulations Assessment. There were more than 72,000 responses to that consultation.

32. On 24 October 2017, the Department for Transport launched a further consultation on updated evidence, including the Government's revised aviation demand forecasts. A revised draft ANPS and a number of other supporting documents were published at the same time, including an updated Appraisal of Sustainability and an updated Habitats Regulations Assessment. There were more than 11,000 responses to that consultation. A joint response was provided by the Hillingdon claimants. The London Borough of Hillingdon Council and the London Borough of Hammersmith and Fulham Council also submitted individual responses. The Mayor of London responded to this consultation in December 2017. The responses raised a number of concerns, including alleged breaches of the SEA Directive and the SEA Regulations.

33. On 23 March 2018, the Transport Committee published the report on its inquiry on the revised draft ANPS, which had been set up in November 2017. The report made 33 recommendations. Subject to those recommendations, it approved the draft ANPS (paragraphs 1 to 25 of the report, entitled "House of Commons Transport Committee Airports National Policy Statement Third Report of Session 2017-2019").

34. In June 2018, the Secretary of State published the final "Appraisal of Sustainability: Airports National Policy Statement". Table 1.1 sets out the information referred to in [Schedule 2 to the SEA Regulations](#). On the "environmental protection objectives, established at international ... level", it states:

"The topics in Appendix A include a review of policy and legislation which has been taken into account by the assessment of the NPS.

The scoping report also undertook a full review of policies, plans and programmes which may affect the Airports NPS (Appendix A of the Scoping Report). [Section 4.3](#) summarises the key sustainability themes and objectives."

Appendix A of the scoping report includes a list of international policy and legislation relevant to airport policy. The Paris Agreement is not in the list.

35. On 5 June 2018, the Department for Transport published the Government's response to the representations made in the course of consultation on the ANPS, entitled "Government response to the consultations on the Airports National Policy Statement: Moving Britain Ahead". This document considered, among other things, noise ([section 7](#)) and carbon emissions ([section 8](#)). On the same day, following its approval by the Cabinet Sub-Committee, the Secretary of State laid before Parliament the final draft of the proposed ANPS. On 25 June 2018, the House of Commons debated and voted on the proposed ANPS. 415 MPs voted in favour of it, 119 against – a majority of 296. It is not suggested in these proceedings that the fact that there was such approval has any legal significance. The ANPS does not have the status of an Act of Parliament and can, in principle, be the subject of challenge by a claim for judicial review. If the process by which the ANPS was adopted by the Secretary of State was unlawful, the fact that it was approved by the House of Commons could not save it from a successful claim.

36. On 26 June 2018, the Secretary of State designated the ANPS under [section 5\(1\) of the Planning Act](#) . On the same day, the Secretary of State also published "The Airports National Policy Statement: Post Adoption Statement", explaining how environmental considerations and consultation responses had been taken into account; and the "Relationship Framework Document between the Secretary of State for Transport and Heathrow Airport Limited", explaining how the Department for Transport and HAL would work together to achieve additional airport capacity.

The Planning Act

37. National policy statements are the statements of national planning policy for "nationally significant infrastructure projects" in England and Wales under the statutory regime in [Parts 2 and 3 of the Planning Act](#) . [Section 14\(1\)](#) defines "nationally significant infrastructure projects" as including projects consisting of "airport-related development" ([section 14\(1\)\(i\)](#)). The [Planning Act](#) specifies the procedural steps that must be undertaken before a national policy statement can be formally "designated" by the Secretary of State, including consultation, Parliamentary scrutiny and consideration of sustainability ([section 5\(3\) and \(4\)](#)). It also obliges the Secretary of State, when determining an application for development consent, to have regard to any relevant national policy statement ([section 104 in Part 6](#)).

38. [Section 5](#) provides:

"(1) The Secretary of State may designate a statement as a national policy statement for the purposes of this Act if the statement –

(a) is issued by the Secretary of State, and

(b) sets out national policy in relation to one or more specified descriptions of development.

...

(3) Before designating a statement as a national policy statement for the purposes of this Act the Secretary of State must carry out an appraisal of the sustainability of the policy set out in the statement.

(4) A statement may be designated as a national policy statement for the purposes of this Act only if the consultation and publicity requirements set out in [section 7](#) , and the parliamentary requirements set out in [section 9](#) , have been complied with in relation to it and –

- (a) the consideration period for the statement has expired without the House of Commons resolving during that period that the statement should not be proceeded with, or
- (b) the statement has been approved by resolution of the House of Commons –
 - (i) after being laid before Parliament under [section 9\(8\)](#) , and
 - (ii) before the end of the consideration period.

...

- (7) A national policy statement must give reasons for the policy set out in the statement.
- (8) The reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change."

An appraisal of sustainability is capable of constituting the environmental report for the purposes of [articles 3 and 5 of the SEA Directive](#) . This was so in the case of the ANPS.

39. [Section 6](#) , "Review", provides for a national policy statement to be reviewed. [Section 6\(1\)](#) states:

"(1) The Secretary of State must review each national policy statement whenever the Secretary of State thinks it appropriate to do so."

Subsection (2) states that such a review "may relate to all or part of a national policy statement". [Section 6\(3\)](#) provides:

"(3) In deciding when to review a national policy statement the Secretary of State must consider whether –

- (a) since the time when the statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,
- (b) the change was not anticipated at that time, and
- (c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different."

Subsection (4) contains equivalent provisions for a decision to "review part of a national policy statement". [Section 6\(5\)](#) and [\(7\)](#) provides:

- (5) After completing a review of all or part of a national policy statement the Secretary of State must do one of the following –
 - (a) amend the statement;
 - (b) withdraw the statement's designation as a national policy statement;
 - (c) leave the statement as it is.

...

(7) A national policy statement must give reasons for the policy set out in the statement."

40. Sections 7 and 8 reflect the consultation requirements of the SEA Directive. They oblige the Secretary of State to "carry out such consultation, and arrange for such publicity, as [he] thinks appropriate in relation to the proposal" (section 7(2)), to "consult such persons, and such descriptions of persons, as may be prescribed" (section 7(4)), and to "have regard to the responses to the consultation and publicity in deciding whether to proceed with the proposal" (section 7(6)). The Secretary of State must consult any local authority in whose area the plan is based and "the Greater London Authority, if any of the locations concerned is in Greater London." (section 8(1) and (2)).

41. Section 9 states:

"(1) This section sets out the parliamentary requirements referred to in sections 5(4) and 6(7) .

(2) The Secretary of State must lay the proposal before Parliament.

(3) In this section "the proposal" means –

(a) the statement that the Secretary of State proposes to designate as a national policy statement for the purposes of this Act, or

(b) (as the case may be) the proposed amendment.

...."

42. Section 10 provides:

"(1) This section applies to the Secretary of State's functions under sections 5 and 6 .

(2) The Secretary of State must, in exercising those functions, do so with the objective of contributing to the achievement of sustainable development.

(3) For the purposes of subsection (2) the Secretary of State must (in particular) have regard to the desirability of –

(a) mitigating, and adapting to, climate change;

...."

43. Section 13(1) provides that the court "may entertain proceedings for questioning a national policy statement or anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement only if ... (a) the proceedings are brought by a claim for judicial review ...".

44. Section 104 states:

"(1) This section applies in relation to an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates.

...

(3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies.

(4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.

(5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.

(6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.

...."

The Habitats Directive

45. [Article 2\(1\) of the Habitats Directive](#) states:

"(1) The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies."

46. [Article 6\(1\)](#) requires Member States to establish necessary conservation measures for an SAC, involving if necessary "appropriate management plans specifically designed for the sites". [Article 6\(2\)](#) compels Member States to take appropriate steps to avoid the deterioration of natural habitats and the habitats of species within the SACs.

47. We are largely concerned with the correct interpretation of the requirements of [article 6\(3\) and \(4\)](#) , which are transposed into domestic law by [regulations 63 and 64 of the Habitats Regulations](#) .

48. [Article 6\(3\)](#) states:

"(3) Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

The effect of [article 6\(3\)](#) , therefore, is that a competent national authority – here the Secretary of State – may only designate a national policy statement or grant a development consent order after an appropriate assessment under the Habitats Regulations

has been performed and if satisfied, on the basis of that assessment, that the national policy statement or the development consent order would not "adversely affect the integrity" of the site concerned – subject to the derogation provisions in [article 6\(4\)](#) .

49. [Article 6\(4\)](#) provides:

"(4) If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

...."

[Article 6\(4\)](#) also provides for the situation where an SAC hosts a "priority natural habitat type" or a "priority species". Priority natural habitat types are "natural habitat types in danger of disappearance" ([article 1\(d\)](#)) and priority species are those which are "endangered" ([article 1\(g\)\(i\)](#)), "vulnerable" ([article 1\(g\)\(ii\)](#)), "rare" ([article 1\(g\)\(iii\)](#)), or "requiring particular attention" ([article 1\(g\)\(iv\)](#)), for the conservation of which "the Community has particular responsibility" ([article 1\(g\) and \(h\)](#)). In such cases, [article 6\(4\)](#) states that the only considerations that may be raised are restricted to "those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest".

The SEA Directive and the SEA Regulations

50. The purpose of the SEA Directive is "to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development" ([article 1](#)).

51. The provisions of the SEA Directive are founded on the "precautionary principle". Recital 1 states:

"(1) [Article 174](#) of the Treaty provides that Community policy on the environment is to contribute to, *inter alia* , the preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilisation of natural resources and that it is to be based on the precautionary principle"

52. Recital 9 states:

"(9) This Directive is of a procedural nature, and its requirements should either be integrated into existing procedures in Member States or incorporated in specifically established procedures."

53. Recital 14 states:

"(14) Where an assessment is required by this Directive, an environmental report should be prepared containing relevant information as set out in this Directive, identifying, describing and evaluating the likely significant environmental

effects of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme"

54. [Article 2\(b\)](#) provides that an "environmental assessment" means the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making, and the provision of information on the decision. Under [article 2\(c\)](#) an "environmental report" should contain the information required in [article 5](#) and [Annex I](#) .

55. [Article 3](#) states:

"1. An environmental assessment, in accordance with [Articles 4 to 9](#) , shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.

2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,

(a) which are prepared for ... transport ... and which set the framework for future development consent of projects listed in [Annexes I and II to Directive 85/337/EEC](#) ...

...

4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.

...."

56. [Article 4\(1\)](#) requires that the environmental assessment must be carried out "during the preparation of a plan or programme and before its adoption". In this case, therefore, the environmental assessment had to be carried out before the ANPS was designated.

57. [Article 5](#) provides:

"1. Where an environmental assessment is required under [Article 3\(1\)](#) , an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in [Annex I](#) ."

The information required by [article 5\(1\)](#) and [Annex 1](#) is subject to [articles 5\(2\) and \(3\)](#) which state:

"2. The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

3. Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation may be used for providing the information referred to in [Annex I](#) ."

58. So far as is relevant here, [Annex I](#) states:

"The information to be provided under [Article 5\(1\)](#) , subject to [Article 5\(2\) and \(3\)](#) , is the following:

(a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes;

...

(c) the environmental characteristics of areas likely to be significantly affected;

(d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to [Directives 79/409/EEC](#) and [92/43/EEC](#) ;

(e) the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;

...

(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information.

...."

59. [Article 6\(1\)](#) states:

"1. The draft plan or programme and the environmental report prepared in accordance with [Article 5](#) shall be made available to the authorities referred to in paragraph 3 of this Article and the public."

60. The SEA Directive has been transposed into domestic law by the SEA Regulations. It was common ground before this court that, since the Regulations are in similar terms to the Directive, it is appropriate to go straight to the Directive, although it does not strictly speaking have direct effect in domestic law.

61. [Regulation 12 of the SEA Regulations](#) states:

"12. – Preparation of environmental report

(1) Where an environmental assessment is required by any provision of [Part 2](#) of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.

(2) The report shall identify, describe and evaluate the likely significant effects on the environment of –

(a) implementing the plan or programme; and

- (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
- (3) The report shall include such of the information referred to in [Schedule 2](#) to these Regulations as may reasonably be required, taking account of –
- (a) current knowledge and methods of assessment;
 - (b) the contents and level of detail in the plan or programme;
 - (c) the stage of the plan or programme in the decision-making process; and
 - (d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.
- ...
- (5) When deciding on the scope and level of detail of the information that must be included in the report, the responsible authority shall consult the consultation bodies.
-"

The EIA Directive

62. [Directive 2011/92/EU](#) on the assessment of the effects of certain public and private projects on the environment ("the EIA Directive") has been transposed into domestic law by the [Town and Country Planning \(Environmental Impact Assessment\) Regulations 2017](#) ("the EIA Regulations"). It applies at the development consent order stage.

The issues on the operation of the Habitats Directive

63. Before the Divisional Court, and before us, the parties were agreed on the consequences of a plan not qualifying as an "alternative solution". As the Divisional Court put it (in paragraph 299):

"299. During the course of oral submissions, as we understood it, it became common ground that, if and when a plan or scheme does not qualify as an "alternative solution" within the meaning of [article 6\(4\)](#), then it does not need to be considered any further under the Habitats Directive. If it is properly assessed as not qualifying as an "alternative solution" before an HRA has been conducted, it is not necessary for Habitats Directive purposes to consider that plan or scheme in any later HRA or otherwise at all. It was also common ground that [articles 6\(3\) and \(4\)](#) involve an iterative process, certainly for policy-making as a plan proceeds from an initial draft through consultation to its finally adopted form; and, in that iterative process, something which is considered by the competent authority to be an "alternative solution" at one stage may, in the light of further information and/or assessment, properly cease to be so regarded subsequently."

64. The ANPS acknowledges (in paragraph 1.32) that the development of the north-west runway at Heathrow has the potential to have adverse effects on the integrity of European sites for the purposes of [article 6\(3\) of the Habitats Directive](#), because "more detailed project design information and detailed proposals for mitigation are not presently available and inherent uncertainties exist at this stage". However, it rejects the Gatwick second runway scheme as an alternative solution under [article 6\(4\)](#), concluding that:

"1.32. ... [No] alternatives [to the preferred scheme] would deliver the objectives of the Airports NPS in relation to increasing airport capacity in the South East and maintaining the UK's hub status. In line with [Article 6\(4\)](#) of the Directive, the Government considers that meeting the overall needs case for increased capacity and maintaining the UK's

hub status, as set out in chapter two, amount to imperative reasons of overriding public interest supporting its rationale for the designation of the Airports NPS....."

65. There are numerous references in the ANPS to the importance of the objective of "maintaining the UK's hub status". Paragraph 1.3 says that the Airports Commission had been established "to examine the scale and timing of any requirement for additional capacity to maintain the UK's position as Europe's most important aviation hub ...". Several passages in chapter 2, which deals with the need for additional airport capacity, emphasize the United Kingdom's role as a "hub". In chapter 3, which explains why the north-west runway at Heathrow was chosen as the preferred scheme, paragraphs 3.18 and 3.19 state:

"3.18 Heathrow Airport is best placed to address this need by providing the biggest boost to the UK's international connectivity. Heathrow Airport is one of the world's major hub airports, serving around 180 destinations worldwide with at least a weekly service, including a diverse network of onward flights across the UK and Europe. Building on this base, expansion at Heathrow Airport will mean it will continue to attract a growing number of transfer passengers, providing the added demand to make more routes viable. In particular, this is expected to lead to more long haul flights and connections to fast-growing economies, helping to secure the UK's status as a global aviation hub, and enabling it to play a crucial role in the global economy.

3.19 By contrast, expansion at Gatwick Airport would not enhance, and would consequently threaten, the UK's global aviation hub status. Gatwick Airport would largely remain a point to point airport, attracting very few transfer passengers. Heathrow Airport would continue to be constrained, outcompeted by competitor hubs which lure away transfer passengers, further weakening the range and frequency of viable routes. At the UK level, there would be significantly fewer long haul flights in comparison to the preferred scheme, with long haul destinations served less frequently. Expansion at Heathrow Airport is the better option to ensure the number of services on existing routes increases and allows airlines to offer more frequent new routes to vital emerging markets." (our emphasis).

Habitats Directive issue (1) – the standard of review

66. Having cited relevant authority, including the decisions of the Supreme Court in *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 W.L.R. 1591 and *Kennedy v Information Commissioner* [2014] UKSC 20; [2015] 1 A.C. 455, and observations made by Carnwath L.J., as he then was, in *Office of Fair Trading v IBA Health Ltd.* [2004] EWCA Civ 142; [2004] 4 All E.R. 1103 (at paragraphs 91 and 92) and of Sir Thomas Bingham M.R., as he then was, in *R. v Ministry of Defence, ex p. Smith* [1996] Q.B. 517 (at p.556B), the Divisional Court said that in its view, "as well as the nature of the decision under challenge, the factors upon which the degree of scrutiny of review particularly depends include (i) the nature of any right or interest it seeks to protect, (ii) the process by which the decision under challenge was reached and (iii) the nature of the ground of challenge" (paragraph 151 of the judgment).

67. With those considerations in mind, the Divisional Court acknowledged that the interests the claimants sought to protect were "matters of great public importance", but also that the proponents of airport expansion had pointed to "the contribution made to the national economy and the creation of employment". It accepted that, "[inevitably], policy-making in this area involves the striking of a balance in which these and a great many other factors are assessed and weighed", and "is carried on at a high, strategic level and involves political judgment as to what is in the overall public interest" (paragraph 152).

68. As the Divisional Court said, "the degree of scrutiny required by any challenge before [it] will be dependent upon ... the strand of policy which is under review" (paragraph 166). It saw in the decision of this court in *R. (on the application of Mott) v Environment Agency* [2016] EWCA Civ 564; [2016] 1 W.L.R. 4338 "a helpful reminder of well-established good law: the court should accord an enhanced margin of appreciation to decisions involving or based upon "scientific, technical and predictive assessments" by those with appropriate expertise". It observed that "where a decision is highly dependent upon the assessment of a wide variety of complex technical matters by those who are expert in such matters and/or who are assigned

to the task of assessment (ultimately by Parliament), the margin of appreciation will be substantial" (paragraph 179). And it accepted that, by analogy with the first instance decision in *R. (on the application of Prideaux) v Buckinghamshire County Council* [2013] EWHC 1054 (Admin); [2013] Env. L.R. 32, "the Secretary of State was entitled to attach great weight to the reports of [the Airports Commission], particularly [the Airports Commission's] Final Report" (paragraph 180).

69. The Divisional Court concluded that the appropriate standard of review to be applied when considering whether there has been a breach of the requirements of [articles 6\(3\) and \(4\) of the Habitats Directive](#) is "Wednesbury" irrationality. In coming to this conclusion, it relied on the judgment of Sales L.J., as he then was, in *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174; [2016] Env. L.R. 7 (at paragraphs 78 to 80), and the judgment of Peter Jackson L.J. in *R.(on the application of Mynydd y Gwynt) v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWCA Civ 231; [2018] Env. L.R. 22 (at paragraph 8). It said that "although a strict precautionary approach is required for [article 6\(3\) of the Habitats Directive](#), the appropriate standard of review is ["Wednesbury" irrationality]: the court should not adopt a more intensive standard or effectively remake the decision itself" (paragraph 350). It saw no "arguable justification for a different standard of review to be adopted" when the court is assessing whether a project or plan meets core policy objectives under [article 6\(4\)](#) as opposed to [article 6\(3\)](#). Indeed, it went on to say that, "if anything, the assessment of whether a policy meets the core objectives of a policy-maker, assigned by Parliament with the task, is ... even more essentially a matter for that policy-maker, and not the court which is peculiarly ill-equipped to make such assessments" (paragraph 351).

70. In coming to those conclusions, the Divisional Court distinguished *R. (on the application of Lumsdon) v Legal Services Board* [2015] UKSC 41; [2016] A.C. 697 on its facts. The decision in that case – where the crucial issue was whether a quality assurance scheme for advocates was proportionate as a derogation from the freedom of establishment for providers of services under EU law – was, it said, of "no assistance in determining whether [article 6\(3\) and \(4\) of the Habitats Directive](#) are to be construed as incorporating a proportionality approach ..." (paragraph 347). The relevant provision there – [article 9\(1\)\(b\) and \(c\) of Parliament and Council Directive 2006/123/EC](#) – explicitly required the use of a "less restrictive measures" test, which included proportionality (paragraph 345). The Habitats Directive imposes no such test. The passages in the judgment of Lord Reed and Lord Toulson relied on by the Hillingdon claimants (in particular, paragraphs 63 and 67) related to "national measures" derogating from "fundamental freedoms". In this case there was no such derogation (paragraph 346 of the Divisional Court's judgment).

71. The Divisional Court added, however, that "the nature and standard of review is not determinative in this case" (paragraph 351). This was because, in its view, there was "no legal basis for challenging the Secretary of State's decision to adopt the ... "hub objective" and/or his assessment that [the Gatwick second runway scheme] failed to meet it" (paragraph 353). Even if "the proportionality approach" were appropriate here, the Secretary of State "would have a significant margin of appreciation; and the evidence was firmly against [the Gatwick second runway scheme] being able to maintain the UK's hub status function" (paragraph 356).

72. For the Hillingdon claimants, Mr Ben Jaffey Q.C. submitted, as he did before the Divisional Court, that the appropriate standard of review here is proportionality. He argued that the use of the domestic law concept of review on "Wednesbury" principles is inappropriate where fundamental principles of EU law are in play. He invoked [article 191\(2\) of the TFEU](#), which states:

(2) Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

...."

The "precautionary principle", Mr Jaffey submitted, should have been applied by the Secretary of State when preparing and designating the ANPS – because uncertainty remained over the environmental impacts of the Heathrow north-west runway. And the preference accorded to "alternative solutions" by [article 6\(4\) of the Habitats Directive](#) was an example of the requirement to take "preventive action".

73. Mr Jaffey maintained that the application of a standard of review based on proportionality was consistent with the opinion of Advocate General Kokott in Case C-239/04 *Commission v Portugal* [2006] ECR I-10183 (at paragraphs 42 and 43). The identification of alternatives under the Habitats Directive was, he submitted, the same kind of exercise as establishing, in the second stage of a proportionality assessment, whether the means chosen are the least restrictive alternative. Measures that impair fundamental environmental protections granted by EU law are, he argued, comparable in their significance to a serious interference with fundamental rights under EU law. He relied again on the Supreme Court's decision in *Lumsdon*. And he drew our attention to the opinion of Advocate General Kokott in Case C-723/17 *Craeynest v Brussels Hoofdstedelijk Gewest* [2020] Env. L.R. 4, in which she said (in paragraphs 43 and 53):

"43. ... [In] complex scientific or technical assessments and weighing up there is, as a rule, broad discretion which can be reviewed only to some degree. That discretion is nevertheless limited in certain cases and must therefore be reviewed more intensively, in particular where they are particularly serious interferences with fundamental rights.

...

53. ... The rules on ambient air quality ... put in concrete terms the Union's obligations to provide protection following from the fundamental right to life under art. 2(1) of the Charter and the high level of environmental protection required under [art. 3\(3\) TEU](#), art. 37 of the Charter and [art. 191\(2\) TFEU](#)."

Mr Jaffey submitted that fundamental rights under article 37 of the Charter were interfered with by the ANPS, and the decision of the Secretary of State must therefore be "reviewed more intensively".

74. Mr James Maurici Q.C. for the Secretary of State and Mr Charles Banner Q.C. for Arora reminded us that the Advocate General's analysis in *Craeynest* was not adopted by the court in its judgment in that case. The court held (in paragraph 54 of the judgment):

"54. ... [It] is clear from the Court's case-law that, in the absence of EU rules, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, such as [Directive 2008/50](#). However, the detailed rules provided for must not be less favourable than those governing similar domestic situations (principle of equivalence) and must not make it impossible in practice or excessively difficult to exercise rights conferred by EU law (principle of effectiveness)."

Thus the court effectively confirmed that it is for the Member States to determine the applicable standard of review, and that this is so in cases involving complex scientific or technical assessments in Directives concerned with environmental protection. Therefore, submitted Mr Maurici and Mr Banner, it is wrong to suggest that review on the basis of "manifest error" – equivalent in EU law to "Wednesbury" unreasonableness – is inadequate here. The Hillingdon claimants had failed to demonstrate that it would otherwise be "impossible in practice" to exercise rights conferred by EU law.

75. We accept those submissions of Mr Maurici and Mr Banner, for two reasons. First, although the Advocate General in *Craeynest* indicated that in some cases a more intensive standard of review will apply, this was especially – as she put it (in paragraph 43 of her opinion) – "where they are particularly serious interferences with fundamental rights". The Hillingdon claimants have not shown how any fundamental EU rights have been interfered with in this case, let alone seriously interfered with or made "impossible in practice" to exercise. Secondly, as the court said in *Craeynest*, there is a clear strand of EU case law that respects the discretion of Member States to lay down procedural rules for the protection of EU law rights.

"Wednesbury" irrationality is the normal standard of review applicable in judicial review proceedings in this jurisdiction where interferences are alleged with rights of various kinds, including rights arising in domestic environmental law. And it seems to us appropriate in principle, and not less favourable, to apply the same standard to rights under EU law. Nor does it render the exercise of EU rights virtually impossible or excessively difficult in practice. In our view, therefore, there is no justification for applying a more intense standard of review than "Wednesbury" to the operation of the provisions of [article 6\(4\) of the Habitats Directive](#). Neither the court's decision in *Craeynest* nor the Advocate General's opinion supports a different conclusion.

76. Mr Jaffey also submitted that the Divisional Court's reliance on *Smyth* and *Mynydd y Gwynn* was misguided: first, because those cases do not address [article 6\(4\)](#) explicitly, and that provision is different from [article 6\(3\)](#); and secondly, because the concept of an "alternative solution" under [article 6\(4\)](#) is a question of EU law, not domestic law.

77. We cannot accept that argument. In our view, as Mr Maurici submitted, the Divisional Court was right to follow *Smyth* and *Mynydd y Gwynn*, and to conclude there is no good reason to distinguish between the appropriate standard of review for [article 6\(3\)](#) and that for [article 6\(4\)](#). In *Smyth* it was submitted that in scrutinizing the performance by the Secretary of State of his obligations under [article 6\(3\) of the Habitats Directive](#) the national court is required to adopt a more intensive standard of review than "Wednesbury". Sales L.J. said (in paragraph 80 of his judgment):

"80. I do not accept these submissions. In the similar context of review of screening assessments for the purposes of the Environmental Impact Assessment (EIA) Directive and Regulations, this Court has held that the relevant standard of review is the *Wednesbury* standard Although the requirements of [Article 6\(3\)](#) are different from those in the EIA Directive, the multi-factorial and technical nature of the assessment called for is very similar. There is no material difference in the planning context in which both instruments fall to be applied. There is no sound reason to think that there should be any difference as regards the relevant standard of review to be applied by a national court in reviewing the lawfulness of what the relevant competent authority has done in both contexts."

78. A similar conclusion is to be seen in the judgment of Peter Jackson L.J. in *Mynydd y Gwynn*, where he said (at paragraph 8):

"8. The proper approach to the Habitats Directive has been considered in a number of cases at European and domestic level, which establish the following propositions:

...

(9) The relevant standard of review by the court is the *Wednesbury* rationality standard, and not a more intensive standard of review: *Smyth* at [80]."

79. It seems to us, therefore, that the Hillingdon claimants' criticism of the Divisional Court's reliance on *Smyth* and *Mynydd y Gwynn* is unfounded. If a particular standard of review is appropriate in judging compliance with a provision in EU environmental legislation that involves a decision-maker's assessment, the same standard is likely to be appropriate for the corresponding exercise under another such provision, so long as the requirements of the two provisions are sufficiently alike and the context is not materially different. The assessment called for in [article 6\(3\)](#) and in [article 6\(4\)](#) is similar. There is, as Sales L.J. put it in *Smyth*, "no material difference in the planning context in which both instruments fall to be applied". Neither assessment nor context diverge. We therefore agree with the Divisional Court that the same standard of review should apply to both provisions, and that the appropriate standard is "Wednesbury".

80. Ultimately however, as the Divisional Court also concluded, the question of the appropriate standard of review is, in this case, academic. Even on the approach urged on us by the Hillingdon claimants, applying the test of proportionality, we would agree with the Divisional Court that the Secretary of State was entitled to reach the conclusion he did on "alternative solutions" under [article 6\(4\)](#). In our view he was not in breach of any provision of the Habitats Directive or the Habitats Regulations in finding the Gatwick second runway scheme failed to meet the "hub objective". If this is right, the standard of review appropriate to [article 6\(4\)](#) does not affect the outcome of these three claims for judicial review.

Habitats Directive issue (2) – the rejection of the Gatwick second runway scheme for its failure to meet the "hub objective"

81. In the draft Habitats Regulations Assessment published for consultation on 2 February 2017, the Heathrow extended northern runway was ruled out as an alternative because it was not shown to have less damaging ecological impacts than the north-west runway (paragraph 9.2.6, under the heading "Habitats Regulations Assessment of Short-List"). The second runway at Gatwick was ruled out because of its impact on air quality at the Mole Gap to Reigate Escarpment SAC (paragraph 9.2.7). The draft Habitats Regulations Assessment concluded (in paragraphs 9.2.8 and 9.2.9):

"9.2.8 Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised for IROPI are those relating to human health or public safety, to beneficial consequences of primary importance for the environment. Airport capacity expansion is not applicable to those considerations. Accordingly given the potential for adverse effects to priority [habitats] at [the Gatwick second runway scheme] opinion from the European Commission would be necessary with regard to other IROPI; in the absence of such an opinion being obtained it is not possible to conclude that [the Gatwick second runway scheme] is a reasonable alternative. In Case C-258/11 [*Sweetman v An Bord Pleanala* [2014] P.T.S.R. 1092] the European Court said at para. 55 that maintaining protected sites in a favourable status was "particularly important" where there was a priority species/habitat and in Case C-404/09 [*Commission v Spain*] it was said, at para 163, that under the Habitats Directive Member States must take appropriate protective measures to preserve the characteristics of sites which host priority natural habitat types and/or priority [species] and should generally avoid "intervention when there is a risk that the ecological characteristics of those sites will be seriously compromised as a result".

9.2.9 In conclusion based on the information available at this stage it has not been possible to identify any reasonable alternatives to the preferred scheme."

82. The draft ANPS, published for consultation on the same day, concluded (in paragraph 3.18) that the "expansion at Gatwick Airport would not enhance, and would consequently threaten, the UK's global aviation hub status"; that "Gatwick Airport would largely remain a point to point airport, attracting very few transfer passengers"; and that expansion at Heathrow was "the better option to ensure the number of services on existing routes increases", which would allow "airlines to offer more frequent new routes to vital emerging markets". Paragraph 3.19 of the ANPS itself is in identical terms (see paragraph 65 above).

83. The same conclusion was expressed in the revised draft of the Habitats Regulations Assessment, published for consultation on 24 October 2017, which stated unequivocally (in paragraph 9.2.7) that the Gatwick scheme could not be regarded as an "alternative solution" under [article 6\(4\) of the Habitats Directive](#) (paragraph 9.2.7).

"9.2.7 The LGW-2R scheme is not considered to meet the plan objectives of increasing airport capacity in the South East and maintaining the UK's hub status, because expansion at Gatwick Airport would not enhance (and would consequently threaten) the UK's aviation hub status. Gatwick Airport would largely remain a point to point airport, attracting very few transfer passengers. At the UK level, there would be significantly fewer long haul flights in comparison to the preferred scheme, with long haul destinations served less frequently. As such, it cannot be considered as an alternative solution." (our emphasis).

84. Explaining its conclusion that there was no legal basis for challenging the Secretary of State's decision to adopt the "hub objective" or his view that the Gatwick second runway scheme failed to meet that objective, the Divisional Court observed that "at least as far back as September 2012 when [the Airports Commission] was established, increasing airport capacity so as to maintain the UK's position as Europe's most important aviation hub was identified as a core objective". The Airports Commission's Final Report had "confirmed the economic importance of the "hub objective", and the need to increase capacity in order to reverse the decline in the UK's hub status". This had been acknowledged both in the February 2017 draft ANPS and in the final designated version of it. Thus "the inclusion of the 'hub objective' as properly one of the fundamental aims of the ANPS [was] simply not open to challenge" (paragraph 354 of the judgment).

85. The Divisional Court noted that although the Hillingdon claimants contested the conclusion in the ANPS and in the Habitats Regulations Assessment that the expansion of Gatwick by the addition of a second runway would not deliver the "hub objective", there were "no legal challenges to the assessments and conclusions reached in paragraphs 3.18-3.19 ... of the ANPS". One of those conclusions was that the Gatwick second runway scheme would not maintain, but would threaten, the United Kingdom's "global aviation hub status", and this was "entirely consistent with [the Airports Commission's] Final Report" (paragraph 355). It continued (in paragraphs 355 to 359):

"355. ... Therefore, on the conclusions reached by the Secretary of State, this is not an issue about the *extent* to which the Gatwick 2R Scheme would meet the "hub objective", which would be a matter of degree or relative attainment of that aim. Rather, the Secretary of State has concluded that the scheme would not meet that policy objective at all. That conclusion is not open to challenge by way of judicial review. The Secretary of State was entitled to decide that a proposal that would threaten the "hub objective" is not an "alternative solution" for the purposes of the Habitats Directive. That conclusion too is not open to legal challenge.

356. ... The selection of the "hub objective" as a consideration of central importance to the ANPS and the Gatwick 2R Scheme as failing to deliver that objective, were both key points for Parliament to consider when the final version of the NPS was laid before it and for the Secretary of State when he designated the NWR Scheme. ...

357. Finally, Mr Jaffey contends that the decision to reject the Gatwick 2R Scheme as an "alternative solution" for the purposes of the HRA is inconsistent with its retention as a "reasonable alternative" in the AoS for the purposes of the SEA Directive. We have already dealt with the language of these two regimes and their differing legal purposes (see paragraphs 320-322 above). The Gatwick 2R Scheme was not ruled out as an alternative at the beginning of the SEA process. An opportunity was given for the case for it to be advanced. The "sifts" of alternatives referred to by Mr Jaffey were carried out either by the AC or before the consultation stage under the SEA Directive.

358. Mr Jaffey then relied upon the description of the Gatwick 2R Scheme as an alternative in the final version of the AoS (June 2018) and the Post Adoption Statement (26 June 2018). But these documents are not to be construed as if they were legal instruments. Moreover, they plainly state that they are to be read together with the ANPS, and so the passages relied upon should be read compatibly with the policy statement unless that is made impossible by the language used. That is not the case here. The documents referred to by Mr Jaffey state that, even with a second runway, Gatwick would largely remain a point-to-point airport. In other words, as paragraph 3.10 of the ANPS states, Gatwick would attract "very few transfer passengers". That is an assessment by the Secretary of State that is justified on the evidence. On the basis of that assessment, Gatwick would be the antithesis of a hub.

359. Furthermore, Annex C of the submission by officials to the Secretary of State on 25 September 2017 explained why Gatwick was retained in the consideration of alternatives in the AoS, having regard to the different purposes of the SEA regime, in accordance with the analysis set out above (paragraph 322), and to record and explain how the evidence underpinning the decision to select the NWR had been tested comprehensively. We see no merit in Mr Jaffey's criticisms, which we consider overly forensic."

86. The Hillingdon claimants do not, and in our opinion cannot, challenge the Secretary of State's conclusion that the Gatwick second runway scheme would not fulfil the "hub objective" or his conclusion that such a development "would not enhance (and would consequently threaten) the UK's aviation hub status". The thrust of this part of the claim is different. It goes to the Secretary of State's selection and use of the "hub objective" as a criterion by which to measure potential plans or projects and "alternative solutions" in formulating the ANPS. Mr Jaffey's main submission on this issue is that the "hub argument" was adopted by the Secretary of State at a late stage in the evolution of the ANPS, with the aim – or at least with the effect – of avoiding the need to consider expansion at Gatwick as an alternative and then potentially having to select that option. Mr Jaffey confirmed, however, that he was not alleging bad faith on the part of the Secretary of State. The Divisional Court had countenanced a "deliberately narrow re-definition" of the object of the ANPS.

87. We reject that argument, essentially for the same reasons as did the Divisional Court. First, as the Divisional Court recognized, the "hub objective" was a central aim of the ANPS throughout its process, and indeed was firmly in place before that process began. When the Airports Commission was established in September 2012, its explicit purpose was to "examine the scale and timing of any requirement for additional capacity to maintain the UK's position as Europe's most important aviation hub" (paragraph 1.3 of the ANPS). The suggestion that the "hub argument" was adopted by the Secretary of State only at a late stage in the process, and with a view to avoiding the need to consider expansion at Gatwick as an alternative, is incorrect as a matter of fact.

88. Secondly, and again as the Divisional Court concluded, the Secretary of State was entitled to decide that a potential scheme threatening the "hub objective" could not properly be an "alternative solution" under the Habitats Directive. It is true that the Airports Commission's Final Report accepted that a second runway at Gatwick was a "credible option" for expansion, stating (in paragraphs 16.62 and 16.63):

"16.62 Whilst each of the three schemes shortlisted for detailed consideration was considered a credible option for expansion, the Commission has unanimously concluded that the proposal for a new northwest runway at Heathrow Airport ... presents the strongest case.

16.63 ... [It] is the most effective means of achieving the goal set out in the Commission's original terms of reference to maintain the UK's position as a global hub for aviation."

However, as the Divisional Court acknowledged, the consistent view of the Secretary of State in the course of the ANPS process, accurately reflected in the Habitats Regulations Assessment, was that the Gatwick second runway scheme was not merely incompatible with the "hub objective" but inimical to it. It could therefore scarcely be considered a realistic "alternative solution" under [article 6\(4\) of the Habitats Directive](#) .

89. The conclusion in paragraph 3.19 of the ANPS, foreshadowed by the conclusion in paragraph 9.2.7 of the Habitats Regulations Assessment, which firmly rejected the Gatwick second runway scheme as an "alternative solution" under the Habitats Directive, is legally unimpeachable. It is not attacked in these proceedings, nor could it be. And it provides a complete answer to much of the Hillingdon claimants' case on the Habitats Directive issues.

90. Mr Jaffey relied on a passage in the judgment of Hickinbottom J., as he then was, in *R. (on the application of Friends of the Earth England, Wales and Northern Ireland Ltd.) v Welsh Ministers* [2015] EWHC 776 (Admin); [2016] Env. L.R. 1 (at paragraph 88 xi):

xi) ... An assessment as to whether the objectives would be "met" by a particular option is therefore peculiarly evaluative; but an option will meet the objectives if, although it may not be (in the authority's judgment) the option that best meets the objectives overall (i.e. the preferred option), it is an option which is capable of sufficiently meeting the

objectives such that that option could viably be adopted and implemented. That, again, is an evaluative judgment by the authority, which will only be challengeable on conventional public law grounds. However, whilst allowing the authority a due margin of discretion, the court will scrutinise the authority's choice of alternatives considered in the SEA process to ensure that it is not seeking to avoid its obligation to evaluate reasonable alternatives by improperly restricting the range options it has identified as such."

Mr Jaffey sought to deploy those observations in support of his submission that the Secretary of State had consistently treated the Gatwick second runway scheme as an option that sufficiently met the Government's objectives to make it a viable "alternative solution" under [article 6\(4\)](#).

91. We do not think that submission is tenable. It seems to be based on a misunderstanding of the relevant conclusions in the Habitats Regulations Assessment and the ANPS. On a true reading, those conclusions were not to the effect that Heathrow, with or without a third runway, would be merely a better "hub" than Gatwick with the addition of a second runway. Rather, as the Divisional Court recognized, the crucial point was that, in the Secretary of State's view, Gatwick was simply not capable of attaining the necessary "hub status" to meet the essential aim of the ANPS even if it was expanded by the development of a second runway.

92. As the Divisional Court said (in paragraph 341):

"341. ... [The] correct approach to "alternative solution" in [article 6\(4\) of the Habitats Directive](#) is tolerably clear. In respect of an NPS, a proposed option is not an "alternative solution" unless it meets the core policy objectives of the statement. In this regard, Mr Jaffey's concern that, at an early stage, objectives may be defined with deliberate narrowness so that potential alternatives are (he said) unreasonably or (we say) unlawfully excluded has some force; but the objectives must be both genuine and critical, i.e. objectives which, if not met, would mean that no policy support would be given to the development. It would be clearly insufficient to exclude an option simply because, in the policy-maker's view, another, preferred option meets the policy objectives to a greater extent and is on balance more attractive. ... But the extent to which an option meets policy objectives is different from an option not meeting a core policy objective at all."

93. Here, the "hub objective" was clearly a "genuine and critical" objective of the ANPS, which, "if not met, would mean that no policy support would be given to the development". It was described in the Divisional Court's judgment (at paragraph 46) as "the aim of maintaining the UK's position as Europe's most important aviation hub". It cannot be said that this objective was constructed with "deliberate" and unlawful "narrowness" to exclude other options. Given that a central purpose of the ANPS was to promote the United Kingdom's status as an "aviation hub", we see no room for a submission that the Secretary of State acted unlawfully in rejecting the Gatwick second runway scheme on the evidence that it could not fulfil that objective. On the contrary, as we have said, since there was a clear and unassailable finding that expansion at Gatwick "would not enhance, and would consequently threaten, the UK's global aviation hub status" (paragraph 3.19 of the ANPS), a scheme for the development of a second runway at that airport could not realistically qualify as an "alternative solution" under [article 6\(4\)](#). In fact, it would be no solution at all.

Habitats Directive issue (3) – was the exclusion of the Gatwick second runway scheme as an alternative solution because of its potential harm to an Sac in breach of the Habitats Directive?

94. On 25 September 2017, a document was presented to the Secretary of State by officials in the Airport Capacity Policy Directorate of the Department for Transport, distilling the most significant parts of the draft Habitats Regulations Assessment published in February 2017. The relevant content of that document was summarized by the Divisional Court (in paragraph 308):

"308. The submission document explained that, because it had not been possible at this policy-making stage to exclude the possibility of adverse effects of the NWR Scheme on European sites, an assessment had been made of potential "alternative solutions". Increased capacity at Gatwick would generate additional traffic which was expected to have adverse effects on two European protected sites, the Ashdown Forest SPA/SAC and the Mole Gap to Reigate Escarpment SAC, by causing increases in NOX levels. The latter site is important for wild orchids, and therefore treated under the Habitats Directive as a priority habitat requiring enhanced protection. Consequently the Gatwick 2R Scheme "was discounted as an alternative solution".

95. The revised draft Habitats Regulations Assessment published in October 2017 concluded (in paragraph 9.2.11):

"9.2.11 ... Unlike the other European sites considered for LHR-NWR and LGW-2R, Mole Gap to Reigate Escarpment SAC contains a priority natural habitat type, which is defined as one in danger of disappearance, and for the conservation of which the European Community has particular responsibility (see [Article 1\(d\) of the Habitats Directive](#))."

The following two paragraphs (paragraphs 9.2.12 and 9.2.13) were in identical terms to paragraphs 9.2.8 and 9.2.9 of the February 2017 draft Habitats Regulations Assessment (see paragraph 81 above). Thus a second runway at Gatwick was considered not to be an "alternative solution" because of the potential adverse effects on priority habitats.

96. In their response to consultation dated 19 December 2017 on the draft Habitats Regulations Assessment and the revised draft Habitats Regulations Assessment, in their role as relevant "nature conservation body", Natural England said (in paragraph 4(e)) that they "broadly [agreed] with the conclusions of the strategic Habitats Regulations Assessment, but would highlight the importance of the work still to be done at the project level HRA, with much of the detail still to be worked out ... through detailed design assessment". Commenting on paragraphs 9.2.11 to 9.2.13 of the Habitats Regulations Assessment, they stated (in paragraph 14 of Annex 2):

"Paragraph 9.2.11, 9.2.12, 9.2.13 [of the Habitats Regulations Assessment]:

These sections identify the potential for air quality impacts from road traffic on Mole Gap to Reigate Escarpment SAC, with the presence of a priority natural habitat making an IROPI case challenging. This section concludes 'based on the information available at this stage it has not been possible to identify any alternative solutions to the preferred scheme'.

Whilst we recognise this position for the strategic level assessment, we would advise that if the detailed project level HRA for Heathrow NWR also produces findings that are negative or uncertain, then a more detailed assessment of alternatives (including Gatwick) is needed. This would need to consider in more detail the ecological impacts of emissions on the Mole Gap to Reigate Escarpment SAC in view [of] its qualifying features and conservation objectives. For example if the priority features of interest do not fall within the distance criteria for air quality impacts (200m for roads), then such an impact may be able to be ruled out, which may affect the view taken on alternative solutions."

97. In December 2017, Gatwick Airport Ltd. submitted to the Secretary of State a report produced by RPS in response to the Habitats Regulations Assessment ("Revised draft Airports National Policy Statement: Mole Gap to Reigate Escarpment SAC Orchid Survey of Unit 23"), which asserted that "potential effects on the Mole Gap Reigate Escarpment SAC could be excluded as not likely to have a significant effect on this site" (paragraph S1). The report went on to say (in paragraphs S2 to S4 and S6):

"S2. Notwithstanding that, the purpose of this current RPS report is to present the results of a survey, undertaken by RPS for Gatwick, of the part of the MGRE SAC closest to the M25 to map the location of orchids and the condition of

the grassland in general. The aim of the survey was to provide further clarification to the conclusions of the previous RPS work with respect to the potential for effects on priority habitat.

S3. The survey did not identify any orchids of any species on this small part of the SAC that lies within 200 m of the M25. As expected, orchids are restricted to areas that are not grazed or trampled and to those that can tolerate rougher grassland such as Common Twayblade, Common Spotted-orchid and possibly Bee-orchid. Therefore, based on the survey reported here, this part of the SAC does not currently support the [Annex I](#) priority habitat calcareous grassland with 'important orchid sites'.

S4. Further, the grassland in the 200m buffer was found to be depauperate compared to the more species-rich swards on the steep slopes elsewhere in the SAC. Some small areas of more species-rich grassland did occur but these were rabbit grazed and subject to high visitor pressure. Therefore, it is highly unlikely that such grassland would support the rare orchid species characteristic of the priority habitat in its current condition.

...

S6. Based on the survey work carried out by RPS, this report concludes that the grassland within 200 m of the M25 is of a condition unlikely to support SAC quality orchidaceous rich grasslands. There are no plans to change the management of this area in the foreseeable future. Therefore there is no potential for an increase in traffic on the M25, as a result of LGW-2R, to have a significant effect with respect to the [Annex I](#) priority habitat calcareous grassland with 'important orchid sites'."

98. In the light of Natural England's response to consultation, accepting the possibility that the development of a second runway at Gatwick might have an impact on priority species within an SAC, the Divisional Court was satisfied there was "evidence before the Secretary of State to support the conclusion that potential significant effects upon the SAC arising from [the Gatwick second runway scheme] could not be ruled out" (paragraph 368). It also concluded that the reference made in the draft Habitats Regulations Assessment published in February 2017 to the need to obtain the opinion of the European Commission on the potential effects on the SAC was not in itself an obstacle to the Gatwick second runway scheme being treated as an "alternative solution". But equally, this "did not detract from the essential judgment that, on the information available at the stage of preparing the ANPS, and applying the precautionary approach, the adverse impacts of [the Gatwick second runway scheme] could not be discounted" (paragraph 369). The Divisional Court's final conclusions on this point were these (in paragraphs 370 and 371 of its judgment):

"370. ... [We] accept that that leads to a further question: why should the Gatwick 2R Scheme have been completely discounted as an alternative solution at the ANPS stage because of this potential impact on an SAC near the M25 when, according to the advice of Natural England, a more detailed study at the project level stage for the NWR might be able to rule that impact out? In our view, before us, that question has not been satisfactorily answered.

371. However, Ground 8.2 was not put in that way; and, whatever the answer to that question might be, it could not establish a failure to satisfy [article 6\(4\)](#) because, in any event, the Secretary of State acted lawfully in excluding the Gatwick 2R Scheme as an alternative solution on the grounds that it failed to meet the "hub objective"."

99. The Hillingdon claimants say it is common ground that there is a substantial risk of harm to a number of SACs if the development of the Heathrow north-west runway proceeds and a risk of harm to priority species at the Mole Gap to Reigate Escarpment SAC if the Gatwick second runway scheme is built. But in any event, Mr Jaffey submitted, it was unlawful to exclude the Gatwick second runway scheme as an alternative on the basis of potential harm to the SAC, for two reasons: first, because no attempt had been made to evaluate the comparative harm of the two developments; and secondly, because the nature and extent of harm likely to be caused by the Gatwick second runway had not been identified and assessed.

100. Mr Maurici submitted that this was to misunderstand Natural England's advice. The true sense of that advice, he contended, was that Natural England had accepted the Secretary of State's approach, while also, and correctly, pointing out that [article 6\(4\)](#) would apply again at the project stage. In response to the Divisional Court's observation (in paragraph 370) that the question to be answered was why the Gatwick scheme had been discounted at the ANPS stage because of its impact on the SAC when, according to Natural England, a "more detailed assessment" might have ruled the impact out, Mr Maurici submitted that the requirements of [article 6\(4\)](#) are engaged at two distinct stages, each of which involves its own process: first, the plan stage – here the stage at which the ANPS was prepared and designated – and second, the project stage – when an application for a development consent order would be submitted and determined. It was inevitable that less information would be available at the plan stage. In the case of the ANPS, on the information available at the plan stage the Secretary of State, in agreement with Natural England, decided that the harmful effects of a second runway at Gatwick could not be ruled out, and Natural England had advised that more detailed work should be done at the project stage. But the Gatwick second runway scheme was conclusively ruled out as an alternative at that stage because it did not meet – and indeed was seen to threaten – the United Kingdom's "hub status". It follows, Mr Maurici submitted, that only if the Secretary of State was demonstrably wrong on the "hub objective" issue could the Gatwick second runway scheme be regarded as an alternative to the third runway at Heathrow, at either stage. The Secretary of State's conclusion on this issue was legally sound.

101. We see force in those submissions. If, as we have held, the Secretary of State was entitled to reject the concept of a second runway at Gatwick as an "alternative solution" to the north-west runway at Heathrow because, in his lawful view, it was contrary to the "hub objective", this was logically an overriding factor. It was conclusive on the question of the Gatwick second runway scheme being an "alternative solution" – regardless of the possibility that a scheme could be devised that would avoid harm to the SAC and the priority species within it. Crucially, it meant that such expansion at Gatwick could never be a solution, alternative or otherwise.

102. Under [article 6\(4\)](#) the Secretary of State has the power, and the duty, to make appropriate judgments about the possible harmful effects of a proposed scheme on a European site, and the "overriding public interest" in fulfilling the objectives of the plan or project in question. Mr Jaffey laid emphasis on the opinion of the Advocate General in *Commission v Portugal*. But, as Mr Maurici pointed out, the facts of that case can be distinguished from this, because the relevant authority there failed to consider any alternative plan at all. In this case the criticism made of the Secretary of State is not that he simply failed to consider the Gatwick second runway scheme as an alternative; it is that he wrongly excluded that scheme after he had considered it. And it also seems to us that the Advocate General's reasoning in *Commission v Portugal* supports Mr Maurici's submission that the Secretary of State acted reasonably and lawfully in carrying out the exercise he did to determine which scheme should be pursued. In paragraph 44 of her opinion the Advocate General said this:

"44. Among the alternatives short-listed ..., the choice does not inevitably have to be determined by which alternative least adversely affects the site concerned. Instead, the choice requires a balance to be struck between the adverse effect on the integrity of the SPA and the relevant reasons of overriding public interest."

103. Mr Jaffey also relied on the opinion of Advocate General Kokott in Case C-6/04 *Commission v United Kingdom [2005] ECR I-9017* as supporting his submission that it may often not be possible to determine the outcome of compliance with the requirements of [article 6\(4\)](#) until final approval comes to be given, and it is essential therefore that potentially harmful impacts must be dealt with as fully as possible at every stage.

104. In principle, that proposition can hardly be doubted. As Advocate General Kokott said (at paragraph 49 of her opinion):

"49. The United Kingdom Government is admittedly right in raising the objection that an assessment of the implications of the preceding plans cannot take account of all the effects of a measure. Many details are regularly not settled until the time of the final permission. It would also hardly be proper to require a greater level of detail in preceding plans or the abolition of multi-stage planning and approval procedures so that the assessment of implications can be concentrated

on one point in the procedure. Rather, adverse effects on areas of conservation must be assessed at every relevant stage of the procedure to the extent possible on the basis of the precision of the plan. This assessment is to be updated with increasing specificity in subsequent stages of the procedure."

105. We readily accept that [article 6\(4\)](#) requires an iterative assessment of adverse effects, so far as is practical, at each stage of a procedure comprising more than a single stage. This is not in dispute. If the Gatwick second runway scheme had not fallen decisively outside the range of "alternative solutions" to the expansion of Heathrow by the addition of a third runway because such development was incompatible with – and hostile to – the "hub objective", it might well have been necessary to retain it as an alternative. If, in the course of the process leading to the designation of the ANPS, the Secretary of State had finally excluded the Gatwick second runway scheme as an alternative solely or principally on the ground of possible harm to the SAC, or to the priority species within it, his decision to do so might have been vulnerable to the criticism that it was premature and inappropriate.

106. That, however, is not what the Secretary of State did in this case. As the Divisional Court rightly concluded (in paragraph 371 of its judgment), it was, in the circumstances, reasonable and lawful for the Secretary of State to exclude the Gatwick second runway scheme as an "alternative solution" because in his view the evidence before him clearly indicated that it did not comply with the qualifying conditions for an "alternative solution" under the Habitats Directive. So the requirements of [article 6\(4\)](#) effectively ceased to apply to that scheme. It had been validly excluded as an alternative for the project stage for reasons unrelated to, and unaffected by, any possible conclusions relating to harmful effects, or the absence of them, on the Mole Gap and Reigate Escarpment SAC. It follows that if the Secretary of State was in error in relying on such conclusions as an additional and separate consideration, this ultimately had no effect on his performance of the duties imposed on him by the Habitats Directive and the Habitats Regulations, or on the outcome of the designation process. The decisive reason for the exclusion of the Gatwick second runway scheme as an alternative was its failure to satisfy the central objective of maintaining the United Kingdom's "hub status". This, in our view, is clear.

Habitats Directive issue (4) – did the Divisional Court err in distinguishing as it did between "alternative solutions" under the Habitats Directive and "reasonable alternatives" under the Sea Directive?

107. The scoping report produced by WSP in March 2016, was intended to comply with [article 5\(1\) of the SEA Directive](#) and [section 5\(3\) of the Planning Act](#) . It formed the environmental report for the purposes of the SEA Directive.

108. The consultation on the draft ANPS that began on 2 February 2017 was intended to comply with the relevant obligations under both [article 6 of the SEA Directive](#) and [article 6\(3\) of the Habitats Directive](#) .

109. The Divisional Court (in paragraph 322 of its judgment) contrasted the operation of the Habitats Directive with that of the SEA Directive. In particular, it contrasted the obligation to consider "alternative solutions" in [article 6\(4\) of the Habitats Directive](#) with the requirement to consider "reasonable alternatives" under [article 5 of the SEA Directive](#) . It emphasized the "substantive" nature of the obligation in [article 6\(4\) of the Habitats Directive](#) , whose operation bears on the outcome of the process, in contradistinction to the requirement in [article 5 of the SEA Directive](#) , which is not "substantive" but "procedural". This essential difference between the provisions for the consideration of alternatives in the two Directives enabled it to conclude (in paragraph 323) that it was lawful for the Secretary of State to rule out the Gatwick second runway scheme as an "alternative solution" under [article 6 of the Habitats Directive](#) while also treating it as a "reasonable alternative" under [article 5 of the SEA Directive](#) . It said (in paragraph 322):

"322. Second, and more importantly, it is necessary to have well in mind fundamental differences in the operation of the Habitats Directive and the SEA Directive. Where a proposal (whether to adopt a policy or to grant consent for a project) adversely affects the integrity of a European site, the operation of [article 6\(3\) and \(4\) of the Habitats Directive](#) (and [regulations 63 and 64 of the Habitats Regulations](#)) determines the outcome of the process, according to the results

of applying the tests laid down in those provisions. It is therefore rightly said by Mr Jaffey that these provisions are *substantive* in nature, and not merely *procedural*. In our judgment, an option which does not meet a core objective of a policy should not be allowed to affect the application of [article 6\(4\)](#). By contrast, the requirements of the SEA Directive for the content of an environmental report and for the assessment process which follows are entirely procedural in nature. Thus, the requirement to address "reasonable alternatives" in the environmental report (or AoS under [section 5\(3\) of the PA 2008](#)) is intended to facilitate the consultation process under [article 6](#) (and [section 7 of the PA 2008](#)). The operator of Gatwick and other parties preferring expansion at that location would be expected to advance representations as to why the hub objective should have less weight than that attributed to it by the Secretary of State or that, contrary to his provisional view, the Gatwick 2R Scheme could satisfy that objective. The outputs from that exercise are simply taken into account in the final decision-making on the adoption of a plan, but the SEA Directive does not mandate that those outputs determine the outcome of that process."

110. The Hillingdon claimants seek to fault those conclusions in two ways. First, they say it was inconsistent and unlawful for the Secretary of State to recognize the Gatwick second runway scheme as a credible alternative throughout the SEA process but not to treat it as an alternative under the Habitats Directive. The result of this, they say, was that, before designating the ANPS, the Secretary of State did not fully and properly consider the comparative effects of the north-west runway at Heathrow against the second runway at Gatwick on European protected sites. Secondly, they contend that the Divisional Court was wrong to hold that the corresponding provisions on alternatives in the SEA Directive and the Habitats Directive can be distinguished on the basis that the provisions of the SEA Directive are "procedural" in nature and those of the Habitats Directive "substantive". Mr Jaffey submitted that this false distinction led the Divisional Court to adopt an incorrect approach to the interpretation of the EU law concept of an "alternative". He argued that the test for ruling out alternatives under the Habitats Directive is no less stringent than under the SEA Directive, because an "alternative solution" is necessarily a broader concept than a "reasonable alternative".

111. We cannot accept these submissions. It is necessary, we think, to keep in mind the underlying purpose of each Directive. The purpose of the SEA Directive is to ensure the consideration of environmental information and to secure public participation in the formulation of plans and programmes (see recitals 1, 4, 5, 14, 15, 17 and 18). As a reflection of this basic purpose, and to give effect to it, all "reasonable alternatives" must be considered in an "environmental report" ([article 5](#)), which must be prepared and consulted upon before the adoption of the plan or programme ([article 6](#)). This exercise, if it is to be carried out effectively, requires that "reasonable alternatives" be put to the public in consultation. In this case, that requirement made it necessary that consultees, including Gatwick Airport Ltd., were given the opportunity to submit to the Secretary of State their representations in favour of particular alternatives, including the Gatwick second runway scheme, and to explain how such alternatives would meet the essential objectives of government policy, of which the "hub objective" was one.

112. In the Habitats Directive, however, there is no duty on the competent authority to consult before concluding that the requirements of [article 6\(4\)](#) are met. This is apparent in the language of [article 6\(4\)](#), which specifies what must be done "[if], in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out ...". It is implicit that the consequent requirements – that "the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected", and that it "shall inform the Commission of the compensatory measures adopted" – are engaged only after a consideration of alternatives has been undertaken.

113. We therefore agree with the Divisional Court's conclusion. Whether or not the difference between the relevant provisions in the SEA Directive and those in the Habitats Directive is accurately described as a distinction between "procedural" and "substantive" is not, in the end, the decisive point. One must look at the substance of the provisions in either Directive, and their effect. The Divisional Court did that. As it recognized, in both substance and effect there is a real difference between the respective provisions.

114. In this case, where – in the Secretary of State's judgment – the suggested alternative proposal would go against the "hub objective" as a "core objective" of the policy, its consideration as an "alternative solution" would not only have been unnecessary under [article 6\(4\) of the Habitats Directive](#), but also inappropriate. As Mr Maurici and Mr Michael Humphries Q.C. for HAL submitted, when the Secretary of State came to consider the designation of the ANPS, he was not obliged by the Habitats Directive and the Habitats Regulations to consider other schemes already rejected as possible "alternative solutions" because of their failure to meet an essential objective of the policy.

115. The operation of [article 3 of the SEA Directive](#), however, is different. In this case it enabled consultees to argue that the "hub objective" should not be decisive against the suggested alternative, and to have their representations to that effect taken into account under [article 6](#). But it did not bind the Secretary of State to a particular outcome. If the Gatwick second runway scheme had been ruled out as an alternative at the beginning of the SEA process, consultees would have been denied the opportunity of making representations in support of it, and having those representations considered.

116. It follows that we accept the argument presented by Mr Maurici and Mr Humphries on this issue. The Secretary of State's approach to the procedure for considering alternatives under each of the two Directives is not to be criticized. It was not inconsistent, irrational or otherwise unlawful. Since the respective provisions were, in substance and effect, different, a difference in approach was justified. Under the Habitats Directive, if a suggested alternative does not meet a central policy objective of the project or plan in issue, then it is no true alternative and will properly be excluded. It is not then, and cannot be, an "alternative solution". In short, the Habitats Directive has a determining effect on the inclusion or exclusion of alternatives. By contrast, the identification of "reasonable alternatives" under the SEA Directive is a requirement designed to inform the following consultation process. It was, therefore, permissible, in the preparation of the ANPS, to retain the Gatwick second runway scheme as a "reasonable alternative" in the Appraisal of Sustainability throughout the process. However good a plan or project the alternative in question might be in itself, and even if there may be a strong case on environmental grounds for preferring it to the plan or project actually proposed, the SEA Directive does not dictate that it be adopted and the proposed plan or project rejected.

117. Although the Appraisal of Sustainability included consideration of the Gatwick second runway scheme as an alternative, it also expressly acknowledged (in paragraphs 7.4.52 to 7.4.57) the exclusion of that scheme as an alternative under [article 6\(4\) of the Habitats Directive](#) because it failed to meet the "hub objective":

"7.4.52 On the basis of information that is available or can be reasonably obtained, and in accordance with the Precautionary Principle, it has not been possible to rule out adverse effects on the integrity of the above Natura 2000 sites, either alone or in combination with other plans and projects, with respect to each site's conservation objectives.

7.4.53 Where mitigation does not conclude an absence of adverse effects on integrity, both alone and in-combination, further assessment of the Airports NPS would be required under Stages 3 and 4 of the HRA process.

...

7.4.55 ... The assessment of alternative solutions has considered whether there are any feasible ways to deliver the overall objectives of the proposed plan, which will be less damaging to the integrity of the European sites affected. The two other schemes shortlisted by the Airports Commission have been considered against the objectives of the plan in relation to meeting the need to increase airport capacity in the South East and maintaining the UK's hub status. Whilst the Heathrow Extended Northern Runway scheme (LHR-ENR) would meet both of these objectives, the Gatwick Second Runway scheme (LGW-2R) would not. The assessment of the LHR-ENR scheme shows it would be no less damaging to European sites and as such is not an alternative solution.

...

7.4.57 Notwithstanding the conclusion above, the AA undertaken for the two other shortlisted schemes also led to no suitable alternative solutions to LHR-NWR being identified. Further, the basis on which it could be concluded that the LHR-NWR scheme needed to be carried out for IROPI has been examined and it is considered that the needs case underpinning the Airports NPS sufficiently fulfils those reasons. In any event, the Airports NPS provides that no consent will be granted unless there is full compliance with [Article 6\(3\)](#) or [Article 6\(4\) of the Habitats Directive](#) and that any necessary compensatory measures will be secured in accordance with [Regulation 66](#) ."

118. Those four paragraphs demonstrate the true nature of the process involved in the provisions of [article 6\(3\) and article 6\(4\) of the Habitats Directive](#) . A scheme considered by the competent authority to be an "alternative solution" at one stage may, in the light of further information or assessment, cease to be so regarded at a subsequent stage. No conflict with this process arose from the Secretary of State's decision to rule out the Gatwick second runway scheme as an "alternative solution" under [article 6 of the Habitats Directive](#) while also continuing to treat it as a "reasonable alternative" under [article 5 of the SEA Directive](#) .

119. But even if the Divisional Court's analysis, and ours, were incorrect, we would conclude nevertheless that there was no basis for granting relief on this issue. This is because, in our view, the Secretary of State was clearly entitled to reject the Gatwick second runway scheme as an "alternative solution" under the Habitats Directive for its failure to meet an essential objective of his policy. If, as the Hillingdon claimants assert, "alternative solutions" under [article 6 of the Habitats Directive](#) and "reasonable alternatives" under [article 5 of the SEA Directive](#) are synonymous, it would follow that the Gatwick second runway scheme should also have been rejected as a "reasonable alternative" under the SEA Directive. The criticism levelled at the Secretary of State for adopting an inconsistent approach would amount only to a complaint that he undertook a broader and more burdensome assessment than the SEA Directive required. The Gatwick second runway scheme would have been included unnecessarily, and unjustifiably, as an alternative in the strategic environmental assessment for the ANPS. So as Mr Maurici and Mr Humphries submitted, under [section 31\(2A\) of the Senior Courts Act 1981](#) ("the Senior Courts Act") (see paragraphs 269 to 280 below), the court would have been right to withhold a remedy for an error of no real consequence in the ANPS process.

Habitats Directive issue (5) – a reference under article 267 of the TFEU?

120. The Hillingdon claimants request a reference to the Court of Justice of the European Union under [Article 267 of the TFEU](#) . They say the relevant EU law is not "acte clair", in two respects. The first question should be whether the test for the identification of "alternative solutions" in the Habitats Directive differs from the test for the identification of "reasonable alternatives" in the SEA Directive, and, if so, how. The second should be whether it is compatible with EU law for the court to limit its role to considering whether the identification of "alternative solutions" under [article 6 of the Habitats Directive](#) is "irrational", in the sense of being in defiance of logic or lacking any coherent basis.

121. Mr Jaffey referred to these remarks of Advocate General Kokott in her opinion in *Commission v Portugal* (at paragraph 43):

"43. The absence of alternatives cannot be ascertained when only a few alternatives have been examined, but only after *all* the alternatives have been ruled out. The requirements applicable to the exclusion of alternatives increase the more suitable those alternatives are for achieving the aims of the project without giving rise – beyond reasonable doubt – to manifest and disproportionate adverse effects."

As Mr Jaffey pointed out, the court in its judgment did not adopt, or even comment upon, what the Advocate General had said about the "absence of alternatives". He submitted that a reference is therefore necessary if this important issue of EU law is to be definitively decided. At the time of the hearing before us, "exit day" was to be 31 October 2019, but it was subsequently postponed to 31 January 2020. Mr Jaffey provided us with an outline of the likely effect of each of three scenarios for the

United Kingdom's departure from the EU on references under [article 267](#) . Subsequently, Parliament has enacted the [European Union \(Withdrawal Agreement\) Act 2020](#) , which, among other things, amends the [European Union \(Withdrawal\) Act 2018](#) . There is now to be an "implementation period" after exit day, until 31 December 2020. Given the view to which we have come on the merits of the application for a reference, it is not necessary to discuss those scenarios here.

122. The Secretary of State resists the request for a reference on the grounds that an answer to the questions raised is not necessary to enable the court to give judgment, and that in the circumstances the inevitable delay and uncertainty would be unjustified.

123. The Divisional Court did not consider making a reference. In its view, as we have said, the status and consideration of "alternative solutions" under the Habitats Directive and of "reasonable alternatives" under the SEA Directive does not present any real difficulty. It evidently regarded both concepts as uncomplicated. It described the correct approach to "alternative solutions" under [article 6\(4\) of the Habitats Directive](#) as "tolerably clear" (paragraph 341 of the judgment).

124. We agree. In our view, there is no need for a reference in this case. The meaning of – and distinction between – "alternative solutions" under the Habitats Directive and "reasonable alternatives" under the SEA Directive is not unclear. And, in our opinion, the Advocate General's unsurprising observation in *Commission v Portugal* on the need for " all the alternatives" to have been ruled out before "the absence of alternatives" can be ascertained does not cast doubt on what an "alternative" may be in either of these two regimes. This must be established in the conventional way, by reading the legislative language in its own legislative context. Neither the Advocate General's remarks nor the absence of endorsement from the court can be said to create any uncertainty on the issues we have to consider. A reference here would serve no useful purpose.

The issues on the operation of the SEA Directive

125. The grounds of appeal concerning the operation of the SEA Directive relate to the adequacy and quality of the Appraisal of Sustainability against the criteria for an environmental report under the SEA Directive.

SEA Directive issue (1) – the court's approach when considering whether an environmental report complies with the SEA Directive

126. The Divisional Court concluded that the judgment of Sullivan J., as he then was, in *Blewett* demonstrates the correct standard of review for an environmental report prepared under the SEA Directive (paragraph 434 of the Divisional Court's judgment). On the legal adequacy of an environmental statement prepared under the EIA Directive and the EIA Regulations, Sullivan J. said this (at paragraph 41 of his judgment):

"41. ... The Regulations should be interpreted as a whole and in a common-sense way. The requirement that "an EIA application" (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. ... In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the "full information" about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting "environmental information" provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations..., but they are likely to be few and far between."

127. Whilst those observations concerned the EIA Regulations, the Divisional Court held that they applied by analogy to the SEA Directive and the SEA Regulations. It said (in paragraph 419 of its judgment):

"419. ... Sullivan J held that the starting point was that it was for the local planning authority to decide whether the information supplied by the applicant was sufficient to meet the definition of an environmental statement in the EIA Regulations, subject to review on normal ["Wednesbury"] principles (see [32]-[33]). Information capable of meeting the requirements in [schedule 4 to the EIA Regulations](#) should be provided (see [34]), but a failure to describe a likely significant effect on the environment does not result in the document submitted failing to qualify as an environmental statement or in the local planning authority lacking jurisdiction to determine the planning application. Instead, deficiencies in the environmental information provided may lead to the authority deciding to refuse permission, in the exercise of its judgment (see [40]). Thus, the statement in [41], that the deficiencies must be such that the document could not *reasonably* be described as an environmental statement in accordance with the EIA Regulations, was in line with the judge's earlier observations in [32]-[33]. It simply identified conventional ["Wednesbury"] grounds as the basis upon which the court may intervene."

and (in paragraph 420):

"420. In [[Shadwell Estates Ltd v Breckland District Council \[2013\] EWHC 12 \(Admin\)](#)], at paragraph 73], Beatson J referred to a number of authorities which had taken the same approach in EIA cases to judicial review of the adequacy of environmental statements or the environmental information available: [[R. v Rochdale Metropolitan Borough Council ex p. Milne \[2000\] EWHC 650 \(Admin\)](#)]; [2001] Env. L.R. 22, at paragraph 106], [[R. \(on the application of Bedford and Clare\) v Islington London Borough Council \[2002\] EWHC 2044 \(Admin\)](#)]; [2003] Env. L.R. 22, at paragraphs 199 and 203], and [[Bowen-West v Secretary of State for Communities and Local Government \[2012\] EWCA Civ 321](#)]; [2012] Env. L.R. 22, at paragraph 39]. In [Bedford and Clare](#) , Ouseley J held that the environmental statement for the development of a new stadium for Arsenal was not legally inadequate because it had failed to assess transportation impacts using the local authority's preferred modal split, the loss of an existing waste handling capacity to make way for the development, noise effects at night and on bank holidays, contaminated land issues, and the effects of dust during construction. He considered that the significance or otherwise of those matters had been a matter for the local authority to determine. The claimant's criticisms did not show that topics such as modal split or noise effects had not been assessed at all. Instead, they related to the level of detail into which the assessment had gone and hence its quality. That was pre-eminently a matter of planning judgment for the decision-maker and not the court."

128. In [Shadwell Estates](#) , Beatson J., as he then was, said (in paragraph 73 of his judgment):

"73. As to the role of the Court, review of the adequacy of environmental appraisals, assessments, and impact statements, is on conventional ["Wednesbury"] grounds: see [[ex p. Milne](#)] [2001] Env. L.R. 22 at [106] *per* Sullivan J (Environmental Assessment); [[Bedford and Clare](#)] at [199] and [203] *per* Ouseley J (Environmental Statement); [R \(Jones\) v Mansfield DC \[2003\] EWCA Civ. 1408](#) at [14] – [18] (Environmental Impact Assessment), and [[Bowen-West](#)], at [39] *per* Laws LJ (Environmental Impact Assessment and Environmental Statement)."

129. Though there are differences between the two legislative regimes, those differences did not, in the Divisional Court's view, justify a divergence in the intensity of review. The similarities were significant. Both Directives require an environmental assessment to be undertaken if significant environmental effects are likely (paragraph 417(i) of the Divisional Court's judgment). Both allow the responsible authority to exercise its judgment in deciding the scope of, and detail to be included in, an environmental statement under the EIA Directive or an environmental report under the SEA Directive (paragraph 417(ii)). And both allow for a defect in an environmental statement or an environmental report to be cured by the subsequent publication of, and consultation upon, supplementary material (paragraph 417(iv)). Claims challenging the adequacy of an environmental report under the SEA Directive have been successful only when it has been shown that the

authority responsible for preparing the plan or programme has failed to take into account something that [article 5](#) and [Annex I](#) expressly require to be dealt with (paragraph 422).

130. As the Divisional Court saw it, the "*Blewett* approach" does not represent a freestanding principle of law, but is simply a "practical application of conventional ["Wednesbury"] principles of judicial review" (paragraph 432). As the information to be included in an environmental report under [article 5\(1\)](#) and [Annex I](#) is a matter of judgment on what "may reasonably be required", that judgment is subject to review on normal public law principles, including "Wednesbury" unreasonableness (paragraph 433). The "*Blewett* approach" exemplified this principle and was applicable here. The Divisional Court concluded (in paragraph 434):

"434. Where an authority fails to give any consideration at all to a matter which it is explicitly required by the SEA Directive to address, such as whether there are reasonable alternatives to the proposed policy, the court may conclude that there has been non-compliance with the Directive. Otherwise, decisions on the inclusion or non-inclusion in the environmental report of information on a particular subject, or the nature or level of detail of that information, or the nature or extent of the analysis carried out, are matters of judgment for the plan-making authority. Where a legal challenge relates to issues of this kind, there is an analogy with judicial review of compliance with a decision-maker's obligation to take reasonable steps to obtain information relevant to his decision, or of his omission to take into account a consideration which is legally relevant but one which he is not required (e.g. by legislation) to take into account ([*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] A.C. 1014 , at p.1065B]; [*CREEDNZ Inc. v Governor-General* [1981] N.Z.L.R. 172 ; [*In re Findlay* [1985] A.C. 318 , at p.334]; [*R. (on the application of Hurst) v HM Coroner for Northern District London* [2007] UKHL 13 ; [2007] A.C. 189, at paragraph 57]). The established principle is that the decision-maker's judgment in such circumstances can only be challenged on the grounds of irrationality (see also [*R. (on the application of Khatun) v Newham London Borough Council* [2004] EWCA Civ 55 ; [2005] Q.B. 37, at paragraph 35]; [*R. (on the application of France) v Royal London Borough of Kensington and Chelsea* [2017] EWCA Civ 429 ; [2017] 1 W.L.R. 3206, at paragraph 103]; and [*Flintshire County Council v Jeyes* [2018] EWCA Civ 1089 ; [2018] E.L.R. 416, at paragraph 14]). The "*Blewett* approach" is simply an application of this public law principle."

In the Divisional Court's view, therefore, "... the question whether the decision-maker has acted irrationally, be they a local planning authority or a Minister, demands the intensity of review appropriate for those particular circumstances" (paragraph 435).

131. Arguing this part of the Hillingdon claimants' appeal, Mr Nigel Pleming Q.C. submitted that although under [article 5\(2\)](#) the question of what information is "reasonably ... required" involves an evaluative judgment by the decision-maker, it remains a legal requirement that the information is sufficient for the purposes of the SEA Directive. Whether this requirement has been met is a matter for the court. The effect of the Divisional Court's approach, said Mr Pleming, is that if the authority responsible for the preparation of the plan or programme is able to point to some information that can be said to address the requirements of the SEA Directive, the court will not examine the adequacy or quality of that information. Mr Pleming submitted that the appropriate intensity of review for testing compliance with the SEA Directive should match the requirements it contains and the court's obligation to give effect to the "precautionary principle". In short, the Divisional Court should have applied greater scrutiny than it did.

132. In the light of the decision of the Court of Justice of the European Union in Case C-567/10 *Inter-Environnement Bruxelles ASBL v Region de Bruxelles-Capitale* [2012] Env. L.R. 30 , Mr Pleming submitted that an environmental report cannot be regarded as compliant with the SEA Directive simply because it refers to the requirements of [article 5](#) . In that case the court held (at paragraph 37) that "... given the objective of [the SEA Directive], which consists in providing for a high level of protection of the environment, the provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly". Mr Pleming contended for an interpretation that is both broad and purposive. He referred to the basic objective identified in recital 14, and the mandatory requirements of [articles 5](#) and [12](#) . An appropriately purposive construction of [article 5](#) , he submitted, would indicate that the court should ask itself whether the environmental report is of sufficient quality to allow for effective comment by those affected. Any failure to

fulfil this essential purpose would amount to non-compliance with the SEA Directive. Pointing to the language of [article 12\(2\)](#), which requires Member States to "ensure that environmental reports are of a sufficient quality to meet the requirements of this Directive", Mr Fleming cited *Save Historic Newmarket Ltd. v Forest Heath District Council* [2011] EWHC 606 (Admin); [2011] J.P.L. 233, where Collins J. (at paragraph 12 of his judgment) said that "[quality] involves ensuring that a report is based on proper information and expertise and covers all the potential effects of the plan or programme in question".

133. As Mr Fleming reminded us, a principle stated by Lord Mance in his judgment in *Pham* (at paragraph 96) is that, "[whether] under EU, Convention or common law, context will determine the appropriate intensity of review". The relevant context here, submitted Mr Fleming, is set by the guiding objectives of the SEA Directive. Those objectives demand a structured review of the environmental report to ensure that compliance is achieved. This, he argued, accords with a modern approach to review commended by the Supreme Court in *Pham*, an approach more exacting than that adopted in *Blewett*. He referred to an observation by Advocate General Kokott in her opinion in *Holohan and others v An Bord Pleanála Case C-461/17* [2019] Env. L.R. 16 (at paragraph 90): that "[for] the purposes of a judicial challenge ... an applicant must show which potential significant effects of the project concerned the developer has not adequately assessed and discussed". He submitted that the Advocate General's deliberate use of the word "adequately" is consistent only with a more demanding approach than review at the standard of "Wednesbury" irrationality.

134. Mr Maurici and Mr Banner disputed the proposition that [article 5](#) and [Annex I](#) impose requirements justifying a more intensive review than traditional public law principle dictates. They do not lay down hard-edged legal requirements. They allow the Secretary of State a broad discretion to determine what "may reasonably be required ...". Mr Banner emphasized the fact that the SEA Directive does not prescribe a right of appeal against an authority's decision to adopt a plan or programme. Where a challenge is made, he submitted, the use of conventional principles in domestic public law, including "Wednesbury" irrationality, is an orthodox application of the Member State's discretion. He relied on the principle acknowledged by Advocate General L[ö]ger in his opinion in *Case C-120/97 Upjohn Ltd. v Licensing Authority Established Under Medicines Act 1968* [1999] 1 W.L.R. 927 (at paragraph 50): "[the] court has always taken the view that when an authority is required, in the exercise of its functions, to undertake complex assessments, a limited judicial review of the action which that authority alone is entitled to perform must be exercised, since otherwise that authority's freedom of action would be definitively paralysed ...". Consistently with that principle, as Mr Maurici reminded us, the Court of Appeal accepted in *Ashdown Forest Economic Development LLP v Wealden District Council* [2015] EWCA Civ 681; [2016] Env. L.R. 2 that, as Richards L.J. put it (in paragraph 42 of his judgment), "the identification of reasonable alternatives [under [article 5\(1\) of the SEA Directive](#)] is a matter of evaluative assessment for the local planning authority, subject to review by the court on normal public law principles, including ["Wednesbury"] unreasonableness".

135. In our view, the submissions made by Mr Maurici and Mr Banner on this issue are correct. The question here goes not to the principle of an appropriate role for the court in reviewing compliance with [article 5 of the SEA Directive](#). That principle is, of course, uncontroversial. We are concerned only with the depth and rigour of the court's enquiry. How intense must it be?

136. The answer, we think, must be apt to the provisions themselves. The court's role in ensuring that an authority – here the Secretary of State – has complied with the requirements of [article 5](#) and [Annex I](#) when preparing an environmental report, must reflect the breadth of the discretion given to it to decide what information "may reasonably be required" when taking into account the considerations referred to – first, "current knowledge and methods of assessment"; second, "the contents and level of detail in the plan or programme"; third, "its stage in the decision-making process"; and fourth "the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment". These requirements leave the authority with a wide range of autonomous judgment on the adequacy of the information provided. It is not for the court to fix this range of judgment more tightly than is necessary. The authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind. This, in our view, indicates a conventional "Wednesbury" standard of review – as adopted, for example, in *Blewett*. A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature

and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court.

137. None of the authorities relied on by Mr Pleming casts doubt on the well-established principle in domestic case law that it is not the court's task to adjudicate on the content of an environmental statement under the EIA Directive or an environmental report under the SEA Directive, unless there is some patent defect in the assessment, which has not been put right in the making of the decision (see, for example, *R. (on the application of Squire) v Shropshire Council* [2019] EWCA Civ 888 ; [2019] Env. L.R. 36, at paragraphs 65 to 69). This principle is not inconsistent with the relevant jurisprudence in the Court of Justice of the European Union. In her opinion in *Craeynest*, the Advocate General said (at paragraph 42) that "EU law does not require the Member States to establish a procedure for judicial review of national decisions applying rules of EU law which involve a more extensive review than that carried out by the Court in similar cases".

138. The Hillingdon claimants also contended that the Divisional Court understated the so-called "*Blewett* standard of review" – and presumably the related case law cited by Beatson J. in *Shadwell Estates*, which the Divisional Court mentioned in its reasoning here. Assuming for the moment that this was the correct standard, Mr Pleming urged us to note Sullivan J.'s reference to the need, under the EIA Directive, for the "resulting "environmental information" [to provide the authority] with as full a picture as possible". He submitted that there is a parallel requirement under the SEA Directive for the "information" included in an environmental report to provide the decision-maker with "as full a picture as possible". Thus the "*Blewett* approach" itself does not merely require the court to consider whether an environmental report is "so deficient that it could not reasonably be described as" being such a document. It requires nothing less than the "full picture" to be provided. And in this case, Mr Pleming submitted, the Secretary of State had failed to ensure that the environmental report for the ANPS measured up to this level of content and assessment.

139. We do not accept that argument. Providing "as full a picture as possible" is not an explicit requirement of [article 5 of the SEA Directive](#). Without distorting the words actually used in that provision, one can sensibly infer from them a requirement to provide as full a picture as "may reasonably be required", subject to the considerations referred to – which include "the extent to which certain matters are more appropriately assessed at different levels in [the decision-making] process". They do not compel an exhaustive provision of information or an exhaustive assessment. The expression used by Sullivan J. must be read together with what he said in the following sentence – that "[there] will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations ..., but they are likely to be few and far between". As he recognized in the same paragraph of his judgment, deficiencies in the environmental statement could, in principle, be overcome in the course of the process, so that, in the end, the "environmental information" in its totality – not merely the environmental statement itself – composed "as full a picture as possible".

140. Our conclusion on this issue is, we think, consistent with the reasoning of Lord Hoffmann in *R. (on the application of Edwards) v Environment Agency* [2008] UKHL 22 ; [2009] 1 All E.R. 57 (at paragraph 61):

"61. In *Commission of the European Communities v Federal Republic of Germany (Case C-431/92)* [1995] ECR I-2189 the German authorities gave consent to the construction of a power station without requiring the submission, *eo nomine*, of an environmental statement. (At that time the EIA directive had not yet been transposed into German law). Instead, the authorities required and published the information specified by the *Bundesimmissionsschutzgesetz* (Federal Pollution Protection Law). The Court of Justice found that as this information coincided with that required by the EIA directive and the public had been given the opportunity to make representations about it, the requirements of the directive had been satisfied. The same is in my opinion true of the application in this case. No doubt more information could have been provided, but the observations of Sullivan J in [*Blewett*] at para 41 ... show that this does not make the statement inadequate. I should add that this is not a case like *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 in which the alleged environmental statement had to be pieced together from a number of documents emanating from different sources. The application itself, emanating from the applicant as the EIA directive requires, was perfectly adequate."

There is nothing in those observations of Lord Hoffmann to suggest that the "Wednesbury" standard of review is not the appropriate standard. And they seem to us to support Mr Maurici's argument that, although more information could have been provided in the Appraisal of Sustainability for the ANPS, this does not mean it was legally inadequate as an environmental report.

141. We can see no force in the contention that the approach adopted in *Blewett* is, in principle, inapplicable to the SEA Directive. As we understand this argument, it is, essentially, that the procedure provided for in the EIA Directive is materially different from that under the SEA Directive. The former is directed to the assessment of the likely significant effects on the environment of an individual project, within a decision-making process in which the merits of the project, and its credentials as sustainable development, must also be judged against policy. The latter, by contrast, involves assessment of the environmental effects of the policy itself – here the ANPS – and there is no other means of formally testing the sustainability of that policy before it has crystallized.

142. Mr Pleming sought to derive support for this argument in an observation made by Lady Hale in *R. (on the application of HS2 Action Alliance Ltd and others) v Secretary of State for Transport* [2014] UKSC 3 ; [2014] 1 W.L.R. 324, the case in which challenges to the HS2 project came before the court. Lady Hale said (in paragraph 133 of her judgment) that the "evaluation of alternatives [under the SEA Directive] is of a different order from that required for projects covered by the EIA Directive". And Lord Carnwath observed (in paragraph 44 of his judgment) that the "difference between the two procedures [EIA and SEA Directive] is significant principally in relation to the treatment of alternatives". Mr Pleming submitted that "a different order" in the treatment of alternatives necessarily implies "a different order" in the assessment itself. Thus, he argued, the "*Blewett* approach" cannot simply be read across from one process to the other.

143. We reject this submission, as did the Divisional Court. In our view, there is no warrant for a more taxing approach to be taken in reviewing compliance with the SEA Directive than that indicated in *Blewett* . Indeed, this would be contrary to the clear indications in the case law that the approach to judging the adequacy of an environmental report under the SEA Directive should be essentially the same. The Divisional Court accepted that. And in our opinion it was clearly right to do so.

144. This view seems consistent with both domestic and European authority. In *Walton v Scottish Ministers* [2012] UKSC 44 ; [2013] P.T.S.R. 51, Lord Reed (in paragraphs 10 to 30 of his judgment), in the light of European case law including *Terre Wallonne ASBL v Region Wallonne (Joined Case C-105/9 and C-110/09)* [2010] ECR I-5611 , recognized that the objectives and the procedures for environmental assessment in the SEA Directive and those in the EIA Directive are intended to complement each other. We have referred already to the observation of Beatson J. in *Shadwell Estates* (at paragraph 73) that "review of the adequacy of environmental appraisals, assessments and impact statements, is on conventional *Wednesbury* grounds". In the same vein, in *Seaport Investments Ltd., Re Application for Judicial Review* [2007] N.I.Q.B. 62; [2008] Env. L.R. 23 , Weatherup J., as he then was, said (in paragraph 26 of his judgment) that "[the] responsible authority must be accorded a substantial discretionary area of judgment in relation to compliance with the required information for environmental reports". He added that the court "will not examine the fine detail of the contents but seek to establish whether there has been substantial compliance with the information required". And in *No Adastral New Town Ltd. v Suffolk Coastal District Council* [2015] EWCA Civ 88 ; [2015] Env. L.R. 28 this court too has, in effect, approved the application of the "*Blewett* approach" in a challenge to the adequacy of an environmental report prepared under regulation 12 of the SEA Regulations . At first instance ([2014] EWHC 223 (Admin); [2015] Env. L.R. 3), Patterson J. had found there were two flaws in the early stages of the process, but concluded that these had later been remedied. In the subsequent appeal Richards L.J. considered the judgment of Singh J., as he then was, in *Cogent Land LLP v Rochford District Council* [2012] EWHC 2542 (Admin) ; [2013] 1 P. & C.R. 2, where a similar issue arose. Singh J. had applied the approach of Sullivan J. in *Blewett* , and Richards L.J. concluded he was right to do so (see paragraphs 48 to 54 of Richards L.J.'s judgment). This, in our view, is a clear indication that the "*Blewett* approach" can and should be applied in claims alleging breaches of the legislative regime for SEA.

SEA Directive issue (2) – a failure to provide an outline of the relationship between the ANPS and other relevant plans or programmes?

145. The Divisional Court noted that the Secretary of State had "made it plain in the SEA process that [the Appraisal of Sustainability] drew upon and updated the extensive work which had had previously been carried out by, and on behalf of, [the Airports Commission], including numerous reports to [the Airports Commission] and its own final report". None of the claimants had suggested that the Secretary of State was not entitled to take that course, and in the view of the Divisional Court "[he] clearly was" (paragraph 393 of the judgment).

146. In [section 2.4](#), "Cumulative Effects", the scoping report produced in March 2016 confirmed that "[local] land-use plans and policies for proposed development in local authorities relating to options considered", and "[other] major projects" would be considered for their cumulative effects with expansion at Heathrow in the "next stage". However, it provided an "initial indication" of the "policies, plans and programmes" that should "potentially be included in the assessment of cumulative effects of other developments" (paragraph 2.4.2).

147. In [section 6.15](#) of the Appraisal of Sustainability itself, under the heading "Cumulative Effects", paragraphs 6.15.1 and 6.15.2 state:

6.15.1 As described in [Section 3](#), cumulative effects arise, for instance, where several developments each have insignificant effects but together have a significant effect, or where several individual effects of the plan (e.g. noise, dust and visual) have a combined effect. In the context of AoS, this is also taken to include PPPs as well as major projects. A review of PPPs and major infrastructure projects was undertaken and potential for cumulative effects identified. This is presented in Table 6.5 below. Potential cumulative effects have been included within the assessments described above and in the topic based assessments in Appendix A.

6.15.2 It should be noted that at the strategic level, this list is not exhaustive and cumulative effects arising from individual projects and plans should be revisited as part of a project level assessment." (our emphasis).

The potential cumulative effects referred to in Table 6.5, "Potential cumulative effects of schemes for the NPS", include effects arising from development planned by the councils among the Hillingdon claimants. The table lists local development plans, local mineral and waste plans, and the London Plan. It recognizes that local plans will provide for residential and commercial development and infrastructure, and that an increase in airport capacity would have cumulative effects with such development. It identifies the potential effects to be addressed, including the reduction in land available for other forms of development, the loss of "greenfield" land, noise and air quality impacts from aircraft, and the environmental effects of additional housing and commercial development and infrastructure. It recognizes the increasing difficulty of identifying suitable land for development faced by many local authorities, particularly around Heathrow, where the availability of land is "highly constrained".

148. Table 6.5 states, under the heading "Plans: Local Development Plans":

"The local authorities located in the vicinity of the expansion schemes have various plans for residential, commercial or infrastructure development. Cumulative effects with planned development can be anticipated, particularly where proposed new development is located in close proximity to the expansion schemes and the associated surface access improvements. A detailed consideration of the potential for cumulative effects arising would need to be undertaken as part of an EIA"

149. Bringing its various assessments together, the ANPS states, in paragraph 3.53:

"3.53. The Appraisal of Sustainability identifies that, in addition to changes due to local noise and air quality impacts, communities may be affected by airport expansion through loss of, and/or additional demand for housing, community facilities or services, including recreational facilities. In addition, there will be effects on parks, open spaces and the historic environment, which will affect the quality of life of local communities which benefit from access to these facilities and features. These effects will be of a higher magnitude for the two Heathrow expansion schemes and a lower magnitude for [the second runway at] Gatwick. Overall, each of the three schemes is expected to have negative impacts on local communities, with more severe impacts expected from the Heathrow schemes. Impacts of all three schemes will not be felt equally across social groups." (our emphasis).

150. The Divisional Court was unpersuaded by the Hillingdon claimants' argument that the Appraisal of Sustainability failed properly to address the relationship of the ANPS with other relevant plans (paragraphs 448 and 449 of the judgment). It accepted that, "although individual effects on local authority areas were not separately identified, the cumulative effects of such matters as additional demand for housing and community facilities, together with impacts on open spaces, were weighed in the balance; and they were assessed as counting more severely against the Heathrow schemes than [the Gatwick second runway scheme]" (paragraph 453). It held that the absence of a reference to "cumulative effects" in [paragraph \(a\) of Annex I to the SEA Directive](#) "does not mean that an environmental report cannot deal with the relationship with a group of other plans in terms of "cumulative effects" rather than as impacts on individual plans" (paragraph 454). It saw no reason to reject the evidence given on behalf of the Secretary of State that "it would not have been appropriate in the SEA to analyse the effects of the draft ANPS on the policies of individual local plans and that even if that approach had been followed, the Appraisal Framework would not have changed (Stevenson 1, paragraphs 3.44-3.53)" (paragraph 455).

151. It went on to say (in paragraphs 457 and 458):

"457. The court was referred in Ms Stevenson's evidence; and, in a table of key points submitted by Mr Maurici, to a large number of references where matters such as loss of housing, schools and community facilities, along with increased demand for such development and facilities, have been addressed at a strategic level. For example, the AoS states that the NWR Scheme is likely to generate a demand for 300 to 500 additional homes per local authority per year as well as support from additional schools, two additional health centres and two primary care centres per local authority to 2030. The AoS makes the judgment that overall impacts on housing demand will affect local authorities across London and the South East and that the demand will spread and be low in comparison to existing planned housing. Those effects were assessed as being negative in relation to the NWR Scheme (see paragraph 1.12.2 of Appendix A to the AoS).

458. So, it is plain that consequences of this kind (and not just impacts) *have* been assessed for the NWR Scheme, albeit on a cumulative basis. Essentially, the Hillingdon Claimant Boroughs' complaint is limited to those consequences not having been assessed individually for each local authority area and the analysis having been carried out only at a "high level". By the end of the argument, it had therefore become clear that this was a challenge solely to qualitative aspects of the assessment."

152. As the wording of [paragraph \(a\) of Annex I](#) makes plain, the information to be provided under the provisions in [article 5\(1\) and \(2\)](#) is specifically " [an outline](#) of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes" (our emphasis). With this mind, the Divisional Court concluded that "[the] relevant plans [had] not been ignored" in this case, and "the relationship with these plans [had] been addressed". The Appraisal of Sustainability had "addressed impacts cumulatively", and likewise "the consequences of those impacts". In discharging the obligation to provide an "outline", the Secretary of State was at liberty to decide how far the analysis should be taken. His decision not to analyse these matters at the level of each local authority was not open to challenge (paragraph 460). And his "series of judgments" did not betray a failure to comply with the requirement to provide an "outline of the relationship with other relevant plans". None of those judgments was irrational "as regards the content and level of detail of the coverage by [the Appraisal of Sustainability]" (paragraph 461). Even on the standard or review contended for by the Hillingdon claimants,

the Divisional Court "would have concluded that the "quality" of [the Appraisal of Sustainability] did not fail to comply with [paragraph (a) of Annex I to the SEA Directive]" (paragraph 462).

153. It concluded (in paragraph 463):

"463. ... [As] accepted by the Secretary of State ..., the issues raised by the Hillingdon Claimant Boroughs, namely the consequences of the NWR Scheme for the areas of individual local authorities, taking into account environmental and planning constraints and the scope for distributing additional development across a number of areas, will remain to be considered in the EIA accompanying any application for development consent and the examination of that application through the DCO process. It follows that the Mayor and local planning authorities will be able to make representations in that process about harmful impacts of this nature, both for individual areas and cumulatively, and the findings about these matters will be taken into account and weighed in the balance under section 104(7) of [the Planning Act] ."

154. Before us, as before the Divisional Court, the Hillingdon claimants' main submission was that the Appraisal of Sustainability did not describe, even in outline, the relationship between the north-west runway scheme at Heathrow and the local plans for administrative areas where the environment would be severely affected by that development, nor the relationship with local strategies for the environment, including the London Environment Strategy, adopted by Greater London Authority in May 2018, which includes the London Zero Carbon Target.

155. Mr Pleming complained that there was no reference in the scoping report to the London Environment Strategy or the London carbon budgets. He did not contest the Divisional Court's conclusion (in paragraph 459) that "... the London Environment Strategy, [the Ultra-Low Emissions Zone] and [the Air Quality Plan of 2017] ... were addressed during the SEA process in a number of places, e.g. in section 8.10 of Appendix A to [the Appraisal of Sustainability] and in the WSP October 2017 [Air Quality] Re-analysis to which [the Appraisal of Sustainability] cross-refers". But he submitted that no consideration was given in the Appraisal of Sustainability to the London carbon budgets. The Secretary of State concedes that. However, Mr Maurici said this was a deliberate decision in the light of expert advice that separate consideration of carbon budgets for London would have made no difference to the relevant assessment. The Secretary of State relied on the expert advice of Ms Ursula Stevenson, an "environmental consultant" and, as she describes her role (in paragraph 1.5 of her first witness statement dated 28 November 2018) WSP's "internal 'Technical Excellence' lead for Environmental Assessment and Management services", that the carbon budgets would not change the outcome of the assessment and therefore need not be included in it.

156. We see nothing unlawful in the Secretary of State taking this course. This was a matter of judgment for him. The judgment itself was not irrational or otherwise unlawful. It was consistent with the advice the Secretary of State received, which Ms Stevenson explains (in paragraphs 3.125 to 3.134 of her first witness statement).

157. It is common ground that development provided for in local plans was taken into account in the Appraisal of Sustainability, but that this was done cumulatively – not individually, plan by plan. The issue therefore, as it was before the Divisional Court, is whether cumulative consideration of local plan policies and allocations was sufficient to satisfy the requirement under paragraph (a) of Annex I to the SEA Directive to provide "an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes". The Hillingdon claimants say the obligation to provide an outline of the "relationship" of the plan or programme "with other relevant plans" can only be satisfied if an outline of its relationship with each relevant plan is provided individually; it is not enough to provide a description of its relationship with all the relevant plans and an assessment of its cumulative effects in combination with them, taken as a whole. For example, the local plan for the London Borough of Hillingdon – "A vision for 2026, Local Plan: Part 1 , Strategic Policies" adopted in November 2012 – provides for the development of new housing in the borough in the course of the plan period. But the expansion of Heathrow, if it proceeds, will itself generate pressure for additional housing, not planned in the

local plan. The nature of the "relationship" between the local plan and the ANPS, therefore, is that the amount of development in the local area is likely to be more than has been identified and assessed in the SEA process. This should have been done, in accordance with [paragraph \(a\) of Annex I](#), but it was not.

158. The simple answer to this argument, as Mr Maurici submitted, is that the total amount of development likely to come forward through local plans, including the Hillingdon Local Plan Part 1, together with the expansion of Heathrow by the development of a third runway, was sufficiently embraced in the scoping report and sufficiently assessed in the Appraisal of Sustainability to satisfy the requirements of the SEA Directive and the SEA Regulations. We share the conclusions of the Divisional Court (in paragraphs 457, 458 and 460 of its judgment). It is, we think, unrealistic to suggest that the assessment was invalidated by taking the effects of development in several local plans together, rather than separately. To do this, at least in the circumstances of this case, was not at odds with the requirement in [paragraph \(a\) of Annex I](#). On a straightforward reading of that provision, the requirement to provide an "outline" of the "relationship" between the plan or programme under consideration and "other relevant plans and programmes", in the plural, does not preclude such "relevant plans and programmes" being dealt with, as the words suggest, on their aggregate effects.

159. The Hillingdon claimants dispute the contention that it was unnecessary for local plans to be considered individually under [paragraph \(a\) of Annex I](#) because the ANPS addresses airport capacity at the national level. Mr Fleming submitted that the complexity of considering the relationship of the ANPS to each of a number of local plans does not excuse a failure to comply with [paragraph \(a\) of Annex I](#). The ANPS provides policy support for a specific scheme at a specific location, and the effects of that scheme in combination with individual local plans should therefore have been assessed in the SEA.

160. We do not agree. Like the Divisional Court, we consider the approach taken to assessing cumulative effects in the Appraisal of Sustainability to have been lawful. It does not offend either the letter or the spirit of the relevant provisions of the SEA Directive. Given the national policy context in which the ANPS takes its place, it was in our view appropriate to adopt a broad approach to cumulative effects. That was realistic, and, we think, perfectly lawful. It was not a culpable omission to leave out a consideration of cumulative effects with individual local plans in favour of a more comprehensive assessment, following the expert guidance the Secretary of State received. There was no breach of [article 5\(2\)](#) or [paragraph \(a\) of Annex I](#).

161. Finally, the Hillingdon claimants take issue with the Divisional Court's conclusion (in paragraph 499 of its judgment) that the interaction of the ANPS with local plans can be adequately addressed in the EIA at the development consent stage. The purpose of the legislative regime for SEA, they say, is to ensure that the strategic implications of development are known and considered at the plan-making stage, so that the Secretary of State, local authorities, those affected by the development, and the wider public are able to understand its effects. The counter argument from the Secretary of State is that the Divisional Court was right to recognize the inevitably more detailed assessment under the regime for EIA at the development consent order stage. As it accepted (in paragraph 463), the Mayor of London and local planning authorities will at that stage be able to make specific representations about the likely effects on the environment, including cumulative impacts, and those effects will have to be considered before a development consent order is granted.

162. Again, we agree with the view of the Divisional Court. The SEA regime and the regime for EIA will operate, at different stages of the process under the Planning Act, to ensure that the cumulative impacts of the development are fully assessed. Both at the policy-making stage in the preparation of the ANPS and in the subsequent process by which an application for a development consent order under [section 103 of the Planning Act](#) is considered, the cumulative effects of development at Heathrow and any other development with which it interacts, including development planned in local plans, will be assessed. The outcome of that process is not pre-determined by the strategic-level assessment of cumulative effects in the Appraisal of Sustainability. The strategic-level assessment informs an understanding of the strategic implications of the development envisaged in the ANPS. The degree of refinement required in that assessment, under the SEA Directive, is set by the terms of [article 5](#) and [Annex I](#). Those provisions are not unduly onerous. They do not stipulate a particular approach to cumulative assessment. They leave with the authority responsible for promulgating the plan or programme a reasonably

generous discretion in deciding how it should go about that work. In our view, that discretion was not exceeded by the Secretary of State in the preparation of the Appraisal of Sustainability.

SEA Directive issue (3) – a failure to identify the environmental characteristics of areas likely to be significantly affected by the ANPS?

163. The Appraisal of Sustainability included, in Appendix A-4 Noise, a noise impact assessment for the three shortlisted schemes. Because the patterns of air traffic movement likely to be created by the use of a new runway were at that stage uncertain – as indeed they are now – it was not possible to base the assessment of likely noise impacts on definite flight paths. The authors of the assessment therefore used indicative flight paths. They adopted a 54 dB LAeq 16-hour threshold as the level of noise likely to have a significant effect on people (paragraphs 4.5.6 to 4.5.9 and 4.8.2).

164. In its response to representations made in consultation on the ANPS, published in June 2018, the Government said this on the future design of changes to airspace (in paragraph 6.48):

"6.48. Airspace design falls outside the scope of the Airports NPS. As stated in the Airports NPS, precise flight path designs can only be defined at a later stage after detailed airspace design work has taken place. Once completed, the airspace proposal will be subject to consultation with local communities and relevant stakeholders in line with the requirements of the airspace change process which is owned by the Civil Aviation Authority (CAA). This is a very thorough and detailed process that covers all aspects of the proposal including safety and environmental impacts."

It was made clear (in paragraph 7.13) that the use of the indicative flight paths for the three schemes was considered to be appropriate for the taking of "strategic" decisions at the ANPS stage:

"7.13. The AoS noise assessment is based on one set of indicative flightpaths. This is consistent with the approach adopted by the [Airports] Commission to compare the three expansion schemes in its final report. The purpose of this assessment is to draw out key strategic considerations relevant to noise. In light of this, the Government considers that the AoS is satisfactory, given that airspace design is currently highly uncertain, and the AoS follows the same approach as that used by the [Airports] Commission to compare the three expansion schemes in its final report."

The time likely to be required for making changes in airspace design was emphasized (in paragraph 7.15):

"7.15. Proposals to change the UK's airspace design are governed by the separate [CAA's] airspace change process, which was made more rigorous from 2 January 2018. The design of new flight paths is highly technical and can take several years. It is a requirement of the CAA's airspace change process that there must be adequate consultation. Airspace change sponsors would need to take account of the Government's new policy on appraising options for airspace design, such as considering the use of multiple routes. It is therefore through this regulatory process that communities will see and have the opportunity to comment on detailed proposals for new flight paths which may affect them."

Whilst the Government acknowledged that the Gatwick second runway scheme clearly performed better than the Heathrow schemes in the number of people likely to be significantly affected by aviation noise, this had been only one factor in the Secretary of State's decision. When all "benefits and dis-benefits" were considered together, the Secretary of State considered that the north-west runway scheme at Heathrow would deliver the greatest "net benefits" to the United Kingdom (paragraph 7.20).

165. The Government emphasized the "strategic" nature of the noise assessment for the ANPS (in paragraphs 7.54 to 7.56):

"7.54. The noise analysis that is presented in the AoS represents a strategic assessment of unmitigated noise impacts, based on indicative flightpaths. Its purpose is to draw out key strategic considerations relevant to noise. To this end, relevant noise metrics are presented in the AoS. The high level noise assessment presented in the AoS includes an

assessment of unmitigated noise impacts at 54 dB LAeq, 16hr, which is consistent with the findings of the [Survey of Noise Attitudes] report. ...

7.55. The Lowest Observed Adverse Effects Level ("LOAEL") recommended in the Government's response to the consultation on UK Airspace Policy (51 dB LAeq 16hr) is specifically for comparing different options for airspace design. The AoS Noise Appendix explains why it would not be appropriate at this stage of the process to assess absolute noise levels and associated local population exposure below 54 dB LAeq 16hr. For practical reasons it becomes more difficult to estimate noise exposure accurately, and therefore population numbers affected, below this noise level. This is because it is difficult to measure aircraft noise levels at greater distances from an airport where aircraft noise levels are closer to those of other noise sources. Also, due to variability in aircraft position in the air at these greater distances from the airport, the absolute noise levels have a lower level of certainty.

7.56. Any airspace change required for the Heathrow Northwest Runway scheme would be subject to the CAA's airspace change process. This would require a comparative assessment of options for airspace design with noise impacts assessed from the LOAELs set out in the new national policy on airspace – 51 dB LAeq, 16hr for day time noise and 45 dB Lnight for night time noise. This would be done using WebTAG, which is the Government's standard appraisal methodology for transport schemes, and would ensure that the total adverse effects of each option on health and quality of life can be assessed."

166. On the use of indicative flight paths, the ANPS says this (in paragraph 5.50):

"5.50. The Airports Commission's assessment was based on 'indicative' flight path designs, which the Government considers to be a reasonable approach at this stage in the process. Precise flight path designs can only be defined at a later stage after detailed airspace design work has taken place. This work will need to consider the various options available to ensure a safe and efficient airspace which also mitigates the level of noise disturbance. Once the design work has been completed, the airspace proposal will be subject to extensive consultation as part of the separate airspace decision making process established by the Civil Aviation Authority."

167. The ANPS indicates (in paragraph 5.52) the likely requirements for the noise impact assessment in the EIA that will have to be undertaken if an application for a development consent order is made. The environmental statement prepared at that stage would include an "assessment of the likely significant effect of predicted changes in the noise environment on any noise sensitive premises (including schools and hospitals) and noise sensitive areas (including National Parks and Areas of Outstanding Natural Beauty)". A number of necessary noise mitigation measures are specified. These include the alternation of runway use to ensure local communities have predictable periods of respite from noise (paragraph 5.61) and a ban on scheduled night flights for six and a half hours between 11 p.m. and 7 a.m. (paragraph 5.62). Describing the approach that will be taken to any decision on an application for development consent, the ANPS says (in paragraph 5.68):

"5.68. Development consent should not be granted unless the Secretary of State is satisfied that the proposals will meet the following aims for the effective management and control of noise, within the context of Government policy on sustainable development:

- Avoid significant adverse impacts on health and quality of life from noise;
- Mitigate and minimise adverse impacts on health and quality of life from noise; and
- Where possible, contribute to improvements to health and quality of life."

168. As the Divisional Court recognized, even using indicative flight paths and the 54 dB LAeq 16-hour noise threshold – the two points on which the Hillingdon claimants say the Secretary of State's approach was legally flawed – the Appraisal

of Sustainability had still found that the potential negative effects of each of the two Heathrow schemes on quality of life, health and amenity would be greater than those of the Gatwick second runway scheme. This was, as the Divisional Court put it, "because Gatwick is in a more rural location and fewer people are affected by the impact there" (paragraph 467 of the judgment). It is quite clear, however, that the more harmful noise impacts arising from expansion at Heathrow were considered by the Secretary of State in making the decision to select the north-west runway scheme at Heathrow as the preferred development in the ANPS. Equally clear is that even if different flight paths had been assumed or a different noise threshold selected, the conclusion that the Heathrow schemes would result in worse and more widespread noise effects than a second runway at Gatwick would have been the same. As the Divisional Court said, "[this] self-evident point has clearly been taken into account in the decision to designate the ANPS" (ibid.).

169. The Divisional Court reminded itself, and the parties, of the limits to the court's jurisdiction in a claim for judicial review where criticism is made of the decision-maker's approach on a technical or scientific question. As it rightly said, "although many people may be concerned about the noise effects of airport expansion, it is not the function of this court to become involved in the technical merits of the two criticisms made by [the councils among the Hillingdon claimants] in their claim", but only to "[decide] whether they can demonstrate that the Secretary of State has made an error of law ..." (paragraph 468).

170. In its conclusion on the Secretary of State's use of indicative flight paths, the Divisional Court saw a distinction between an approach based on areas "over which flight paths *may* be located" and one based on areas "within which it is *likely* that landings and take offs causing noise pollution will occur". It concluded that the former does not accord with the requirement in [paragraph \(c\) of Annex I to the SEA Directive](#) to identify areas "likely to be significantly affected". The Hillingdon claimants' argument based on that approach was, in its view, "misconceived" (paragraph 475). It also held that "there can be no legal objection to the use of indicative flight paths as a matter of principle" (paragraph 476).

171. As for the argument that flight paths ought to have been determined on a "worst case" basis to "respect the precautionary principle in the SEA Directive", the Divisional Court observed that even if this were correct "there would still remain the same difficult judgment for experts to make as to how to predict where such flight paths are likely to be located". Then there would be the question of "what factors would produce a "worst case" analysis, without arriving at something which is unrealistic and not therefore a sound basis for decision-making". Though this was, as the Divisional Court said, "[to] some extent ... a matter of degree", it necessarily involved "an evaluative judgment using predictive techniques and [was] dependent upon expert technical opinion". Undoubtedly, it engaged the "enhanced margin of appreciation" described in *Mott* (paragraph 477). Having considered the evidence and submissions before it on this issue, the Divisional Court concluded (in paragraph 487):

"487. Ultimately, it was a matter of judgment for the Secretary of State, assisted by expert advice, to determine what information was reasonably required in relation to flight paths, so as to identify areas likely to be significantly affected. On the material before the court, it is impossible to say that the judgment he reached was irrational or that there has been a failure to comply with the SEA Directive in this respect."

172. The Divisional Court grasped the differences in the expert evidence on the appropriate threshold for the noise assessment. Ms Low and Mr Michael Lotinga, a chartered engineer and acoustician employed by WSP, had explained why, in taking strategic level decisions for the ANPS, it had been judged appropriate to adopt the 54 dB LAeq 16-hour level rather than 51 dB LAeq 16-hour. Mr Colin Stanbury, the Aviation Project Officer for the councils of the London boroughs of Richmond upon Thames and Wandsworth, had explained why he disagreed and believed the lower figure should have been used. But, as with the issue of flight paths, the Divisional Court stood back from adjudicating on technical questions of this kind. It said (in paragraph 490):

"490. We were invited to review the extensive evidence on this subject filed by both sides. Mr Stanbury says (in Stanbury 1, paragraph 28) that in its Air Navigation Guidance 2017 the Government has set the LOAEL at 51dB LAeq16hour based upon the CAA's publication 1506: Survey of noise attitudes 2014: Aircraft. We note in passing that, in his footnotes 24 and 29, Mr Stanbury explains that, according to this survey, at the 51dB level 7% of the population would be "highly

annoyed" compared with 9% at the 54dB level. The source for those results is table 31 of CAA publication 1506. To put that into context, the AoS treats 54dB LAeq16hour as signifying "a level at which significant community annoyance starts to occur" (Table 4.2 of Appendix A to the AoS)."

It concluded (in paragraph 491):

"491. ... [*Mott*] again underscores that point. There was nothing that could be described as irrational in the Secretary of State's approach to the selection of noise parameters. This issue did not involve any failure to comply with the SEA Directive."

173. In what was largely a reprise of the argument that did not succeed before the Divisional Court, Mr Fleming's main submission here was that the noise impact assessment carried out in the Appraisal of Sustainability failed adequately to define the extent of the areas likely to be significantly affected by noise, as [paragraph \(c\) of Annex I](#) requires. The Secretary of State went wrong in three ways: first, in deciding to use a single set of indicative flight paths that understated the geographical extent of the areas likely to be subject to overflying; secondly, in adopting the 54 dB LAeq 16-hour threshold for identifying noise whose effect on people would be significant – in spite of the Government's own policy setting the threshold at 51 dB LAeq 16-hour; and thirdly, in deciding to identify the numbers of people and buildings, rather than the areas, likely to be significantly affected.

174. Mr Fleming submitted that if [paragraph \(c\) of Annex 1](#) is read, as it should be, in the light of the precautionary principle and the aim of the SEA Directive to ensure that communities likely to be affected by a plan or programme are consulted and given an early and effective opportunity to comment, it is necessary to avoid underestimating the area over which flights may occur. Using only one set of indicative flight paths, as the Secretary of State did here, was not enough. It was probable that many people significantly affected by noise would not be under those flight paths. It was true that in the Divisional Court the Hillingdon claimants had not argued for the use of "actual flight paths" in the Appraisal of Sustainability (see paragraph 473 of the judgment). But in the absence of precise flight paths, the Secretary of State ought to have used areas instead, not indicative flight paths. Mr Fleming relied on the approach indicated in Advocate General Kokott's opinion in Case C-290/15 *D'Oultremont and others v Region Wallonne* [2016] 7 WLUK 325 (AGO) (at paragraph 37 to 45).

175. We cannot accept those submissions. In our opinion, there was nothing amiss in the Secretary of State's use of indicative flight paths. It was neither irrational nor in any other way unlawful. As Mr Maurici argued, it was understandable, for at least three reasons. First, when the ANPS was being prepared, the siting, dimensions and design of the new runway were not yet final. Secondly, the assessment of noise impacts in the Appraisal of Sustainability had to be undertaken before the separate statutory process for airspace change was conducted, and its outcome known. And thirdly, the approach adopted by the Secretary of State corresponded to that of the Airports Commission when comparing the three airport expansion schemes in its Final Report in July 2015.

176. Mr Fleming also submitted that the Divisional Court was wrong to think it was purely a matter of judgment for the Secretary of State, aided by expert advice, to decide what information was reasonably required when establishing the areas likely to be significantly affected by noise. The Divisional Court should have looked beyond the mere fact that the noise assessment was informed by expert technical judgment. This, of itself, was not enough to comply with the requirements of the SEA Directive. To rely here on an "enhanced margin of appreciation", as suggested in *Mott*, was wrong. It was possible for an environmental report to be technically adequate but still not compliant. *Mott* concerned a challenge to the rationality of a decision taken by the Environment Agency to impose an annual "catch limit" on a commercial fisherman's licence to operate a salmon fishery on the strength of technical evidence and judgment. In this case, Mr Fleming submitted, the question is of a different kind, and more basic. It is whether the Secretary of State complied with the mandatory requirement under

paragraph (c) of Annex I to the SEA Directive to identify areas likely to be significantly affected by noise caused by aircraft using the north-west runway.

177. We find that argument unconvincing. The Divisional Court was, in our view, right to conclude that the Secretary of State's decision, on expert advice, to use indicative flight paths in the noise assessment lay squarely within his decision-making discretion. This was a classic exercise of planning judgment, on the kind of issue for which the court will allow the decision-maker a substantial "margin of appreciation" – as explained in *Mott*. The Secretary of State exercised his judgment rationally. And there was no default in his meeting the requirement in paragraph (c) of Annex I to identify areas "likely to be significantly affected" or that in article 5(2) to include in an environmental report "the information that may reasonably be required ...". Both of those requirements leave the authority responsible for preparing a plan or programme a wide margin of judgment.

178. A similar conclusion applies to Mr Fleming's other submission on this issue, which attacks the Secretary of State's decision to adopt the 54 dB LAeq 16-hour threshold as the LOAEL. Mr Fleming accepted that the SEA Directive and the SEA Regulations do not provide generally for prescriptive limits or thresholds to be used in the assessments performed in an environmental report, nor any specific threshold for noise impact assessment. Yet he submitted that in this case the adoption by the Secretary of State of the 54 dB LAeq 16-hour threshold was unlawful, for two reasons. First, he submitted, it was irrational and contrary to the precautionary principle to adopt a higher threshold than was set in the Government's own policy, namely the 51 dB LAeq 16-hour level in its Air Navigation Guidance 2017. Secondly, the adoption of that threshold had the effect of masking the true potential noise impacts of aircraft using the north-west runway at Heathrow.

179. In responding to those submissions Mr Maurici contended, as he did before the Divisional Court, that they amount to no more than a disagreement with expert opinion – an impermissible basis for impugning a decision-maker's exercise of judgment in a claim for judicial review (see the judgment of Beatson L.J. in *Mott*, at paragraph 70). Mr Maurici pointed to Mr Lotinga's evidence, which explained why the adoption of the 54 dB LAeq 16-hour contour was appropriate. In his first witness statement, dated 28 November 2018, Mr Lotinga concluded (in paragraph 3.3.39):

"3.3.39. ... [In] aviation noise policy terms, a suitable threshold for identifying potentially significant adverse effects of aviation noise is considered to be 54 dB LAeq,16hr ... In the AoS, the assessment approach taken was that any predicted increases in exposure to the noise impact categories of 54 dB LAeq,16hr and above, due to an expansion scheme option, constituted a 'significant negative effect' – this is consistent with current national policy."

As Mr Maurici also told us, the CAA, as regulator, specifically advised against the use of a threshold below 54 dB LAeq 16-hour.

180. The Secretary of State's position here is, it seems to us, correct. The Hillingdon claimants' argument is, in truth, a criticism of the expert evidence upon which the Secretary of State based his decision to select 54 dB LAeq 16-hour as the appropriate threshold. The court's reviewing role does not stretch to determining disputed issues of technical, expert evidence. As the Divisional Court concluded (in paragraph 491 of its judgment), it was inappropriate to expect, in a claim for judicial review, a resolution of contentious matters of expert opinion on the question of whether the threshold ought not to have been set at 54dB, but at 51dB or some other level. This again was, obviously, a matter of judgment for the Secretary of State, having in mind the expert advice he was given. The judgment he reached might have been different. But it is not vulnerable to public law challenge.

181. Mr Fleming submitted that it was not enough for the Secretary of State to identify in the Appraisal of Sustainability only the numbers of people and buildings likely to receive a significant noise impact. This, he submitted, was inconsistent with the requirement under paragraph (c) of Annex I to identify the "areas" likely to be significantly affected. "Areas" would include,

for example, schools, open spaces, hospitals and care homes. The impacts on them ought to have been considered in the noise assessment – but were not. Failure to do this went against the purpose of the SEA Directive to ensure that communities likely to be affected by a plan or programme are properly consulted and given an early and effective opportunity to comment. If, as here, only numbers of people and buildings are included in a noise impact assessment, communities are denied that opportunity.

182. This argument, we think, rests on a misunderstanding of [paragraph \(c\) of Annex I](#). The concept of "areas" in that provision does not, in our view, exclude the approach to noise impact assessment adopted in the Appraisal of Sustainability. It does not preclude an assessment that concentrates on the effects of aviation noise on the population of an area within particular noise contours, demonstrating the number of people and buildings likely to experience noise at given levels. This does not mean that an approach that goes further – for example, by bringing into the assessment the effects on particular land uses within the "areas" affected by noise – would not also comply. But it does mean that the hurdle of demonstrating irrationality or illegality in the noise impact assessment undertaken for the ANPS in the Appraisal of Sustainability is not overcome by the submission that the assessment should have been on a different basis, or enlarged beyond what was actually done.

183. A further point, fairly made by Mr Maurici, is that, at the development consent order stage, there will be a full process of consultation and assessment in the EIA for the third runway project – if and when that project is pursued; and that the airspace change process also lies ahead. In both of those future processes the Hillingdon claimants will be able to make submissions on noise and other environmental impacts, with the advantage, then, of much greater clarity not only on the third runway development itself but also on the flight paths to and from the expanded airport.

The climate change issues

184. The issues concerning the United Kingdom's commitments on climate change can conveniently be simplified, and dealt with, under four principal headings: "Climate change issues (3), (4), (5) and (6) – did the Government's commitment to the Paris Agreement constitute government policy on climate change, which the Secretary of State was required to take into account?"; "Climate change issue (1) – whether the designation of the ANPS was unlawful because the Secretary of State acted in breach of [section 10\(3\) of the Planning Act](#)"; "SEA Directive issue (4) – whether the Secretary of State breached the SEA Directive by failing to consider the Paris Agreement"; and "Climate change issue (2) – did the Secretary of State err in his consideration of non-CO2 impacts and the effect of emissions beyond 2050?" (see paragraphs 12 and 13 above).

185. As we have said, the [Climate Change Act](#) set a "carbon target" for the United Kingdom to reduce its greenhouse gas emissions by 80% from their level in 1990 by 2050 ([section 1](#)). This was consistent with the global temperature limit in place in 2008, which was 2°C (see paragraph 17 above). In contrast, the Paris Agreement enshrines a firm commitment to restricting the increase in the global average temperature to "well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels" ([article 2\(1\)\(a\)](#)) (see paragraph 23 above).

186. It is common ground that the Secretary of State did not take the Paris Agreement into account in the course of making his decision to designate the ANPS.

The judgment of the Divisional Court

187. We begin by outlining the reasoning of the Divisional Court, which considered the topic of climate change in paragraphs 558 to 660 of its judgment.

188. In paragraphs 558 to 592, the Divisional Court set out a helpful summary in chronological form of developments in this area, both at the international level and at the domestic level. It set out the history of international agreements since 1992, culminating in the Paris Agreement in 2015. It also referred to the domestic legislation, in particular the [Climate Change Act](#) .

189. In paragraphs 593 to 601, the Divisional Court summarized what was said in the ANPS about the subject of climate change. In particular, it quoted in full paragraphs 3.61 to 3.69 and 5.82 of the ANPS. It is unnecessary to set out paragraphs 3.61 to 3.69 of the ANPS again here. But we should set out paragraph 5.82, which states:

"5.82 Any increase in carbon emissions alone is not a reason to refuse development consent, unless the increase in carbon emissions resulting from the project is so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets, including carbon budgets."

190. In paragraphs 602 to 660, the Divisional Court considered in turn Plan B Earth's grounds of challenge and Friends of the Earth's grounds of challenge in the applications for permission to bring claims for judicial review then before it. The court concluded that none of the arguments were viable and refused permission to bring claims for judicial review. Some – but not all – of the arguments made to the Divisional Court have been resurrected before this court.

191. It is to be noted that Plan B Earth's grounds centred upon the meaning and effect of [section 5\(8\) of the Planning Act](#) , with the support of the Hillingdon claimants, whereas the arguments for Friends of the Earth focused on [section 10](#) . Indeed, counsel for Friends of the Earth (Mr David Wolfe Q.C.) expressly distanced himself from the submissions of Plan B Earth based on [section 5\(8\)](#) , accepting the relevant policy was no more and no less than that set out in the [Climate Change Act](#) (see paragraphs 605 and 636 of the judgment).

192. In paragraphs 606 and 607, the Divisional Court said:

"606. It is well-established that English law is a dualist legal system under which international law or an international treaty has legal force at the domestic level only after it has been implemented by a national statute (see, e.g., [*J. H. Rayner (Mincing Lane) Ltd. v Department of Trade and Industry* [1990] 2 A.C. 418 , at p.500] per Lord Oliver of Aylmerton, and [*R. v Secretary of State for the Home Department, ex p. Brind* 1 A.C. 696 , at p.747F-H] per Lord Bridge of Harwich). Therefore, none of them having been incorporated, any obligation imposed on the UK Government by the Paris Agreement has no effect in domestic law.

607. But, in any event, as we have described, whilst expressing international objectives – notably, to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels – the Paris Agreement imposes no obligation upon any individual state to limit global temperatures or to implement the objective in any particular way. It expresses global objectives, and aspirations in respect of national contributions to meet those objectives; and it obliges each state party to "prepare, communicate and maintain successive nationally determined contributions that it intends to achieve". Parties are required to pursue domestic mitigation measures, with the aim of achieving the objectives; and ensure they meet the requirement for successive nationally determined contributions to be progressive ([article 4](#)). But it clearly recognises that the action to be taken in terms of contributions to the global carbon reduction will be nationally determined "in the light of different national circumstances" ([article 2\(2\)](#)); and that, in that determination of national contributions, economic and social (as well as purely environmental) factors and the consideration of how other states are proposing to contribute will or may play a proper part. It is clearly recognised on the face of the Paris Agreement that the assessment of the appropriate contribution will be complex and a matter of high level policy for the national government."

It went on to say (in paragraph 608):

"608. Parliament has determined the contribution of the UK towards global goals in the [CCA 2008](#) . Of course, that is not framed in terms of global temperature reduction – a national contribution could not be so framed – but it was clearly based on a global temperature limit in 2050 of 2°C above pre-industrial levels. No one suggests otherwise. However, the target set in [section 1](#) of the Act – that the net UK carbon account for 2050 is at least 80% lower than the 1990 baseline – was set, by Parliament, having taken into account, not just environmental, but economic, social and other material factors. It is an entrenched policy, in the sense that that target cannot be changed other than in accordance with the Act, i.e. only if there have been significant developments in scientific knowledge about climate or in European or international law or policy, and then only after obtaining and taking into account advice from the CCC and being subject to the Parliamentary affirmative resolution procedure."

and in paragraph 610:

"610. The most recent formally expressed view of the CCC is that the current target in [section 1 of the CCA 2008](#) is potentially compatible with the ambition of the Paris Agreement to limit temperature rise to 1.5°C and "well below" 2°C, i.e. that ambition could be attained even if the current target is maintained, and therefore one possible rational response to the Paris Agreement is to retain the current [CCA 2008](#) targets, at least for the time being."

193. In paragraph 612, the court agreed with the submission of Mr Maurici in this regard, supported by Mr Wolfe for Friends of the Earth, "that Government policy in respect of climate change targets was and is essentially that set out in the [CCA 2008](#) ".

194. In paragraph 615, the Divisional Court said:

"615. The UK policy in this regard, now and at all relevant times, is and has been based on a national carbon cap. The cap is as set out the [CCA 2008](#) . It is based upon the 2°C temperature limit. For the reasons we have given, that policy is "entrenched" and can only be changed through the statutory process. Despite the fact that Government policy could of course be outside any statutory provisions – and despite Mr Crosland's submissions that, in some way, the [CCA 2008](#) cap has to be read with the Paris Agreement (see, e.g., Transcript, day 7 pages 112 and 116) – neither policy nor international agreement can override a statute. Neither Government policy (in whatever form) nor the Paris Agreement can override or undermine the policy as set out in the [CCA 2008](#) . In our view, this way of putting the submission is inconsistent with Mr Crosland's express and unequivocal concession that the carbon target in the [CCA 2008](#) is Government policy and was a material consideration for the purposes of the ANPS. It seeks collaterally to undermine the statutory provisions. The same flaw permeated Plan B's Amended Statement of Facts and Grounds and written submissions."

and in paragraphs 618 and 619:

"618. For those reasons, in his decision to designate the ANPS, the Secretary of State did not err in taking the [CCA 2008](#) targets into account; indeed, he would clearly have erred if he had not taken into account the targets as fixed by Parliament.

619. Nor, in our view, did he err in failing to take into account the Paris Agreement, or the premise upon which that Agreement was made namely that the temperature rise should be limited to 1.5°C and "well below" 2°C. This way of putting the ground substantially overlaps with Ground 12 pursued by Mr Wolfe on behalf of FoE, and we will not repeat our response to that ground here (see, rather, paragraphs 633 and following below). However, briefly, the Secretary of State was not obliged to have foreshadowed a future decision as to the domestic implementation of the Paris Agreement by way of a change to the criteria set out in the [CCA 2008](#) which can only be made through the statutory process; and, indeed, he may have been open to challenge if he had proceeded on a basis inconsistent with the current statutory criteria. Nor was he otherwise obliged to have taken into account the Paris Agreement limits or the evolving knowledge and analysis of climate change that resulted in that Agreement."

195. As that passage mentions, the court also addressed, and rejected, a similar argument that was advanced by Friends of the Earth (in paragraphs 633 to 649 of its judgment).

Relevant evidence

196. In her first witness statement (dated 29 November 2018) Ms Low, on behalf of the Secretary of State, said (in paragraph 458):

"458. In October 2016 the CCC said that the Paris Agreement *"is more ambitious than both the ambition underpinning the UK 2050 target and previous international agreements"*, but that the UK should not set new UK emissions targets now, as it already has stretching targets and achieving them will be a positive contribution to global climate action. Furthermore, the CCC acknowledged in the context of separate legal action brought by Plan B against the Secretary of State for Business, Energy and Industrial Strategy [here there is footnote 111] that it is possible that the existing 2050 target could be consistent with the temperature stabilisation goals set out in the Paris [Agreement]. Subsequently, in establishing its carbon obligations for the purpose of assessing the impact of airport expansion, my team has followed this advice and considered existing domestic obligations as the correct basis for assessing the carbon impact of the project, and that it is not appropriate at this stage for the government to consider any other possible targets that could arise through the Paris Agreement." (our emphasis).

197. The document referred to in footnote 111 was the Committee on Climate Change's response to Plan B Earth's reply to the summary grounds of defence in the proceedings brought by Plan B Earth in 2018 against the Secretary of State for Business, Energy and Industrial Strategy.

198. That document was ordered to be served by Nicola Davies J. on 20 March 2018. It does not take the form of evidence, for example as a witness statement, because it is not signed as to the truth of its contents. Nor is it a formal pleading or skeleton argument because it is not signed by counsel or solicitors either. Nevertheless, it comprises submissions made in the then proceedings for judicial review. Paragraph 11(v) stated:

(v) In considering the implications of the political agreement reached in Paris for the UK's 2050 target, it is necessary to translate the temperature goal in the Agreement to what this could mean for UK emissions. Having considered this in our 2016 Report, we noted that "The UK 2050 target is potentially consistent with a wide range of global temperature outcomes" (page 16). The CCC recommended no change to the existing UK 2050 target (at that time, October 2016), not because a more ambitious target was infeasible, but rather because the existing UK target was potentially consistent with more ambitious global temperature goals, including that in the Paris Agreement." (our emphasis).

199. In paragraph 9 it was stated:

"In any consideration of the need to amend the 2050 target for reducing emissions, there is an explicit role for the CCC. The [Climate Change Act \(2008\)](#) sets out ([section 3\(1\)\(a\)](#)) that before amending the 2050 target, the SoS must obtain and take into account the advice of the CCC. Following on from the Paris Agreement, reached towards the end of 2015, the CCC decided – and in the absence of a request from the Government – that it should provide advice to the SoS. This advice was provided in October 2016."

and in paragraph 27:

"The CCC accepts that the Paris Agreement describes a greater level of global ambition, in terms of limiting temperature rise, than the one which formed the basis for setting the UK's existing 2050 target. However, the Committee's advice in its 2016 report was based on an updated assessment, taking account of the latest evidence, including the IPCC Fifth Assessment Report (AR5). That evidence had moved on, reflecting factors including:

- a. The latest scientific understanding, including a wider range for climate sensitivity, i.e. the amount of warming that would result from a given amount of greenhouse gas emissions
- b. Slower growth in global emissions since 2008 than had previously – in 2008 – been assumed (partly reflecting the effects of the global financial crisis)
- c. The latest assessments of options for reducing emissions, including greenhouse gas removal technologies.

On this basis, as assessed in 2016, the evidence suggested an at least 80% emissions reduction target for the UK in 2050 could be consistent with achieving a less than 2°C temperature rise globally." (our emphasis).

In paragraph 32, in its summary, the document said the claimants' argument in that case was based on a misinterpretation of the Paris Agreement and a confusion between the Committee on Climate Change's advice relating to the 2050 target and that relating to the achievements of net zero emissions. The summary continued (at sub-paragraph b):

"The claim that the CCC's advice in terms of consistency with the Paris Agreement is 'untenable'. It was integral to the CCC's advice that it should be consistent with the Paris Agreement. The long-term temperature goal in the Paris Agreement covers a range of ambition from 'well below 2°C' to 'efforts towards 1.5°C'. It does not specify a separate 1.5°C goal. The CCC's 2016 advice reflected consideration of the range and concluded that the existing 2050 target was consistent with a wide range of global temperature outcomes. There will be opportunities, and further evidence, to look at this again."

200. Mr Tim Crosland, on behalf of Plan B Earth, submitted that this was not evidence, still less was it an up to date statement of the Committee on Climate Change's advice to the Secretary of State in April 2018. Rather it was no more than a cross-reference back to the Committee on Climate Change's report of October 2016. Furthermore, he submitted, it was merely the interpretation of the person, presumed to be counsel, responsible for drafting the legal submissions of that report.

201. Nevertheless, as is apparent from the terms of paragraph 458 in the witness statement of Ms Low, the document was treated by her and her team as "advice" from the Committee on Climate Change. As is also clear from paragraph 458, Ms Low and her team clearly regarded "existing domestic legal obligations" as being "the correct basis for assessing the carbon impact of the project". We do not think, however, that this necessarily followed from what the Committee on Climate Change was saying in its response document.

202. In our view, there are two difficulties with the reliance that Ms Low and her team placed upon the "advice" from the Committee on Climate Change. First, the committee was not necessarily saying that the targets set by the [Climate Change Act](#) were consistent with the Paris Agreement. It was saying that they "could" be consistent with it.

203. Secondly, and more fundamentally, even if the legal targets in the [Climate Change Act](#) were consistent with the Paris Agreement, it did not follow that, as a matter of law, the Government was somehow precluded from taking into account the Paris Agreement when designating the ANPS. What the Committee on Climate Change was addressing was a different question, namely whether the legal targets for reducing CO₂ emissions set out in the [Climate Change Act](#) should be amended. Those targets would naturally apply across the board, in a variety of contexts. The narrower question that is raised in this case is whether the Secretary of State was under a legal obligation to take into account the Paris Agreement – or indeed an

obligation not to take it into account at all – in the particular context of the decision to designate the ANPS. That question was not necessarily answered, as a matter of law, by what the legal targets in the [Climate Change Act](#) were.

204. Mr Crosland submitted that the Committee on Climate Change report of October 2016 did not in fact say that the 80% target for 2050 was potentially consistent with the Paris Agreement.

205. We have already referred (in paragraph 27 above) to the passage in the Executive Summary of the Committee on Climate Change's report, advising the Government that it should "not set new UK emissions targets now".

206. In [section 1](#) of its report the Committee on Climate Change said:

"1. UK and international ambition

In December 2015 the UK, under the UN negotiations and alongside over 190 other countries, drafted the Paris Agreement to tackle climate change. It will enter into force by the end of 2016 having been ratified by the US, China, Brazil, the EU and others.

The Agreement describes a higher level of global ambition than the one that formed the basis of the UK's existing emissions reduction targets:

- The UK's current long-term target is a reduction of greenhouse gas emissions of at least 80% by the year 2050, relative to 1990 levels. This 2050 target was derived as a contribution to a global emissions path aimed at keeping global average temperature to around 2°C above pre-industrial levels.
- The Paris Agreement aims to limit warming to well below 2°C and to pursue efforts to limit it to 1.5°C. To achieve this aim, the Agreement additionally sets a target for net zero global emissions in the second half of this century.

Alongside the Agreement nearly all parties have submitted pledges of action to 2030. Current pledges fall short of a path to meet either the stated temperature aim of the Paris Agreement or the implicit aim behind the UK target. However, the Agreement includes a process for taking stock of progress and increasing action around the world:

- Pledges by parties in total imply annual global emissions in 2030 of 56 billion tonnes of carbon dioxide equivalent (GtCO₂e) whereas the parties to the Agreement agreed the need to reduce annual emission to 40 GtCO₂e to be on a path to below 2°C.
- The Agreement creates a 'ratchet' mechanism of pledges and reviews to facilitate parties increasing their ambition towards the temperature target. A UN dialogue to take stock of current pledges will take place in 2018. Starting in 2020 the parties will provide new pledges every five years, with stocktakes of the pledges occurring every five years from 2023.
- Parties are also asked to publish mid-century, long-term low greenhouse gas emission development strategies by 2020.

We welcome the Government's commitment to ratifying the Paris Agreement by the end of the year. The clear intention of the Agreement is that effort should increase over time. While relatively ambitious, the UK's current emissions targets are not aimed at limiting global temperature to as low a level as in the Agreement, nor do they stretch as far into the future. " (our emphasis).

207. On page 9 of the report it was said that to stay close to 1.5°C, CO2 emissions would need to reach net zero by the 2040s. Reference was made to Table 1, which was set out on the same page.

208. In [section 4](#) of the report the Committee on Climate Change said:

"4. Implications for UK policy priorities in the nearer term

Current policy in the UK is not enough to deliver the existing carbon budgets that Parliament has set. The Committee's assessment in our 2016 Progress Report was that current policies would at best deliver around half of the emissions reductions required to 2030, with no current policies to address the other half. This carbon policy gap must be closed to meet the existing carbon budgets, and to prepare for the 2050 target and net zero emissions in the longer term.

The existing carbon budgets are designed to prepare for the UK's 2050 target in the lowest cost way as a contribution to a global path aimed at keeping global average temperature to around 2°C. Global paths to keep close to 1.5°C, at the upper end of the ambition in the Paris Agreement, imply UK reduction of at least 90% below 1990 levels by 2050 and potentially more ambitious efforts over the timescale of existing carbon budgets.

However, we recommend the Government does not alter the level of existing carbon budgets or the 2050 target now. They are already stretching and relatively ambitious compared to pledges from other countries. Meeting them cost-effectively will require deployment to begin at scale by 2030 for some key measures that enable net zero emissions (e.g. carbon capture and storage, electric vehicles, low-carbon heat). In theory these measures could allow deeper reductions by 2050 (on the order of 90% below 1990 levels) if action were ramped up quickly.

The priority now should be robust near-term action to close the gap to existing targets and open up options to reach net zero emissions:

- The Government should publish a robust plan of measures to meet the legislated UK carbon budgets, and deliver policies in line with the plan.
- If all measures deliver fully and emissions are reduced further, this would help support the aim in the Paris Agreement of pursuing efforts to limit global temperature rise to 1.5°C.
- The Government should additionally develop strategies for greenhouse gas removal technologies and reducing emissions from the hardest-to-treat sectors (aviation, agriculture and parts of industry).

There will be several opportunities to revisit the UK's targets in future as low-carbon technologies and options for greenhouse gas removals are developed, and as more is learnt about ambition in other countries and potential global paths to well below 2°C and 1.5°C:

- 2018: the Intergovernmental Panel on Climate Change (IPCC) will publish a Special Report on 1.5°C, and there will be an international dialogue to take stock of national actions.
- 2020: the Committee will provide its advice on the UK's sixth carbon budget, including a review of progress to date, and nations will publish mid-century greenhouse gas development plans.
- 2023: the first formal global stocktake of submitted pledges will take place.

We will advise on whether to set a new long-term target, or to tighten UK carbon budgets, as and when these events or any others give rise to significant developments." (our emphasis).

Statements made on behalf of the Government after its ratification of the Paris Agreement

209. In the Government paper, "The Clean Growth Strategy" first published in 2017, the Secretary of State for Energy and Industrial Strategy stated:

"The UK played a central role in securing the 2015 Paris Agreement in which, for the first time, 195 countries (representing over 90 per cent of global economic activity) agreed stretching national targets to keep the global temperature rise [well] below two degrees. The actions and investments that will be needed to meet the Paris commitments will ensure the shift to clean growth will be at the forefront of policy and economic decisions made by government and businesses in the coming decades . " (our emphasis).

210. In the judicial review application (CO/16/2018) brought by Plan B Earth against the Secretary of State for Business, Energy and Industrial Strategy (see paragraphs 197 to 199 above), the Secretary of State served summary grounds of defence dated 29 January 2018. Those summary grounds included quotations from Government Ministers, upon which Mr Crosland now relies.

211. Paragraph 23 stated:

"23. ... [While] the Government is fully committed to the objectives in the Paris Agreement, the legal obligation upon the Parties is to prepare, communicate and maintain nationally determined contributions to reduce net emissions, with a view to achieving the purpose of holding global average temperature increases to "*well below 2°C*" above pre-industrial levels, and pursuing efforts to limit them to 1.5°C. This is not the same as a legal duty or obligation for the Parties, individually or collectively, to achieve this aim. ..." (emphasis in original).

212. In paragraph 29 there were quotations set out from two relevant Ministers. First on 14 March 2016, the Rt. Hon. Andrea Leadsom MP, then Minister of State for Energy, said in a debate in the House of Commons during the report stage of the Energy Bill:

" The Government believe we will need to take the step of enshrining the Paris goal of net zero emissions in UK law – the question is not whether, but how we do it, and there is an important set of questions to be answered before we do. The Committee on Climate Change is looking at the implications of the commitments made in Paris and has said it will report in the autumn. We will want to consider carefully its recommendations" (our emphasis).

213. On 24 March 2016, the Rt. Hon. Amber Rudd MP, then Secretary of State for Energy and Climate Change, said, in answer to an oral question on what steps her department was taking to enshrine the commitment to net zero emissions made at the Paris Climate Change Conference:

"As confirmed last Monday during the Report stage of the Energy Bill, the Government will take the step of enshrining into UK law the long-term goal of net zero emissions, which I agreed in Paris last December . The question is not whether we do it but how we do it." (our emphasis).

214. On 14 June 2018, the Chair and Deputy Chair of the Committee on Climate Change (Lord Deben and Baroness Brown of Cambridge) wrote a letter to the Secretary of State for Transport (the Rt. Hon. Chris Grayling MP) in the following terms:

"The UK has a legally binding commitment to reduce greenhouse gas emissions under the [Climate Change Act](#) . The Government has also committed, through the Paris Agreement, to limit the rise in global temperature to well below 2°C and to pursue efforts to limit it to 1.5°C .

We were surprised that your statement to the House of Commons on the National Policy Statement on 5 June 2018 made no mention of either of these commitments. It is essential that aviation's place in the overall strategy for UK emissions reduction is considered and planned fully by your Department.

...

- Our analysis has illustrated how an 80% economy-wide reduction in emissions could be achieved with aviation emissions at 2005 levels in 2050. Relative to 1990 levels this is a doubling of emissions, and an increase in its share of total emissions from 2% to around 25%. We estimate that this would allow for around 60% growth in aviation demand, dependent on the delivery of technological and operational improvements and some use of sustainable biofuels.
- Aviation emissions at 2005 levels in 2050 means other sectors must reduce emissions by more than 80%, and in many cases will likely need to reach zero.
- Higher levels of aviation emissions in 2050 must not be planned for, since this would place an unreasonably large burden on other sectors.

The Airports Commission also incorporated the CCC's advice on aviation, concluding that 'any change to [the] UK's aviation capacity would have to take place in the context of global climate change, and the UK's policy obligations in that area'.

We look forward to the Department's new Aviation Strategy in 2019, which we expect will set out a plan for keeping UK aviation emissions at or below 2005 levels by 2050. To inform your work we are planning to provide further advice in spring 2019." (our emphasis).

215. On 20 June 2018 the Secretary of State replied:

"I note your surprise that the UK's commitments to reduce greenhouse gas emissions were not specifically addressed in the oral statement to the House of Commons but I can assure you that the Government remains committed to meeting our climate change target of an at least 80% emissions reduction below 1990 levels by 2050 and remains open and willing to consider all feasible measures to ensure that the aviation sector contributes fairly to UK emissions reduction. I hope you will understand that I am not always able to include all the detail I would like in an oral statement."

216. It is clear, therefore, that it was the Government's expressly stated policy that it was committed to adhering to the Paris Agreement to limit the rise in global temperature to well below 2°C and to pursue efforts to limit it to 1.5°C.

The Secretary of State's stance as pleaded

217. In the amended detailed grounds for contesting the claim dated 29 November 2018 (and amended on 1 February 2019), it was submitted on behalf of the Secretary of State (at paragraph 30) that the [Climate Change Act](#) does not include emissions from international aviation. It was said that the Committee on Climate Change had advised that emissions from UK aviation (both domestic and international) should be no more than 2005 levels (37.5 MtCO₂) in 2050. This is sometimes referred to as "the Planning Assumption". Plan B Earth had referred to it as "the Aviation Target". It was said that the Government had not yet decided whether to accept that advice. A decision on this was deferred by the Aviation Policy Framework and would be

considered as part of the emerging Aviation Strategy to be adopted in 2019. This would re-examine how the aviation sector can best contribute its fair share to emissions reductions at both UK and global level.

218. In paragraph 61 of the amended grounds the Secretary of State submitted:

"61. There is no credible basis for a suggestion that the obligation in s.10(2) and (3) in some way extends further than s. 5(8) to cover (i.e. in the sense of mandating) " *consideration of how the NPS policies relate to known developing areas of climate change policy* ". Rather, those provisions provide a very strong pointer that such matters should not be considered : the clear intention of Parliament being that consideration should be given only to existing domestic legal obligations and policy commitments in relation to the mitigation of, and adaptation to, climate change. At the least, the provisions provide no statutory obligation to consider anything other than existing domestic legal obligations and policy commitments. There is, in sum, no warrant for the suggestion that Parliament was intending to set the Secretary of State the impossible task of assessing and taking into account in an NPS not just existing domestic legal obligations and policy commitments in relation to the mitigation of, and adaptation to, climate change but also any possible and as yet unsettled future policies and commitments." (our emphasis).

He went on in paragraph 62(5) and (6) to submit:

"5) Unless and until the 2050 Target is amended following the proper processes under the CCA 2008 , the correct approach is to consider existing domestic legal obligations and policy commitments and this is what the ANPS does. The relevant domestic legal and policy commitments being those found principally in or set under the CCA 2008 itself (which included for example the Clean Growth Strategy referred to paragraphs 8.5 and 8.6 of the Consultation Response) and the APF;

6) The Secretary of State and his officials did not ignore the Paris Agreement, or that there would be emerging material within Government evidencing developing thinking on its implications, but it was concluded that such material should not be taken into account, i.e. it was not relevant , since it did not form an appropriate basis upon which to formulate the policies contained in the ANPS. This included for the reasons set out in paragraph 34, above. Those reasons relate to the nature of the obligations set out in the Paris Agreement, its effect in domestic law as an unincorporated, international treaty, and to the fact that as at the date of designation of the ANPS, the CCC's views on the implications of the Paris Agreement had not yet been sought, let alone received. As the Government's statutory advisor on matters relating to climate change, the CCC has a critical advisory role in relation to the setting of relevant policy by the Government." (our emphasis).

and in paragraph 63(9):

"9) Accordingly, the Secretary of State will not pursue any discretion argument that there: (a) was no emerging material within Government evidencing developing thinking on the implications of the Paris Agreement, or (b) that such material would highly likely have made no difference to the decision to designate the ANPS. There is no need for him to do so as the argument that he was obliged to consider such material in the first place is hopeless and should be refused permission."

219. There were similar matters pleaded in the amended detailed grounds for contesting the claim brought by Plan B Earth, in particular at paragraph 10.

220. In early 2019, Holgate J. conducted a pre-trial review ("PTR") in preparation for the substantive hearing due to take place in the Divisional Court in March. After that PTR the judge conveyed the following message (via his clerk) to the parties:

"The judge has read the recent exchange of emails on the Statement of Common Ground and climate change issues. His recollection of what occurred at the PTR is broadly along the lines recounted in the letter from Mr Crosland. The defendant's "concession" (if that be the correct description), or rather helpful narrowing of issues, arose in the context of submissions regarding the applications for disclosure by FoE and Plan B. A principal submission by the Defendant was that once the real issue under the grounds of challenge were correctly defined, then the disclosure sought was unnecessary. Para 29 of his position statement says that the only issue is whether the Defendant was entitled as a matter of law to consider matters as against existing legal obligations and policy commitments as given effect by the [Climate Change Act 2008](#) . If he was, then this particular ground fails. If he was not, and the matter had to be considered as against the Paris Agreement, then the ground of challenge would be made out. Leading counsel for the Defendant confirmed to the court that that was the issue and that any other references in the Defendant's documents which might be taken to suggest otherwise could be ignored. He also said that if the Defendant lost on this issue (defined in this way) he would not raise any discretion points which would justify further specific disclosure. Instead discretion points would be "generic" in nature. The indication given for the Defendant at the hearing was that in so far as the Paris Agreement differs from the 2008 Act in any relevant, significant way, then the matter was not taken into account."

221. It has been made clear before this court, both in writing and in oral submissions, that the Secretary of State (in contrast to HAL) does not take any point under [section 31 of the Senior Courts Act](#) . It follows therefore that the Secretary of State accepts that, if he erred in law in failing to take into account the Paris Agreement before designating the ANPS, it cannot be said that it is highly likely that the outcome would have been substantially the same in any event. If the court does reach that conclusion therefore, the Secretary of State (but not HAL) accepts that there would be no reason to deny the claimants appropriate remedies to give effect to the judgment of the court.

Climate change issues (3), (4), (5) and (6) – did the Government's commitment to the Paris Agreement constitute government policy on climate change, which the Secretary of State was required to take into account?

222. As we have said, the grounds advanced on behalf of Plan B Earth by Mr Crosland focused principally on the requirements of [section 5\(8\) of the Planning Act](#) . Mr Crosland submitted in essence that the Government's commitment to the Paris Agreement was part of "Government policy" within the meaning of that provision. Mr Crosland's position was supported by Mr Fleming for the Hillingdon claimants. In our view, that submission is well-founded.

223. It is important to start by emphasizing what [section 5\(8\)](#) does and does not require of the Secretary of State. It does not require him to follow or act in accordance with government policy. In terms what it requires is that the ANPS should explain how the Secretary of State has "taken into account" government policy. It is necessarily implicit in that obligation that the Secretary of State must indeed first have taken that government policy into account. This is an important aspect of the transparency of the Secretary of State's actions and his accountability, both to Parliament and to the wider public.

224. Next it is important to appreciate that the words "Government policy" are words of the ordinary English language. They do not have any specific technical meaning. They should be applied in their ordinary sense to the facts of a given situation. In particular, we can find no warrant in the legislation for limiting the phrase "Government policy" to mean only the legal requirements of the [Climate Change Act](#) . The concept of policy is necessarily broader than legislation.

225. Thirdly, there is no inconsistency or contradiction between that interpretation and the express language of the [Climate Change Act](#) . We note that the target set out in the Act is "at least" 80% by 2050. We consider that the Divisional Court fell into error in those passages of its judgment that we have cited earlier (in particular at paragraph 615), where it appears to have taken the view that the Secretary of State was somehow being required to take a position inconsistent with what was required by his statutory obligations in the [Climate Change Act](#) .

226. Fourthly, there is no question of giving effect to the Paris Agreement (an unincorporated international agreement) through "the back door", as Mr Maurici submitted before us. In our view, the debate that took place before the Divisional Court about the possible impact of an international agreement on domestic law that has not been incorporated by legislation enacted by Parliament was a distraction from the true issue. That debate, it seems to us, did not bear on the proper interpretation of a statutory provision deliberately and precisely enacted by Parliament itself, in the words of [section 5\(8\) of the Planning Act](#) . As we have said, those words do not require the Secretary of State to act in accordance with any particular policy; but they do require him to take that policy into account and explain how it has been taken into account. None of that was ever done in the present case.

227. It appears that the reason why it was never done is that the Secretary of State received legal advice that not only did he not have to take the Paris Agreement into account but that he was legally obliged not to take it into account at all (see the quotations from the Secretary of State's pleaded case in the Divisional Court, in paragraphs 216 to 220 above, in particular the passages we have emphasized). In our view, that was a clear misdirection of law and there was, therefore, a material misdirection of law at an important stage in the process. That misdirection then fed through the rest of the decision-making process and was fatal to the decision to designate the ANPS itself.

228. In our view, the Government's commitment to the Paris Agreement was clearly part of "Government policy" by the time of the designation of the ANPS. First, this followed from the solemn act of the United Kingdom's ratification of that international agreement in November 2016. Secondly, as we have explained, there were firm statements re-iterating Government policy of adherence to the Paris Agreement by relevant Ministers, for example the Rt. Hon. Andrea Leadsom MP and the Rt. Hon. Amber Rudd MP in March 2016.

229. It is important to stress that this means no more than that the executive must comply with the will of Parliament, as expressed in the terms of [section 5\(8\)](#) .

230. Furthermore, it simply requires the executive to take account of its own policy commitments. After all, the acts of negotiating, signing and ratifying an international treaty are all acts which under the British constitution are entrusted to the executive branch of the State – the Crown. This distinction between the functions of the Crown and Parliament is what underlies the dualist character of our legal system (see, for example, the speech of Lord Oliver of Aylmerton in *J. H. Rayner (Mincing Lane) Ltd.* , at p.500) and explains why the ratification of an international treaty cannot, without more, change domestic law; if it could, the Crown would be able to change the law of this country without the consent of Parliament. But requiring the Crown to comply with what has been enacted by Parliament (in this case the obligations in [section 5\(8\) of the Planning Act](#)) is an entirely conventional exercise in public law.

231. We repeat that the duty in [section 5\(8\)](#) does not even require the executive to conform to its own policy commitments, simply to take them into account and explain how it has done so.

232. Finally, as we have already said, the Secretary of State has accepted that, if this court should conclude that he fell into legal error in this respect, there can be no question of refusing remedies under [section 31 of the Senior Courts Act](#) .

233. We would add this observation. It was not submitted to us that in designating the ANPS the Secretary of State committed no error of law – or that, if he did, the error itself was immaterial – because the relevant consequences of meeting the targets already in place under the [Climate Change Act](#) would have been, or at least might have been, the same as those of

implementing the United Kingdom's commitments under the Paris Agreement. Such an argument, had it been put forward, would in our opinion have been mistaken. If the Secretary of State was to comply with his duty under [section 5\(8\) of the Planning Act](#), the implications of the Paris Agreement for his decision, and whether they were different from the implications of meeting the targets under the Climate Change Act, were matters for him specifically to consider and explicitly address in that very exercise. But he did not do so. It is clear that, in deciding to designate the ANPS, he did not take the Paris Agreement into account at all. On the contrary, as we understand it, he consciously chose – on advice – not to take it into account. And in our view, as we have said, his failure to take it into account was enough to vitiate the designation.

Climate change issue (1) – whether the designation of the ANPS was unlawful because the Secretary of State acted in breach of section 10(3) of the Planning Act

234. The grounds advanced on behalf of Friends of the Earth by Mr Wolfe focused in particular on the requirements of [section 10 of the Planning Act](#). Mr Wolfe submitted:

- (1) There was an error of law in the approach taken by the Secretary of State because he never asked himself the question whether he could take into account the Paris Agreement pursuant to his obligations under [section 10](#).
- (2) If he had asked himself that question, and insofar as he did, the only answer that would reasonably have been open to him is that the Paris Agreement was so obviously material to the decision he had to make in deciding whether to designate the ANPS that it was irrational not to take it into account.

235. We accept those submissions in essence.

236. First, it is clear to us from the material that was before the Divisional Court that the Secretary of State was advised that he was not permitted as a matter of law to take into account the Paris Agreement because he should for relevant purposes confine himself to the obligations set out in the [Climate Change Act](#) (see paragraphs 218 and 220 above). He therefore did not ever consider whether to take the Paris Agreement into account as a matter of discretion.

237. Secondly, and in any event, if he had appreciated he had any discretion in the matter, we agree that the only reasonable view open to him was that the Paris Agreement was so obviously material that it had to be taken into account. It is well established in public law that there are some considerations that must be taken into account, some considerations that must not be taken into account and a third category, considerations that may be taken into account in the discretion of the decision-maker (see, for example, the opinion of Lord Brown of Eaton-under-Heywood in *Hurst*, at paragraphs 57 to 59). As Lord Brown observed of that third category (in paragraph 58 of his opinion), there can be some unincorporated international obligations that are "so obviously material" that they must be taken into account. The Paris Agreement fell into this category.

238. Again we would emphasize that it does not follow from this that the Secretary of State was obliged to act in accordance with the Paris Agreement or to reach any particular outcome. The only legal obligation, in our view, was to take the Paris Agreement into account when arriving at his decision.

WWF's submissions

239. We had substantial written submissions placed before us on behalf of the intervener, WWF. This generated a great deal of dispute between the parties. With the permission of the court, the Secretary of State filed a 30-page response some time after the hearing had finished; together with a new witness statement and documents, taking up a lever arch file. There were replies by WWF and Friends of the Earth and an unsolicited response to those replies by the Secretary of State, dated 8 November 2019, for which no permission was granted and to which objection was taken by WWF and Friends of the Earth.

240. What Ms Helen Mountfield Q.C. on behalf of WWF submitted is that the phrase "sustainable development" must now be interpreted in the light of the United Kingdom's obligations in international law generally and, in particular, under the 1989 UN Convention on the Rights of the Child, as interpreted by the committee established under that Convention. The Secretary of State objected to this line of argument, essentially because he submitted that this is, in substance, a new ground of challenge and it is inappropriate for this to be raised on an appeal, let alone by an intervener.

241. In the end we have not found it necessary to resolve these procedural and new substantive issues. This is because the submissions for WWF were made in support of the grounds advanced by Friends of the Earth, which we have in essence accepted for the reasons set out above.

SEA Directive issue (4) – did the Secretary of State breach the SEA Directive by failing to consider the Paris Agreement?

242. On behalf of Friends, of the Earth Mr Wolfe (under what he has called ground C in this appeal) also relied on an alleged breach of the duty to undertake a lawful strategic environmental assessment in accordance with the requirements of the SEA Directive and the SEA Regulations.

243. Mr Wolfe submitted that the reference to the "international" level in [Annex I to the SEA Directive](#) must include unincorporated international agreements because otherwise, if an agreement has been incorporated into either EU law or domestic law, there would be no need to refer to the international level at all. Mr Wolfe also emphasized that what has to be taken into account are the "objectives" established at international level. This does not necessarily have to consist of particular, precise legal obligations.

244. We accept those submissions on behalf of Friends of the Earth.

245. Mr Maurici submitted that this provision still leaves a wide margin of discretion to the Secretary of State in deciding what is "relevant" to the plan or programme in question.

246. That is of course right. But no matter how wide the margin of judgment to be afforded to the Secretary of State in this context, in our view the Paris Agreement was obviously relevant to the plan or programme under consideration in this case. This is essentially for the reasons we have already given in considering domestic law (see [section 10 of the Planning Act](#)).

247. We have therefore come to the conclusion that in this respect too the designation of the ANPS was vitiated by an error of law.

Climate change issue (2) – did the Secretary of State err in his consideration of non-CO2 impacts and the effect of emissions beyond 2050?

248. Mr Wolfe submitted that the Divisional Court failed in its duty to set out reasons why it was refusing permission to bring this application for judicial review on two grounds:

- (1) the non-CO2 climate impacts of aviation; and

(2) the effect of emissions beyond 2050.

249. Mr Wolfe contended that these grounds of challenge were clearly raised in the arguments before the Divisional Court by Friends of the Earth. He submitted, first, that the total adverse impact of aviation on the climate is around twice that of its CO₂ emissions if taken alone. These impacts are not accounted for under the [Climate Change Act](#) framework, which is only concerned with CO₂ emission targets. Secondly, the Heathrow third runway project was envisaged to last until well into the second half of the present century. Its benefits were assessed in the ANPS up to 2085 but, Mr Wolfe submitted, there was no assessment of the climate change impacts beyond 2050. Furthermore, he argued, aviation is one of the very few sectors for which there are no current or currently envisaged credible alternatives to fossil fuel, it was obviously relevant to consider whether it was sustainable in the long-term to expand aviation activity in the light of the foreseen need to move to net zero emissions during the lifetime of the new runway and the potential need to move to net negative emissions.

250. Mr Wolfe's fundamental complaint on this ground is that none of these arguments was addressed in the judgment of the Divisional Court. This ground of appeal in effect raises a "reasons" point.

251. It is clear from paragraph 659(iv) of the Divisional Court's judgment that it was aware that two of the grounds of challenge brought by Friends of the Earth concerned non-CO₂ emissions and the needs of future generations. However, submitted Mr Wolfe, the reasoning of the court that led to its conclusions in paragraph 659 did not separately deal with those two aspects at all.

252. Earlier in its judgment (in paragraph 638), the court noted that the Secretary of State accepted that, in designating the ANPS, he took into account only the [Climate Change Act](#) carbon emission targets and did not take into account either the Paris Agreement, or otherwise, any post-2050 target or non-CO₂ emissions. Mr Wolfe submitted that the reasoning of the court that then followed dealt exclusively with the Paris Agreement point and not these two other aspects at all.

253. Mr Maurici made two essential responses to those complaints. First, he submitted that it was unnecessary for the Divisional Court to set out every step in its reasoning and that, in substance, its reasoning relating to the Paris Agreement issue also applied to these two matters. Secondly, if he is wrong about that, he invited this court to rely on the additional grounds set out in the Secretary of State's respondent's notice. We will address each of those submissions in turn.

254. In so far as the first submission is sound, which we would not accept, the consequence of this court's conclusions above on the relevance of the Paris Agreement and the defect in the Secretary of State's decision-making process would apply equally to these two further aspects. It is therefore unnecessary for us to dwell at length on what is in essence a "reasons" complaint under Friends of the Earth's ground B. It will suffice that the preparation and designation of the ANPS will be remitted to the Secretary of State for reconsideration in accordance with the law, during which exercise the Secretary of State can take these further matters into account as well.

255. On the Secretary of State's respondent's notice we would make these observations.

256. Mr Maurici submitted that the effect of emissions beyond 2050 was a matter closely bound up with the aspiration in the Paris Agreement to achieve net zero greenhouse gas emissions in the second half of this century. He submitted, by reference to the witness evidence of Ms Low, that it would be sensible to assess the impact of airport expansion against current climate change targets and that, as and when carbon reduction targets are developed for the post-2050 period, all those concerned

will have to comply with the obligations which result when, and to the extent that, they apply. This point is closely related to the fundamental submission made by Mr Maurici, that there was no obligation on the Secretary of State to take into account the Paris Agreement at all. For the reasons we have already given, we reject that submission. It follows therefore that these two additional aspects of the case, being closely bound, as Mr Maurici submitted they are, with the Paris Agreement issue, will need to be considered in the exercise that the Secretary of State must perform according to law.

257. That said, we would not be inclined to accept the other submission made by Mr Maurici on the Secretary of State's respondent's notice which relates to non-CO2 emissions. Mr Maurici submitted that the reason why this was not taken into account in the preparation of the ANPS was that the state of scientific knowledge was too uncertain to be capable of accurate measurement at that stage. He pointed out that the question of non-CO2 effects was highlighted in the Airport Commission's discussion paper on aviation and climate change (in April 2013) and in its interim report (on 17 December 2013). The Chair of the Airports Commission (Sir Howard Davies) discussed the question directly with the Chair of the Committee on Climate Change (Lord Deben), who advised that the appropriate approach was not to assess or include non-CO2 effects given the significant scientific uncertainty surrounding their scale. Furthermore, Mr Maurici submitted that, as part of its assessment of the ANPS, the Appraisal of Sustainability considered non-CO2 emissions but set out that these were not able to be assessed because of levels of scientific uncertainty. It was acknowledged in the Appraisal of Sustainability (at paragraph 6.11.11) that there are likely to be highly significant climate change impacts associated with non-CO2 emissions from aviation, which are likely to be of a similar magnitude of the CO2 emissions themselves, but which cannot be readily quantified due to the level of scientific uncertainty. Furthermore, submitted Mr Maurici, these matters were considered in the Government's response to the consultations on the ANPS (at paragraphs 11.49 to 11.50); and in the Post Adoption Statement (at paragraphs 4.4.49 to 4.4.50).

258. Although those submissions have some force, in the end they do not persuade us. This is because, as Mr Wolfe submitted, the fact that there would be non-CO2 effects was acknowledged and it was recognized that they would be more than twice the CO2 effects. In line with the precautionary principle, and as common sense might suggest, scientific uncertainty is not a reason for not taking something into account at all, even if it cannot be precisely quantified at that stage.

259. The core of that principle is reflected in Principle 15 of the Rio Declaration (adopted at the UN Conference on Environment and Development in Rio de Janeiro on 14 June 1992 and endorsed by the UN General Assembly on 22 December 1992), which provides:

"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

260. The precautionary principle is well-established in the jurisprudence of the Court of Justice of the European Union (see, for example, Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-07405).

261. Since the outcome of our decision is that the preparation and designation of the ANPS was unlawful, and the ANPS will be remitted to the Secretary of State for reconsideration in accordance with the law, this matter will need to be taken into account as part of that exercise.

The test for the grant of permission

262. Mr Maurici submitted that the test for deciding whether to grant permission to apply for judicial review in a case of this kind is not the normal one – namely whether the grounds are arguable – but rather the heightened test set out by the Court of Appeal in *Mass Energy Ltd. v Birmingham City Council* [1994] *Env. L.R.* 298 (in particular at pp.307 to 308 in the judgment of Glidewell L.J.), where he said:

"... in my view, the proper approach of this Court, in this particular case, ought to be ... that we should grant leave only if we are satisfied that Mass Energy's case is not merely arguable but is strong; that is to say, is likely to succeed."

263. Glidewell L.J. gave three reasons for reaching that conclusion. First, the court had the benefit of detailed argument between the parties of such depth that, if leave were granted, it was unlikely that the points would be canvassed in much greater depth at substantive hearing. Secondly, there would be a very considerable public disadvantage if there were delay to the project, the subject of that application for judicial review. Thirdly, the court had most, if not all, of the documents that would need to be considered at the substantive hearing.

264. In our judgment, the test in *Mass Energy* is not appropriate in a case of this kind. That is because the practice has grown up, since the decision in *Mass Energy*, in which, in appropriate cases, the Administrative Court can order a "rolled-up" hearing, deferring the question of permission to be decided, with the substantive hearing to follow immediately if permission is granted. A similar practice has been developed in the Court of Appeal, as this case demonstrates. In such "rolled-up" hearings, there will be no further delay, if permission is granted, before a substantive hearing can take place. The considerations that led the Court of Appeal to set the heightened standard for the grant of leave which it did in *Mass Energy* do not therefore apply in this context.

265. For those reasons we reject the submission made by Mr Maurici on the approach we should adopt in dealing with the application for permission to apply for judicial review.

266. In any event, the issue is not in the end dispositive. This is because, even if the heightened test in *Mass Energy* were appropriate, we would conclude that it is met in this case. This is for the reasons we have already given in addressing the substantive grounds of challenge relating to the Paris Agreement, which we have concluded are well-founded.

Relief

267. It has long been established that, in a claim for judicial review, the court has a discretion whether to grant any remedy even if a ground of challenge succeeds on its substance. It was established by Purchas L.J. in *Simplex GE (Holdings) Ltd. v Secretary of State for the Environment* [1988] 3 *P.L.R.* 25 (at paragraph 42) that it is not necessary for the claimant to show that a public authority would – or even probably would – have come to a different conclusion. What has to be excluded is only the contrary contention, namely that the Minister "necessarily" would still have made the same decision. The *Simplex* test, as it has become known, therefore requires that, before a court may exercise its discretion to refuse relief, it must be satisfied that the outcome would inevitably have been the same even if the public law error identified by the court had not occurred.

268. The *Simplex* test has been modified by the amendments made to section 31 of the Senior Courts Act by section 84 of the Criminal Justice and Courts Act 2015. The new provisions apply to all claims for judicial review filed since 13 April 2015. They do not apply to applications for statutory review.

269. On the question of relief, [section 31 of the Senior Courts Act](#) provides:

"(2A) The High Court –

- (a) must refuse to grant relief on an application for judicial review, and
- (b) may not make an award under subsection (4) on such an application

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court may disregard the requirements of subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."

270. The meaning of "conduct" for this purpose is defined by a new subsection (8), which provides:

"(8) In this section "the conduct complained of", in relation to an application for judicial review, means the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief."

271. Similar provisions have been introduced into [section 31](#) on the question whether permission to bring a claim for judicial review (still referred to in the statute as "leave") should be granted:

"(3C) When considering whether to grant leave to make an application for judicial review, the High Court –

- (a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and
- (b) must consider that question if the defendant asks it to do so.

(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.

(3E) The court may disregard the requirement in subsection (3D) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(3F) If the court grants leave in reliance on subsection (3E), the court must certify that the condition in subsection (3E) is satisfied."

272. The new statutory test modifies the *Simplex* test in three ways. First, the matter is not simply one of discretion, but rather becomes one of duty provided the statutory criteria are satisfied. This is subject to a discretion vested in the court nevertheless to grant a remedy on grounds of "exceptional public interest". Secondly, the outcome does not inevitably have to be the same;

it will suffice if it is merely "highly likely". And thirdly, it does not have to be shown that the outcome would have been exactly the same; it will suffice that it is highly likely that the outcome would not have been "substantially different" for the claimant.

273. It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old *Simplex* test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales L.J., as he then was, in *R. (on the application of Public and Commercial Services Union) v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin) ; [2018] 1 All E.R. 142, at paragraph 89).

274. In this case, as we have said, the Secretary of State does not contend that relief should be refused by this court if otherwise the grounds of challenge relating to the Paris Agreement succeed. In contrast, HAL does make that contention. On its behalf Mr Humphries submitted that it is unnecessary and inappropriate to grant a remedy in these proceedings because policy in the ANPS requires the applicant for development consent to provide evidence of the carbon impact of the project "such that it can be assessed against the Government's carbon obligations" (paragraph 5.76 of the ANPS) and that carbon emissions alone may be a reason to refuse development consent if they would be "so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets, including carbon budgets" (paragraph 5.82). Therefore, submitted Mr Humphries, the substance of the issues raised by the appellants can be considered by the Secretary of State at the stage of an application for development consent. And even that would not be the end of the matter. Even if a decision to grant development consent would be in accordance with the ANPS, the Secretary of State would not be bound to grant consent if to do so would lead to the United Kingdom being in breach of any of its international obligations (see [section 104\(4\) of the Planning Act](#)). This would include compliance with the Paris Agreement. Mr Humphries also pointed out, and emphasized, that the Secretary of State has agreed to consider a request from Plan B Earth to review the ANPS in light of the Committee on Climate Change's advice of 2 May 2019. That request is being considered under [section 6\(3\) and \(4\) of the Planning Act](#) . Mr Humphries submitted that this development renders Plan B Earth's proceedings academic.

275. We do not accept those submissions on behalf of HAL. In essence, we are of the clear view that it is incumbent on the Government to approach the decision-making process in accordance with the law at each stage, not only in any current review of the ANPS or at a future development consent stage. The stages of the decision-making process are inter-dependent. The formulation of the ANPS sets the fundamental framework within which further decisions will be taken.

276. We are unable to accept the suggestion that the terms of [section 31\(2A\)](#) are satisfied in this case. We find it impossible to conclude that it is "highly likely" that the ANPS would not have been "substantially different" if the Secretary of State had gone about his task in accordance with law. In particular, in our view, it was a basic defect in the decision-making process that the Secretary of State expressly decided not to take into account the Paris Agreement at all. That was a fundamentally wrong turn in the whole process.

277. Furthermore, and in any event, this is one of those cases in which it would be right for this court to grant a remedy on grounds of "exceptional public interest". The nature and degree of that public interest hardly needs to be set out here. The legal issues are of the highest importance. The infrastructure project under consideration is one of the largest. Both the development itself and its effects will last well into the second half of this century. The issue of climate change is a matter of

profound national and international importance of great concern to the public – and, indeed, to the Government of the United Kingdom and many other national governments, as is demonstrated by their commitment to the Paris Agreement.

278. For those reasons, we have reached the firm conclusion that appropriate relief must be granted here, as normally it will be where unlawfulness in the conduct of the executive is established. In our view, therefore, it would not be appropriate to refrain from granting a suitable remedy at this stage to ensure, at least, that the ANPS does not remain effective in its present unlawful form pending the outcome of its statutory review – under [section 6 of the Planning Act](#) – in the light of the Paris Agreement (see paragraph 39 above).

279. We have given the parties the opportunity in the light of our draft judgment to agree the precise terms of the appropriate remedy. In the event, however, the parties have been unable to reach agreement on that matter. We have in mind that the relief we grant must properly reflect our conclusions on all the issues before us, in their entirety, and not merely the conclusions we have reached on the climate change issues. The Secretary of State, in his submissions in the light of the draft judgment, has not resisted the granting of relief, but has not suggested any particular form of remedy. HAL and Arora have contended for a stay of the ANPS and a mandatory order requiring the Secretary of State to undertake a review under [section 6 of the Planning Act](#). Friends of the Earth and Plan B Earth have contended for a declaration and a quashing order. The Hillingdon claimants have also submitted that the ANPS should be quashed.

280. In our view, in light of the submissions made to us, the appropriate form of relief to reflect our conclusions as a whole is a declaration, the effect of which will be to declare the designation decision unlawful and to prevent the ANPS from having any legal effect unless and until the Secretary of State has undertaken a review of it in accordance with the statutory provisions, including the provisions of [sections 6, 7 and 9 of the Planning Act](#). We do not consider that in the particular circumstances of this case, given our conclusions on the issues of the SEA Directive and the Habitats Directive, it is necessary or appropriate to quash the ANPS at this stage. Nor do we accept that it is appropriate to make a mandatory order requiring the Secretary of State to undertake a [section 6](#) review, bearing in mind that the Secretary of State has a discretion under [section 6\(1\)](#) to decide to undertake a review "whenever [he] thinks it appropriate to do so". The declaration we make will ensure that the ANPS has no legal effect unless and until the Secretary of State decides to conduct a review. Any such review would have to be conducted in accordance with the judgment of this court. We should add finally that the initiation, scope and timescale of any review must and will be a matter for the Secretary of State to decide.

Conclusion

281. At the beginning of this judgment we emphasized the long-established limits of the court's role when exercising its jurisdiction in claims for judicial review (see paragraph 2 above). As an appellate court, we operate within the same limits. We have made it clear that we are not concerned in these proceedings with the political debate and controversy to which the prospect of a third runway being constructed at Heathrow has given rise. That is none of the court's business. We have emphasized that the basic question before us in these claims is an entirely legal question.

282. As we have said, we are required – and only required – to determine whether the Divisional Court was wrong to conclude that the ANPS was produced lawfully. Our task therefore – and our decision – does not touch the substance of the policy embodied in the ANPS. In particular, it does not venture into the merits of expanding Heathrow by adding a third runway, or of any alternative project, or of doing nothing at all to increase the United Kingdom's aviation capacity. Those matters are the Government's responsibility and the Government's alone.

283. To a substantial extent we agree with the analysis and conclusions of the Divisional Court. Like the Divisional Court, we have concluded that the challenges to the ANPS must fail on the issues relating to the operation of the Habitats Directive, and also on all but one of the issues concerning the operation of the SEA Directive. However, for the reasons we have given,

we have concluded that in one important respect the ANPS was not produced as the law requires, and indeed as Parliament has expressly provided. The statutory regime for the formulation of government policy in a national policy statement, which Parliament put in place in the Planning Act, was not fully complied with. The Paris Agreement ought to have been taken into account by the Secretary of State in the preparation of the ANPS, but was not (see paragraphs 222 to 238, and 242 to 261 above). What this means, in effect, is that the Government when it published the ANPS had not taken into account its own firm policy commitments on climate change under the Paris Agreement.

284. That, in our view, is legally fatal to the ANPS in its present form. As we have explained, the normal result in a successful claim for judicial review must follow, which is that the court will not permit unlawful action by a public body to stand. Appropriate relief must therefore be granted. We have formulated a declaration that is, in our view, appropriate, necessary and proportionate in the light of our conclusions as a whole (see paragraphs 267 to 280 above). A declaration has binding effect.

285. Our decision should be properly understood. We have not decided, and could not decide, that there will be no third runway at Heathrow. We have not found that a national policy statement supporting this project is necessarily incompatible with the United Kingdom's commitment to reducing carbon emissions and mitigating climate change under the Paris Agreement, or with any other policy the Government may adopt or international obligation it may undertake. That is not the outcome here. However, the consequence of our decision is that the Government will now have the opportunity to reconsider the ANPS in accordance with the clear statutory requirements that Parliament has imposed.

Crown copyright



Neutral Citation Number: [2017] EWHC 534 (Admin)

Case No: CO/5521/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT IN LEEDS

Leeds Combined Court Centre
1 Oxford Road, Leeds LS1 3BG

Date: 20/03/2017

Before:

MR JUSTICE JAY

Between:

R (oao SKIPTON PROPERTIES LIMITED)

Claimant

- and -

CRAVEN DISTRICT COUNCIL

Defendant

Gregory Jones QC and Caroline Daly (instructed by Walton & Co) for the Claimant
Michael Bedford QC (instructed by Solicitor to the Council) for the Defendant

Hearing dates: 7th and 8th March 2017

Approved Judgment

MR JUSTICE JAY:

Introduction

1. By this application for judicial review, Skipton Properties Ltd (“the Claimant”) challenges the decision of Craven District Council (“the Defendant”) dated 2nd August 2016 to adopt a document entitled “Negotiating Affordable Housing Contributions August 2016” (“NAHC 2016”).
2. It is the Claimant’s case that, pursuant to the Town and Country Planning (Local Planning) (England) Regulations 2012 [SI 2012 No 767] (“the 2012 Regulations”) the NAHC 2016 was required to be adopted as a development plan document, alternatively as a supplementary planning document; and that the failure to comply with antecedent statutory conditions renders the purported adoption unlawful. Further, it is contended that the NAHC 2016 was adopted in breach of Directive 2001/42/EC (“the SEA Directive”) and the Environmental Assessment of Plans and Programmes Regulations 2004 [SI 2004 No 1633] (“the SEA Regulations”).
3. Before I examine the issues joined in the pleadings, I propose to set out the Essential Factual Background to this dispute as well as the governing legal framework.

Essential Factual Background

4. The Claimant is described in the Statement of Facts and Grounds as a local landowner and residential property developer. There is disagreement between the parties as to the scale of its operations. According to the witness statement of the Defendant’s planning officer, Ms Sian Watson, dated 2nd February 2017, “since ... [2012] the Claimant’s developments have (with one exception) involved sites of more than 10 dwellings”. She draws my attention to planning applications made for 37 and 65 dwellings in May 2013 and July 2016 respectively. In December 2015 the Claimant sought planning permission for a development of 3 dwellings on a site in Cowling. Mr Brian Verity, the Claimant’s managing director, does not contradict these basic facts, but states as follows:

“The changes made to the NAHC 2016, as compared to previous Council policy documents in respect of affordable housing, are also of direct interest to [the Claimant]. The introduction of vacant building credit and the requirement that off-site affordable housing contributions be provided in schemes of 6-10 dwellings in rural areas are both of relevance to [the Claimant’s] commercial position in the area. Firstly, we are acutely aware of the fact that these two important policy changes will have an impact on the decisions made by all local housing developers in respect of the number, nature and location of sites to bring forward, which could have a profound effect on the housing market in Craven District Council. Secondly, the off-site contributions for 6-10 dwellings may

well cause [the Claimant] to consider bringing forward smaller sites in the future.”

5. The Craven District (Outside the Yorkshire Dales National Park) Local Plan was adopted in July 1999. Under the objectives section of the Housing Chapter, one such objective was “to encourage and enable the development of affordable housing for rent and purchase in locations where it is required including rural areas”. Policy H11 (“Affordable Housing on Large/Allocated Sites in District and Local Services Centres”) was deleted in September 2007 (or, put another way, was not expressly saved by the Secretary of State), leaving the Defendant without a policy in its adopted development plan for the provision of affordable housing (save in one very specific respect). I am told by Ms Watson that the Defendant is preparing a new local plan, but that it will not be submitted for independent examination by the Secretary of State until later this year.

6. On 29th May 2012 the Defendant adopted the “Interim Approach to Negotiating Affordable Housing Requirements” (“IANAHR 2012”). It superseded the Affordable Housing Guide 2008 and stated, in so far as is material to this application:

“The Interim approach is to require affordable housing at 40% provision on sites of 5 or more dwellings, subject to site specific financial viability. Strategic Housing will provide guidance to applicants on how this will be delivered, including type, size and tenure issues.

...

Applicants would ... be advised that the failure to make provision for affordable housing may be a reason that is used to refuse planning permission.”

7. The IANAHR 2012 was subsequently updated, altered and expanded. A series of supplements to the original document were published in July 2012, January 2013 and August 2014. The original document and the supplements were then amalgamated into a single document in January 2015. A new version of this document with improved format and content was published in October 2015, entitled “Negotiating Affordable Housing Contributions (October 2015)”. This document was further updated following the publication of the 2015 Strategic Housing Market Assessment, and a new version entitled “Negotiating Affordable Housing Contributions (December 2015)” (“NAHC 2015”) was promulgated on 5th January 2016. It should be noted that none of the post-IANAHR 2012 documents was separately adopted by the Defendant.

8. The NAHC 2015 contained the following statements:

“This document sets out the council’s interim approach to negotiating affordable housing contributions, in connection with planning applications for residential development. The approach (which is not a development plan policy) was adopted for development control purposes by the Council’s Policy Committee on 29th May 2012. Guidance explaining the

approach has been updated, improved and expanded over time. This latest version will be used as a stop-gap measure, by planning and housing officers, until an affordable housing policy has been prepared as part of the new local plan.

...

Our approach

In view of the above, the Council will commence negotiations with developers on the basis that, in developments of 5 dwellings or more, 40% of the units to be built on-site shall be affordable housing. On occasion, it may be appropriate to negotiate the payment of a cash-sum contribution, by the developer, in lieu of on-site affordable housing provision. All contributions will be subject to site-specific financial viability ...”

9. The Defendant’s “Draft Text, Policies and Policies Map with Sustainability Appraisal, Interim Report and Sustainability Appraisal of Policies Consultation Document”, dated 4th April 2016, forming part of the consultation process in respect of the new local plan, stated (in relation to proposed affordable housing guidance):

“The council will publish additional practical guidance on the provision of affordable housing in the form of a supplementary planning document (SPD). This will include guidance on the limited circumstances in which off-site provision or financial contributions will be considered *in lieu* of on-site provision.”

10. On 19th July 2016 the Defendant’s Policy Committee received a report from the Strategic Manager for Planning and Regeneration which recommended a “revised approach” to negotiating affordable housing contributions in connection with planning applications for residential development. In November 2014 the Government had sought by Ministerial Statement to introduce changes to national policy on requiring affordable housing contributions from small sites. These changes were successfully challenged in judicial review proceedings, but the Government’s position prevailed on appeal: see SSCLG v West Berkshire Council [2016] EWCA Civ 441, 11th May 2016. According to the Defendant’s draft NAHC 2016 (appended to the July 2016 report):

“3.2 The main effects of national affordable housing policy and guidance are as follows:

- A new national site-size threshold has been introduced. Local Planning Authorities should no longer seek affordable housing contributions from developments of 10 dwellings with a maximum combined floor space of 1,000 sqm or less.
- In designated rural areas ... authorities may choose to implement a lower threshold of 5 dwellings or less, but only

cash contributions (as opposed to on-site provision) should be sought from developments of 6-10 dwellings.

- Vacant building credit has been introduced. Authorities should apply the credit where developments include the re-use or re-development of empty buildings, so that affordable housing contributions relate only to net increases in floor space.

3.6 Paragraph 3.2 above, explains that changes to national policy and guidance are intended to lift the burden on small developers. It should be noted, therefore, that replacing the 5 dwelling threshold, adopted in 2012, with a 6 dwelling threshold will represent an improvement for landowners for landowners and developers in designated rural areas ... It is therefore considered that the recommendations of paragraphs 2.1 to 2.3 above, are likely to support the appropriate development of new homes, by small developers, in rural areas.”

I should add that the Defendant has not yet amended its draft local plan (see paragraph 9 above) to reflect the Court of Appeal’s decision. The position adopted in the draft NAHC 2016 (and, indeed, the final version) may not necessarily be reflected in the next draft of the local plan.

11. The principal change between the NAHC 2015 and the NAHC 2016 was explained at paragraph 3.3 of the July 2016 report:

“The revised approach and guidance, contained in the appendix to this report, is based on the December 2015 version, but incorporates new site-size thresholds (page 2), cash-sum contributions (page 7) and vacant building credit (page 8). A contributions flow chart has also been added to help explain how affordable housing contributions are now determined (page 14). The following table appears on page 2 of the appendix and sets out a general approach to affordable housing negotiations.

Proposed development	Affordable housing contribution
More than 10 dwellings	40% of the units to be built on-site should be affordable housing
More than 1,000 sqm	
6-10 dwellings in designated	A cash contribution should be paid,

rural area	once a reasonable proportion of the units is occupied, in lieu of on-site affordable housing provision
Less than 6 dwellings, but more than 1,000 sqm, in designated rural area	
All contributions will be subject to vacant building credit and site-specific financial viability	

”

12. The rationale for the change was explained at paragraph 3.5 of the July 2016 report:

“Under the council’s current approach, which was adopted on 29th May 2012, on-site provision has been sought from all developments of 5 dwellings or more, with cash contributions only accepted in exceptional circumstances. This approach has worked well and the council has secured on-site provision from six developments of 6-10 dwellings in designated rural areas, delivering approximately four affordable homes per year on average. Though relatively small in number, these homes will have a significant impact on sparsely populated rural areas, helping local people stay living and working in the communities in which they have been brought up. Whilst changes in national policy and PPG mean that the council can no longer require affordable homes to be built on sites of 6-10 dwellings, cash contributions can be required in designated rural areas, which could avoid a disproportionate effect on rural communities ...”

13. On 29th July 2016 the Defendant’s Policy Committee resolved to recommend to Full Council that, owing to significant changes in national planning policy “which necessitated the Council to determine whether affordable housing commuted sums should be sought for developments of 6-10 dwellings (or less than 6 dwellings with a combined floor space of more than 1,000 sqm) in designated rural areas before such sums can be secured from developers”, it was recommended:

“(1) That, the lower threshold for affordable housing contributions in designated rural areas and, in those areas, seek cash contributions from developments of 6-10 dwellings is implemented.

(2) That, there is a requirement that affordable housing contributions are paid in respect of developments of less than 6 dwellings with a combined floor space of more than 1,000 sqm.

(3) That, the approach and guidance set out in the document entitled ‘NAHC (draft July 2016)’ ... is approved.”

14. This recommendation was confirmed, and adopted, by Full Council at its meeting on 2nd August 2016; and published on the Defendant’s website two days later.

The Legal Framework

Primary Legislation

15. The Planning and Compulsory Purchase Act 2004 (“PCPA 2004”) differentiates between “development plan documents” (“DPDs”) and “local development documents” (“LDDs”). The scheme of the PCPA 2004 is that DPDs are a sub-set of LDDs. The latter comprises all the local planning authority’s policies relating to the development and use of land in its area (section 17(3)), but these do not acquire that status until adopted as such (section 17(8)). By section 38(3)(b), “the development plan consists of the DPDs (taken as a whole) which have been adopted or approved in relation to the area in question”. The effect of section 38(6) is that applications for planning permission must be “made in accordance with the [development] plan unless material considerations indicate otherwise”.
16. The PCPA 2004 does not provide the touchstone for discriminating between DPDs and LDDs. The applicable criteria are determined by secondary legislation. Section 17(7) provides:
- “Regulations under this section may prescribe –
- (za) which descriptions of documents are, or if prepared are, to be prepared as LDDs;
- (a) which descriptions of LDDs are DPDs;
- (b) the form and content of the LDDs;
- (c) the time at which any step in the preparation of any such document must be taken.”

Even so, I do not overlook section 37(3) which defines a DPD as a “[LDD] which is specified as a [DPD] in the local development scheme”. An issue arises as to whether a document which may fall within the prescribed description of an LDD (but is not prescribed as a DPD within regulations made under section 17(7)(a)) may still be treated by a local planning authority as a DPD.

17. Under the PCPA 2004, DPDs must be subject to independent examination by the Secretary of State (section 20). LDDs are not so subject. The combined effect of section 17(3) of the PCPA 2004 and section 70(2)(c) of the Town and Country Planning Act 1990 (“the 1990 Act”) is that LDDs are (if they are not also DPDs) material considerations in the determination of planning applications, although they do not carry the weight of the statutory development plan (c.f. section 38(6)).

Secondary Legislation

18. Regulation 2 of the 2012 Regulations defines “local plan” as “any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b), and for the purposes of section 17(7)(a) of the Act these documents are prescribed as DPDs” (see also regulation 6). Further, “supplementary plan document” (“SPD”) means “any document of a description referred to in regulation 5 (except an adopted policies map or a statement of community involvement) which is not a local plan”.
19. By regulation 5:

“Local Development Documents

- (1) For the purposes of section 17(7)(a) of the Act the documents which are to be prepared as [LDDs] are –

(a) any document prepared by a local planning authority individually or in co-operation with one or more local planning authorities which contains statements regarding one or more of the following -

(i) the development and use of land which the local planning authority wish to encourage during any specified period;

(ii) the allocation of sites for a particular development or use;

(iii) any environmental, social design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and

(iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission.

...

- (2) For the purposes of section 17(7)(za) of the Act the documents which, if prepared, are to be prepared as local development documents are –

(a) any document which -

...

(iii) contains the local planning authority’s policies in relation to the area; ...”

20. Thus, the effect of regulations 2 and 6 is that the local plan (and, therefore, the development plan) comprises documents of the description referred to in regulation 5(1)(a)(i), (ii) or (iv), or 5(2)(a) or (b). Documents which fall within the description referred to in regulation 5(1)(a)(iii) or (1)(b) cannot be DPDs.
21. SPDs are subject to regulations 12 and 13 of the 2012 Regulations, and specific public consultation requirements. DPDs are subject to the different consultation requirements of regulation 18.
22. SPDs, which are not a creature of the PCPA 2004, are defined negatively (see regulation 2(1)) as regulation 5 documents which do not form part of the local plan, i.e. are not DPDs. By the decision of this court in R (RWE Npower Renewables Ltd) v Milton Keynes Borough Council [2013] EWHC 751 (Admin) (Mr John Howell QC sitting as a DHCJ), not all documents which are not DPDs are SPDs. As I have said, SPDs are only those documents which fall within regulation 5(1)(a)(iii) or (1)(b) of the 2012 Regulations. Documents which are neither DPDs nor fall within any of the provisions of regulation 5(1) are capable of being LDDs but – in order to differentiate them from DPDs and SPDs - are “residual LDDs”. At paragraphs 57-59 of this judgment in RWE, Mr Howell QC made clear that it is not the location of a document within the prescribed categories which is critical; what matters is that the document fulfils the separate criteria of section 17(3) and (8) of the 2004 Act.
23. Thus, there are three discrete categories, namely:
- (1) DPDs: these are LDDs which fall within regulation 5(1)(a)(i), (ii) or (iv). They must be prepared and adopted as a DPD (as per the requirements of Part 6 of the 2012 Regulations). They must be subject to public consultation (regulation 18) and independent examination by the Secretary of State (section 20 of the PCPA 2004). As I have said (see paragraph 16 above), an issue potentially arises as to whether a document which does not fall within these regulatory provisions may nonetheless be a DPD because a local planning authority chooses to adopt it as such.
 - (2) SPDs: these are LDDs which are not DPDs and which fall within either regulation 5(1)(a)(iii) or (1)(b). They must be prepared and adopted as SPDs (as per the requirements of Part 5 of the 2012 Regulations). SPDs do not require independent examination but they do require public consultation (regulations 12 and 13).
 - (3) Residual LDDs: these are LDDs which are neither DPDs or SPDs. They must satisfy the criteria of section 17(3) and (8) of the PCPA 2004, and must be adopted as LDDs (as per (2) above). There are no public consultation and independent examination requirements: see paragraphs 44-46 of the decision of this Court on R (Miller Homes) v Leeds City Council [2014] EWHC 82 (Admin). At paragraph 17 above, I said that LDDs are material considerations in planning applications although they do not have the status of DPDs. I consider that the same logic should hold that LDDs which are SPDs carry greater weight in such applications than do residual LDDs.

24. The National Policy Planning Framework (“NPPF”) provides:

“17. Within the overarching roles that the planning system ought to play, a set of core land-use planning principles should underpin both plan-making and decision-taking. These 12 principles are that planning should:

- be genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area ...

...

- proactively drive and support sustainable economic development to deliver the homes, business and industrial units, infrastructure and thriving local places that the country needs. Every effort should be made objectively to identify and then meet the housing, business and other development needs of an area, and respond positively to wider opportunities for growth. Plans should take account of market signals, such as land prices and housing affordability, and set out a clear strategy for allocating sufficient land which is suitable for development in their area, taking account of the needs of the residential and business communities;

...

50. To deliver a wide choice of high quality homes, widen opportunities for home ownership and create sustainable, inclusive and mixed communities, local planning policies should:

- plan for a mix of housing based on current and future demographic trends ...
- identify the size, type, tenure and range of housing that is required in particular locations, reflecting local demand; and
- where they have identified that affordable housing is needed, set policies for meeting this need on site, unless off-site provision or a financial contribution of broadly equivalent value can be robustly justified ...

...

156. Local planning authorities should set out the **strategic priorities** for the area in the Local Plan. These should include strategic policies to deliver:

- * the homes and jobs in the area.

...

174. Local planning authorities should set out the policy on local standards in the Local Plan, including requirements for affordable housing ...

...

Glossary

[I note the definitions of “affordable housing”, “development plan”, “local plan” and “supplementary planning documents”, but in my view these do not merit direct citation]”

25. At paragraph 9 above, I mentioned the Defendant’s draft local plan which will go out to consultation in due course. The precise terms on which it will be consulted are unclear. By paragraph 216 of the NPPF, decision-makers may give weight to emerging plans, with the degree of weight dependent on the stage of preparation, the extent to which there are unresolved objections to relevant policies, and the degree of consistency between such plans and the NPPF itself.

Strategic Environmental Assessment

26. Regulation 2(1) of the SEA Regulations defines the “plans or programmes” to which this regime applies as:

“plans and programmes ... which

(a) are subject to preparation or adoption by an authority at ... a local level,

(b) are prepared by an authority for adoption, through a legislative procedure by Parliament or Government; and in either case

(c) are required by legislative, regulatory or administrative provisions ...”

27. By regulation 5:

“(1) Subject to paragraphs (5) and (6) and regulation 7, where –

(a) the first formal preparatory act of a plan or programme is on or after 21st July 2004; and

(b) the plan or programme is of the description set out in either paragraph (2) or paragraph (3)

the responsible authority shall carry out, or secure the carrying out of, an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of

that plan or programme and before its adoption or submission to the legislative procedure.

(2) The description is a plan or programme which -

(a) is prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, and

(b) sets the framework for future development consent of projects listed in Annex I or II of Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC.

...

(4) Subject to paragraph (5) and regulation 7 -

(a) the first formal preparatory act of a plan or programme, other than a plan or programme of the description set out in paragraph (2) or (3), is on or after 21st July 2004;

(b) the plan or programme sets the framework for future development consent of projects; and

(c) the plan or programme is subject to a determination under regulation 9(1) ... that it is likely to have significant environmental effects,

the responsible authority shall carry out, or secure the carrying out, of an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of that plan or programme and before its adoption or submission to the legislative procedure.

...

(6) An environmental assessment need not be carried out -

(a) for a plan or programme of the description set out in paragraph (2) or (3) which determines the use of a small area at local level; or

...

unless it has been determined under regulation 9(1) that the plan, programme or modification, as the case may be, is likely to have significant environmental effects, ...”

28. By regulation 9:

“(1) The responsible authority shall determine whether or not a plan, programme ... referred to in –

(a) paragraph (4)(a) and (b) of regulation 5;

(b) paragraph (6)(a) of that regulation;

(c) paragraph (6)(b) of that regulation,

is likely to have environmental effects.

(2) Before making a determination under paragraph (1) the responsible authority shall -

(a) take into account the criteria specified in Schedule 1 to these regulations; and

(b) consult the consultation bodies.

(3) Where the responsible authority determines that the plan, programme ... is unlikely to have significant environmental effects (and, accordingly, does not require an environmental assessment), it shall prepare a statement of its reasons for the determination.”

The NAHC 2016

29. The NAHC 2016 makes clear that it contains the Defendant’s “interim approach” to negotiating affordable housing contributions, which approach was first adopted on 29th May 2012. According to its drafters, it is not in the nature of a development plan policy (the “not” is italicised). Further:

“This current version incorporates a ministerial statement issued in 2014 and related to changes to planning practice guidance. It will be used as a stop-gap measure, by planning and housing officers, whilst an affordable housing policy is being prepared as part of the new local plan.”

30. The NAHC 2016 recognised the conclusion of the Defendant’s Strategic Housing Market Assessment (“the 2015 SHMA”) that there was a high need for affordable housing in Craven. It also recognised that the 2014 Ministerial Statement, upheld by the Court of Appeal in May 2016, allowed local planning authorities in designated rural areas the option of lowering the threshold from 10 dwellings to 5 dwellings/1,000 sqm, with any affordable housing contributions being taken as cash payments.

31. The following provisions of the NAHC 2016 are relevant to the issues which arise:

- (i) Paragraph 3: this sets out the general approach, and reflects the table I have included at paragraph 11 above.
- (ii) Paragraph 4: this defines “affordable housing” with reference to the definition in the glossary section of the NPPF.
- (iii) Paragraph 6: as regards the “size and tenure of affordable housing units”, the general approach to securing the local housing needs as set out in the 2015 SHMA is to prioritise small affordable homes for “forming and growing households”. There should also be an affordable housing mix of about 75% affordable rented and 25% intermediate housing for sale.
- (iv) Paragraph 7: affordable housing units should, as a general rule, be spread through developments rather than concentrated in particular areas.
- (v) Paragraph 8: the design requirements should be as laid down by the HCA and in the Defendant’s own document, “Design Guidance for Affordable Housing Providers”. Paragraph 8 also specifies minimum space standards.
- (vi) Paragraphs 10-12 deal with the detail of housing transfer prices, cash-sum contributions and vacant building credit.

32. I set out the salient parts of paragraph 16 of the NAHC 2016 separately:

“Planning Applications

Anyone proposing a development of 6 or more dwellings, or more than 1,000 sqm, should discuss affordable housing requirements with the council’s housing development team at a pre-application meeting.

...

If an applicant believes that affordable housing requirements are not financially viable, he/she should submit a financial viability appraisal before submitting a planning application ...

...

Applicants are urged to take the opportunities offered to engage in pre-application discussions, as insufficient attention to affordable housing requirements is likely to result in a refusal of planning permission.”

The Issues

33. The parties are agreed that the following five issues arise for my consideration:

- (1) Did the Defendant act unlawfully in failing to adopt the NAHC 2016 as a DPD in accordance with regulation 5(1)(a)(i) or (iv) of the 2012 Regulations? (Ground 1)

- (2) Did the Defendant act unlawfully in failing to adopt the NAHC 2016 as an SPD in accordance with Regulation 5(1)(a)(iii) of the Town and Country Planning (Local Planning) (England) Regulations 2012? (Ground 2)
- (3) If the answer to (1) or (2) is yes, did the Defendant breach the SEA Directive and Regulations in failing to carry out an environmental assessment? (Ground 3)
- (4) What is the proper scope of this claim?
- (5) Does s. 31(2A) of the Senior Courts Act 1981 apply to this Claim?

The Rival Contentions

The Claimant's Case

Issue 1

34. Mr Gregory Jones QC for the Claimant submitted that the NAHC 2016 contains statements which fulfil all the requirements of regulation 5(1)(a)(i). The NAHC 2016 is intended to be the Defendant's interim policy in relation to affordable housing, implemented in direct response to paragraph 50 of the NPPF, and to the option accorded to local planning authorities in the Ministerial Statement of 2014, pending the preparation and finalisation of the new local plan. Specifically, the NAHC 2016 was promulgated in response to a clearly perceived need for affordable housing, and, accordingly, encourages it. The various components of the policy document, including references to size and tenure, distribution of housing units, and design, relate to or are regarding "development and use of land": the link between the statements on the one hand and their target on the other ("the development and use of land") need not be particularly tight. Further, these are matters which the Defendant wishes to encourage "during any specified period", being an admittedly indeterminate period of time which will end once the new local plan has been adopted.

35. In his skeleton argument, Mr Jones encapsulated his submission in this manner:

"The logical implication of this ... viewed in the round, it is clear that the NAHC does contain statements that seek to encourage residential development in a form that accords with the requirements of the NAHC 2016 until such time as a new local plan is adopted."

When, during oral argument, I pointed out that this formulation rather tended to circularity, Mr Jones recast his headline submission slightly. His principal submission was that the NAHC 2016, properly construed and seen in context, encourages residential development of a particular type: namely, affordable housing. In the alternative, Mr Jones submitted that the NAHC 2016 encourages residential development more generally, because the fixing of the percentage allocation of affordable housing to market housing has a direct impact on the latter, and on the commercial attractiveness of residential development generally.

36. In the alternative, Mr Jones submitted that the NAHC 2016 contains statements that regulate the development or use of land more generally, and that it therefore falls within regulation 5(1)(a)(iv). The document sets forth the conditions which must be satisfied in order for planning permission to be granted: if these are not fulfilled, it is probable that permission will be refused. The NAHC 2016 applies in respect of all residential development in the Defendant's administrative area and can therefore be envisaged as a general development management policy.

37. Mr Jones accepted that the NAHC 2016 contains no statements regarding site allocation policies, but he submitted that the conjunction “and” in regulation 5(1)(a)(iv) is disjunctive rather than conjunctive – in the sense that, in order to be caught by the provision, it is unnecessary for both elements to be satisfied.
38. If the NAHC 2016 falls within either regulation 5(1)(a)(i) or (iv), Mr Jones submitted that it is a DPD which ought to have been made the subject of consultation under regulation 18 of the 2012 Regulations, and have been submitted to the Secretary of State for independent examination of its soundness under regulation 20.

Issue 2

39. Mr Jones’ primary case is that the NAHC 2016 is a DPD, but he submitted in the alternative that it is an SPD because it clearly contains objectives which the Defendant seeks to attain in relation to the provision of affordable housing: these are the financial conditions, and the size and tenure, design, and spatial objectives I have previously mentioned.
40. Mr Jones observes that the Defendant’s skeleton argument raises for the first time the objection that there is no or insufficient nexus between any statements in the NAHC 2016 which might *prima facie* fall within regulation 5(1)(a)(iii) and any saved policies in the 1999 Local Plan. His riposte to this objection was two-fold: first, that the NAHC 2016 contains statements which pertain to saved policy H12; secondly, that it contains statements which qualify one or more of the more general aspects of the Housing Chapter of the 1999 Local Plan.
41. If the NAHC 2016 falls within regulation 5(1)(a)(iii), Mr Jones submitted that it is an SPD which ought to have been made the subject of consultation under regulations 12 and 13 of the 2012 Regulations.

Issue 3

42. It is common ground that, if the Claimant succeeds on Ground/Issue 1, the Defendant should have undertaken an SEA.
43. In the event that the Claimant succeeds on Ground/Issue 2 (having, by definition, failed on Ground/Issue 1), Mr Jones submitted that the NAHC 2016 *qua* SPD falls within the ambit of regulation 5(2) of the SEA Regulations because it is a “plan or programme” that is “prepared for town and country planning or land use”, and it “sets the framework for future development consent of [urban development projects]”. That being the case, it was incumbent on the Defendant to carry out, or secure the carrying out, of an environmental assessment under regulation 5(1).
44. The rubric “plan or programme” applies only to documents “required by legislative, regulatory or administrative provisions” (see article 2(a) of the SEA Directive). Mr Jones relied on the decision of the CJEU in Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale [2012] Env L.R. 30 in support of the proposition that

the statutory preconditions for the adoption of an SPD satisfied the criterion of “required” notwithstanding that the SPD itself was not a mandatory document. In the alternative, Mr Jones submitted that the NAHC 2016 is a plan required by “administrative provisions”, namely provisions in the NPPF.

45. As for the separate rubric, “sets the framework for future development consent of [urban development projects]”, Mr Jones submitted, in reliance on the decision of the Supreme Court in R (Buckinghamshire County Council) v Transport Secretary [2014] UKSC 3, that the NAHC 2016 satisfies this test because it constrains subsequent consideration of applications for planning permission within the terms of Lord Carnwath JSC’s analysis.

Issue 4

46. As I have pointed out at paragraph 11 above, when a comparison is made between the NAHC 2015 and the NAHC 2016, it is clear that the main substantive difference relates to paragraph 3 and the approach to cash-sum contributions *in lieu* of on-site provision in certain specified circumstances. There are also minor consequential changes. Whereas the NAHC 2015 was published, but not adopted, by the Defendant, the NAHC 2016 was adopted and then published two days later.
47. Mr Jones submitted that in these circumstances it is open to the Claimant to seek to challenge the entirety of the NAHC 2016, and not just those portions which were new. Given the procedures adopted by the Defendant in August 2016, and that the NAHC 2015 was impliedly abrogated the instant after the NAHC 2016 came into effect, there was nothing to preclude a challenge to the entirety of the later document. The fact, which is not accepted, that the Claimant’s real grievance might relate not to the new parts is nothing to the point.

Issue 5

48. Mr Jones submitted that, had the Defendant not acted unlawfully, it was not “highly likely” that the outcome would not have been substantially different (see the familiar wording of section 31(2A) of the Senior Courts Act 1981). If I were to find in his favour on Ground 1 (and, therefore, on Ground 3 too), it would follow that the Defendant was in breach of the various regulatory requirements by failing to consult on the NAHC 2016, in failing to carry out an SEA, and in failing to submit the document for independent assessment by the Secretary of State. In such circumstances, the court simply cannot speculate as what the outcome would or might have been had these omissions not occurred. Mr Jones submitted that the analysis should be the same were he to succeed only on Ground 2, with or without Ground 3; although he would have to accept that the point would not be as powerful.
49. In terms of the comparative exercise predicated by section 31(2A), Mr Jones submitted that I should examine the outcome with reference to what would have obtained had the unlawfulness not occurred rather than on the basis of any comparison between the NAHC 2016 and the NAHC 2015.

The Defendant's Case

Issue 1

50. Mr Michael Bedford QC for the Defendant submitted, by way of introductory observation, that the distinction between DPDs, SPDs and residual LDDs “is, at times, opaque”. He also submitted that Mr Jones’ approach to regulation 5(1)(a)(i) was so broad that it left little space for SPDs (within (iii)) and for residual LDDs, which are outside the frame of these regulations altogether.
51. His first submission was that regulation 5(1)(a) is concerned, in essence, with *policies*, and that the NAHC 2016 is not intended to be such a document: it lays down an interim approach, and must therefore be treated as no more than a material consideration for planning purposes, rather than as generating a statutory presumption pursuant to section 38(6) of the 2004 Act. Given that the Defendant is not intending to circumvent the statutory scheme, and is developing its local plan in line with the substantive and procedural requirements which the 2004 Act and national policy has prescribed, there can be no sound reason in principle why, pending this plan coming to fruition, the Defendant cannot adopt, promulgate and adhere to guidance of this nature as a form of stop-gap measure. On my understanding, Mr Bedford deployed this submission in relation to both Grounds 1 and 2; but, as it features as a preliminary point, I raise it at this stage.
52. Secondly, Mr Bedford submitted that the NAHC 2016, as its introductory section makes clear, addresses the Defendant’s “interim approach to negotiating affordable housing contributions, in connection with planning applications for residential development”. The focus is on the contributions rather than on residential development. For the purposes of regulation 5(1)(a)(i), residential development is not being encouraged. The premise upon which the NAHC 2016 proceeds is that a developer may propose a particular development (this is treated as a given), and then the Defendant will address the issue of affordable housing, in particular cash-sum contributions. Thus, in no relevant sense is residential development being encouraged or promoted: the developer has already decided to apply for permission to undertake such development. Although the “development and use of land” within this part of the regulation covers residential development (see Use Class C3, for individual dwellings), it does not embrace affordable housing. This is not the development and use of land; rather, it is concerned only with the terms and tenure for the occupation of residential development.
53. In answer to Mr Jones’ alternative argument on regulation 5(1)(a)(iv), Mr Bedford’s submissions passed along the following tracks:
- (1) on the assumptions that (a) the “and” in this sub-paragraph should be read disjunctively, and (b) paragraphs 75-76 of the judgment of Mr Howell QC in RWE are correct, it cannot be said that the NAHC 2016 is a policy guiding applications for planning permission *generally*. It is concerned only with the issue of affordable housing provision, which amounts to a specific policy not dissimilar from the sort of policy under scrutiny in RWE itself.

- (2) In the alternative, the “and” in this paragraph should be read conjunctively, which is its more natural and ordinary meaning. This chimes with the more sensible, purposive construction of the provision inasmuch as a disjunctive interpretation lends no separate life to the second limb of regulation 5(1)(a)(iv): this is because all site allocation policies will already be DPDs on account of the wording of paragraph 5(1)(a)(ii), there being no material difference in the regulatory language. Recognising that this alternative analysis is inconsistent with paragraphs 193-197 of RWE (on the basis that development management policies *simpliciter* would be outside the regulatory scheme, because they could not be DPDs), Mr Bedford did not shrink from submitting that Mr Howell QC was wrong, and should not be followed. This is the issue I mentioned at paragraph 16 above. Regulation 5(1)(a) does not establish an exhaustive code. Not merely are there residual LDDs, local planning authorities may decide that particular documents should form part of the local plan, and be processed as such. Section 37(3) is wide enough to enable this to happen.

Issue 2

54. Mr Bedford accepted in principle that the NAHC 2016 contained statements regarding social, design and economic objectives (see the wording of regulation 5(1)(a)(iii)). Indeed, he deployed this in support of his construction of paragraph (i): a case which is apt, at least in principle, to be accommodated within one provision must (at the very least) be less apt to be accommodated within another (it being impossible for the case to fall within both provisions). His submission, however, was that these various objectives are not relevant to “the attainment of the development and use of land mentioned in paragraph (i)”, which must be a reference to a specific DPD to which the putative SPD is subordinate. Given that there is no saved affordable housing policy in the 1999 Local Plan, it must follow that there is nothing to which this putative SPD can be supplementary. The very general statements in the saved local plan cannot be recruited for this purpose, nor can policy H12 which relates very specifically to rural exception sites and 100% affordable housing.

Issue 3

55. On the footing that the NHC 2016 is an SPD, Mr Bedford remarked that it was not readily apparent how and why the provision of affordable housing could have likely environmental effects; it was neutral in this regard.
56. Mr Bedford advanced two submissions on the language of regulation 5(2) of the SEA Regulations, as interpreted by relevant European and domestic jurisprudence. First, he submitted that the NAHC 2016 was a voluntary plan which was not “required by legislative, regulatory or administrative provisions”. Secondly, he submitted that it did not “set the framework for future development consent”. All environmental effects would be fully and properly considered under the rubric of separate assessment under the EIA Regulations, where appropriate.

Issue 4

57. Mr Bedford submitted that those parts of the NAHC 2016 which differed from the NAHC 2015, and could properly be regarded as “new”, were limited in scope (see paragraph 11 above). The Claimant did not challenge the NAHC 2015, and is now far too late to do so. The NAHC 2015 must therefore be regarded as a valid document. In substance, albeit perhaps not in form, the majority of the NAHC 2015 has been carried through into the NAHC 2016; and should be seen as immune from challenge.

Issue 5

58. Mr Bedford submitted that the “outcome” for the Claimant “if the conduct complained of had not occurred” would have been substantially the same. This is because: (i) the correct comparison for these purposes is between the NAHC 2016 and the NAHC 2015 (had the former not been adopted, the latter would have remained in place), (ii) the Claimant has no interest in the smaller sites covered by the changes to paragraph 3 of the NAHC 2016, and/or (iii) any knock-on effects on the housing market brought about by the policy under current scrutiny are wholly contingent on the 2014 Ministerial Statement, which has not been challenged. Further, and in relation only to Ground 3, Mr Bedford submitted that, even were an SEA to be required, no likely environmental effects could stem from the provision of affordable housing.
59. Both Counsel referred me to authority in support of the submissions they made. I will address relevant authority during the course of the next section of this judgment.

Analysis and ConclusionsIntroduction

60. Although he formulated the point slightly differently, I agree with Mr Bedford that the quest for the true construction and meaning of regulation 5(1)(a) is unnecessarily challenging. Frankly, those responsible for these regulations should consider redrafting them.
61. Were the 2012 Regulations primary legislation, the interpretative exercise would have to proceed on the assumption that Parliament is all-knowing and infallible, and that they can only be viewed as an entirely coherent entity without any internal inconsistencies. No doubt secondary legislation aspires to like standards, but in my view the same assumption does not have to be made. Inconsistencies and anomalies may exist. It is often a question of the lesser of two evils.
62. Regulation 5(1)(a) has been subjected to close analysis by Mr Howell QC in RWE, but interpretative problems remain. Despite all the difficulties, and the weight and breadth of submission brought to bear on the issues, I have been able to come to the clear conclusion that the NAHC 2016 is a DPD because it falls within regulation

5(1)(a)(i). The robustness of this conclusion may not relieve me entirely of the need to touch on other provisions, but the pressure is less great.

63. It is common ground, and in any event correct, that the allocation of the NAHC 2016 to its correct legal category raises a question of law rather than of planning judgment: see R (oao Wakil) v Hammersmith and Fulham LBC [2012] EWHC 1411 (QB), paragraphs 81 and 82. The NAHC states in terms that it is not a DPD, possibly protesting too much; but, in any event, the decision is for me, not for the Defendant.
64. I reject Mr Bedford's submission that the NAHC 2016 is an "interim approach" and not a policy. It obviously is a policy, as it was in the 1999 Local Plan (H11, now deleted), and will be in the Defendant's new local plan. It goes without saying that the content of the policy has changed, and will change, over time; but in terms of category or concept we are talking about policies and not about anything else.
65. Mr Bedford did not submit in the alternative that, if the NAHC 2016 is a policy, it is a residual LDD. However, that must be the logic of his case, and I proceed on that basis.

Issue 4

66. I note the ordering of the issues as agreed by the parties, but it is convenient to begin with Issue 4, the scope of the claim. If Mr Bedford's submission were correct, the Claimant may only seek to challenge that which is "new" or different in the NAHC 2016, when it is placed against the NAHC 2015. However, his submission is incorrect. The Defendant decided to adopt the NAHC 2016 as a fresh document. It was probably right to do so, but that is neither here nor there. I asked Mr Bedford for assistance as to the status of the NAHC 2015 once the NAHC 2016 had been adopted. He accepted that the earlier document had been impliedly abrogated. In my view, the position could not be otherwise.
67. Mr Bedford relied on the following passage in paragraph 67 of Mr Howell QC's judgment in RWE:

" ... But in my judgment regulation 5(1) is not concerned with documents containing statements that merely repeat the policies already contained in the adopted local plan or in another [LDD] by way of background or for the sake of clarity."

I entirely agree. However, in the instant case the NAHC 2016 did not merely repeat earlier statements of policy by way of background or for the sake of clarity. In RWE, the earlier statements retained their legal vigour; in the instant case, they no longer exist. Mr Bedford's riposte that this is to elevate form over substance would have appeal were it not for the fact that his clients decided to take this particular course.

68. The Claimant is therefore entitled to challenge the whole of the NAHC 2016. The Defendant does not dispute its standing to do so. The fact that the Claimant may not be particularly interested in the so-called "new" elements of the Defendant's policy is irrelevant because (a) the whole document falls under scrutiny, (b) an ordinary

member of the public within the Defendant's area would have sufficient interest to bring this challenge, and the Claimant has commercial corporate interests of a general nature, and (c) the Claimant may have an indirect commercial interest in so far as the NAHC impacts on residential development generally. This last point will be developed below.

Issue 1

69. Regulation 5(1)(a) has been addressed in two decisions of this court.
70. In RWE, the challenge was to the Defendant's "Wind Turbines Supplementary Planning Document and Emerging Policy" ("Wind SPD"). RWE's main arguments were that this document was not an SPD, but a DPD; and that it conflicted with Milton Keynes' adopted DPD.
71. The following paragraphs in Mr Howell QC's judgment are relevant to Issue 1:
- (1) A putative LDD which does not fall within the descriptions of documents referred to in regulation 5 may still be an LDD, because of the combined effect of section 17(3) and (8) of the 2004 Act. These are the "residual LDDs" discussed at paragraph 22 above (paragraphs 59-60).
 - (2) By contrast, the class of possible DPDs is limited to those prescribed in regulation 5 (paragraphs 193-197).
 - (3) "what all [LDDs] ... contain are "policies" relating to the use and development of land. What regulation 5(1)(a) is thus concerned with are statements that contain policies, which are described in sub-paragraphs (i) to (iv)" (paragraph 67).
 - (4) In order to ascertain whether a document encourages the development and use of land, regard must be had to the type of statements a document contains, not on what the effect of such statements may be in practice (paragraph 70).
 - (5) The Wind SPD was not a DPD within regulation 5(1)(a)(i) because, on the facts of that case, any statements of encouragement merely repeated the statements in Milton Keynes' adopted DPD (paragraph 69).
 - (6) The Wind SPD was not a DPD within regulation 5(1)(a)(iv) because the new parts of the Emerging Policy were all connected with a particular form of development that Milton Keynes' adopted DPD already sought to encourage, namely proposals to develop wind turbines; they were not connected with regulating the development or use of land generally (paragraph 76). Specifically (at paragraph 75):

"In my judgment the difference, between (a) documents containing statements regarding matters referred to in sub-paragraphs (i) to (iii) of regulation 5(1)(a) of the 2012 Regulations and (b) a document containing statements regarding a development management policy which is intended to guide the determination of applications for planning

permission, is that the former are all connected with particular developments or uses of land which a local planning authority is promoting whereas the latter is concerned with regulating the development or use of land generally.”

Mr Howell QC’s reason for this conclusion was that any different construction of regulation 5(1)(a)(iv) would render (i), (ii) and (iii) effectively otiose (paragraph 74).

(7) Mr Howell QC endorsed what was common ground before him, namely that the “and” in regulation 5(1)(a)(iv) should be read disjunctively – “were it otherwise a document containing a simple development control policy ... could not form part of the local plan for the purpose of the 2012 Regulations and become part of the development plan” (paragraph 72).

72. In Miller, the challenge was to an interim policy which constituted a departure from Leeds City Council’s adopted Policy N34, which served to safeguard some non-Green Belt land. Miller contended that the interim policy was a DPD, alternatively an SPD, relying on all the various categories in regulation 5(1)(a) and (2)(b).

73. The following paragraphs in Stewart J’s judgment are relevant to Issue 1:

(1) “regarding” (in the stem of regulation 5(1)(a)) signifies a relatively loose relationship between the “document” and the matters contained in (i)-(iv) (paragraph 23).

(2) The Interim Policy did not encourage the development and use of land. Specifically (at paragraph 26):

“... The court must look at the substance as to whether the LPA wishes to encourage the development and use of land; the court must also have regard to the subjective element in the verb ‘wish’. There will be situations where an LPA wishes to encourage the development and use of land, for example to regenerate an area. The Interim Policy is very different. It sets out criteria which are an attempt by the LPA to comply with the NPPF. These criteria encourage and discourage development, albeit that the overall net effect is to release further land. Nor does the fact that there is reference in subparagraph (v)(a) of the Interim Policy to regeneration change the character of the document as a whole.”

(3) The Interim Policy did not fall within regulation 5(1)(a)(iv) because Policy N34 was not a development management policy: it was a safeguarding policy, rather than a policy which *regulated* the development or use of land. Thus, statements in the Interim Policy were not regulating a development management policy (paragraphs 36-37).

(4) It was unnecessary to decide whether the “and” in regulation 5(1)(a)(iv) was conjunctive or disjunctive. Even if disjunctive, Miller’s case could not succeed (paragraph 38).

- (5) It was common ground that Policy N34 was not restricted to a particular land use (paragraph 36). By implication, therefore, Stewart J was proceeding on the basis of Mr Howell QC's distinction between particular and general policies.
- (6) "The material word [in regulation 5(1)(a)(iv)] is "regulating". Regulating land may include a number of features for example density of housing, housing mix etc." (paragraph 37). I agree with Mr Bedford that this was *obiter*.
74. Having set out relevant authority on this topic, I begin with a number of observations of a general nature.
75. First, if the document at issue contains statements which fall within any of (i), (ii) or (iv) of regulation 5(1)(a), it is a DPD. This is so even if it contains statements which, taken individually, would constitute it an SPD or a residual LDD. This conclusion flows from the wording "one or more of the following", notwithstanding the conjunction "and" between (iii) and (iv).
76. Secondly, I agree with Stewart J that "regarding" imports a material nexus between the statements and the matters listed in (i)-(iv). Stewart J referred to "document" rather than to "statements", but this makes no difference. There is no material distinction between "regarding" and other similar adjectival terms such as "relating to", "in respect of" etc.
77. Thirdly, I agree with Mr Howell QC that there may be a degree of overlap between one or more of the (i)-(iv) categories, although (as I have already said) a document which must be a DPD (because it falls within any of (i), (ii) and/or (iv)) cannot simultaneously be an SPD. This last conclusion may well flow as a matter of language from the true construction of regulation 5(1)(a)(iii), but it certainly flows from the straightforward application of regulations 2(1) and 6.
78. Fourthly, it would have been preferable had regulation 5(1)(a)(iii) followed (iv) rather than preceded it. However, the sequence does not alter the sense of the provision as a whole. Nor do I think that much turns on the relative order of (i) and (iv).
79. Fifthly, I note the view of Mr Howell QC that regulation 5(1)(a) pertains to statements which contain policies. This reflects section 17(3) of the 2004 Act – LDDs must set out the local planning authority's policies relating to the development and use of land in its area. I would add that section 17(5) makes clear, as must be obvious, that an LDD may also contain statements and information, although any conflict between these and policies must be resolved in favour of the latter. Regulation 5(1)(a) fixes on "statements" and not on policies. However, in my judgment, the noun "statements" can include "policies" as a matter of ordinary language, and any LDD properly so called must contain policies. It follows that any document falling within (i)-(iv) must contain statements which constitute policies and may contain other statements, of a subordinate or explanatory nature, which are not policies.
80. Sixthly, the difference in wording between regulation 5(1)(a)(i) and (iv) featured in the argument in Miller but not on my understanding in the argument in RWE. For the purposes of (i), the statements regarding the development and use of land etc. *are* the policies, or at the very least include the policies. On a strict reading of (iv), the statements at issue are "regarding ... development management and site management

policies”. In other words, the statements are not the policies: they pertain to policies which exist in some other place. I will need to examine whether this strict reading is correct.

81. Seventhly, given that we are in the realm of policy, “however expressed”, it seems to me that by definition we are dealing with statements of a general nature. A statement which can only apply to a single case cannot be a policy. To my mind, the difference between a policy which applies to particular types of development and one which applies to all developments is one of degree not of kind. The distinction which Mr Howell QC drew in RWE (see paragraph 75 of his judgment, and paragraph 69(6) above) is nowhere to be found in the language of the regulation, save to the limited and specific extent that regulation 5(1)(a)(ii) uses the adjective “particular”. Looking at regulation 5(1)(a)(i), I think that this could not be a clearer case of a policy of general application (“development and use of land”), subject only to the qualification of the development being that which the authority wishes to encourage.
82. Eighthly, regulation 5(1)(a) must be viewed against the overall backdrop of the 2004 Act introducing a “plan-led” system. Local planning authorities owe statutory duties to keep their local development schemes and their LDDs under review: see, for example, section 17(6) of the 2004 Act.
83. Does the NAHC 2016 fall within regulation 5(1)(a)(i)? Mr Bedford draws a distinction between affordable housing and residential development. On his approach, affordable housing is a concept which is adjunctive to that which is “development” within these regulations or the 2004 Act; and, moreover, the NAHC 2016 predicates a pre-existing wish or intention to carry out residential development. I would agree that if the focus were just on the epithet “affordable”, there might be some force in the point that it is possible to decouple the NAHC 2016 from the scope of regulation 5(1)(a)(i), which is concerned only with “development”.
84. I was initially quite attracted by Mr Bedford’s submissions, and the attraction did not lie simply in their deft and effective manner of presentation. On reflection, I am completely satisfied that they are incorrect, for the following cumulative reasons.
85. First, the Defendant wishes to promote affordable housing throughout its area in the light of market conditions. It no longer has an affordable housing policy in its adopted local plan, but there is such a policy (differently worded) in its emerging local plan. In the meantime, the Defendant wishes to promote affordable housing in conformity with the overarching policy direction of paragraphs 17 and 50 of the NPPF and the 2014 Ministerial Statement. Indeed, the language of the NPPF is reflected in the NAHC 2016 itself. Affordable housing policies are ordinarily located in local plans because they relate to the development and use of land.
86. Secondly, affordable housing forms a sub-set of residential development. The latter may be envisaged as the genus, the former as the species. It is artificial to attempt to separate out “affordable housing” from “residential development”. This entails an excessive and unrealistic focus on narrow aspects of tenure. As Mr Jones convincingly pointed out, the NAHC 2016 ranges well beyond tenure (which is simply another way of expressing what affordable housing is) into matters such as size of dwelling, distribution of types of housing across developments etc.

87. Thirdly, the correct analysis is that the NAHC 2016 promotes residential development which includes affordable housing. The latter is expressed as a percentage of the former. The setting of that percentage will inevitably have an impact on the economics of all residential development projects, because it impinges directly on developers' margins. Setting the percentage too high would kill the goose laying these eggs. Setting the percentage too low would lead to insufficient quantities of the affordable housing the Defendant wishes to encourage. The common sense of this is largely self-evident, and is reflected both in the language of paragraph 50 of the NPPF and paragraph 2 of the NAHC 2016 itself – “[s]uch policies should be sufficiently flexible to take account of changing market conditions over time”.
88. Fourthly, it is incorrect to proceed on the basis that (in accordance with Mr Bedford's primary submission) residential development should be taken as a given, with the affordable housing elements envisaged as a series of restrictions and constraints. Arguably, some support for this approach may be drawn from paragraph 26 of Miller, although that case turned on its own facts. This approach ignores the commercial realities as well as what the NAHC 2016 specifically says about the need for pre-application discussions, with insufficient attention to affordable housing requirements likely leading to the refusal of an application. In my judgment, all elements of a housing package which includes affordable housing are inextricably bound.
89. Fifthly, the language of regulation 5(1)(a)(i) mirrors section 17(3) of the 2004 Act, “development and use of land”. These terms are not defined in the 2004 Act. “Development” is defined in section 55 of the Town and Country Planning Act 1990 and includes “material change of use”. “Use” is not defined, although such uses which cannot amount to a material change are. Mr Bedford submitted that regulation 5(1)(a)(i) is tethered to section 55; Mr Jones submitted that the concept is broader. In my judgment, even on the assumption that section 17(3) of the 2004 Act should be read in conjunction with section 55 of the 1990 Act, nothing is to be gained for Mr Bedford's purposes by examining the latter. “Use” is not defined for present purposes, still less is it defined restrictively. I would construe section 17(3) as meaning “development and/or use of land”. If residential development includes affordable housing, which in my view it does, there is nothing in section 55 of the 1990 Act which impels me to a different conclusion.
90. I mentioned in argument that there may be force in the point that the NAHC 2016 sets out social and economic objectives relating to residential development, and that this might lend support to the contention that the more natural habitat for an affordable housing policy is regulation 5(1)(a)(iii) rather than (i). On reflection, however, there is no force in this point. There is nothing to prevent a local planning authority including all its affordable housing policies in one DPD. Elements of these policies may relate to social and economic objectives. However, these elements do not notionally remove the policy from (i) and locate it within (iii). The purpose of regulation 5(1)(a)(iii) is to make clear that a local planning authority may introduce policies which are supplementary to a DPD subject only to these policies fulfilling the regulatory criteria. The Defendant has made clear that it may introduce an SPD, supplementary to its new local plan, which sets out *additional* guidance in relation to affordable housing.
91. In any event, on the particular facts of this case it is clear that the NAHC 2016 could not be an SPD even if I am wrong about it being a DPD. This is because there is

nothing in the saved policies of the 1999 Local Plan to which the NAHC is supplementary, despite Mr Jones' attempts to persuade me otherwise. This is hardly surprising, because the whole point of the NAHC 2016 is to fill a gap; it cannot logically supplement a black hole. That it fills a gap is, of course, one of the reasons I have already identified in support of the analysis that the NAHC 2016 is a DPD.

92. In my judgment, the correct analysis is that the NAHC 2016 contains statements in the nature of policies which pertain to the development and use of land which the Defendant wishes to encourage, pending its adoption of a new local plan which will include an affordable housing policy. The development and use of land is either "residential development including affordable housing" or "affordable housing". It is an interim policy in the nature of a DPD. It should have been consulted on; an SEA should have been carried out; it should have been submitted to the Secretary of State for independent examination.
93. Strictly speaking, it is unnecessary for me to address regulation 5(1)(a)(iv). However, in deference to the full argument I heard on this provision, I should set out my conclusions as follows:
- (1) despite the textual difficulties which arise (see paragraph 78 above), and notwithstanding the analysis in Miller (which addressed the claimant's formulation of its case), I cannot accept that it is necessary to identify a development management policy which is separate from the statements at issue. As I have already pointed out, the whole purpose of regulation 5 is to define LDDs *qua* policies, by reference to statements which amount to or include policies. A sensible, purposive construction of regulation 5(1)(a)(iv) leads to the clear conclusion that the NAHC 2016 could fall within (iv) if it contains development management policies (subject to the below).
 - (2) I would construe the "and" in regulation 5(1)(a)(iv) disjunctively. This is in line with regulation 5(1)(a)(iii) (see the first "and", before "economic") and the overall purpose of the provision. As Mr Howell QC has rightly observed, a conjunctive construction would lead to absurdity. It would have been better had the draftsman broken down (iv) into two paragraphs ("development management policies which ..."; "site allocation policies which ...") but the upshot is the same.
 - (3) I agree with Mr Howell QC, for the reasons he has given, that it is possible to have LDDs which are outside regulation 5 but that it is impossible to have DPDs which are outside the regulation. This is another reason for supporting a disjunctive construction.
 - (4) I disagree with Mr Howell QC that regulation 5(1)(a)(i) and (iii) applies to particular developments or uses of land, whereas (iv) is general (see paragraph 79 above).
 - (5) The real question which therefore arises is whether the NAHC 2016 contains development management policies which guide or regulate applications for planning permission. It may be seen that the issue here is not the same as it was in relation to regulation 5(1)(a)(i) because there is no need to find any encouragement; this provision is neutral.

(6) I would hold that the NAHC 2016 clearly contains statements, in the form of development management policies, which regulate applications for planning permission. I therefore agree with Stewart J's *obiter* observations at paragraph 37 of Miller.

94. There is force in Mr Bedford's objection that a disjunctive reading of regulation 5(1)(a)(iv) leaves little or no space for (ii) and site allocation policies, given the definition of the latter in regulation 2(1). However, this is an anomaly which, with respect, is the fault of the draftsman; it cannot affect the correct approach to regulation 5(1)(a)(iv). There is more limited force in paragraph 74 of the judgment of Mr Howell QC in RWE, but I would make the same point. Regulation 5(1)(a)(i) and (iv) do not precisely overlap (see paragraph 93(5) above); (iii) is in any event separate because it only applies in relation to statements of policy objectives which are supplemental to a specific DPD. Further, anomalies pop up, like the heads of Hydra, however these regulations are construed. These, amongst others, are good reasons why the 2012 Regulations should be revised.

Issue 3

95. It is unnecessary for me to address Issue 3 on the alternative premise that the NAHC 2016 is an SPD rather than a DPD. I am satisfied that it is not.

Issue 5

96. Mr Bedford submitted that I should refuse relief in this case because, if the NAHC 2016 quashed, the Defendant will revert to the NAHC 2015. On his submission, the correct approach to section 31(2A) of the Senior Courts Act 1981 is that I should proceed on the premise that the NAHC 2016 was never adopted.
97. In my judgment, this submission cannot be accepted. I am required to refuse relief, namely a quashing order, if "it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". This is a backward-looking provision. However, and contrary to Mr Bedford's argument, the "conduct complained of" here is the various omissions I have listed (the failure to consult, assess and submit for examination), not the decision to adopt. "The conduct complained of" can only be a reference to the legal errors (in the Anisminic sense) which have given rise to the claim.
98. Had the Defendant not perpetrated these errors, by omission, I simply could not say what the outcome would have been, still less that it would highly likely have been the same.

Disposal

99. I grant an order under section 31(1)(a) of the Senior Courts Act 1981 quashing the NAHC 2016.

Coda

100. Like Stewart J, I am not oblivious to the practical difficulties facing local planning authorities assailed by constant changes in the legislative regime and national policy. However, a local planning authority is required to keep its local plans under review. The correct course is to press on with the timeous preparation of up-to-date local plans, and in the interregnum between draft and adoption, deploy these as material considerations for the purpose of the rights and duties conferred by the 2004 Act.

*295 Fadeyeva v Russia



Positive/Neutral Judicial Consideration

Court

European Court of Human Rights

Judgment Date

30 November 2005

Report Citation

(2007) 45 E.H.R.R. 10

Application No.55723/00

Before the European Court of Human Rights

(The President Judge Rozakis , Judges Lorenzen , Tulkens , Vajic , Botoucharova , Kovler , Zagrebelsky)

November 30, 2005

Ill-health; Legitimate aim; Necessary in democratic society; Nuisance; Pollution; Rehousing; Right to private and family life; Steel industry;

H1. The applicant was born in 1949 and lived in the town of Cherepovets, an important steel producing centre in the respondent State. From 1982 she and her family were living about 450 metres from a large steel plant. In order to limit the impact of pollution from the plant, a 5,000 metre wide “sanitary security zone” existed. The zone was supposed to separate the plant from residential areas although, in practice, several thousand people, including the applicant and her family, lived in the zone.

H2. In 1990 the government adopted a programme under which the plant was required to reduce its toxic emissions to safe levels by 1998 and to finance the resettlement of people living within the zone. In 1992 the zone was reduced to only 1,000 metres and in 1993 the plant was privatised and the residential accommodation transferred to the control of the municipality.

H3. In 1996 the government noted that the plant was responsible for 96 per cent of all emissions in the area and that the overlap between industrial and residential areas was plainly harmful to health. The pollution was found to be responsible for the huge increase in the number of children with respiratory and skin diseases and the increased number of adult cancer deaths. The Government required some 18,900 people to be rehoused away from the zone although this policy was abandoned in 2001.

H4. In 1995 the applicant, together with her family and other residents, had brought a court action seeking resettlement outside the zone. The court accepted that the applicant had the right to be rehoused but stated that she would have to wait for the local housing authorities to resettle her in due course. An appeal against this decision in 1996 was partially successful, but the court did not order the applicant to be rehoused.

H5. The applicant brought a second action in 1999, contending that her constitutional rights and Convention rights had been violated. It was held, both at first ***296** instance and on appeal, that she had no right to be rehoused, merely to be placed on a general waiting list.

H6. The applicant complained of a violation of Art.8 of the Convention.

H6. *Held* unanimously

H6. (1) that there had been a violation of Art.8 ;

H6. (2) that the respondent State was to pay a sum in respect of compensation and costs.

1. Right to private and family life; environmental nuisance; legitimate aim; necessary in a democratic society (Art. 8).

H7. (a) It was common ground that the applicant's home was affected by pollution caused by the steel plant. [66]

H8. (b) The court was limited to considering only matters arising after 5 May 1998, when the Convention entered into force with respect to Russia. Since that date, it was clear that the pollution levels had been well in excess of domestic norms. [82]–[83]

H8. (c) Environmental deterioration was not protected by Art.8 unless it directly affected the home, family or private life of an applicant. Even where such interests were affected, the harm had to attain a certain minimum level before Art.8 was engaged. The assessment of that minimum involved a relative, rather than subjective, consideration of all the circumstances. [68]–[69]

H9. (d) The applicant had not submitted any medical evidence which clearly linked her state of health to the high pollution levels. However, it was clear that the pollution levels had constantly exceeded the safe levels. [80]–[81]

H10. (e) The Government had failed to explain why it had only produced figures relating to annual averages and not daily or maximum pollution levels. The Government had further failed to explain why it had not produced reports and documents that the court had requested. The Court concluded that the pollution could easily have been worse than the evidence before it suggested. [84]

H11. (f) The Government had recognised the adverse health implications of the pollution and the domestic courts had accepted the applicant's right to be resettled. [85]–[86]

H12. (g) The indirect evidence and presumptions was sufficient to enable the Court to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the emissions and pollution from the plant. Even if she was not directly harmed, it must have made her more vulnerable to various diseases. This had an adverse impact on the quality of her home life and was sufficient to engage Art.8 . [88]

H13. (h) Although the plant was not owned by the State after 1993, the State was responsible for the regulation of private industry and was under a duty to take reasonable and appropriate measures to secure the applicant's rights. [89]

H14. (i) The plant had been initially built and run by the State. It had malfunctioned from the start and released pollution at unacceptable levels. Following privatisation, the State continued to be responsible for imposing operating conditions on the plant and ensuring effective supervision. The environmental problems were both well known and long lasting. [90]

*297

H15. (k) The State was well aware both of the existence and scale of the problem and was in a position to prevent or reduce them. That was sufficient to engage the positive obligation under Art.8 . [91]–[92]

H16. (l) The refusal to resettle the applicants was due to the need to protect the housing interests of other residents and ensure the fair operation of waiting lists. The continued operation of the plant was vital to the economic well-being of the area. [100]–[101]

H17. (m) The plant did not comply with domestic environmental and health standards. Whilst there had been improvements in recent years, the period since 1998, taken as a whole, revealed consistently high levels of pollution. The plant could only have operated within domestic law if the zone had been effectively enforced. [116]–[117]

H18. (n) The applicant could not be faulted for her choice of housing location. Whilst she had moved to her current residence in 1982 and had been aware of the general nature of the environmental problems, it was plain that her decision to move was influenced by a number of factors, including the shortage of housing at the time and the lack of any private sector alternative. Although the private residential market grew during the 1990s it would have required considerable financial expenditure to enable the applicant to do so. This was not practical in her situation. The applicant did not create the environmental problems and could not be said to have been responsible for the pollution or the consequences that flowed from living in the zone. [120]–[121]

H19. (o) The applicant had, since 1999, been waiting to be rehoused. There was no prospect of this occurring in the foreseeable future. Domestic law provided no realistic hope of being able to escape from the source of the pollution. [123]

H20. (p) Whilst significant progress had been made by the respondent State in improving environmental conditions, the overall improvement was very slow and, in respect of a number of pollutants, inconsistent. [127]

H21. (q) The Government had failed to produce various documents, despite being requested to do so by the Court; it had failed to specify what sanctions had been imposed on the plant; and it had failed to explain its policy towards the plant. These failures led the Court to draw an adverse inference and conclude that the State had given insufficient weight to the interests of the community. [129]–[131]

H22. (r) Despite the wide margin of appreciation afforded to the State, there had been a violation of the applicant's rights to respect for her home and private life, such as to amount to a violation of Art.8 . [134]

2. Just satisfaction: damages; costs and expenses; default interest (Art.41).

H23. (a) A sum of €6,000 was appropriate compensation for the exposure to pollution since May 5, 1998. [138]

H24. (b) The court had no power to order that the applicant be rehoused or to award damages in respect of future losses. [141]–[142]

H25. (c) Not all of the applicant's complaints had been declared admissible. The case was, however, complicated and highly technical. It had not been necessary for the applicant to be represented at court by four lawyers. Costs were assessed accordingly. [148]–[151]

***298**

H26 The following cases are referred to in the Court's judgment:

1. *Aktaş v Turkey* (2002) 34 E.H.R.R. 39
2. *Buckley v United Kingdom* (1997) 23 E.H.R.R. 101
3. *Fredin v Sweden* (A/192) (1991) 13 E.H.R.R. 593
4. *Guerra v Italy* (1998) 26 E.H.R.R. 357
5. *Hatton v United Kingdom* (2002) 34 E.H.R.R. 1
6. *Keegan v Ireland* (A/290) (1994) 18 E.H.R.R. 342
7. *Kyrtatos v Greece* (2005) 40 E.H.R.R. 16
8. *López Ostra v Spain* (A/303-C) (1995) 20 E.H.R.R. 277
9. *Lustig-Prean and Beckett v United Kingdom* (2000) 29 E.H.R.R. 548
10. *McCann v United Kingdom* (A/324) (1996) 21 E.H.R.R. 97
11. *Pine Valley Development Ltd v Ireland* (A/222) (1992) 14 E.H.R.R. 319
12. *Powell and Rayner v United Kingdom* (A/172) (1990) 12 E.H.R.R. 355
13. *Rees v United Kingdom* (A/106) (1987) 9 E.H.R.R. 56
14. X and U v Netherlands (A/91) March 26, 1985
15. Application No.13728/88, S v France, Dec.17.5.1990
16. Application No.46117/99, Taşkin v Turkey, November 10, 2004

H27 The following case is referred to in the concurring opinion of Judge Kovler:

17. *Moreno Gómez v Spain* (2005) 41 E.H.R.R. 40

H28 The following domestic cases are referred to in the Court's judgment:

18. *Ivaschenko v Krasnoyarsk Railways*, Supreme Court of the Russian Federation in Overview of the case law of the Supreme Court, July 15, 1998, para.22

19. Decision of June 3, 2003, No.08-1540/2003, North-Caucasus Circuit Federal Commercial Court

H29 Representation

Mr P. Laptev (Representative), Mr Y. Berestnev (Counsel), Ms T. Gournayak (Adviser), Mr M. Stavrovskiy (Adviser) and Mr M. Vinogradov (Adviser) for the government.

Mr K. Koroteyev (Counsel); Ms D. Vedernikova (Counsel), Mr B. Bowring (Counsel), Mr P. Leach (Counsel) for the applicant.

The Facts

I. The circumstances of the case

A. Background

10. The applicant was born in 1949 and lives in the town of Cherepovets, an important steel-producing centre situated about 300km north-east of Moscow. In 1982 her family moved to a flat situated at 1 Zhukov Street, about 450m from the territory of the “Severstal” steel plant (the plant). This flat was provided by the plant to the applicant's husband, Mr Nikolay Fadeyev, under a tenancy agreement.

11. The Severstal steel plant was built in Soviet times and owned by the Ministry of Black Metallurgy of the Russian Soviet Federative Socialist Republic (RSFSR). The plant was and remains the largest iron smelter in Russia and the main employer of approximately 60,000 people. In order to delimit the areas in which pollution *299 caused by steel production could be excessive, the authorities established a buffer zone around the Severstal premises—“the sanitary security zone”. This zone was first delimited in 1965. It covered a 5,000m-wide area around the territory of the plant. Although this zone was, in theory, supposed to separate the plant from the town's residential areas, in practice thousands of people (including the applicant's family) lived there. The apartment buildings in the zone belonged to the plant and were designated mainly for its workers, who occupied the flats as life-long tenants.¹ A Decree of the Council of Ministers of the RSFSR, dated September 10, 1974, obliged the Ministry of Black Metallurgy to resettle the inhabitants of the sanitary security zone who lived in districts nos 213 and 214 by 1977. However, this has not been done.

12. In 1990 the Government of the RSFSR adopted a programme “On Improving the Environmental Situation in Cherepovets”. The programme stated that “the concentration of toxic substances in the town's air exceeds the acceptable norms many times” and that the morbidity rate of Cherepovets residents was higher than average. It was noted that many people still lived within the steel plant's sanitary security zone. Under the programme, the steel plant was required to reduce its toxic emissions to safe levels by 1998. The programme listed certain specific technological measures to attain this goal. The steel plant was also ordered to finance the construction of 20,000m² of residential property every year for the resettlement of people living within its sanitary security zone.

13. By Municipal Decree No.30 of November 18, 1992 the boundaries of the sanitary security zone around the plant were redefined. The width of the zone was reduced to 1,000m.

14. In 1993 the steel plant was privatised and acquired by Severstal Plc. In the course of privatisation the apartment buildings owned by the steel plant and situated within the zone were transferred to the municipality.

15. On October 3, 1996 the Government of the Russian Federation adopted Decree No.1161 On the Special Federal Programme “Improvement of the Environmental Situation and Public Health in Cherepovets” for 1997 to 2010 (in 2002 this programme was replaced by the Special Federal Programme “Russia's Ecology and Natural Resources”). Implementation of the 1996 programme was funded by the World Bank. The second paragraph of this programme stated as follows:

“The concentration of certain polluting substances in the town's residential areas is 20–50 times higher than the maximum permissible limits (MPLs) (...)”² The biggest ‘contributor’ to atmospheric pollution is Severstal PLC, which is responsible for 96 per cent of all emissions. The highest level of air pollution is registered in the residential districts immediately adjacent to Severstal's industrial territory. The principal cause of the emission of toxic substances into the atmosphere is the operation of archaic and ecologically dangerous technologies and equipment in metallurgic and other industries, as well as the low efficiency of gas-cleaning systems. The situation is aggravated by an almost complete overlap of industrial and residential areas of the city, in the absence of their separation by sanitary security zones”. *300

The Decree further stated that “the environmental situation in the city has resulted in a continuing deterioration in public health”. In particular, it stated that over the period 1991 to 1995 the number of children with respiratory diseases increased from 345 to 945 cases per thousand, those with blood and haematogenic diseases from 3.4 to 11 cases per thousand, and those with skin diseases from 33.3 to 101.1 cases per thousand. The Decree also noted that the high level of atmospheric pollution accounted for the increase in respiratory and blood diseases among the city's adult population and the increased number of deaths from cancer.

16. Most of the measures proposed in the programme concerned the functioning of the Severstal steel plant. The Decree also enumerated a number of measures concerning the city as a whole: these included the resettlement of 18,900 people from Severstal's sanitary security zone. It transpires from the programme that the State was supposed to be the main funding source for such resettlement. However, it seems that in subsequent years Severstal Plc continued to pay for the resettlement of the zone's inhabitants, at least as regards districts Nos 213 and 214. Thus, according to Decree No.1260 by the Mayor of Cherepovets, dated April 4, 2004, in 2004 the residents of the apartment buildings situated on Gagarin Street were resettled to another district of the city. According to a letter of June 3, 2004 from the Mayor of Cherepovets, Severstal funded approximately one-third of the cost of resettlement.

17. On August 9, 2000 the Chief Sanitary Inspector for Cherepovets established that the width of the sanitary security zone should be 1,000m from the main sources of industrial pollution. However, no specific boundaries were identified for the zone. In 2002 the municipality challenged its own Decree No.30 of 1992, which had established the zone's boundaries.³ On June 13, 2002 the Cherepovets Town Court declared Decree No.30 invalid on the ground that it was ultra vires. The Town Court ruled that at the relevant time the municipality had not had jurisdiction to define the width of the zone. The boundaries of the sanitary security zone around the Severstal facilities currently remain undefined.

18. In 2001 implementation of the 1996 Government Programme was discontinued and the measures proposed in it were included in the corresponding section of the sub-programme “Regulation of Environmental Quality” in the Special Federal Programme “Russia's Ecology and Natural Resources (2002–2010)”.

19. According to a letter from the Mayor of Cherepovets dated June 3, 2004, in 1999 the plant was responsible for more than 95 per cent of industrial emissions into the town's air. According to the State Report on the Environment for 1999, the Severstal plant in Cherepovets was the largest contributor to air pollution of all metallurgical plants in Russia.

B. The applicant's attempt to be resettled outside the zone

1. First set of court proceedings

20. In 1995 the applicant, with her family and various other residents of the apartment block where she lived, brought a court action seeking resettlement outside the zone. The applicant claimed that the concentration of toxic elements *301 and the noise levels in the sanitary security zone exceeded the maximum permissible limits established by Russian legislation. The applicant alleged that the environmental situation in the zone was unfavourable for humans, and that living there was potentially dangerous to health and life. In support of her claims she relied mainly on the city planning regulations of 1989.

⁴ According to the applicant, these regulations imposed an obligation on the plant's owners to implement various ecological measures in the zone, including the resettlement of residents to an ecologically safe area. The applicant claimed that Severstal had failed to fulfil this obligation.

21. On April 17, 1996 the Cherepovets Town Court examined the applicant's action. The court recognised that the building at I Zhukov Street, where the plaintiff lived, was located within Severstal's sanitary security zone. The court noted that, prior to 1993, the applicant's flat had been owned by the Ministry of Black Metallurgy, which had also owned the plant. Following privatisation of the plant in 1993 it had become a privately owned entity and the applicant's flat had become the property of

the local authorities. Referring to the Ministerial Decree of 1974, the court found that the authorities ought to have resettled all of the zone's residents but that they had failed to do so. In view of those findings, the court accepted the applicant's claim in principle, stating that she had the right in domestic law to be resettled. However, no specific order to resettle the applicant was given by the court in the operative part of its judgment. Instead, the court stated that the local authorities must place her on a "priority waiting list" to obtain new local authority housing.⁵ The court also stated that the applicant's resettlement was conditional on the availability of funds.

22. The applicant appealed, claiming that the obligation to resettle was on the plant rather than on the municipality. She also maintained that the court had distorted the object of her claim: whereas she had been seeking immediate resettlement, the court had ordered that she be placed on a waiting list. In the applicant's view, this decision was unfeasible because its enforcement depended on too many conditions (the existence of a resettlement order, the number of people on the waiting list, the availability of funds for resettlement, etc.)

23. On August 7, 1996 the Vologda Regional Court upheld in principle the decision of April 17, 1996, and confirmed that the applicant's house was located within the Severstal steel plant's sanitary security zone. The appeal court further found that the applicant's resettlement in an ecologically safe area was to be carried out by the municipality. Finally, the appeal court excluded from the operative part of the judgment the reference to the availability of funds as a pre-condition for the applicant's resettlement.

24. The first instance court issued an execution warrant and transmitted it to a bailiff. However, the decision remained unexecuted for a certain period of time. In a letter of December 11, 1996 the Deputy Mayor of Cherepovets explained that enforcement of the judgment was blocked, since there were no regulations establishing the procedure for the resettlement of residents outside the zone.

*302

25. On February 10, 1997 the bailiff discontinued the enforcement proceedings on the ground that there was no "priority waiting list" for new housing for residents of the sanitary security zone.

2. Second set of court proceedings

26. In 1999 the applicant brought a fresh action against the municipality, seeking immediate execution of the judgment of April 17, 1996. The applicant claimed, *inter alia*, that systematic toxic emissions and noise from Severstal Plc's facilities violated her basic right to respect for her private life and home, as guaranteed by the Russian Constitution and the European Convention of Human Rights. She asked to be provided with a flat in an ecologically safe area or with the means to purchase a new flat.

27. On August 27, 1999 the municipality placed the applicant on the general waiting list for new housing. She was number 6820 on that list.⁶

28. On August 31, 1999 the Cherepovets Town Court dismissed the applicant's action. The court noted that there was no priority waiting list for the resettlement of residents of sanitary security zones, and no council housing had been allocated for that purpose. The court concluded that the applicant had been duly placed on the general waiting list. The court held that the judgment of April 17, 1996 had been executed and that there was no need to take any further measures. That judgment was upheld by the Vologda Regional Court on November 17, 1999.

C. Pollution levels at the applicant's place of residence

29. The state authorities conduct regular inspections of air quality in the city. Pollution is monitored by four stationary posts of the State Agency for Hydrometeorology, including one (post No.1) situated at 4 Zhukov Street, 300m from the applicant's house. The emission levels of 13 hazardous substances are monitored by the authorities (nitrogen dioxide, ammonia, carbonic oxide, dust, hydrogen sulphide, carbon disulphide, phenol, formaldehyde; sulphur dioxide, nitric oxide, manganese, benzopyrene, lead). Four stationary posts of the State Agency for Hydrometeorology monitor emissions of only the first eight of the above substances; additionally, post No.1 monitors emissions of sulphur dioxide, nitric oxide, lead, benzopyrene, manganese; post No.2 monitors emission of benzopyrene, manganese and sulphur dioxide. In addition, the State Agency for Sanitary Control conducts regular air tests at distances of 1, 2, 5, 7, and 19km from the steel plant. Finally, Severstal Plc has its own monitoring system, which evaluates emissions from every separate industrial facility at the plant.

30. It appears that the primary data on air pollution, whether collected by the state monitoring posts or Severstal, are not publicly available. Both parties produced a number of official documents containing generalised information on industrial pollution in the town. These documents, in so far as relevant, are summarised in the following paragraphs and in the Appendix to the present judgment.

***303**

1. Information referred to by the applicant

31. The applicant claimed that the concentration of certain toxic substances in the air near her home constantly exceeded and continues to exceed the safe levels established by Russian legislation. Thus, in the period 1990 to 1999 the average annual concentration of dust in the air in the Severstal plant's sanitary security zone was 1.6 to 1.9 times higher than the MPLs, the concentration of carbon disulphide was 1.4 to 4 times higher and the concentration of formaldehyde was 2 to 4.7 times higher (data reported by the Cherepovets Centre for Sanitary Control). The Cherepovets State Agency for Hydrometeorology reported that the level of atmospheric pollution within the zone during the period 1997 to 2001 was rated as "high" or "very high". The State Agency for Hydrometeorology confirmed that an excessive concentration of other hazardous substances, such as hydrogen sulphide and ammonia, was also registered during this period.

32. As regards the year 2002, the applicant submitted a report prepared by the Northern Regional Office of the State Agency for Hydrometeorology and Environmental Monitoring. This report stated, inter alia, that in 2002 the annual average concentration of dust near the applicant's house was 1.9 times higher than the MPL, and that the short-term peak concentration of dust was twice as high as the MPL. In July an over-concentration of carbon oxide was registered near the applicant's house: the short-term peak concentration of this element was seven times higher than the MPL. The agency also reported that the average annual concentration of formaldehyde in the town was three times higher than the MPL. The average annual concentration of carbon disulphide near the applicant's house was 2.9 times higher than the MPL. The short-term peak concentration of phenols was 4 times higher than the MPL, and that of hydrogen sulphide was 4.5 times higher.

33. The applicant also submitted information published on the website of the Northern Department of the State Agency for Hydrometeorology. This source reported that in April 2004 the concentration of formaldehyde in Cherepovets exceeded the norms. In March 2004 the monthly average concentration of formaldehyde was five times higher than the MPL.

34. The applicant further produced a study paper entitled "On the Economic Effectiveness of Public Health Measures at Severstal PLC", drawn up by the Centre for the Preparation and Implementation of International Projects on Technical Assistance, a public body established in 1993 under the supervision of the then State Committee for Environmental Protection. The study was commissioned by the Cherepovets municipality in order to obtain an analysis of the cost-effectiveness of various measures suggested in the 1996 Federal Programme. The expert team had access to data on 58 polluting elements contained in industrial emissions from the Severstal plant. The experts singled out the 13 most toxic elements and, using a special dispersion dissemination model, established how these elements affected the morbidity rate in the city. The experts then calculated how the implementation of one or another measure from the Federal Programme would reduce the concentration of these pollutants, and, consequently, how the morbidity rate would decrease.

***304**

35. In April 2004 the applicant informed the Court that further information on atmospheric pollution could be requested from the respondent Government. In particular, the applicant sought to obtain:

- (a) baseline emissions data for the Severstal plant, including data on the physical parameters of the stacks and the volume of chemicals emitted annually by each process at the Severstal facility;
- (b) dispersion modelling data for estimating the ambient air concentration of 13 toxic pollutants at each of the x and y co-ordinate locations on the Cherepovets city grid, based on the above emissions data. The applicant indicated that this information might be obtained from the Centre for the Preparation and Implementation of International Projects on Technical Assistance.⁷ The applicant also wished to obtain data on the ambient air quality in Cherepovets, obtained in 1998 to 1999 as part of the Project on Environmental Management in the Russian Federation, implemented with financial support from the World Bank. In May 2004 the Court invited the respondent Government to submit the information sought by the applicant.

2. Information referred to by the respondent Government

36. In June 2004 the Government presented a report entitled “On the Environmental Situation in Cherepovets and its Correlation with the Activity of [Severstal PLC] for the period until 2004”, prepared by the Cherepovets municipality.

37. According to the report, the environmental situation in Cherepovets has improved in recent years: thus, gross emissions of pollutants in the town were reduced from 370.5 thousand tons in 1999 to 346.7 thousand tons in 2003 (by 6.4 per cent). Overall emissions from the Severstal Plc facilities were reduced during this period from 355.3 to 333.2 thousand tons (i.e. by 5.7 per cent), and the proportion of unsatisfactory testing of atmospheric air at stationary posts fell from 32.7 per cent to 26 per cent in 2003.

38. The report further stated that, according to data received from four stationary posts of the State Agency for Hydrometeorology, a substantial decrease in the concentration of certain hazardous substances was recorded in 1999 to 2003:

- (i) dust—from 0.2 mg/m³ (1.28 of MPL) to 0.11 mg/m³ (0.66 of MPL);
- (ii) hydrogen sulphide—from 0.016 mg/m³ (3.2 of MPL) to 0.006 mg/m³ (1.2 of MPL);
- (iii) phenols—from 0.018 mg/m³ (0.6 of MPL) to 0.014 mg/m³ (0.47 of MPL).

39. According to the report, pollution in the vicinity of the applicant's house was not necessarily higher than in other districts of the town. Thus, the concentration of nitrogen dioxide at post No.1 was 0.025 mg/m³ in 2003, whereas it was 0.034 mg/m³ at post No.2, 0.025 mg/m³ at post No.3 and 0.029 mg/m³ at post No.4. The average daily concentration of ammonia registered at post No.1 was 0.016 mg/m³, at post No.2—0.017 mg/m³, at post No.3—0.005 mg/m³, at post No.4—0.0082 *305 mg. The phenol level registered at post No.1 was 0.014 mg/m³, at post No.2—0.015 mg/m³, at post No.4—0.0012 mg/m³. Finally, the concentration of formaldehyde at post No.1 was 0.019 mg/m³, whereas it was 0.012 mg/m³ at post No.2, 0.018 mg/m³ at post No.3 and 0.02 mg/m³ at post No.4.

40. The report stated that the average annual concentrations of nitric oxide, lead, manganese, nitrogen dioxide, ammonia, hydrogen sulphide, phenol, carbon oxide, and carbon disulphide did not exceed the MPL. Excessive annual concentrations were recorded only with respect to dust, formaldehyde and benzopyrene. Over the period 1999 to 2003 a certain improvement in the quality of atmospheric air was registered under the steel plant's “pollution plume” in the residential area of the town. Thus, the proportion of unsatisfactory tests was 13.2 per cent in 1999, whereas in 2003 it had fallen to 12.7 per cent. The report emphasised that the proportion of unsatisfactory air tests was decreasing: from 18.4 per cent to 14.2 per cent, as measured at a distance of 1,000m from the plant; and from 14.05 per cent to 12.8 per cent at a distance of 3,000m. The trend was also positive in respect of certain specific ingredients: within 1,000m the proportion of unsatisfactory tests for nitrogen dioxide decreased from 50 per cent in 1999 to 47 per cent in 2003; for hydrogen sulphide—from 75 per cent in 1999 to 20 per cent in 2003, and for to phenol—from 52 per cent in 1999 to 38 per cent in 2003.

41. The report produced by the Government contained generalised data on average pollution levels for 1999 to 2003, collected from four stationary posts of the State Agency for Hydrometeorology. The Government also produced data collected from monitoring post No.1, reflecting a reduction in the average annual and maximum pollution levels compared to the situation which existed 10 to 20 years ago. The most essential data contained in these reports is summarised in the Appendix to the present judgment.

42. The Government also produced extracts from a report by the Chief Sanitary Inspector for the Vologda Region, which was prepared in June 2004 for the purpose of defining new boundaries for the sanitary security zone. According to the report, Severstal was still responsible in 2004 for 94 to 97 per cent of overall air pollution in the city. The report stated that the emissions from Severstal contained 80 different pollutant substances. Despite a significant reduction in pollution in recent years, the maximum concentrations of “five priority pollutants” (dust containing more than 20 per cent of silicon dioxide, ferroalloy dust, nitrogen dioxide, naphthalene and hydrogen sulphide) still exceed safety standards at distances of one to five kilometres from the plant. The report further indicated that “more than 150,000 people live in a zone where the acceptable level of risk is exceeded”. The report proposed a number of measures which should reduce the concentration of naphthalene and ferroalloys to safe levels by 2010, and stated that the concentration of all toxic substances originating from the Severstal facilities in the bottom layer of the atmosphere should be below the maximum permissible limits by 2015.

43. Finally, the Government submitted that, should the Court need the documents sought by the applicant and referred to by her representatives as a source of primary information on air pollution, “the authorities of the Russian Federation propose that this document be requested from Mr Koroteyev [one of the applicant's representatives]”.

*306

D. Effects of pollution on the applicant

44. Since 1982 Ms Fadeyeva has been supervised by the clinic at Cherepovets Hospital No.2. According to the Government, the applicant's medical history in this clinic does not link the deterioration in her health to unfavourable environmental conditions in her place of residence.

45. In 2001 a medical team from the clinic carried out regular medical check-ups on the staff at the applicant's place of work. As a result of these examinations, the doctors detected indications of an occupational illness in five workers, including the applicant. In 2002 the diagnosis was confirmed: a medical report drawn up by the Hospital of the North-West Scientific Centre for Hygiene and Public Health in St Petersburg on May 30, 2002 stated that she suffered from various illnesses of the nervous system, namely occupational progressive/motor-sensory neuropathy of the upper extremities with paralysis of both middle nerves at the level of the wrist channel (primary diagnosis), osteochondrosis of the spinal vertebrae, deforming arthrosis of the knee joints, moderate myelin sheath degeneration, chronic gastroduodenitis, hypermetropia 1st grade (eyes) and presbyopia (associated diagnoses). Whilst the causes of these illnesses were not expressly indicated in the report, the doctors stated that they would be exacerbated by "working in conditions of vibration, toxic pollution and an unfavourable climate".

46. In 2004 the applicant submitted a report entitled "Human Health Risk Assessment of Pollutant Levels in the Vicinity of the Severstal Facility in Cherepovets". This report, commissioned on behalf of the applicant, was prepared by Dr Mark Chernaik, PhD.⁸ Dr Chernaik concluded that he would expect the population residing within the zone to suffer from above-average incidences of odour annoyance, respiratory infections, irritation of the nose, coughs and headaches, thyroid abnormalities, cancer of the nose and respiratory tract, chronic irritation of the eyes, nose and throat, and adverse impacts on neurobehavioral, neurological, cardiovascular and reproductive functions. The report concluded as follows:

"The toxic pollutants found in excessive levels within the Sanitary Security Zone in Cherepovets are all gaseous pollutants specifically produced by iron and steel manufacturing plants (in particular, by process units involved in metallurgical coke production), but not usually by other industrial facilities.

It is therefore reasonable to conclude that inadequately controlled emissions from the Severstal facility are a primary cause of the excess incidences of the above-mentioned adverse health conditions of persons residing within the Sanitary Security Zone in Cherepovets".

47. The applicant also submitted an information note from the Environmental Department of the Cherepovets municipality, which contained recommendations to Cherepovets residents on how to act in circumstances of "unfavourable weather *307 conditions", namely when the wind carries emissions from the Severstal plant toward the city. The note recommends that people do not leave their homes and that they restrict physical activity. It also contains dietary suggestions. The primary reason for these restrictive recommendations is emissions from the Severstal plant. The applicant also referred to a letter dated September 20, 2001 from the Cherepovets Centre for Sanitary Control, stating that when such "unfavourable weather conditions" occur, admissions of children to local health clinics increase by 1.3.

II. Relevant domestic law and practice

A. Environmental standards

48. Article 42 of the Constitution of the Russian Federation reads as follows:

"Everyone has the right to a favourable environment, to reliable information about its state, and to compensation for damage caused to his health or property by ecological offences".

49. Pursuant to the Federal Law of March 30, 1999 on Sanitary Safety, the Federal Sanitary Service establishes state standards for protecting public health from environmental nuisances. In particular, these standards are applied in assessing air quality in cities: atmospheric pollution is assessed in comparison to the maximum permissible limits (MPLs), a unit which defines the concentration of various toxic substances in the air. It follows from reg.2.1 of the Sanitary Regulations of May 17, 2001 and s.1 of the Atmospheric Protection Act (1999) that if the MPLs are not exceeded the air is safe for the health and well-being of the population living in the relevant area. Pursuant to reg.2.2 of the Sanitary Regulations, the air quality in the residential zones of cities should not exceed 1.0 MPL for all categories of toxic elements, and should not exceed 0.8 MPL in recreational zones.

50. Pursuant to the Atmospheric Protection Act of May 4, 1999, the federal environmental agency establishes environmental standards for various types of polluting sources (cars, farms, industrial enterprises, etc.) These general standards are applied to specific enterprises by the regional environmental agencies. In principle, an industrial enterprise's operations should not result in pollution which exceeds the MPLs.⁹ However, for the sake of a region's economic development, a regional environmental agency may issue a temporary permit authorising an enterprise to exceed these norms.¹⁰ The permit should contain a schedule for the phased reduction of toxic emissions to safe levels.

***308**

B. Sanitary Security Zones

1. Legislation

51. Every polluting enterprise must create a “sanitary security zone” around its territory—a buffer area separating sources of pollution from the residential areas of a city.¹¹ The levels of pollution in this buffer area may exceed the MPLs.

52. The minimum width of the zone is defined by the sanitary regulations for different categories of enterprises. Pursuant to the 1996 regulations, the sanitary security zone around a steel plant of the size of Severstal ought to be 2,000m. Pursuant to the sanitary regulations of October 1, 2000, the width of the sanitary security zone for a metallurgical enterprise of this size ought to be at least 1,000m. In certain cases the State Sanitary Service may enlarge the zone (for example, where the concentration of toxic substances in the air beyond the zone exceeds the MPLs). Subsequent sanitary regulations¹² confirmed these requirements.

53. Regulation 3.6 of the 1989 city planning regulations provides that an enterprise must take all necessary measures in order to develop its sanitary security zone in accordance with the law, with a view to limiting pollution.

54. Regulation 3.8 of the 1989 city planning regulations provides that no housing should be situated within the sanitary security zone. This provision was later incorporated into the Town Planning Code of 1998¹³ and the sanitary regulations of May 17, 2001 and April 10, 2003. According to reg.3.3.3 of the 2001 sanitary regulations, a project to develop the zone may include, as a high-priority objective, resettlement of the zone's residents. However, there is no direct requirement to resettle the residents of the sanitary security zone around an enterprise which is already in operation.

55. Article 10(5) of the Town Planning Code of 1998 provides as follows:

“In cases where State or public interests require that economic or other activities be conducted on environmentally unfavourable territories, the temporary residence of the population on these territories is permitted, subject to the application of a special town planning regime (...)”.

2. Practice

56. It follows from a judgment of the North-Caucasus Circuit Federal Commercial Court¹⁴ that the authorities may discontinue the operation of an enterprise which has failed to create a sanitary security zone around its premises in accordance with the law.¹⁵

57. The applicant produced an extract from the decision of the Supreme Court of the Russian Federation in the case *Ivaschenko v Krasnoyarsk Railways*.¹⁶ In that case the plaintiff had claimed immediate resettlement from a decrepit house. The lower ***309** court had rejected the plaintiff's action, indicating that she could claim resettlement following the order of priority (i.e. should be put on the waiting list). The Supreme Court quashed this judgment, stating as follows:

“the [plaintiff's] house is not only dilapidated (...), but is also situated within 30 metres of a railway, within the latter's sanitary security zone, which is contrary to the sanitary regulations (this zone is 100 metres wide, and no residential premises should be located within it)”.

The Supreme Court remitted the case to the first instance court, ordering it to define specific housing which should be provided to the individual concerned as a replacement for her previous dwelling.

58. In another case, concerning the resettlement of Ms Ledyayeva, another resident of the sanitary security zone around the Severstal facilities, the Presidium of the Vologda Regional Court, in its decision of February 11, 2002, stated, inter alia:

“The lower court did not assess whether the measures taken in order to resettle the residents of the sanitary security zone are adequate in comparison to the degree of threat that the plaintiff encounters. As a result, the court did not establish whether providing [Ms Ledyayeva] with new housing under the provisions of the housing legislation by placing her on the waiting list can be regarded as giving her a real chance to live in an environment that is favourable for her life and health”.

The court also expressed doubts as to whether the state should be held responsible for the resettlement of the zone's residents.

C. Background to the Russian housing provisions

59. During the Soviet period, the majority of housing in Russia belonged to various public bodies or state-owned enterprises. The population lived in those flats as life-long tenants. In the 1990s extensive privatisation programmes were carried out. In certain cases, property that had not been privatised was transferred to local authority possession.

60. To date, a certain part of the Russian population continues to live as tenants in local council homes on account of the related advantages. In particular, council house tenants are not required to pay property taxes, they pay a rent that is substantially lower than the market rate and they have full rights to use and control the property. Certain persons are entitled to claim new housing from the local authorities, provided that they satisfy the conditions established by law.

61. From a historical standpoint, the right to claim new housing was one of the basic socio-economic rights enshrined in Soviet legislation. Pursuant to the Housing Code of the RSFSR of June 24, 1983, which was still valid in Russia at the time of the relevant events, every tenant whose living conditions did not correspond to the required standards was eligible to be placed on a local authority waiting list in order to obtain new council housing. The waiting list establishes the priority order in which housing is attributed once it is available.

62. However, being on a waiting list does not entitle the person concerned to claim any specific conditions or timetable from the State for obtaining new housing. Certain categories of persons, such as judges, policemen or handicapped persons **310* are entitled to be placed on a special “priority waiting list”. However, it appears that the Russian legislation guarantees no right to be placed on the priority waiting list solely on the ground of serious ecological threats.

63. Since Soviet times, hundreds of thousands of Russians have been placed on waiting lists, which become longer each year on account of a lack of resources to build new council housing. At present, the fact of being on a waiting list represents an acceptance by the state of its intention to provide new housing when resources become available. The applicant submits, for example, that the person who is first on the waiting list in her municipality has been waiting for new council housing since 1968. She herself became number 6820 on that list in 1999.

Judgment

I. Alleged violation of Article 8 of the Convention

64. The applicant alleged that there had been a violation of Art.8 of the Convention on account of the state's failure to protect her private life and home from severe environmental nuisance arising from the industrial activities of the Severstal steel plant.

65. Article 8 of the Convention, relied on by the applicant, reads as follows:

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

2. 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”.

A. Applicability of Article 8 in the present case

1. Nature and extent of the alleged interference with the applicant's rights

66. Both parties agreed that the applicant's place of residence was affected by industrial pollution. Neither was it disputed that the main cause of pollution was the Severstal steel plant, operating near the applicant's home.

67. The Court observes, however, that the degree of disturbance caused by Severstal and the effects of pollution on the applicant are disputed by the parties. Whereas the applicant insists that the pollution seriously affected her private life and health, the respondent Government assert that the harm suffered by the applicant as a result of her home's location within the sanitary security zone was not such as to raise an issue under Art.8 of the Convention. In view of the Government's contention the Court has first to establish whether the situation complained of by the applicant falls to be examined under Art.8 of the Convention.

(a) General principles

68. Article 8 has been invoked in various cases involving environmental concern, yet it is not violated every time that environmental deterioration occurs: no right to **311* nature preservation is as such included among the rights and freedoms guaranteed by the Convention.¹⁷ Thus, in order to raise an issue under Art.8 the interference must directly affect the applicant's home, family or private life.

69. The Court further points out that the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Art.8.¹⁸ The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, its physical or mental effects. The general environmental context should be also taken into account. There would be no arguable claim under Art.8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city.

70. Thus, in order to fall under Art.8, complaints relating to environmental nuisances have to show, first, that there was an actual interference with the applicant's private sphere, and, secondly, that a level of severity was attained.

(b) The applicant's arguments

71. The applicant claimed that the extent of environmental pollution at her place of residence was and remains seriously detrimental to her health and well-being and to that of her family.

72. She referred to a number of documents which, in her view, indicated the adverse effects of the Severstal steel plant's industrial activities on the population of Cherepovets. In particular, she referred to the expert opinion by Dr Chernaik,¹⁹ the report of the St Petersburg Centre for Hygiene and Public Health,²⁰ the information note from the Environmental Department of the Cherepovets municipality and the letter from the Cherepovets Centre for Sanitary Control.²¹

73. The applicant pointed out that in 2004 the Court had requested that the Government submit certain primary information about air pollution in Cherepovets. The applicant insisted that the Government had access to this data but failed to submit it to the Court. The report prepared by the Government contained only long-term averages of pollutant levels, which were insufficient to understand how pollutants were influencing human health in Cherepovets. In the applicant's view, the long-term averages, although themselves far above safe levels, masked episodes of extremely elevated pollution during peak periods. The applicant proposed that the Court draw adverse inferences from the Government's failure to produce the documents required.

(c) The Government's arguments

74. The Government generally accepted that the concentration of polluting substances in the air near the applicant's house exceeded the environmental norms. **312* At the same time, there was no evidence that the applicant's private life or health had somehow been disrupted by the operation of the steel plant in the vicinity of her home. It argued that:

“the fact of Ms Fadeyeva's [the applicant] living in the territory of the [Severstal PLC] sanitary security zone indicated not the damage caused, but only the possibility of such damage being caused”.

75. The Government indicated that the domestic courts had never examined the influence of industrial pollution on the applicant's health nor assessed the damage caused by it. The Government claimed that the applicant had not raised these issues in the domestic court proceedings.

76. The Government further indicated that the applicant had failed to use the means prescribed by the Russian legislation for assessing environmental hazards. In particular, the applicant could have commissioned a "sanitary epidemiologic report" on the environmental situation, as provided by the Decree of the Ministry of Public Health of August 15, 2001. Moreover, the Government insisted that,

"when assessing the level of risk to the health of inhabitants, one should follow the officially registered data on emissions into the atmosphere, which is analysed and summarised on the basis of applicable methods in accordance with the legislation of the Russian Federation".

77. As regards the disease diagnosed by the North-West Centre for Hygiene and Public Health,²² the Government argued that it was occupational. According to the Government, the applicant was working in a hazardous industry; her duties consisted of covering tubing and other industrial equipment with thermo-insulating materials. Such work required considerable physical strength and was often carried out outdoors or in unheated premises. Therefore, this disease was not attributable to the applicant's place of residence, but instead to her unfavourable working conditions. In the Government's view, the applicant's concomitant diagnoses were widespread and were not uncommon among persons of her age, regardless of their place of residence.

78. The Government did not disagree with the initial positions contained in Dr Chernaik's report but contested its findings.

²³ The Government claimed that:

"Chernaik's conclusions concerning the increased susceptibility of inhabitants of the OAO Cherepovets sanitary security zone to certain diseases are abstract in nature, have no substantiation and thus cannot be taken into account".

(d) The Court's assessment

79. The Court recalls at the outset that, in assessing evidence, the general principle has been to apply the standard of proof "beyond reasonable doubt". Such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. It should be also noted that it has been the Court's practice to allow flexibility in this respect, taking into **313* consideration the nature of the substantive right at stake and any evidentiary difficulties involved. In certain instances solely the respondent Government have access to information capable of corroborating or refuting the applicant's allegations; consequently, a rigorous application of the principle *affirmanti, non neganti, incumbit probatio* is impossible.²⁴

80. Turning to the particular circumstances of the case, the Court observes that, in the applicant's submission, her health has deteriorated as a result of her living near the steel plant. The only medical document produced by the applicant in support of this claim is a report drawn up by a clinic in St Petersburg.²⁵ The Court finds that this report did not establish any causal link between environmental pollution and the applicant's diseases. The applicant presented no other medical evidence which would clearly connect her state of health to high pollution levels at her place of residence.

81. The applicant also submitted a number of official documents confirming that, since 1995 (the date of her first recourse to the courts), environmental pollution at her place of residence has constantly exceeded safe levels.²⁶ In the applicant's submissions, these documents proved that any person exposed to such pollution levels inevitably suffered serious damage to his or her health and well-being.

82. With regard to this allegation, the Court bears in mind, first, that the Convention entered into force with respect to Russia on May 5, 1998. Therefore, only the period after this date can be taken into consideration in assessing the nature and extent of the alleged interference with the applicant's private sphere.

83. According to the materials submitted to the Court, since 1998 the pollution levels with respect to a number of rated parameters have exceeded the domestic norms. Thus, the data produced by the Government confirm that in 1999 to 2003 the concentration of dust, carbon disulphide and formaldehyde in the air near the applicant's house constantly exceeded the MPLs.²⁷ In 1999 the concentration of dust was 1.76 times higher than the MPL, and in 2003 it was 1.13 times higher. In 1999 the concentration of carbon disulphide was 3.74 times higher than the MPL; in 2003 the concentration of this substance had fallen but still was 1.12 times higher than the MPL. The concentration of formaldehyde was 4.53 times higher than the MPL. In 2003 it was 6.3 times higher than the MPL. Moreover, an over-concentration of various other substances, such as manganese, benzopyrene and sulphur dioxide, was recorded during this period.²⁸

84. The Court observes further that the figures produced by the Government reflect only annual averages and do not disclose daily or maximum pollution levels. According to the Government's own submissions, the maximum concentrations of pollutants registered near the applicant's house were often 10 times higher than the average annual MPLs (which were already above safe levels). The Court also notes that the Government have not explained why they failed to produce the documents and reports sought by the Court,²⁹ although these documents were certainly available to the national authorities. Therefore, the Court concludes that the *314 environmental situation in certain periods could have been even worse than it appears from the available data.

85. The Court notes further that on many occasions the state recognised that the environmental situation in Cherepovets caused an increase in the morbidity rate for the city's residents.³⁰ The reports and official documents produced by the applicant, and, in particular, the report by Dr Mark Chernaik,³¹ described the adverse effects of pollution on all residents of Cherepovets, especially those who live near the plant. Thus, according to the data provided by both parties, during the entire period under consideration the concentration of formaldehyde in the air near the applicant's house was three to six times higher than the safe levels. Dr Chernaik described the adverse effects of formaldehyde as follows:

“Considering this ongoing exposure to formaldehyde within the Cherepovets sanitary security zone, I would expect the population residing within the zone to suffer from above-average incidences of cancer of the nasal passages, headaches, and chronic irritation of the eyes, nose, and throat compared to populations residing in areas not polluted by excessive levels of formaldehyde”.

As regards carbon disulphide, the concentration of which exceeded the MPL by 1.1 to 3.75 times during this entire period (except for 2002), Dr Chernaik stated:

“Considering this ongoing exposure to CS² within the Cherepovets sanitary security zone, I would expect the population residing within the zone to suffer from above-average incidences of adverse neurobehavioral, neurological, cardiovascular, and reproductive functions compared to populations residing in areas not polluted by excessive levels of CS²”.

86. Finally, the Court pays special attention to the fact that the domestic courts in the present case recognised the applicant's right to be resettled. Indeed, the effects of pollution on the applicant's private life were not at the heart of the domestic proceedings. However as follows from the Vologda Regional Court opinion in the Ledyayeva case,³² it was not contested that the pollution caused by the Severstal facilities called for resettlement in a safer area. Moreover, the domestic legislation itself defined the zone in which the applicant's house was situated as unfit for habitation.³³ Therefore, it can be said that the existence of interference with the applicant's private sphere was taken for granted at the domestic level.

87. In summary, the Court observes that over a significant period of time the concentration of various toxic elements in the air near the applicant's house seriously exceeded the MPLs. The Russian legislation defines MPLs as safe concentrations of toxic elements.³⁴ Consequently, where the MPLs are exceeded, the pollution becomes potentially harmful to the health and well-being of those exposed to it. This is a presumption, which may not be true in a particular case. The same may be noted about the reports produced by the applicant: it is conceivable that, despite the excessive pollution and its proven negative effects on the *315 population as a whole, the applicant did not suffer any special and extraordinary damage.

88. In the instant case, however, the very strong combination of indirect evidence and presumptions makes it possible to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions from the

Severstal steel plant. Even assuming that the pollution did not cause any quantifiable harm to her health, it inevitably made the applicant more vulnerable to various diseases. Moreover, there can be no doubt that it adversely affected the quality of life at her home. Therefore, the Court accepts that the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Art.8 of the Convention.

2. Attribution of the alleged interference to the State

89. The Court notes that, at the material time, the Severstal steel plant was not owned, controlled, or operated by the State. Consequently, the Court considers that the Russian Federation cannot be said to have directly interfered with the applicant's private life or home. At the same time, the Court points out that the State's responsibility in environmental cases may arise from a failure to regulate private industry.³⁵ Accordingly, the applicant's complaints fall to be analysed in terms of a positive duty on the state to take reasonable and appropriate measures to secure the applicant's rights under Art.8(1) of the Convention.³⁶ In these circumstances the Court's first task is to assess whether the State could reasonably be expected to act so as to prevent or put an end to the alleged infringement of the applicant's rights.

90. The Court observes in this respect that the Severstal steel plant was built by and initially belonged to the State. The plant malfunctioned from the start, releasing gas fumes, odour and contamination and causing health problems and nuisance to many people in Cherepovets.³⁷ Following the plant's privatisation in 1993, the State continued to exercise control over the plant's industrial activities through the imposition of operating conditions on the plant's owner and supervision of their implementation. The plant was subjected to numerous inspections by the state environmental agency and administrative penalties were imposed on the plant's owner and management.³⁸ The environmental situation complained of was not the result of a sudden and unexpected turn of events, but, on the contrary, was long lasting and well known.³⁹ As in *López Ostra*,⁴⁰ in the present case the municipal authorities were aware of the continuing environmental problems and applied certain sanctions in order to improve the situation.

91. The Court observes further that the Severstal steel plant was and remains responsible for almost 95 per cent of overall air pollution in the city.⁴¹ In contrast with many other cities, where pollution can be attributed to a large number of ***316** minor sources, the main cause of it in Cherepovets was easily definable. The environmental nuisances complained of were very specific and fully attributable to the industrial activities of one particular enterprise. This is particularly true with respect to the situation of those living in close proximity to the Severstal steel plant.

92. The Court concludes that the authorities in the present case were certainly in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them. The combination of these factors shows a sufficient nexus between the pollutant emissions and the state to raise an issue of the state's positive obligation under Art.8 .

93. It remains to be determined whether the State, in securing the applicant's rights, has struck a fair balance between the competing interests of the applicant and the community as a whole, as required by paragraph two of the Article in question.

B. Justification under Article 8(2)

1. General principles

94. The Court reiterates that whatever analytical approach is adopted—the breach of a positive duty or direct interference by the State—the applicable principles regarding justification under Art.8(2) as to the balance between the rights of an individual and the interests of the community as a whole, are broadly similar.⁴²

95. Direct interference by the State with the exercise of Art.8 rights will not be compatible with para.2 unless it is “in accordance with the law”. The breach of domestic law in these cases would necessarily lead to a finding of a violation of the Convention.

96. However, where the State is required to take positive measures, the choice of means is in principle a matter that falls within the contracting states' margin of appreciation. There are different avenues to ensure “respect for private life”, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means. Therefore, in those cases the criterion “in accordance with the law” of the justification test cannot be applied in the same way as in cases of direct interference by the State.

97. The Court notes, at the same time, that in all previous cases in which environmental questions gave rise to violations of the Convention, the violation was predicated on a failure by the national authorities to comply with some aspect of the domestic legal regime. Thus, in *López Ostra* the waste treatment plant at issue was illegal in that it operated without the necessary licence, and it was eventually closed down.⁴³ In *Guerra* too, the violation was founded on an irregular position at the domestic level, as the applicants had been unable to obtain information that the State was under a statutory obligation to provide.⁴⁴ In *S v France*,⁴⁵ the internal legality was also taken into consideration.

98. Thus, in cases where an applicant complains about the State's failure to protect his or her Convention rights, domestic legality should be approached not as a *317 separate and conclusive test, but rather as one of many aspects which should be taken into account in assessing whether the state has struck a "fair balance" in accordance with Art.8(2).

2. "Legitimate aim"

99. Where the State is required to take positive measures in order to strike a fair balance between the interests of the applicant and the community as a whole, the aims mentioned in the second paragraph of Art.8 may be of a certain relevance, although this provision refers only to "interferences" with the right protected by the first paragraph—in other words, it is concerned with the negative obligations flowing therefrom.⁴⁶

100. The Court observes that the essential justification offered by the Government for the refusal to resettle the applicant was the protection of the interests of other residents of Cherepovets who were entitled to free housing under the domestic legislation. In the Government's submissions, since the municipality had only limited resources to build new housing for social purposes, the applicant's immediate resettlement would inevitably breach the rights of others on the waiting lists.

101. Further, the respondent Government referred, at least in substance, to the economic well-being of the country.⁴⁷ Like the respondent Government, the Court considers that the continuing operation of the steel plant in question contributed to the economic system of the Vologda region and, to that extent, served a legitimate aim within the meaning of para.2 of Art.8 of the Convention. It remains to be determined whether, in pursuing this aim, the authorities have struck a fair balance between the interests of the applicant and those of the community as a whole.

3. "Necessary in a democratic society"

(a) General principles

102. The Court recalls that in deciding what is necessary for achieving one of the aims mentioned in Art.8(2) of the Convention, a margin of appreciation must be left to the national authorities, who are in principle better placed than an international court to evaluate local needs and conditions. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the justification given by the State is relevant and sufficient remains subject to review by the Court.⁴⁸

103. In recent decades environmental pollution has become a matter of growing public concern. As a consequence, states have adopted various measures in order to reduce the adverse effects of industrial activities. When assessing these measures from the standpoint of Art.1 of Protocol No.1 to the Convention, the Court has, as a rule, accepted that the states have a wide margin of appreciation in the sphere of environmental protection. Thus, in 1991 in *Fredin v Sweden*⁴⁹ the *318 Court recognised that "in today's society the protection of the environment is an increasingly important consideration", and held that the interference with a private property right (revoking the applicant's licence to extract gravel from his property on the grounds of nature conservation) was not inappropriate or disproportionate in the context of Art.1 of Protocol No.1 to the Convention. Later that year, in *Pine Valley Development Ltd v Ireland*,⁵⁰ the Court confirmed its approach.

104. In another group of cases where the State's failure to act was at issue, the Court has also preferred to refrain from revising domestic environmental policies. In a recent Grand Chamber judgment the Court held that:

"it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights".⁵¹

In an earlier case the Court held that:

“it is certainly not for (...) the Court to substitute for the national authorities any other assessment of what might be best policy in this difficult technical and social sphere. This is an area where the Contracting Parties are to be recognised as enjoying a wide margin of appreciation”.⁵²

105. It remains open to the Court to conclude that there has been a manifest error of appreciation by the national authorities in striking a fair balance between the competing interests of different private actors in this sphere. However, the complexity of the issues involved with regard to environmental protection renders the Court's role primarily a subsidiary one. The Court must first examine whether the decision-making process was fair and such as to afford due respect to the interests safeguarded to the individual by Art.8,⁵³ and only in exceptional circumstances may it go beyond this line and revise the material conclusions of the domestic authorities.⁵⁴

(b) The applicant's arguments

106. The applicant first submitted that the Russian legislation required her resettlement outside Severstal's sanitary security zone. In her view, the 1974 Decree⁵⁵ imposed an obligation on the state to resettle her outside the sanitary security zone. Further, resettlement of the residents of the sanitary security zone was required by the 1996 Federal Programme.⁵⁶ The legislation, as interpreted by the Supreme Court in the case of Ivashchenko,⁵⁷ provides for the applicant's immediate resettlement, not for her placement on the waiting list. The single criterion for resettlement has always been the fact of residence within the sanitary security zone. However, the authorities failed to comply with the legal obligation to rehouse the applicant and this obligation has not been enforced by the courts.

***319**

107. In its submissions, the respondent Government referred to Art.10(5) of the Town Planning Code to justify the applicant's continued residence within the sanitary security zone.⁵⁸ However, in the applicant's view, this provision only applies to temporary housing, and not to dense residential areas and houses, in one of which the applicant lives. Consequently, Art.10(5) of the Town Planning Code, referred to by the Government, is inapplicable to the applicant's situation.

108. The applicant further alleged that the authorities had failed to take adequate measures to secure her rights under Art.8 of the Convention. First, the Government has not sought to justify the interference with her Art.8 rights with any valid reason. Secondly, it failed to implement effective measures in order to prevent or minimise environmental pollution. In spite of compelling evidence of unacceptable levels of pollution from the Severstal plant, in breach of the domestic limits, the Government has merely asserted that “no question arose of limitation, suspension, or discontinuation of its activity in connection with environmental pollution”.

(c) The Government's arguments

109. The Government contended that the applicant's complaint was ill-founded and that no violation of Art.8 of the Convention had occurred in this case. The Government's arguments may be summarised as follows.

110. In its initial observations to the Court the Government accepted the fact that the applicant's house is located within Severstal's sanitary security zone but argued that the domestic courts' decisions rejecting the applicant's claim for immediate resettlement had been lawful. The applicable Russian legislation provides only for placing the applicant on the general waiting list for future resettlement, which is the duty of the municipal authorities. The Government further argued that providing the applicant with a flat, irrespective of her position on the waiting list, would breach the rights of other people entitled to free housing under the domestic legislation.

111. In its post-admissibility observations and at the oral hearing the Government contended that the domestic court's decisions were erroneous because the applicant's house was not situated within the sanitary security zone. The Government also indicated that, under domestic law, “Ms N. M. Fadeyeva's temporary residence in the territory of the sanitary security zone is permissible” in so far as “the State or public interests require the performance of economic or other activity on such territories”. The Government referred in particular to art.10 of the Town Planning Code.⁵⁹ The Government writes that:

“under Article 10 § 5 of the Code of Town Planning of the Russian Federation , temporary residence of people is permitted on environmentally unfavourable territories in cases where state or public interests require the performance of economic or other activity on such territories”.

112. The Government also alleged that the applicant moved to the flat at 1 Zhukov Street of her own will and that nothing prevented her from leaving it. Moreover, the *320 applicant could always privatise the flat and then sell it in order to purchase housing in another district of the city.

113. The Government asserted that the state authorities conducted regular monitoring of air quality in the city and had, moreover, undertaken a number of scientific studies in order to assess the impact of pollution on the inhabitants of Cherepovets.

114. The Government further submitted that the state authorities had imposed various administrative sanctions on Severstal Plc in order to ensure that its activities complied with the domestic norms. In particular, in 1995 to 2000 the State Committee for the Protection of the Environment carried out 89 checks of Severstal Plc, bringing to light more than 300 violations. During this period the managers of the steel plant were charged with administrative offences in the sphere of environmental protection on 45 occasions. In 2001 to 2003 the Ministry of Natural Resources of the Russian Federation carried out four complex checks of the plant, in the course of which 44 violations of the environmental legislation were brought to light. To date, the majority of the violations indicated by the statutory authorities have been eliminated.

115. Finally, the Government argued that in recent years the implementation of a number of federal and municipal programmes has resulted in a reduction of pollution in Cherepovets. The Government stressed that the environmental monitoring carried out by state agencies has revealed an improvement in the overall environmental situation throughout the city, and that the pollution levels near the applicant's house do not differ significantly from the average levels across the city. The Government also enumerated various technological modifications undertaken by the steel plant in order to reduce emissions and asserted that several new improvements are due to be made in the near future.

(d) The Court's assessment

(i) The alleged failure to resettle the applicant

116. The Court notes at the outset that the environmental consequences of the Severstal steel plant's operations do not comply with the environmental and health standards established in the relevant Russian legislation. In order to maintain the operation of an important enterprise of this type, the Russian legislation, as a compromise solution, has provided for the creation of a buffer zone around the enterprise's premises in which pollution may officially exceed safe levels. Therefore, the existence of such a zone is a condition *sine qua non* for the operation of a dangerous enterprise—otherwise it must be closed or significantly restructured.

117. The main purpose of the sanitary security zone is to separate residential areas from the sources of pollution and thus to minimise the negative effects thereof on the neighbouring population. The Government have shown that, in the course of the past 20 years, overall emissions from the Severstal steel plant have been significantly reduced, and this trend can only be welcomed.⁶⁰ However, within the entire period under consideration (since 1998), pollution levels with respect to a number of dangerous substances have continued to exceed the safe levels. *321 Consequently, the operation of the Severstal plant in conformity with the domestic environmental standards would be possible only if this zone, separating the enterprise from the residential areas of the town, continued to exist and served its purpose.

118. The parties argue as to the actual size of the zone. In their later post-admissibility observations and oral submissions to the Court the Government denied that the applicant lived within its boundaries. However, in their initial observations the Government directly stated that the applicant's house was located within the zone. The fact that the Severstal steel plant's sanitary security zone includes residential areas of the town was confirmed in the Government Programme of 1996.⁶¹ As regards the applicant's house in particular, the fact that it was located within the steel plant's sanitary security zone was not disputed in the domestic proceedings and has been confirmed by the domestic authorities on many occasions. The status of the zone was challenged only after the application had been communicated to the respondent Government. Therefore, the Court assumes that during the period under consideration the applicant lived within Severstal's sanitary security zone.

119. The Government further submitted that the pollution levels attributable to the metallurgic industry are the same if not higher in other districts of Cherepovets than those registered near the applicant's home.⁶² However, this proves only that the Severstal steel plant has failed to comply with domestic environmental norms and suggests that a wider sanitary security zone should perhaps have been required. In any event, this argument does not affect the Court's conclusion that the applicant lived in a special zone where the industrial pollution exceeded safe levels and where any housing was in principle prohibited by the domestic legislation.

120. It is material that the applicant moved to this location in 1982 knowing that the environmental situation in the area was very unfavourable. However, given the shortage of housing at that time and the fact that almost all residential buildings in industrial towns belonged to the State, it is very probable that the applicant had no choice other than to accept the flat offered to her family.⁶³ Moreover, due to the relative scarcity of environmental information at this time the applicant may have underestimated the seriousness of the pollution problem in her neighbourhood. It is also important that the applicant obtained the flat lawfully from the state, which could not have been unaware that the flat was situated within the steel plant's sanitary security zone and that the ecological situation was very poor. Therefore, it cannot be claimed that the applicant herself created the situation complained of or was somehow responsible for it.

121. It is also relevant that it became possible in the 1990s to rent or buy residential property without restrictions, and the applicant has not been prevented from moving away from the dangerous area. In this respect the Court observes that the applicant was renting the flat at 1 Zhukov Street from the local council as a life-long tenant. The conditions of her rent were much more favourable than those she would find on the free market. Relocation to another home would imply considerable outlay which, in her situation, would be almost unfeasible, her only income being a state pension plus payments related to her professional disease. *322 The same may be noted about the possibility of buying another flat, invoked by the respondent Government. Although it is theoretically possible for the applicant to change her personal situation, this would appear to be very difficult. Accordingly, this point does not deprive the applicant of the status required to claim to be a victim of a violation of the Convention within the meaning of Art.34, although it may, to a certain extent, affect the scope of the Government's positive obligations in the present case.

122. The Court reiterates that the Russian legislation directly prohibits building of any residential property within a sanitary security zone. However, the law does not clearly indicate what should be done with those persons who already live within such a zone. The applicant insisted that the Russian legislation required immediate resettlement of the residents of such zones and that resettlement should be carried out at the expense of the polluting enterprise. However, the national courts interpreted the law differently. The Cherepovets Town Court's decisions of 1996 and 1999 established that the polluting enterprise is not responsible for resettlement; the legislation provides only for placing the residents of the zone on the general waiting list. The same court rejected the applicant's claim for reimbursement of the cost of resettlement. In the absence of any direct requirement of immediate resettlement, the Court does not find this reading of the law absolutely unreasonable. Against the above background the Court is ready to accept that the only solution proposed by the national law in this situation was to place the applicant on a waiting list. Thus, the Russian legislation as applied by the domestic courts and national authorities makes no difference between those persons who are entitled to new housing, free of charge, on a welfare basis (war veterans, large families, etc.) and those whose everyday life is seriously disrupted by toxic fumes from a neighbouring enterprise.

123. The Court further notes that, since 1999, when the applicant was placed on the waiting list, her situation has not changed. Moreover, as the applicant rightly pointed out, there is no hope that this measure will result in her resettlement from the zone in the foreseeable future. The resettlement of certain families from the zone by Severstal Plc is a matter of the plant's good faith, and cannot be relied upon. Therefore, the measure applied by the domestic courts makes no difference to the applicant: it does not give her any realistic hope of being removed from the source of pollution.

(ii) The alleged failure to regulate private industry

124. Recourse to the measures sought by the applicant before the domestic courts (urgent resettlement or reimbursement of the resettlement costs) is not necessarily the only remedy to the situation complained of. The Court points out that:

“the choice of the means calculated to secure compliance with Article 8 (...) in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. In this connection, there are different ways of ensuring” respect for private life“, and the nature of the State's obligation will depend on the particular aspect of private life that is at issue”.⁶⁴ *323

In the present case the State had at its disposal a number of other tools capable of preventing or minimising pollution, and the Court may examine whether, in adopting measures of a general character, the state had complied with its positive duties under the Convention.

125. In this respect the Court notes that, according to the Government's submissions, the environmental pollution caused by the steel plant has been significantly reduced over the past 20 years. Since the 1970s, air quality in the town has changed for the better. Thus, when the applicant's family moved into the flat at issue in 1982, the overall atmospheric pollution in Cherepovets was more than twice as high as in 2003. Since 1980 toxic emissions from the Severstal steel plant into the town's air have been reduced from 787.7 to 333.2 thousands tons. Following the enactment of the 1996 Federal Programme,⁶⁵ the annual overall emissions of air polluting substances attributable to the Severstal facilities have been reduced by 5.7 per cent. The report submitted by the Government indicated that by 2003 the average concentration of certain toxic elements in the air of the town had been significantly reduced⁶⁶; the proportion of "unsatisfactory tests" of the air around the Severstal plant had fallen in the past five years.

126. At the same time, the Court observes that the implementation of the 1990 and 1996 Federal Programmes did not achieve the expected results: in 2003 the concentration of a number of toxic substances in the air near the plant still exceeded safe levels. Whereas, according to the 1990 Programme, the steel plant was obliged to reduce its toxic emissions to a safe level by 1998, in 2004 the Chief Sanitary Inspector admitted that this had not been done and that the new deadline for bringing the plant's emissions below dangerous levels is henceforth 2015.

127. Undoubtedly, significant progress has been made in reducing emissions over the past 10 to 20 years. However, if only the period within the Court's competence *ratione temporis* is taken into account, the overall improvement of the environmental situation would appear to be very slow. Moreover, as the Government's report shows, the dynamics with respect to a number of toxic substances are not constant and in certain years pollution levels increased rather than decreased.⁶⁷

128. It might be argued that, given the complexity and scale of the environmental problem around the Severstal steel plant, this problem cannot be resolved in a short period of time. Indeed, it is not the Court's task to determine what exactly should have been done in the present situation to reduce pollution in a more efficient way. However, it is certainly in the Court's jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests. In this respect the Court reiterates that the onus is on the state to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community. Looking at the present case from this perspective, the Court notes the following points.

129. The Government referred to a number of studies carried out in order to assess the environmental situation around the Cherepovets steel plant. However, the Government have failed to produce these documents or to explain how they influenced policy in respect to the plant, particularly the conditions attached to the *324 plant's operating permit. The Court also notes that the Government did not provide a copy of the plant's operating permit and did not specify how the interests of the population residing around the steel plant were taken into account when the conditions attached to the permit were established.

130. The Government submitted that during the period under consideration Severstal Plc was subjected to various checks and administrative penalties for different breaches of environmental law. However, the Government did not specify which sanctions had been applied and the type of breaches concerned. Consequently, it is impossible to assess to what extent these sanctions could really induce Severstal to take the necessary measures for environmental protection.

131. The Court considers that it is not possible to make a sensible analysis of the Government's policy vis-à-vis Severstal because the Government have failed to show clearly what this policy consisted of. In these circumstances the Court has to draw an adverse inference. In view of the materials before it, the Court cannot conclude that, in regulating the steel plant's industrial activities, the authorities gave due weight to the interests of the community living in close proximity to its premises.

132. In sum, the Court finds the following. The State authorised the operation of a polluting enterprise in the middle of a densely populated town. Since the toxic emissions from this enterprise exceeded the safe limits established by the domestic legislation and might endanger the health of those living nearby, the State established that a certain territory around the plant should be free of any dwelling. However, these legislative measures were not implemented in practice.

133. It would be going too far to state that the State or the polluting enterprise were under an obligation to provide the applicant with free housing, and, in any event, it is not the Court's role to dictate precise measures which should be adopted by the states in order to comply with their positive duties under Art.8 of the Convention. In the present case, however, although the situation around the plant called for a special treatment of those living within the zone, the state did not offer the applicant any effective solution to help her move from the dangerous area. Furthermore, although the polluting enterprise at issue operated in breach of domestic environmental standards, there is no information that the State designed or applied effective measures which would take into account the interests of the local population, affected by the pollution, and which would be capable of reducing the industrial pollution to acceptable levels.

134. The Court concludes that, despite the wide margin of appreciation left to the respondent State, it has failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life. There has accordingly been a violation of Art.8 .

II. Application of Article 41 of the Convention

135. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party”.

***325**

A. Damage

1. Non-pecuniary damage

136. The applicant claimed €10,000 in compensation for the non-pecuniary damage she had suffered. This figure, in the applicant's view, was justified by the excessive environmental pollution within the sanitary security zone, which had adversely affected the applicant's health and enjoyment of her home and private life. Such conditions had also caused distress and frustration on account of the fact that she and her family had had to live in the zone for more than 20 years.

137. The Government considered that these claims were exaggerated and that the finding of a violation would be adequate just satisfaction. Alternatively, the Government submitted that “only a symbolic amount would be equitable with regard to non-pecuniary damage”.

138. The Court is prepared to accept that the applicant's prolonged exposure to industrial pollution caused her much inconvenience, mental distress and even a degree of physical suffering—this is clear on the grounds on which the Court found a violation of Art.8 . At the same time the Court recalls that the Convention entered into force in respect of Russia on May 5, 1998; therefore, the Court has no competence *ratione temporis* to make an award for the period prior to this date. In sum, taking into account various relevant factors, such as age, the applicant's state of health and the duration of the situation complained of, and making an assessment on an equitable basis in accordance with Art.41 , the Court awards the applicant €6,000 under this head, plus any tax that may be chargeable on this amount.

2. Pecuniary damage

139. Under the head of pecuniary damage the applicant claimed that the Government should be required to offer her new housing, comparable to her current flat, outside the Cherepovets sanitary security zone. The applicant submitted that, in the light of the principles established in similar cases, and the State's failure in this case to comply with Russian domestic law requiring her re-housing, the State should be ordered to provide her with housing outside the sanitary security zone. Alternatively, the applicant claimed an award of damages of €30,000, which was the value of a flat comparable to the applicant's but located outside the Cherepovets sanitary security zone.

140. The Government argued that this claim should be rejected.

141. With regard to this claim the Court notes, first of all, that the violation complained of by the applicant is of a continuing nature. Within the period under consideration the applicant lived in her flat as a tenant and has never been deprived of this title. Although during this time her private life was adversely affected by industrial emissions, nothing indicates that she has incurred any expenses in this respect. Therefore, in respect of the period prior to the adoption of the present judgment the applicant failed to substantiate any material loss.

142. As regards future measures to be adopted by the Government in order to comply with the Court's finding of a violation of Art.8 of the Convention in the present case, the resettlement of the applicant in an ecologically safe area would be only *326 one of many possible solutions. In any event, according to Art.41 of the Convention, by finding a violation of Art.8 in the present case, the Court has established the Government's obligation to take appropriate measures to remedy the applicant's individual situation.

B. Costs and expenses

143. Finally, under the head of costs and expenses the applicant claimed the following:

- (i) €2,000 in respect of her representation by Mr Yury Vanzha before domestic authorities and before the Court at the initial stage of the proceedings, for 40 hours, at the rate of €50 per hour;
- (ii) €3,000 in respect of her representation before the Court by Mr Kirill Koroteyev, for 60 hours, at the rate of €50 per hour;
- (iii) £2,940 in respect of costs and expenses incurred by the applicant's representatives in London (Mr Phillip Leach and Mr Bill Bowring);
- (iv) £600 for advice from Ms Miriam Carrion Benitez.

144. In her additional submissions on this topic, the applicant claimed the following amounts related to the participation of her representatives at the hearing of July 1, 2004:

- (i) £1,200 (£800 as fees for Mr Philip Leach, at the rate of £100 per hour, plus £400 for his travel time, at the rate of £50 per hour);
- (ii) £1,400 (£1,000 as fees for Mr Bill Bowring, at the rate of £100 per hour, plus £400 for his travel time, at the rate of £50 per hour);
- (iii) €1,000 (€500 as fees for Mr Kirill Koroteyev, at the rate €50 per hour, plus €500 for his travel time, at the rate of €25 per hour);
- (iv) €700 (€200 as fees for Ms Dina Vedernikova, at the rate of €50 per hour, plus €500 for her travel time, at the rate of €25 per hour).

145. In reply the Government argued that the applicant's claims in this part were unsubstantiated. It submitted that:

“no contracts with [the applicant's representatives] or payment receipts have been presented by the applicant to confirm that the costs are real”.

It also challenged certain details of the lawyers' bills, in particular, the time allegedly spent by Mr Koroteyev in a telephone interview with the applicant, and the necessity of Ms Vedernikova's appearance before the European Court.

146. The Court has to establish, first, whether the costs and expenses indicated by the applicant were actually incurred and, secondly, whether they were necessary.⁶⁸

147. As to the first question the Court notes that the applicant did not present any written agreement between her and her lawyers. However, this does not mean that such an agreement does not exist. Russian legislation provides that a contract on

consulting services may be concluded in an oral form,⁶⁹ and nothing indicates that *327 this was not the case in respect of the applicant and her representatives. In any event, the Government did not present any argument to the contrary. Therefore, the lawyer's fees are recoverable under domestic law, and, from the standpoint of the Convention, real. The fact that the applicant was not required to cover these fees in advance does not affect this conclusion.

148. Further, it has to be established whether the applicant's lawyers' expenses were necessary. As regards the costs claimed by Mr Yuri Vanzha, a reduction should be applied on account of the fact that some of the applicant's complaints were declared inadmissible. Making an assessment on a reasonable basis, the Court awards €1,500 for the costs incurred under this head.

149. With regard to the costs and expenses incurred by the applicant after her application was declared admissible, referred to in [143], items (ii) to (iv), the Court notes that a large amount of legal and technical work was required from both parties in preparation of this case. Consequently, the Court regards these as necessarily incurred and awards the whole sum required under this head, i.e. €3,000 in respect of Mr Koroteyev's fees and expenses and €3,540 in respect of fees and expenses for the applicant's British lawyers and advisers.

150. Finally, as regards the costs related to the hearing of July 1, 2004, the Court notes that the presence of all four of the applicant's representatives was not absolutely necessary. Making a reasonable assessment, the Court awards €2,000 and £2,000 under this head respectively for the Russian and British lawyers' fees and expenses.

151. Any tax that may be chargeable should be added to the above amounts.

C. Default interest

152. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added 3 percentage points.

For these reasons, THE COURT, unanimously

1. *Holds* that there has been a violation of Art.8 of the Convention;

2. *Holds* :

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Art.44(2) of the Convention, €6,000 in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable on that amount;

(b) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Art.44(2) of the Convention, the following amounts:

- (i) €6,500 in respect of costs and expenses incurred by her Russian lawyers, to be converted into Russian roubles at the rate applicable at the date of settlement less €1,732, already paid to Mr Koroteyev in legal aid;
- (ii) £5,540 in respect of costs and expenses incurred by her British lawyers and advisers;
- (iii) any tax that may be chargeable on the above amounts;

*328

(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus 3 percentage points.

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Concurring Opinion of Judge Kovler⁷⁰

O-11. I share the Chamber's unanimous opinion that the Russian authorities failed in the present case to fulfil their positive obligation to protect the applicant's rights under Art.8 of the Convention. At the same time, I would like to explain my approach to the specific interest protected in the present case.

O-12. In the leading case *Lopez Ostra v Spain*, referred to in the judgment, the Court found that the state had not succeeded in striking a fair balance between the interest of the town's economic well-being and the applicant's effective enjoyment of her right to respect for her home and her private and family life. In the *Hatton* case, also cited, the Court adopted the same line of reasoning (although the Grand Chamber did not ultimately find a violation of Art.8). In a recent case concerning noise pollution,⁷¹ the problem was again regarded as having an effect both on the applicant's private life and on her home.

O-13. On the other hand, in the *Guerra v Italy* case,⁷² where access to information on industrial hazards was at issue, the Court found a violation only of the applicants' right to private and family life, without mentioning their "homes". I would be inclined to agree with the latter approach and to consider that "environmental rights" (in so far as they are protected by Art.8) relate more to the sphere of "private life" than to the "home". In my view, the notion of "home" was included in the text of this provision with the clear intention of defining a specific area of protection that differs from "private and family life". In support of this interpretation, I would quote from a dissenting opinion by Judge Greve in the *Hatton* judgment, in which she stated that "environmental rights are nonetheless of a different character from the core right not to have one's home raided without a warrant". Therefore, without casting doubt on the Court's finding of a violation of Art.8, I would prefer to describe the violation as an unjustified interference with the applicant's private life.

O-14. Consequently, the State's omission in the present case lies not only in the authorities' failure to resettle the applicant to a safer area. The state has a margin of appreciation in devising measures to strike the proper balance between respect for Art.8 rights and the interests of the community as a whole. In the present case, therefore, the resettlement of those living near the plant may be regarded as only one of many possible solutions, and, in my view, not the best one: had the authorities been stricter and more consistent in applying domestic environmental regulations, the problem would have been resolved without any need to resettle the population and with a positive impact on the environmental situation in general.

*329

Appendix— extracts from the Government's report on the environmental situation in Cherepovets

73

A. Dynamics of air pollution in 1999–2003 (compared to Mpls)

Toxic Element	Average daily MPL, mg/m ³	1999	2000	2001	2002	2003
Nitrogen dioxide	0.04	0.027	0.022	0.018	0.016	0.025
Nitric oxide	0.06	0.021	0.015	0.011	0.01	0.024
Ammonia	0.04	0.0125	0.011	0.011	0.005	0.016

Manganese	0.001	0.0006	0.002	0.0007	0.0004	0.0008
Carbonic oxide	3.0	1.884	1.3	1.5	1.28	1.76
Dust	0.15	0.264	0.25	0.24	0.2	0.17
Hydrogen sulphide	0.008	0.0002	0.0007	0.0004	0.0006	0.0006
Carbon disulphide	0.005	0.0187	0.015	0.011	0.004	0.0056
Phenols	0.003	0.002	0.0014	0.0012	0.0009	0.0014
Formaldehyde	0.003	0.0136	0.02	0.013	0.0099	0.019
Sulphur dioxide	0.05	0.0049	0.0056	0.0021	0.0024	0.0037

B. Average and maximal concentrations of toxic elements over the past 20–30 years

Substance monitored	1974		1983		1989		1996		2003	
	Aver.	Max.	Aver.	Max.	Aver.	Max.	Aver.	Max.	Aver.	Max.
Dust	—	—	0.3	4.0	0.3	2.1	0.1	1.2	0.2	0.8
Sulphurous anhydride	0.08	0.86	0.04	0.79	0.03	1.170	0.004	0.160	0.004	0.114
Carbon oxide	7	20	1	7	1	16	1	7	1	18
Nitrogen dioxide	0.07	0.65	0.04	0.31	0.04	0.23	0.02	0.16	0.03	0.45 <i>*330</i>
Nitrogen oxide	—	—	0.07	0.058	0.05	0.43	0.02	0.30	0.03	1.02
Hydrogen sulphide	—	—	0.006	0.058	0.002	0.029	0.002	0.023	0.001	0.013
Carbon disulphide	—	—	—	—	—	—	0.011	0.076	0.006	0.046
Phenol	—	—	—	—	0.003	0.018	0.003	0.04	0.001	0.021
Ammonia	—	—	0.27	5.82	0.08	1.37	0.02	0.23	0.02	0.21
Formaldehyde	—	—	—	—	—	—	0.014	0,129	0.019	0.073

**331*

Footnotes

- 1 See “Relevant Domestic Law and Practice” below.
- 2 MPLs are the safe levels of various polluting substances, as established by Russian legislation.
- 3 See [13].
- 4 See “Relevant Domestic Law and Practice” below.

5 *ibid.*
6 *ibid.*
7 See [34].
8 Dr Chernaik possesses a
Doctor of Philosophy (Ph.D.)
degree in biochemistry from
Johns Hopkins University
School of Public Health,
Baltimore, Maryland, US. His
doctoral studies and research
focused on environmental
toxicology. Since 1992 Dr
Chernaik has served as Staff
Scientist for the US Office
of the Environmental Law
Alliance Worldwide. In this
capacity, he provides requested
scientific information to
lawyers in more than 60
countries. He has frequently
advised lawyers on the human
health effects of exposure
to air pollutants, including
hydrogen sulphide, hydrogen
cyanide, naphthalene,
formaldehyde, carbon
disulphide and particulate
matter.
9 s.16 of the Act.
10 ss.1 and 12 of the Act.
11 regs 3.5 and 3.6 of the 1996
Sanitary Regulations , enacted
by Decree No.41 of the State
Sanitary Service of October
31, 1996; similar provisions
were contained in the sanitary
regulations of 2000, 2001 and
2003, which replaced the 1996
regulations.
12 Enacted on May 17, 2001 and
April 10, 2003.
13 art.43 .
14 Decision of June 3, 2003, No.
—08–1540/2003.
15 This decision concerned the
closure by the authorities of
a filling station which had no
sanitary security zone around
its territory.
16 Published in *Overview of
the Case-law of the Supreme
Court* , of July 15, 1998,
para.22.
17 See *Kyrtatos v Greece (2005)*
40 E.H.R.R. 16 at [52].
18 See *López Ostra v Spain*
(A/303-C) (1995) 20 E.H.R.R.
277 at [51]; see also, *mutatis*
mutandis , *Hatton v United*
Kingdom (2002) 34 E.H.R.R. 1
at [118].
19 See [46].
20 See [45].
21 See [47].
22 See [45].
23 See [46].
24 See *Aktaş v Turkey (2002) 34*
E.H.R.R. 39 at [272].
25 See [45].
26 See [31] *et seq.*

- 27 See the Appendix to this judgment.
- 28 See [38] *et seq.*
- 29 See [43].
- 30 See [12], [15], [34] and [47].
- 31 See [46].
- 32 See [58].
- 33 See [51].
- 34 See [49].
- 35 See the Hatton case cited above.
- 36 See *Powell and Rayner v United Kingdom (A/172) (1990) 12 E.H.R.R. 355* at [41], and *Guerra v Italy (1998) 26 E.H.R.R. 357* at [58].
- 37 See the Appendix, also [11] and [12].
- 38 See below, at [114].
- 39 See [11], [12] and [15].
- 40 López Ostra v Spain , cited above, at [52]–[53].
- 41 See [42].
- 42 See *Keegan v Ireland (A/290) (1994) 18 E.H.R.R. 342* at [49].
- 43 López Ostra judgment, cited above, at [16]–[22].
- 44 Guerra v Italy , cited above, at [25]–[27].
- 45 App. No.13728/88, S v FranceDec. 17.5.1990 .
- 46 See *Rees v United Kingdom (A/106) (1987) 9 E.H.R.R. 56* at [37].
- 47 See below, at [111].
- 48 See, among other authorities, *Lustig-Prean and Beckett v United Kingdom (2000) 29 E.H.R.R. 548* at [80]–[81].
- 49 *Fredin v Sweden (A/192) (1991) 13 E.H.R.R. 593* at [48].
- 50 *Pine Valley Development Ltd v Ireland (A/222) (1992) 14 E.H.R.R. 319* .
- 51 Hatton , cited above, at [122].
- 52 Powell and Rayner v United Kingdom , cited above, at [44].
- 53 See *Buckley v United Kingdom (1997) 23 E.H.R.R. 101* at [76]–[77].
- 54 See App. No.46117/99, Taşkin v Turkey, November 10, 2004 , at [117].
- 55 See [11].
- 56 See [15].
- 57 See [57].
- 58 See [55].
- 59 See [55].
- 60 See [37] *et seq.*
- 61 See [15].
- 62 See [39].
- 63 See [59] *et seq.*
- 64 X and U v Netherlands (A/91) March 26, 1985 , at [24].
- 65 See [15].
- 66 See [37] *et seq.*
- 67 See the Appendix.

68 See *McCann v United Kingdom (A/324) (1996) 21 E.H.R.R. 97* at [220].

69 Civil Code of the Russian Federation, Art.153 read in conjunction with Art.779 .

70 Paragraph numbering added by the publisher.

71 *Moreno Gómez v Spain (2005) 41 E.H.R.R. 40* .

72 Cited above.

73 The data provided above reflect only the results received from stationary monitoring post No.1 of the State Agency on Hydrometeorology, the nearest to the applicant's house.

*841 Hardy and Maile v United Kingdom



No Substantial Judicial Treatment

Court

European Court of Human Rights

Judgment Date

14 February 2012

Report Citation

(2012) 55 E.H.R.R. 28

Application No.31965/07

Before the European Court of Human Rights

The President , Judge Garlicki ; Judges Thór Björgvinsson , Bratza , Nicolaou , Bianku , Kalaydjieva and De Gaetano :

February 14, 2012

Access to information; Environmental information; Hazardous substance consent; Liquefied petroleum gas; Planning permission; Positive obligations; Right to respect for private and family life; Risk assessment;

H1. The applicants lived in Milford Haven and were members of the Safe Haven Residents Group, which opposed the construction and operation of two liquefied natural gas (LNG) terminals in Milford Haven Harbour. The two LNG terminals required planning permission and hazardous substances consent from the local authorities. Planning permission was granted in 2003 and hazardous substances consent was granted in 2004. In assessing the applications, the authorities were advised by the Health and Safety Executive (HSE) and the Milford Haven Port Authority (MHPA). Environment statements supporting the planning permission applications, MHPA reports and HSE reports cumulatively addressed the environmental, social, operational and safety impacts of the LNG terminals.

H2. In March 2005 the applicants applied for judicial review of the grants of planning permission and hazardous substances consent. Leave to apply was refused as the challenge had not been made sufficiently promptly and it was not in the public interest to grant leave. The applicants sought permission to appeal the refusal along with a disclosure order and protective costs order. The Court of Appeal refused permission to appeal and did not grant either order. Due to an error of fact in the Court of Appeal's judgment there was a hearing to determine whether the application for permission to appeal should be re-opened. The hearing was before the original tribunal, who refused to recuse themselves, and permission to re-open was refused. All of the judgments considered the factual and legal basis of the allegations and indicated that the HSE and MHPA risk assessments had been adequate and it had been reasonable for the authorities to rely upon them.

H3. From December 2004 onwards the applicants requested access to environmental information and risk assessments from MHPA under the [Environmental Information Regulations 2004](#) . MHPA provided two redacted reports, which the applicants had specifically requested, but refused to provide more information additional to that which was already publicly available. In July 2007 the applicants applied for judicial review in relation to MHPA's refusal to disclose documents. Leave to apply and *842 permission to appeal were refused on the grounds either that the application was out of time or an attempt to reopen a matter which had already been decided.

H4. The applicants complained under [arts 2 and 8](#) of the Convention that the UK authorities had failed to properly assess the marine risks of the proposed LNG operations in accordance with their duties relating to the regulation of hazardous industrial activities. The complaints related specifically to MHPA's failure to undertake a risk assessment of the potential for

and consequences of an offshore LNG escape. They further complained about the lack of information disclosed regarding the risks associated with the LNG terminals. The applicants also complained of violations of [arts 6](#) and [13](#) of the Convention.

H5. **Held** unanimously:

- (1) that the Government's non-exhaustion objection regarding the alleged denial of access to information be joined to the merits;
- (2) that the applicant's complaint under [art.8](#) of the Convention was admissible and that the remainder of the application was inadmissible;
- (3) that there had been no violation of [art.8](#) of the Convention;
- (4) that it was not necessary to rule on the Government's abovementioned objection.

1. Applicability of article 8

H6. The alleged violations of [arts 2](#) and [8](#) were most appropriately examined from the standpoint of [art.8](#) alone. For [art.8](#) to apply to environmental concerns any interference must directly affect the applicants' home, family or private life. The potential risks which included, inter alia, a collision leading to the escape of LNG and resulting in an explosion or fire were such as to establish a sufficiently close link with the applicants' private lives and homes and [art.8](#) was accordingly applicable. [183]–[184], [187]–[192]

2. Safety of the LNG terminals; preliminary objection; right to respect for private and family life (article 8)

H7. (a) The substance of the applicants' out-of-time application for judicial review was to challenge the planning permission and hazardous substances consent. In making this application, they failed to pursue remedies allowing the consents to be revoked or modified by the authorities. Nevertheless, the domestic courts did examine the merits of the applicants' complaints and any subsequent challenge would not have offered reasonable prospects of success. The Court held that the applicants had exhausted available and effective domestic remedies. [198]–[203]

H8. (b) The first aspect of an inquiry into a decision affecting environmental issues is to assess the merits of the authority's decision. The decision must be compatible with [art.8](#) but the authority is given a wide margin of appreciation. The second aspect is to scrutinise the decision-making process to ensure it is fair and affords due respect to the interests safeguarded to the individual by [art.8](#) and includes an appeal process. [217]–[221]

H9. (c) There was an extensive legislative and regulatory framework in place in the United Kingdom, and specifically Milford Haven Port, to promote safety and limit the risks posed by the LNG operations. The Court examined the assessments undertaken by MHPA and HSE and their evaluation by the developers and the ***843** authorities. The Court cited the domestic court's analysis of the extent and adequacy of the numerous reports and in particular the risk assessments of collisions and LNG leaks. The lengthy environment statements and MHPA tanker simulation exercises were considered and it was noted that The Society of International Gas Tankers and Terminal Operators Limited (SIGTTO) had indicated that MHPA had done everything that was expected of it in respect of risk assessment and planning for LNG shipping. As regards procedure, the applications for planning permission were publicised and comments from the public were invited. Additionally, the applicants' complaints were examined by the domestic courts despite being out of time for judicial review. [222]–[230]

H10. (d) The legislative and regulatory framework, extensive reports and studies and satisfactory advice provided to the authorities meant that there was no manifest error of appreciation by the national authorities in striking a fair balance between the competing interests. Accordingly, there had been no violation of [art.8](#) of the Convention. [231]

3. Lack of information disclosed; preliminary objection (article 8)

H11. (a) Whether the applicants had exhausted domestic remedies was closely linked to the merits of the complaint and accordingly the objection was joined to the merits. Where hazardous activities are planned, it is important that the public can access the conclusions of risk assessments and information enabling them to assess the dangers. There must be an effective and accessible procedure enabling those potentially endangered to seek all the relevant information. [236], [245]–[246]

H12. (b) The planning and hazardous substances applications were public documents and were the subject of public consultation. The environmental statements and the conclusions of MHPA safety and risk assessments and details of simulation exercises were also made public. The provisions of the [Environmental Information Regulations](#) and the [Freedom of Information Act 2000](#) had established an extensive regime enabling public access to environmental information and the applicants had successfully used this legislation to obtain the release of two reports. [247]–[248]

H13. (c) A great deal of information was voluntarily provided to the public by MHPA and the developers and provisions existed to generate greater disclosure, which were successfully employed. Consequently, the United Kingdom had fulfilled its positive obligation under [art.8](#) and there had been no violation of this provision. [249]–[250]

4. Right to a fair trial (article 6)

H14. The applicants complained that the Court of Appeal's failure to recuse itself constituted a breach of [art.6\(1\)](#) of the Convention. The failure related to an application to re-open civil proceedings which had been terminated by a final decision and as such the complaint was incompatible *ratione materiae* and was declared inadmissible. [251]–[253]

5. Other alleged violations of the Convention

H15. The applicants complained that the Court of Appeal's failure to make a disclosure order or hear arguments relating to an application for a protective costs order was **844* in breach of [art.6\(1\)](#). They also complained that the Court of Appeal's implementation of [r.52.17 CPR](#) denied them an effective remedy under [art.13](#). The Court found no violation of the Convention arising from the complaints. [254]–[255]

H16 The following cases are referred to in the Court's judgment:

Akdivar v Turkey (1997) 23 E.H.R.R. 143
Cardot v France (1991) 13 E.H.R.R. 853
Demopoulos v Turkey (2010) 50 E.H.R.R. SE14
Fadeyeva v Russia (2007) 45 E.H.R.R. 10
Giacomelli v Italy (2007) 45 E.H.R.R. 38
Guerra v Italy (1998) 26 E.H.R.R. 357
Hatton v United Kingdom (2003) 37 E.H.R.R. 28
Helmets v Sweden (1998) 26 E.H.R.R. CD73
Kennedy v United Kingdom (2011) 52 E.H.R.R. 4
López Ostra v Spain (1995) 20 E.H.R.R. 277
McGinley v United Kingdom (1999) 27 E.H.R.R. 1
Roche v United Kingdom (2006) 42 E.H.R.R. 30
Taşkın v Turkey (2006) 42 E.H.R.R. 50
Surmont v Belgium (13601/88 and 13602/88) July 6, 1989

Asselbourg v Luxembourg (29121/95) June 29, 1999
 Tătar v Romania (67021/01) July 5, 2007
 Tătar v Romania (67021/01) January 27, 2009
 Dubetska v Ukraine (30499/03) February 10, 2011
 Grimkovskaya v Ukraine (38182/03) July 21, 2011
 Vainio v Finland (62123/09) May 3, 2011
 Kolu v Finland (56463/10) May 3, 2011

H17 The following domestic cases are referred to in the Court's judgment:

R. v Hammersmith and Fulham LBC Ex p. CPRE London Branch [2000] Env. L.R. 549; (2001) 81 P. & C.R. 7

THE FACTS

I. The circumstances of the case

5. The applicants were born in 1946 and 1935 respectively and live in Milford Haven.

A. The background facts

6. The present application concerns the construction and operation of two liquefied natural gas (LNG) terminals on sites at Milford Haven Harbour (the Haven).

7. The applicants were members of an informal group of residents of Milford Haven opposed to the LNG terminals, called "Safe Haven". Safe Haven was formed in May 2004 and had approximately 15 members who met regularly. The applicant became involved in Safe Haven from August to October 2004. *845

1. Brief outline of the relevant factual and legal framework for the grant of planning permission and hazardous substances consent

8. Construction and operation of the LNG terminals at Milford Haven requires, inter alia, planning permission granted by the relevant local planning authority; hazardous substances consent granted by the Hazardous Substances Authority; compliance with the Control of Major Accident Hazards (COMAH) Regulations; compliance with international certification requirements for vessels; and compliance with byelaws, general directions and the Port Marine Safety Code. A brief outline of these requirements is set out below. For further details of the relevant domestic law see [129]–[170] below.

(a) Planning permission

9. Planning permission was required for the construction of the LNG terminals, including the jetties and piers, and the use of the land for that purpose. The power of the local planning authorities to grant planning permission for development was subject to Regulations which prohibited the grant of planning permission unless relevant environmental information had been taken into account.

(b) Hazardous substances consent

10. The operation of the LNG terminals also required consent from the appropriate hazardous substances authority. The key role of the hazardous substances authority was to control the presence of hazardous substances on, over or under land.

11. The Health and Safety Executive (HSE) was a statutory consultee in respect of the applications made for hazardous substances consent. This meant that the hazardous substances authority was obliged to consult the HSE and to take account of its representations, but was not bound to follow them. The role of the HSE was to provide advice on the nature and severity of the risks presented by major hazards to people in surrounding areas so that they could be balanced against other material planning considerations.

(c) COMAH Regulations

12. The LNG terminals remain subject to COMAH Regulations, which apply mainly to the chemical industry but also to some storage activities, explosives and nuclear sites and other industries where threshold quantities of dangerous substances are kept or used. The purpose of the COMAH Regulations is to reduce the risk of major accidents to a level that is as low as reasonably practicable by imposing on-site safety control.

13. The HSE and the Environment Agency Wales (EA) monitor compliance with the COMAH Regulations of the LNG operations at Milford Haven.

(d) International certification for vessels

14. The marine vessels used to transport LNG to Milford Haven are subject to certification for compliance with international standards. Compliance with those standards is monitored by the Maritime and Coastguard Agency (MCA) for England and Wales, an agency of the Department of Transport.

(e) Milford Haven Port Authority

15. Milford Haven Port Authority (MHPA) has a statutory duty to provide, maintain, operate and improve port and harbour facilities in, or in the vicinity of, the haven. It has the power to make byelaws to regulate the use of the haven and to issue **846* directions for the purpose of promoting or securing conditions conducive to the ease, convenience or safety of navigation in the haven and its approaches.

16. The Port Marine Safety Code (the Code), with which MHPA complies, was issued by the Department of the Environment, Transport and the Regions in March 2000, and has since been updated. It introduces a national standard for every aspect of port marine safety. It is supplemented by a *Guide to Good Practice on Port Management Operations* dealing with risk assessment and safety management.

2. The Dragon Site

(a) Application for planning permission for the site

17. In 2002 Petroplus, an oil refiner, applied to Pembrokeshire CC, the relevant local authority, for planning permission to develop an LNG terminal on a site at Milford Haven Harbour (the Dragon Terminal or the Dragon Site). The application was supported by an environmental statement. The planning application was duly advertised and publicised by Pembrokeshire CC and MHPA and the HSE were consulted. Any member of the public who wished to do so was able to make comments regarding the proposed development.

18. Chapter 15 of the environmental statement, dated September 2002, dealt with operational safety. It noted that marine and navigational safety for the delivery of LNG by marine tankers to the jetty was recognised as an area of concern. Petroplus had therefore commissioned a marine risk assessment and a simulation of the manoeuvring and berthing of a large LNG tanker within the waterway, in conjunction with MHPA pilots.

19. The Statement identified the main risks arising in respect of the handling of LNG as fire and explosion. It noted that guidelines for assessment and tolerability of risks existed but that there was no definitive or prescriptive methodology in the United Kingdom. While this could lead to differences in the levels of tolerable risk in the United Kingdom compared to other countries, overall levels of risk tolerability were broadly similar across the European Union and other safety-conscious countries. Work which had been carried out in respect of risk assessment and evaluation included a hazard identification to identify major hazards; a quantitative risk assessment (QRA) in respect of major hazards identified; and a calculation of levels of individual and societal risk.

20. The Statement also considered environmental risk from potential incidents. As regards a possible spillage to surface water it noted:

“[C]omplete evaporation of the LNG would take place. As LNG and water are immiscible no residue would remain to cause ongoing pollution. The adverse phenomena would be a cooling of the water body local to the spillage as the LNG

absorbs heat to evaporate. Given the large volume of water within the Milford Haven waterway it is most unlikely that this cooling would be of significance.”

21. In a section on “Marine Hazards and Navigation”, the statement noted:

“Petroplus is involving the MHPA in planning of the marine aspects of LNG terminal to ensure that its proposals will meet the Authority’s requirements for safe navigation and prevention of pollution. The involvement includes:

- Consultation in the development of a marine risk assessment for the development; *847
- Commissioning of real time simulation for the movement of LNG vessels in the Haven Waterway;
- Arranging for MHPA pilots to witness the operation of LNG vessels at a European terminal; and
- Further consultation during the design, construction and operational stages of the project.”

22. In the context of the real time ship simulation exercise conducted, the statement clarified that MHPA pilots had been able to undertake trial navigation of an LNG vessel, including turning and berthing activities, under a variety of wind, wave and tidal conditions. It concluded that the output from the simulations had confirmed that the large LNG tankers could be safely operated in the Milford Haven waterway under certain restrictions regarding wind conditions set out in the statement. The MHPA pilots who participated in the simulation exercise indicated that they were satisfied with the simulation and made recommendations as to maximum wind speed.

23. The Statement further noted that a risk assessment had been carried out on the effect of increased traffic in the haven from the introduction of LNG vessels. The findings were set out in some detail in the statement, which explained that an average of 10,700 vessel movement took place in the haven each year and that an increase of between 100 and 240 movements per year could be expected once the LNG terminal was operational. The Statement concluded that the proposed operations would have little significant impact on the marine traffic environment of the haven.

24. As to mitigation measures for marine aspects, the statement noted:

“As the MHPA is responsible for safe marine operations in the Haven Waterway, mitigating measures would include:

- Continuing consultation of MHPA during the design, construction and operational stages of the project;
- Implementing further simulation exercises to assess additional aspects, such as strong wind conditions in the approach channel, emergency situations, failures and aborts;
- Implementing simulation training for all MHPA pilots who will handle LNG vessels prior to commencement of vessel operations;
- Application of conservative operational requirements, under specified wind conditions initially; with modification when the pilots become more experienced with the LNG vessels;
- Installation of wind monitoring facilities on the Petroplus berth.”

25. In its conclusions and management recommendations, the statement summarised the impact of the proposed development on a wide variety of aspects including ecology and nature conservation, transport, social and economic issues, tourism and recreation, air quality and noise. On the safety aspects of the development, the statement concluded that the level of risk presented by the LNG terminal was tolerable and observed that the operation of the terminal would be subject to ongoing inspection and audit by the HSE.

26. On October 21, 2002 MHPA submitted its views to Pembrokeshire CC. It noted that: *848

“As a Port Authority, we have a duty to assess anticipated building works in the waterway in respect of their impact upon navigation, and also of course have a responsibility for maintaining and regulating the use of the waterway in a safe and effective manner.”

27. MHPA indicated that its marine department had been working closely with marine advisers to Petroplus to assess the feasibility of LNG vessels transiting the port area and berthing at the proposed jetties with suitable modifications. This assessment had included periods using the MARIN simulator, based in the Netherlands, where a variety of different situations including different ways of approaching the berth, various sizes of ships and different weather and tidal conditions were

all able to be trialled. The conclusion was that the identified and agreed means of navigation and operation “more than adequately” contained the risks associated with handling such vessels. MHPA also pointed to the benefit to the marine service community of the increase in traffic which would result from the development and the diversification into new sectors of activity. In short, MHPA was “supportive of [the] proposed development and have no concerns regarding safety or navigation in this respect”.

28. On March 19, 2003 Pembrokeshire CC granted planning permission for an LNG terminal at the Dragon Site.

(b) Application for planning permission for extension

29. On April 25, 2003, an application was made by Petroplus to extend the LNG terminal at the Dragon Site. Again, Pembrokeshire CC advertised and publicised the planning application and consulted various statutory consultees, including the HSE and MHPA.

30. A further environmental statement, dated April 2003, was prepared to consider the implications of the extension. It appears to have been a revised version of the original Statement. In the section on “operational safety”, the report addressed the potential increase in risk to safety which would arise from the increase in the stored quantity and throughput of LNG at the site. It noted that a revised safety report would be required under the COMAH Regulations to examine the hazards, risks and potential consequences of a major accident, to complement the report which had been accepted by the HSE for the existing installation. It further noted that a new risk assessment had been undertaken to consider the cumulative risk from the approved scheme together with the additional tank and regasification facilities, as well as ongoing operations.

31. The Statement noted that current movements per year at the Petroplus berths were in the region of 2,000, and that there were around 1,450 ferry movements. When the increase in movements was considered in the context of these statistics as well as the statistics for movements in the haven as a whole, it was clear that the increased traffic would have little significant impact on the marine traffic of the waterway.

32. The Statement concluded that the risks posed by the extended LNG terminal remained acceptable, observing that the expansion of the terminal would be subject to further scrutiny by the HSE under the COMAH Regulations.

33. A report prepared by the HSE for consideration on September 2, 2003 demonstrated some initial examination of the modalities and consequences of a major release from a delivery ship whilst moored at the jetty. The relevant section concluded:

**849*

“It is clear that such plumes, centred on the jetty, are capable of engulfing the densely populated developments of Milford Haven (town), Neyland or Pembroke Dock. But without PCAG Guidance on the frequency to be assigned to the release, an ignition probability analysis cannot be undertaken to determine the significance in risk terms ...

...

The paper has included some consideration of releases from delivery ships whilst moored at the jetty, but the analyses are incomplete due to shortage of data. A complete methodology could be developed over time.”

34. The application, together with the environmental statement and responses to the consultation, was considered at Pembrokeshire CC’s Planning and Rights of Way Committee meeting on October 21, 2003. The minutes noted that the HSE had not advised against the granting of permission for the extension on safety grounds. They also recorded that MHPA strongly supported the proposal and was confident that the port had the capacity to handle the extra shipping traffic and that there would be no negative impacts on the satisfactory risk assessment already undertaken.

35. On February 11, 2004 Petroplus made a further planning application, accompanied by an environmental statement, dated January 2004, for amendments to the approved LNG terminal. The application was again publicised and was the subject of consultation.

36. On September 10, 2004 planning permission was granted for an extension at the Dragon Site and for the amended scheme.

(c) Application for hazardous substances consent

37. In the meantime, on March 1, 2004, Petroplus applied for hazardous substances consent for the storage of LNG. Pembrokeshire CC consulted the HSE and MHPA and publicised the planning application.

38. A report dated October 12, 2004 by the Director of Development of Pembrokeshire CC recorded that strong objections to the application had been received from residents of nearby areas calling, in particular, for:

“[A]ll health and safety information concerning the proposed Milford Haven LNG Terminals [to be] made publicly available and openly debated before any further consents are given to build.”

It also noted that the HSE had confirmed that its statutory obligation was complete when all shore-based activities had been assessed and had been taken into account. Such activities, in the present case, would include the transfer of LNG from the ship to the shore and storage and regasification of the LNG. They would not, however, include the risks from ships moored at or approaching the jetty. The assessment of such risks would fall to the Maritime and Coastguard Agency.

39. The report continued:

“The MCA has confirmed that as the national maritime administration, it would have responsibility for the safety of LNG tankers, transporting the cargo, whilst inside UK territorial waters. Although it would continue to have some general responsibility for the vessel when it passed from UK territorial waters into the Milford Haven Port Authority’s jurisdiction area, the MCA take the view that primary responsibility passes to the competent harbour *850 authority. The MCA has stated that it would be reasonable to assume that there is some, unspecified increase in ‘risk’ by virtue of the explosive nature of LNG as a cargo. The Port Authority would be expected to allow the proposed activity to go ahead only where this risk has been reduced to ‘as low as reasonably practicable’. The mitigating actions initiated by the Port Authority would then be reflected in the Port’s safety management system which they are required to have in place through the Port Maritime Safety Code. The MCA have a range of responsibilities for various ‘operational’ aspects of the code including a general monitoring role for compliance with the Code by Port Authorities.”

40. MHPA’s submissions were recorded in the report as follows:

“The Port Authority has confirmed its jurisdiction including responsibilities (and powers) to regulate the use of the Haven and the overarching views of the MCA on a UK basis ... The MCA’s role in regard to LNG ships specifically would be that of Port State Control Inspectors looking into the condition and standard of shipboard operations of the vessels from a safety standpoint. The Port Authority has confirmed that its marine personnel, including pilots, have participated in risk assessments with teams from both proposed terminals facilitated by independent risk consultants. The Port Authority state that the outcome has been to confirm that Milford Haven has the capability of handling these vessels safely. The Port Authority has also confirmed that the security issue addressed through the International Ship and Port Facility Security Code which sets out detailed security requirements for ships and port facilities based on risk assessments to determine the level of risk and the measures necessary to meet that risk. Port facilities including Petroplus have been required to produce a security plan before operations start and this plan has been and will continue to be approved by Transec as the UK Government body responsible for security.”

41. The report recommended that the application be approved.

42. On December 7, 2004 Pembrokeshire CC approved the application for hazardous substances consent in respect of the Dragon Site.

3. The South Hook site

(a) Application for planning permission for the site

43. On April 28, 2003 Qatar Petroleum and ExxonMobil applied for planning permission to develop an LNG terminal at another site at Milford Haven Harbour (the South Hook Terminal or the South Hook Site). Unlike the Dragon Terminal, the South Hook Site fell within the authority of both Pembrokeshire CC and Pembrokeshire Coast National Park Authority and an application was accordingly made to both bodies. In the same month, the operators of the site opened a public exhibition

and visitors' centre in the town centre of Milford Haven regarding the proposed development. The HSE and MHPA were, among others, consulted on the application. It was also advertised and publicised to allow members of the public to submit any views on the proposed development.

44. Qatar Petroleum and ExxonMobil instructed an environmental statement in respect of the proposed development. A draft dated April 2003 has been provided to the Court. It noted that the LNG industry had an excellent safety record and that *851 the LNG transport and distribution industry in the United Kingdom had not experienced a major accident in a history of nearly forty years. A qualified risk assessment was also commissioned by the developers which identified potential hazards in respect of the LNG terminal.

45. Chapter 14 of the statement dealt with major hazards. It was noted at the outset that the discussion of the hazards was general, but that a detailed and specific safety report was being prepared.

46. The Statement summarised the basic obligations arising under the COMAH Regulations, noting:

“Operators of sites that come under COMAH have a general duty to take all measures necessary to prevent major accidents and limit their consequences to persons and the environment ... These sites are classified primarily according to inventory of hazardous substances, with approximately 750 being classified as ‘lower tier’, where operators must prepare a Major Accident Prevention Policy (MAPP). The remaining 350 sites, with larger inventories of dangerous substances, are classified as ‘top tier’ and are subject to additional requirements. These include submitting a Safety Report to the CA [competent authority – in this case the HSE and the EA], preparing and testing a site emergency plan, and providing information to local authorities to enable off-site emergency plans to be developed. The proposed installation will be top tier.”

47. As to assessment of risks, the statement explained:

“The COMAH Regulations govern land based industrial hazards. Under these, the proposed terminal will include the jetty, to the point where the loading arms connect to a berthed LNG carrier. The jetty comes within the jurisdiction of the Milford Haven Port Authority, which has responsibility for marine navigational safety and loss prevention issues within the 200 square mile Waterway. The close contact between the project and local expertise was recently manifested in a formal, two-day marine hazard identification exercise. Attendees included representatives of the Port Authority, pilots and tug masters, as well as master mariners from the project. Potential mitigation measures were identified in this exercise and are being evaluated for incorporation into the design.”

48. It summarised the identified hazards. Most pertained to the on-site activities but two hazards were identified which would have an impact beyond the site itself. The first was the possibility of a vapour cloud with delayed ignition. Safeguards proposed related to the design of the containment tanks, an emergency shut-down system to limit release and gas detection to identify leaks. The second was a ship collision at the jetty. Safeguards included emergency release coupling to allow the ship to depart quickly, an emergency shut-down system and a fire-fighting system.

49. On May 15, 2003 MHPA responded to the consultation in support of the proposed development, in terms similar to their letter of October 21, 2002 in respect of the Dragon Site.¹

50. The minutes of a meeting of Pembrokeshire CC's Planning and Rights of Way Committee on October 21, 2003 recorded that the HSE had not advised against *852 the granting of permission for the development on health and safety grounds and that MHPA supported the proposed development and had no concerns regarding safety or navigation. One letter of objection from a member of the public had been received.

51. On November 12, 2003, planning permission was granted by Pembrokeshire Coast National Park Authority in respect of the South Hook Site.

52. On December 18, 2003, planning permission was granted by Pembrokeshire CC in respect of the South Hook Site.

(b) Application for hazardous substances consent

53. In the meantime, on January 21, 2003, Qatar Petroleum and ExxonMobil applied to Pembrokeshire CC and Pembrokeshire Coast National Park Authority for hazardous substances consent for the storage and gasification of LNG at the South Hook Site. The application was publicised and the HSE and MHPA were consulted.

54. On January 8, 2004 the HSE provided observations in respect of the application for hazardous substances consent at the South Hook Terminal. It noted that:

“Our specialist team has assessed the risks to the surrounding areas from the activities likely to result if these Consents are granted. Only the risks from the hazardous substance for which the Consent is being sought have been assessed, together with the risk from these same substances in vehicles that are being loaded or unloaded.”

55. On February 10, 2004, the Chief Executive of MHPA wrote to Pembrokeshire Coast National Park Authority with responses to questions asked. He observed that it was necessary to ensure that large LNG ships were managed in such a way that they were safely and effectively accommodated. He indicated that MHPA’s approach to accommodating the LNG vessels was by detailed risk assessment, taking into account the characteristics of the ships and the terminal to be used and making use of simulators and their own pilots and technical teams working with those of the project proposers, together with a wide range of specialist consultants, to determine the requirements to meet this objective. The result would take into account, for example, the number of tugs required for a movement; the number of pilots; whether tugs should be escorting the vessel; the limits on any weather conditions to allow a movement to take place; and the timing of any movement related to tidal conditions. He explained that MHPA did not intend to close the port while an LNG ship entered or left as it was not necessary and did not improve the situation. He continued:

“What we will probably be seeking to do (and I say probably because we are still very much involved in the risk assessment of a wide variety of scenarios) is that there will be a restriction on vessels being within a given distance of an LNG ship when transiting the Haven ...

I also understand that some questions have been raised about the distance at which other vessels will be allowed to pass an LNG ship at the South Hook Jetty, given that this stretches some way into the Haven and that the main shipping channel in this vicinity is used by all other commercial ships being that their berths are further upriver. Again, we are researching this, testing on the simulators and undertaking risk assessments, but it is likely that we will be looking to undertake some dredging to widen the shipping channel to the South so that some vessels, including the ferry, will be able to pass the South *853 Hook Jetty with an LNG ship alongside at a further distance than would be the case otherwise. We are also looking at other ways of controlling shipping passing the South Hook Jetty in such circumstances which could include criteria of speed, tugs in attendance, maybe even a ‘guard’ tug in the vicinity of the LNG ship and restricting any movements to one vessel at a time, certain weather conditions etc.”

56. On March 4, 2004, the Western Telegraph newspaper published a question and answer article with ExxonMobil regarding the LNG terminal. Relevant extracts are quoted below:

“Could LNG explode if there was a collision at sea or in the Haven? Or could it explode for any other reason?”

The South Hook sponsors have been working closely with organisations such as Milford Haven Port Authority to ensure that the possibility of a shipping incident is extremely low. Vessels are also designed to withstand significant impact. If an LNG release were to occur from a shipping incident, and if it were ignited, then the effect would be localised to the vessel and its immediate surroundings and unlikely to impact the land. The recent Health and Safety Executive assessment examined the consequence of such an incident and found no cause for local concern.

...

What would happen if there were a spill ... on sea or on land?

Health and Safety Executive experts have considered potential spill scenarios and have found no areas of concern. An incident at sea is extremely unlikely, and the current design of ship is aimed at minimising the likelihood of release in the event of collision. Milford Haven Port Authority has emphasised its ability to safely handle LNG shipping.

...

Would it not be better if such a terminal was in a more uninhabited area?

The HSE's review has concluded there are no safety reasons to object to the proposed development. Our plans will be subject to a further safety review by the HSE, Environment Agency and the Coastguard under the Control of Major Hazards (COMAH) requirements. We, as operator, will have to demonstrate that all necessary measures have been taken to prevent major accidents. Any issues raised locally relating to safety systems, operating procedures and emergency response plans will have to be fully addressed."

57. On March 10, 2004 Pembrokeshire Coast National Park Authority Planning Committee considered the application for hazardous substances consent. Concerns were raised at the meeting regarding a perceived absence of any QRA on tankers and the need to dredge the channel to increase its depth.

58. On April 2, 2004, Pembrokeshire CC approved the application for hazardous substances consent in respect of the South Hook Site.

59. Pembrokeshire Coast National Park Authority approved the application on August 19, 2004. On the same day, the development planning officer of Pembrokeshire Coast National Park Authority, in a letter to the HSE, MHPA and Pembrokeshire CC's Emergency Planning Officer, highlighted concerns about the lack of comprehensive structure for assessing the risks of the project, saying: **854*

"Members however were still extremely concerned about safety issues and are hoping that the COMAH process is rigorous and very demanding and addresses all issues.

This concern has arisen partly because of the fact that there does not appear to be one overriding Authority but a number of bodies involved whose responsibility does not overlap – and where the edge of that responsibility may be a bit blurred, and a genuine concern about exactly which body is responsible for what.

The major concern appears to be the possible conflict between ships using the channel whilst an LNG slip is tied up at the jetty. Objectors seem to think that the space available is too narrow and that there is the potential for accidents if the jetty remains where it is."

60. ExxonMobil's representatives were also advised of this concern by letter of August 19, 2004 and were asked to "ensure that the issue is fully addressed at the time of the COMAH submission".

4. The Health and Safety Executive's risk assessment of the two projects

61. As set out above, the HSE played an important role in the planning and hazardous substances consent process and carried out its own assessments of the projects. In this context, it conducted a preliminary examination of potential marine spill scenarios, including the consequences of a major release from a delivery ship while moored at the jetty. However, it ceased work on this aspect of risk before it was concluded as marine risks were found to fall outside its ambit.

62. On February 2, 2006, in a letter to The Guardian newspaper, Geoffrey Podger, Chief Executive of the HSE, wrote:

"Re your report on the gas terminals at Milford Haven: I am happy to make clear that the HSE gave independent advice in the public interest and was not swayed by any external pressure ... The reason the HSE examined the shore side operation but not the risk of an accident at sea is simply because we have no legal competence to assess risks from ships while at sea or under the direction of the ship's master. We made this clear to the local authorities and suggested they consult others, including the Maritime and Coastguard Agency, to assess these risks prior to any consent being granted."

5. Milford Haven Port Authority's risk assessment of the two projects

63. Like the HSE, it can be seen from the above summary of the two projects that MHPA also participated in the planning process in respect of the LNG terminals.

64. On February 23, 2004 the Chief Executive of MHPA was asked which body had ultimate responsibility for assessing the risks involved in the movements of LNG tankers in Milford Haven. He replied on February 25, 2004, confirming that:

“The Milford Haven Port Authority is responsible for the conservancy (management, regulation, provision of navigation aids and systems etc) of the Waterway. This includes the regulation and management of all shipping movements. We have a statutory responsibility to support all traffic and indeed, in common with all UK ports, cannot forbid a ship to enter (except in particular *855 circumstances as laid down in appropriate Acts of Parliament). What we can and do lay down are the conditions under which movements will take place – e.g. time of entry, state of tide, number of pilots, number of tugs etc.”

65. On September 27, 2004, in a letter to Pembrokeshire CC, the Harbourmaster of MHPA clarified the extent of MHPA’s responsibilities:

“[MHPA] has navigational jurisdiction over the Waterway ...

This jurisdiction includes responsibilities (and powers) to regulate the use of the Haven. Our primary objectives in this regard are to maintain, improve, protect and regulate the navigation and in particular the deep water facilities in the Haven ...

Whilst the HSE have said that the Maritime and Coastguard Agency are the UK competent authority, this is correct inasmuch as they regulate shipping at sea and through legislation. As a competent authority they have an overarching view UK wide. Indeed, they advise on primary legislation which can affect the Port Authority and may act as auditors for the Port Marine Safety Code to which this Authority wholeheartedly subscribes. Their role in regard to LNG ships specifically would be that of Port State Control inspectors looking into the condition and standard of shipboard operations of the vessels from a safety standpoint.

Marine personnel from the [MHPA], including pilots, have participated in risk assessments with teams from both proposed terminals facilitated by independent risk consultants. The outcome has been to confirm that Milford Haven has the capability of handling these vessels safely

...

[Security] is addressed through the International Ship and Port Facility Security Code ... which sets out detailed security requirements for ships and port facilities based on risk assessments to determine the level of risk and the measures necessary to meet that risk.

Port facilities throughout the Haven including Petroplus have been required to produce a security plan, appoint a security officer, provide additional security equipment, monitor and control access of people, cargo and stores as well as ensuring effective security communications. There will be a similar requirement for the South Hook terminal to prepare a security plan before they start operation.”

66. On December 20, 2004 the Chief Executive of MHPA responded to a letter from a member of parliament regarding the LNG terminals as follows:

“As to the perception that we as a Port Authority are ‘reluctant’ to publish risk assessments ... this really flows from a lack of understanding of the role of the Port Authority. Unlike applications for the shore terminals where the process that is undertaken is very clearly defined and results on a go/no-go decision, our role as a Port Authority is different. We do not have the ability to deny access to any ship (other than in very specific and individual circumstances) given that the UK operates what can be loosely termed an ‘open ports policy’. What we do have is a responsibility to ensure that any shipping movements are managed in a safe and efficient manner. To this end we have undertaken, and continue to undertake, a wide range of risk assessments to determine the way in which this safe and effective management *856 will be carried out. There is therefore no one single document or set of documents that clearly define the situation in which a ‘go/no-go decision’ can be determined, but rather a continuing process of scenario setting, risk assessment, trial, refining scenarios and identification of mitigation and prevention measures in which a wide number of variables are

taken into account – some of which are still being developed as decisions as to the type of ships and their characteristics are being defined by the terminal operators and their teams.”

67. In a report dated April 13, 2005 Lloyd’s Register Risk Assessment Services, on the instructions of MHPA, examined and summarised high level statistics for worldwide accidents involving ships. Experience of a fire or explosion on board a ship large enough potentially to injure people nearby was “as likely per year as being struck by lightning”. The report observed that the likelihood of an LNG incident was extremely low and that there had never been a recorded incident of a major release of LNG from a ship to external atmosphere and no member of the public had ever been injured by LNG from a ship. The authors explained that the report carried a moderate level of error in light of the high level statistics used and concluded that more detailed research could be carried out to address the specific risks at Milford Haven.

68. In a paper of May 20, 2005, the Chief Executive of MHPA summarised the position regarding the LNG terminals. On the matter of risk assessments, the paper noted:

“One of the concerns constantly banded about by Safe Haven ... is the lack of quantified risk assessment. This is a fallacy either through genuine misunderstanding or a deliberate refusal to accept what has been told.

We have undertaken a significant amount of risk assessment both ourselves with the terminal operators, their advisers and making use of specialist third parties. The terminal developers themselves have also undertaken quantified risk assessment some of which related to shipping movements and we have made use of these in our own processes.

To assist us in this we recently commissioned a report from Lloyds Register Risk Assessment Services looking specifically at the risk of incidents in Milford Haven large enough to potentially injure people nearby.

Their conclusion was that there is as much risk of being struck by lightning as there is of being injured by any explosion including fire from LNG in the Haven.”

69. On June 9, 2005 a journalist contacted MHPA asking what risk assessments it had undertaken in relation to plans to import LNG to the South Hook and Waterson sites, with specific regard to the marine-based risk. In an email response dated June 15, 2005, the Chief Executive of MHPA indicated that a number of risk assessments had been undertaken as part of the process of determining the way in which LNG ships would be managed. He referred to the commissioning of “studies and reports from experts and consultants”. He indicated that, as a port, the MHPA had a statutory duty to facilitate and support any use of the waterway, noting:

“[A]s a port authority we have no say in the selection of the sites, our responsibility is managing the ships that will visit the sites chosen.” *857

70. Accordingly, he explained, the studies were not designed to determine whether MHPA would handle LNG ships, but rather how it would handle them.

71. In its summary grounds lodged with the High Court in subsequent judicial review proceedings,² MHPA provided details of the risk assessment work it had carried out. In particular, it stated:

“The Authority has been and continues to be under the Port Marine Safety Code to assess safety. It has worked closely with the developers to ensure that what is proposed will be safe and has undertaken a series of robust risk assessments.

In summary, the Authority has been an active participant in the process of risk assessment undertaken by [the developers] since Spring 2002. It has undertaken simulation tests and made specific recommendations about navigation and procedures to minimize hazards. The Authority has visited LNG tankers, other Port Authorities and terminals which handle LNG, trained pilots, harbour masters and managers and obtained and commissioned advice from consultants about potential hazards.

...

The Authority's risk assessment has been open in that it has, for example, explained what has been happening in its annual reports. Moreover, it has taken part in a range of public presentations and responded to any enquiries that it has received from interested members of the public and other stakeholders."

72. The grounds set out, at para.28, some of the specific risk assessments undertaken, including:

- (a) a Marine Traffic Analysis of vessel movements through the port during a 25-day period in November 2002 by a marine and risk consultant, Marico Marine;
- (b) a Concept Risk Assessment by South Hook LNG Terminal Company Ltd, with the participation of MHPA, dated December 9–10, 2002 identifying hazards, consequences and possible mitigation measures relating to potential use of Milford Haven Port for the importation of LNG;
- (c) a Report by the Maritime Research Institute Netherlands (MARIN), dated February 14, 2003, on simulations to check the nautical consequences of future 200,000cum LNG carriers;
- (d) a March 2003 Navigational Risk Assessment by Marico Marine;
- (e) MARIN Report of May 19, 2003 on fast time simulations for large LNG ships;
- (f) a Technical Report dated October 13, 2003 by Det Norske Veritas (USA) Inc, a major classification society, in respect of South Hook LNG Terminal Co Ltd's proposal assessing the marine risk associated with vessel manoeuvres in the channel and around the South Hook Terminal for discharging cargo from LNG vessels;
- (g) a Report dated February 20, 2004 by ABS Consulting, an international consulting operation experienced in the analysis of shipping collisions, for *858 South Hook LNG Terminal Company Ltd, dealing with potential damage to LNG tankers due to ship collisions;
- (h) a Report dated March 2005 from Burgoyne Consultants, international consulting engineers and risk consultants, updating a report on the potential consequences of fires and explosions involving ships carrying petroleum products (including LNG);
- (i) a November 2003 Report commissioned by South Hook LNG Terminal Co Ltd from HR Wallingford, the former research facility for the Ministry of Defence, dealing with mooring safety and the possibility of disturbance caused to moored vessels; and
- (j) a Report by Gordon Milne, senior risk analyst at Lloyd's Register of Shipping, commissioned by MHPA assessing the risk of explosion and gas release from LNG carriers.

73. MHPA refused to disclose any of these reports citing commercial confidentiality.

74. The summary grounds further indicated that:

"6. SIGTTO [see [160] below] has worked with [MHPA] and confirmed to the best of their knowledge that [MHPA] and the terminal operators have done precisely what they would expect to be done in undertaking risk assessments and planning for LNG shipping."

75. This was confirmed by SIGTTO in a letter dated November 14, 2006.

B. The first judicial review proceedings (planning permission and hazardous substances consent)

76. Pursuant to applicable civil procedure rules, a claim for judicial review of a decision must be filed promptly and in any event within three months of the decision under challenge.³

77. On March 4, 2005 the applicants filed an application for leave to apply for judicial review in respect of the grants of planning permission and hazardous substances consent for the South Hook and Dragon Terminals. They alleged a failure to carry out a comprehensive environmental impact assessment of the project as a whole; a failure to have regard to the risks arising from marine traffic and to consider alternative locations for the LNG terminals; and a fundamental misunderstanding as to the characteristics of LNG in the event of an escape.

78. On May 3, 2005 the High Court ordered that an oral hearing be held to focus primarily on the issue of the delay in lodging the claim for judicial review, the applicants' reasons for it and the practical implications of the delay for the operators. A two-day oral hearing subsequently took place.

79. On July 26, 2005 leave to apply for judicial review was refused on the grounds that the challenge was not made sufficiently promptly; that there was undue delay; and that quashing the planning and hazardous substances decisions would substantially

prejudice the rights of ExxonMobil and Petroplus, would cause them substantial hardship and would be very detrimental to good administration.

80. Mr Justice Sullivan summarised the decisions being challenged in respect of the South Hook Site as: (1) planning permission by Pembrokeshire Coast National Park Authority on November 12, 2003; (2) planning permission by Pembrokeshire **859* CC on December 18, 2003; (3) hazardous substances consent by Pembrokeshire CC on April 2, 2004; and (4) hazardous substances consent by Pembrokeshire Coast National Park Authority on August 19, 2004. The decisions being challenged in respect of the Dragon Site were: (1) planning permission by Pembrokeshire CC on March 19, 2003; (2) planning permission by Pembrokeshire CC for an extension on September 10, 2004; (3) planning permission by Pembrokeshire CC for an amended scheme on September 10, 2004; and (4) hazardous substances consent by Pembrokeshire CC on December 7, 2004.

81. As to the reason for the delay in applying for judicial review, Sullivan J. rejected the applicants' contention that the delay resulted from a "labyrinthine decision-making process". He accepted that there was a mass of material, but considered that this was because the claim form had adopted a "scatter gun" approach and sought permission to challenge not merely the decision on December 7, 2004 in respect of the Dragon Site, but also the earlier decisions in respect of that site going back some 18 months, and the decisions going back some 12 months in respect of the South Hook Site. He noted that, insofar as the applicants complained of the absence of a comprehensive environmental impact assessment or its failure to take account of marine risks, the complaints were directed towards the grant of planning permission itself, rather than hazardous substances consent. In relation to both sites, relevant planning permissions had been granted more than three months before the judicial review proceedings were brought. Sullivan J. was satisfied that the applicants had known of the relevant decisions they wished to challenge by August to October 2004.

82. Having concluded that there was no good reason why the three-month deadline for bringing judicial review proceedings had not been respected as regards all of the decisions except the December 7, 2004 decision and that there was no good reason that the December 7, 2004 decision was not challenged "promptly" as required by the relevant [Civil Procedure Rules](#) (CPR), Sullivan J. went on to consider the extent of any hardship or prejudice to third-party rights and detriment to good administration which would be occasioned if permission were nonetheless granted. He concluded that it was clear that the grant of relief to the applicants "would cause really significant damage in terms of hardship and/or prejudice" to the rights of the owners and operators of the South Hook and Dragon Terminals. He further considered that it would be detrimental to good administration to allow a challenge to decisions going back as far as March 2003.

83. Finally, Sullivan J. considered whether the public interest required that the application should proceed. In this context, he considered [art.2](#) of the Convention but concluded that the public interest did not merit the granting of permission out of time, noting:

"81. Although much of the claimants' skeleton argument before me was devoted to the merits of the claim, I have not heard full argument on the substantive issues which are vigorously contested by the defendants and the interested parties. They deny that there was any misunderstanding as to the characteristics of LNG in the event of an escape. ...

82. ... It would not be possible to resolve the substantive matters in dispute without examining in considerable detail the decision-making processes that were employed by [Pembrokeshire CC and Pembrokeshire Coast National Park Authority] in respect of each of the decisions under challenge. In these **860* circumstances it would not be right to start from the premise that it would not be in the interests of good administration to maintain the decisions because they were unlawful, as on occasions the claimants' submissions appeared to do."

84. The judge commented:

"83. I do not doubt that the issues raised in the claim are of considerable local importance in Milford Haven and the surrounding area. Equally, I do not doubt the genuineness of the claimants' concerns and that they fairly represent Safe Haven's concerns. But it is also fair to say that Safe Haven's views are very far from being representative of the views expressed by the very wide range of consultees, including such bodies as the Town Council and relevant community councils."

85. The applicants sought permission to appeal the refusal of leave.

86. The judge ordered that an oral hearing be held to consider whether leave to appeal should be granted. A one-day hearing took place on January 20, 2006.

87. On January 24, 2006 the applicants indicated their intention, in the event that permission was granted, to apply for a disclosure order seeking disclosure of all the documents referred to in para.28 of MHPA's summary grounds⁴ and any other documents relevant to the proceedings. The application notice specified that the application was made in order to "cover the situation should the Court grant permission to apply for Judicial Review". They also applied for a protective costs order in respect of the second applicant, who had at that stage not been granted legal aid.

88. On March 17, 2006 Keene L.J., with whom the other members of the Court of Appeal agreed, delivered the court's judgment. He considered the applicants' arguments under art.2 of the Convention and explained:

"26. It is obvious that public safety is potentially an issue of importance and that, if there is evidence that it has been overlooked or not properly considered by the decision-maker, then that may justify permission to seek judicial review. Public safety must be a material consideration in the decision-making process carried out by the hazardous substances authority, irrespective of Article 2 considerations."

89. However, he considered that although Sullivan J. had not heard full argument on the substantive issues, he had been alive to the art.2 and public safety issues which arose in the case. Keene L.J. observed that:

"27. ... The Milford Haven Port Authority is a statutory body required to ensure the safety of waters within its jurisdiction. The evidence before Sullivan J made it clear that the Port Authority was satisfied as to the safety of the terminal proposals, so far as its own sphere of responsibility was concerned, while the Health and Safety Executive had advised that it was content so far as the land-based activities were concerned. Both these bodies had advised the decision-makers, the County Council and the Park Authority, who were entitled to rely on the specialist advice received from those bodies." *861

90. Keene L.J. accordingly concluded that it was open to Sullivan J. to find that the merits of the applicants' claim did not outweigh the undue delay and the prejudice which permission to proceed would produce.

91. Observing that it was "strictly speaking unnecessary to scrutinise in greater depth" the planning decisions in light of his findings on delay, Keene L.J. nonetheless addressed briefly the issues raised.

92. He noted that the essence of the applicants' case was:

"... [T]hat the decision-makers did not adequately consider what are called 'marine risks', namely the risks to those in the Milford Haven area from an escape of LNG from a ship. In particular, concern is expressed about the risk of the formation, in the event of such an escape, of a flammable gas cloud. It is stressed that a population of some 20,000 lies within a radius of just over 4 miles of the South Hook and Dragon sites."

93. However, Keene L.J. disagreed that the risk assessment had been inadequate. He considered that the risk of collision "was undoubtedly dealt with by the Port Authority", as counsel for the applicants conceded during the hearing. He pointed out that MHPA had advised both bodies responsible for granting planning permission and consents that it had the "capability of handling these vessels safely". As to counsel for the applicants' argument that an assessment of the risk of collision was insufficient and that there was a lacuna because of the absence of any assessment of the consequences for the local population of a vapour cloud, Keene L.J. concluded:

"32. I do not accept that the evidence before us, including the evidence submitted on behalf of the applicants since the oral hearing, demonstrates any such arguable lacuna. One has to bear in mind in this connection the very extensive assessments carried out by the Health and Safety Executive, because these provide the context for the Port Authority's assessment. The Health and Safety Executive did assessments which considered both the consequences and the likelihood of an escape of LNG for all land-based and jetty-based activities. Those included the risk of catastrophic failure of an LNG storage tank at the terminal; the failure of a loading arm at the jetty while LNG was being transferred from ship to shore; and 'major release from a delivery ship while tied up at a jetty': see HSE responses to Park Authority, 5 March 2004, and the HSE Summary Grounds of Resistance, paragraphs 10 and 11. Having carried out

these assessments, the Health and Safety Executive did not object to the proposal for either terminal on safety grounds. The applicants do not criticise the work done by the Health and Safety Executive.

33. That body made it clear in its response of 5 March 2004 that it was not responsible for advising on accidents ‘whilst the ship is not attached to the jetty’. But the Port Authority, which is responsible for advising on such accidents, did participate in an assessment process which led to a risk assessment submitted by the South Hook LNG Terminal Company Limited in December 2002 ‘to identify hazards, *consequences* and possible mitigation measures’ relating to the use of the port as proposed: see the Port Authority’s Summary Grounds of Resistance, paragraph 28(b) (emphasis added). It refers in those grounds to a number of other reports and exercises carried out, so that it could fulfil its statutory responsibilities for safety. In any event, once **862* the Health and Safety Executive had concluded that there were no unacceptable risks to the local population arising from either a catastrophic storage tank failure on land or a major release of LNG from a tanker tied up at a jetty, the crucial element in any assessment of risk from a vessel not moored to the jetty must have been the risk of a collision. The risks to the population from a vapour cloud travelling over land or sea had already been considered by the Health and Safety Executive, since the jetties end far out in the Haven. What the Port Authority needed to concentrate on above all else was the risk of a collision, and that it seems to have done.”

94. Permission to appeal was refused. In a subsequent discussion of the application for disclosure, Keene L.J. noted that it was related to the prospect of a substantive hearing had permission to bring judicial review proceedings been granted, and that permission had not been granted. Accordingly, no order as to disclosure was made.

95. Prior to the judgment being handed down, the applicants had been provided with a copy in draft for comment on typographical errors. The applicants’ legal advisers immediately recognised that the judgment contained an error of fact at [32], where Keene L.J. had made reference to the HSE assessment of the consequences of a “major release from a delivery ship while tied up at a jetty”.⁵ The applicants’ solicitor wrote to the court on March 15, 2006 advising that no such assessment had in fact been carried out and requested the court to consider the implications of the factual error before confirming its conclusions in the draft judgment. In the event, no change was made to the relevant paragraph of the draft judgment before it was handed down in its final form.

96. On April 10, 2006, the applicants’ solicitor made an application to the Court of Appeal under the [CPR r.52.17](#) to have the judgment of March 17, 2006 re-opened.⁶ The application was made on the basis, inter alia, of an obvious factual error. The solicitor noted in the application that although as a matter of routine such applications go back to the original tribunal, he would imagine that the members would recuse themselves in this case.

97. On April 27, 2006 Treasury Solicitors on behalf of the HSE advised all parties involved in the proceedings as well as the Court of Appeal of a mistake in the HSE’s Summary Grounds. The statement to the effect that the HSE’s comprehensive risk analysis included risks associated with “major release from a delivery ship while tied up a jetty” was incorrect. The correct position was that:

“Risks that may arise from the presence of other substances, or from the presence of LNG on a delivery ship, either when sailing or when berthed, have not been taken into account in the assessment.”

98. On May 8, 2006 the Court of Appeal ordered that there should be an oral hearing on the question of permission in the [r.52.17](#) Proceedings, limited to the question whether the application for permission to appeal should be reopened in light of the information provided by the HSE.

99. On May 19, 2006 the applicants’ solicitor requested that the matter go to a freshly constituted Court of Appeal and that the scope of the hearing be widened to allow them to canvass all of their complaints concerning the judgment. On June 13, 2006 the Court of Appeal declined to vary its order of May 8, 2006. **863*

100. On July 12, 2006 the matter came before the original Court of Appeal. It heard and refused an application that its members recuse themselves. Counsel for the applicants accepted that there was no appearance of bias as a result of the narrow question whether the application for permission to appeal should be opened on the ground that the court was misled by the HSE’s summary of objections. However, he argued that the court appeared to be acting in a partisan way in circumstances in which it was prepared to reopen the question following receipt of a letter from the Treasury Solicitor confirming the true

position, whereas it had not been prepared to reopen the matter when the applicants' solicitor had made representations as to the issue of fact that was in dispute. Chadwick L.J., giving judgment for the court, held:

"32. For my part, I can see no appearance of bias arising from that fact. The positions changed in an important respect when the letter from the Treasury Solicitor was received. Until that date, there was an issue of fact: whether or not the HSE had carried out the tests and risk assessments which they said they had carried out. That issue of fact arose because the applicants asserted that those risk assessments had not been carried out. The HSE, in a summary of grounds – the truth of which was verified by its solicitor – asserted that they had been. That question of fact had been determined against the applicants in the judgments which this court handed down on 17 March ... It is clear that it was determined against the applicants in reliance on what was said by the HSE in the summary grounds of objection.

33. In those circumstances, it would have been inappropriate for the court to reopen that question of fact in the period between making its judgments available in draft and the formal handing down of those judgments. The purpose of making the judgments available in draft is not to invite further submissions on questions of fact which have already been decided, but to enable the parties to draw attention to obvious errors of fact, such as a mis-name or a mis-date. Nor would it have been a proper ground for reopening the application for permission to appeal that the claimants, through their solicitors, continued to assert that the court had reached the wrong conclusion of fact on the evidence. But a significant change occurred when it became clear that the court had reached the conclusion of fact which it did as a result of being misled by the HSE though the statement of objections."

101. On July 19, 2006, the Court of Appeal refused permission to reopen the application. Keene L.J. highlighted that the error of fact arose in the context of his discussion of a matter which he had indicated was not strictly necessary in light of his other findings. He nonetheless considered the implications of the factual error identified and concluded that although MHPA might well have concentrated on the safety of navigation, it was clear that in light of the work it had done it felt able to advise that it had no concerns regarding safety or navigation in respect of the proposed developments. He concluded that:

"20. ... The significance of the error in terms of public safety has to be seen in context.

21. That context is that both the HSE and the Port Authority had undoubtedly carried out a number of exercises and studies before advising the planning authorities that there was no objection on safety grounds. The HSE for its part *864 had assessed the consequences of an escape of LNG from a land-based storage tank; from the failure of a loading arm at the jetty; and from the guillotine rupture of a thirty inch pipeline between the jetty and the storage tanks ... Those assessments have not been criticised. It is to be observed that the HSE assessments of the failure of a storage tank on land included that of a catastrophic failure, which would take place at a location not obviously more distant from the areas of population than the proposed jetties. Yet the HSE was satisfied that public safety would not be jeopardised, presumably because of the very low likelihood of such an incident.

22. The Port Authority for its part had carried out a range of studies referred to in its summary Grounds of Resistance at paragraph 28. Those were, as one might expect, largely directed towards an assessment of marine risks. They included a report from a Senior Risk Analyst at Lloyd's Register of Shipping, commissioned to assess the risk of explosion and gas release from LNG carriers ... There was also evidence before the judge and before this court that there had never been an incident of major release of LNG from a ship to the external atmosphere ...

23. The Port Authority has statutory responsibilities for safety within the Haven and it advised the decision-makers, the County Council and the Park Authority, that there was no such risk to public safety as to warrant refusal of the applications. It was principally for the Port Authority to decide on what research was necessary for it to be so satisfied. It is not for this court or any court to try to second guess the Authority's decision on what it needs by way of research in order to advise the decision-makers, unless it is obvious that it has neglected its statutory duties. The evidence falls far short of that. In short, the factual point now seen to be mistaken was of limited significance even on this aspect of the case. Moreover, as Mr Straker on behalf of the Port Authority submits, that Authority has powers, if at any time it should appear to it that the risks are likely to be greater than presently seem to be the case, to prevent the jetties being used for LNG unloading, and of course the planning authorities also have powers to revoke the consents with which these proceedings are concerned."

102. Having set out the position as regards assessment of marine risk, Keene L.J. concluded:

“But in any event, I come back to the fundamental point, which I indicated earlier, namely that the mistake of fact now relied on by the applicants did not occur in an essential part of this court’s reasoning when it dismissed this application for permission to appeal.”

103. The applicants’ solicitor subsequently wrote to the then Head of Civil Justice asking for advice on what could be done. He replied that a new [r.52.17](#) Application could be made, which would be considered by a Lord Justice who had not been on the original tribunal. The applicants’ solicitor duly lodged a new [r.52.17](#) application.

104. Wall L.J. considered the application and, concluding that the members of the tribunal had not erred in refusing to recuse themselves, dismissed the application by order of October 2, 2006. He concluded that there was no perception or appearance of bias in such a panel revisiting its earlier judgment in light of an [*865](#) identified error of fact. Indeed, in his view, it was manifestly sensible for it to do so.

105. The applicants sought leave to appeal to the House of Lords the decision of the Court of Appeal tribunal not to recuse itself. The House of Lords refused leave on March 13, 2007 on the grounds that it “discerned no error of law”.

106. In or around May 2007, the second applicant was advised by the Legal Services Commission that his application for legal aid in the judicial review proceedings had been granted.

C. The requests for information

107. On December 23, 2004 the applicants’ solicitor wrote to MHPA requesting access to environmental information. On January 5, 2005 MHPA answered that it did not see any benefit in responding.

108. On January 7, 2005, following the entry into force of the [Environmental Information Regulations 2004](#),⁷ the applicants’ solicitor wrote again to MHPA. On January 31, 2005, he wrote a third time explicitly under the [Environmental Information Regulations](#). On February 1, 2005, MHPA again answered that it did not see any benefit in responding.

109. On February 15, 2005 the applicants’ solicitor asked MHPA to reconsider its response in accordance with [reg.11 of the Environmental Information Regulations](#).⁸ By letter dated March 18, 2005, MHPA responded that it remained to be convinced that the [Environmental Information Regulations](#) were applicable.

110. On April 22, 2005 the solicitor for the applicants wrote to the Information Commissioner asking him to confirm whether MHPA was a “public authority” for the purposes of the [Environmental Information Regulations](#).

111. On October 22, 2005 a request was made to MHPA by members of the public under the [Freedom of Information Act 2000](#)⁹ to see all formal, documented risk assessments which had informed MHPA’s decision that it could handle LNG vessels safely. MHPA replied on November 2, 2005 that it was not subject to the [Freedom of Information Act](#). It indicated that it sought to respond to questions and concerns but that it did not intend to make the large amounts of information obtained through the planning process publicly available as raw data, although the information had been made available to regulatory bodies and agencies.

112. On November 10, 2005 the applicants’ solicitor made a further request to MHPA to see copies of risk assessments and reports referred to in their summary grounds of defence lodged in the judicial review proceedings.¹⁰ He also requested copies of any subsequent marine risk assessments undertaken in respect of the LNG terminals.

113. On November 14, 2005 the Information Commissioner’s Office confirmed that MHPA did constitute a “public authority” for the purposes of the [Environmental Information Regulations](#). It further advised that MHPA could nonetheless continue to refuse to disclose the information sought if it did not constitute “environmental information” for the purposes of the regulations, or if any of the exceptions to the disclosure obligation applied. [*866](#)¹¹

114. By letter of June 26, 2006 MHPA replied to the applicants’ solicitor’s requests for disclosure under the [Environmental Information Regulations](#). MHPA indicated that while it had concluded that it did fall within the ambit of those regulations, it was not required to disclose the risk assessments carried out in respect of the LNG terminals at Milford Haven, on the basis that these constituted operational, and not environmental, information. MHPA did, however, provide a copy of an

environmental assessment undertaken prior to the widening of the channel opposite the two terminals. It also offered to provide such environmental information as could be extracted from operational reports, on the basis that the costs of doing so would have to be met by the applicants. The letter concluded:

“[W]e have gone to great lengths to explain and describe not only the details of what we are doing but why, and the outcomes in terms of the formation of our plans for handling LNG ships. What we have not done is make freely available large volumes of information, as it is our firm belief, that to do so would be irresponsible and confusing for the public. The information needs to be put into context of not only the purposes for which it was obtained, but also the explanations and conclusions drawn from it. We maintain that the best way to do that is through personal contact, presentations and explanations on given courses of action.”

115. On June 29, 2006 the applicants’ solicitor wrote to MHPA asking it to reconsider its decision and challenging the assertion that information pertaining to risk assessment did not constitute “environmental information” in terms of [reg.2 of the Environmental Information Regulations](#) .¹²

116. On July 14, 2006 MHPA responded. It advised that many of the risk assessments undertaken were not instructed in order to advise the planning authorities but in order to assess MHPA’s own operational requirements for handling LNG ships in Milford Haven. However, the assessments subsequently assisted MHPA in providing the necessary advice to the planning authorities. MHPA offered to extract relevant environmental information for the sum of approximately £400. The solicitor for the applicants subsequently asked for information from two reports only, namely: (i) a report by Gordon Milne, senior risk analyst at Lloyd’s Register of Shipping, commissioned by MHPA assessing the risk of explosion and gas release from LNG carriers (the Milne Report); and (ii) relevant extracts containing environmental information of a report entitled, Qatargas II Project: Milford Haven Marine Concept Risk Assessment (the *Qatargas Report*). He requested a new quote on that basis.

117. On September 28, 2006 the Chief Executive of MHPA advised the applicants’ solicitor that he was unable to disclose any of the material requested as to do so could seriously jeopardise the fairness of the judicial review proceedings. He also relied on the refusal of the companies concerned to consent to the disclosure of material from the reports. In weighing up the public interest test, as required by the [Environmental Information Regulations](#) , he noted that notwithstanding the presumption in favour of disclosure, disclosure was not in the public interest in the present case as the information requested should not be made publicly available without an explanatory context and where it would cause unnecessary confusion or concern. The applicants’ solicitor replied on September 29, 2006 expressing his disappointment and disputing MHPA’s reliance on the exceptions set out in [*867 reg.12 of the Environmental Information Regulations](#) .¹³ He referred the matter to the Information Commissioner.

118. On November 16, 2006 the applicants’ solicitor wrote to MHPA advising that in light of this Court’s findings in [Giacomelli v Italy](#) ,¹⁴ it would commence judicial review proceedings regarding the failure of MHPA to disclose documents unless the information was provided within 12 days.

119. On March 12, 2007 the Information Commissioner issued a decision notice under [s.50\(1\) of the Freedom of Information Act 2000](#) ¹⁵ ordering disclosure of the Milne Report and the Qatargas Report . As regards the public interest test, the notice advised that:

“In this particular case, the Commissioner believes that there is a very strong public interest in the disclosure of environmental information relating to the development of LNG terminals in Milford Haven. The LNG developments are locally controversial ... Disclosure of environmental information of the type requested in this case could add significantly to public knowledge of the risks posed by the development and better inform public debate.

Furthermore, the Commissioner believes that there is a public interest in ensuring that the Port Authority is undertaking its duties effectively and that it adequately assesses and manages risk within the Haven. In terms of high-profile and potentially hazardous developments such as the LNG terminals, there is a legitimate public interest in demonstrating that public safety has been fully considered by all relevant authorities, including the Port Authority, at each stage of the development process.”

120. On April 25, 2007 MHPA appealed the ruling to the Information Tribunal. However, on October 1, 2007 it withdrew its appeal and provided redacted copies of the Milne Report and relevant extracts of the Qatargas Report to the applicants.

D. The second judicial review proceedings (disclosure of documents)

121. While the MHPA appeal against the Information Commissioner's ruling was outstanding, the first applicant sought leave to bring judicial review proceedings in respect of MHPA's continuing refusal to disclose documents related to the risk assessments it claimed to have conducted with regard to the LNG terminals.

122. On July 4, 2007 permission was refused following an oral hearing. As regards information falling within the [Environmental Information Regulations](#), Beatson J. referred to the existence of an alternative remedy, namely an application to the Information Commissioner and the Information Tribunal. To allow judicial review, he said, would be duplication and would risk circumventing the system set out in the Regulations.

123. In respect of information not falling within those Regulations, Beatson J. concluded that the applicant had failed to demonstrate an arguable case that there was an obligation to provide the information arising from a positive duty on the authority under [arts 2 and 8](#). He noted that MHPA had advised the decision-making authorities that the risks were so low as not to warrant the refusal of planning permission or hazardous substances consent and that the Court of Appeal had, in [*868](#) the earlier judicial review proceedings, found that the authorities were entitled to accept that advice. Accordingly, the activities in question could not be considered "dangerous" such as to give rise to an obligation under the Convention to allow the public access to the information. He further considered that insofar as the applicant sought disclosure of assessments required for the previous judicial review proceedings, [16](#) the claim was an "improper use of judicial review". He noted that the matter had been before Sullivan J. in the original judicial review proceedings and found that had it been arguable that the applicants were entitled to this information, then the matter would have been dealt with then. He concluded that the application was either out of time or an attempt to reopen a matter which had already been decided.

124. The applicant sought leave to appeal the ruling. In a judgment dated November 30, 2007, the Court of Appeal dismissed the application. Toulson L.J. indicated that while he did not consider that Beatson J. had erred as regards the applicability of [arts 2 and 8](#), he would have allowed the applicant to argue the matter before the full court. However, he concluded:

"11. As it seems to me, the plain and obvious purpose [of the present proceedings] is to endeavour to elicit material which could have been, and indeed to a point was, asked for in the earlier proceedings, in order to present continuing argument that those previous consents ought not to have been granted. This is exactly the sort of endeavour which the court ought not to support. This appellant has had the opportunity to seek these documents at the time of the earlier proceedings, and it seems to me that the conclusion arrived at by Beatson J was entirely apposite: that this is indeed a reformulation of what was being sought in those proceedings. Those proceedings have already occupied the time of the Administrative Court for a lengthy leave hearing, followed by two considerations by the Court of Appeal and it would be wholly wrong that permission should now be granted to bring judicial review in the present form."

E. The applicants' expert report

125. The applicants submitted to the Court a copy of an expert report by Dr R.A. Cox dated September 7, 2008 and prepared in the context of a complaint to the European Commission in 2008. In his report, Dr Cox reviewed the approach to and use of risk assessments by MHPA. He considered each of the reports referred to in its summary grounds, [17](#) noting that the majority of the reports were never released and that only two of them, the ABS Consulting and Burgoyne Consultants reports, looked as though they might be relevant to the kinds of risk assessments that MHPA should have carried out.

126. The report concluded:

"For most LNG projects, the risks due to spills on the sea are the highest risks involved in such projects, due to the particular difficulties of controlling a [*869](#) spill of LNG on water, the size of the ships' cargo tanks, and the relatively high likelihood of a marine accident compared to a similarly large spill onshore.

...

In particular, the risks to the onshore population, due to marine operations at Milford Haven, have fallen through a regulatory gap. The EU Seveso-2 Directive does not extend to port areas, and the authorities did not elect to use their other powers to evaluate this risk to an equivalent standard.”

127. The applicants also submitted a letter from Dr Cox dated April 29, 2010, following a review of the Government’s observations in the case. In his letter, Dr Cox noted:

“In short, the modular ‘risk assessment’ that MHPA rely on is a risk assessment only in the sense that it is a compendium of separate pieces of work that all touch upon the risks in some way but which have never been pulled together into a clear and convincing analysis concerning the overall degree of risk which the shore populations will have to bear, nor has it been shown that the safeguards that are planned will be sufficient to offset the very large potential consequences of a spill of LNG from a ship’s cargo tanks into the Haven.”

128. Dr Cox went on to explain the gaps in the risk assessment carried out, including the absence of any identification of locations in the port where a ship might become grounded or be involved in a collision; the failure to calculate the annual frequency of such incidents; the failure to evaluate the chance of immediate ignition of an LNG cloud in various scenarios; the failure to calculate the rate of LNG vapour evolution and cloud size in different conditions and the probability of scenarios where the LNG vapour reached the shoreline; and the failure to compute the risk to individuals on the shore.

II. Relevant domestic law and practice

A. *Planning permission*

1. Granting planning permission

129. Pursuant to [s.57 of the Town and Country Planning Act 1990](#) (the Planning Act), planning permission is required for the carrying out of any development of land.

130. The power of the relevant local planning authorities to grant planning permission for development is subject to the requirements of the [Town and Country Planning \(Environmental Impact Assessment\) \(England and Wales\) Regulations 1999](#) (the EIA Regulations). [Regulation 3 of the EIA Regulations](#) prohibits the grant of planning permission unless the planning authority has taken into account the relevant environmental information required when the project comprises environmental impact assessment development.

131. The [EIA Regulations](#) give effect to Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, as amended [1985] OJ L175/40 (the EIA Directive). Article 1(1) of the EIA Directive provides that it applies to the assessment of the environmental effects of public and private projects likely to have significant effects on the environment. Pursuant to art.2(1), Member States of the European Union are required to adopt all measures necessary to ensure ***870** that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Article 3(1) provides that the environmental impact assessment must identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect effects of a project on human beings, fauna and flora; soil, water, air, climate and the landscape; material assets and the cultural heritage; and the interaction between all these factors.

132. Article 5(3) obliges the developer to furnish the authorities with information including a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects; the data required to identify and assess the main effects which the project is likely to have on the environment; and an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects.

133. Article 6 provides that Member States shall ensure that any request for development consent and any information gathered pursuant to art.5 are made available to the public within a reasonable time, in order to give them the opportunity to express an opinion before the decision on the request for development consent is taken.

2. Discontinuing or revoking planning permission

134. [Section 97 of the Planning Act](#) allows a local planning authority to revoke or modify any planning permission that it has granted before the permitted operations have been completed, as it considers expedient. Under [s.100 of the Planning Act](#), the Welsh Ministers have the power to direct a local planning authority to revoke or modify a planning permission if they consider it expedient to do so. [Section 107](#) provides that compensation may be payable where planning permission is revoked or modified under these sections.

135. [Section 102 of the Planning Act](#) empowers the local planning authority to require that any use of the land be discontinued, or to impose conditions on the use of land or require that building works be altered, after the permitted operations have taken place. Pursuant to [s.104 of the Planning Act](#), the Welsh Ministers have the power to make such an order if they consider it expedient to do so. [Section 115](#) provides that compensation may be payable where planning permission is discontinued or made subject to conditions under these sections.

136. Any decision whether to exercise these powers, either by the local planning authority or by the Welsh Ministers, would in principle be susceptible to judicial review.

137. In *R. v Hammersmith and Fulham LBC Ex p. CPRE London Branch*,¹⁸ leave to apply for judicial review in respect of a decision not to revoke outline planning consent under [s.97 of the Planning Act](#) was granted. The application was subsequently dismissed on its merits but, in obiter dicta, the judge observed that there was substance in the respondents' submission that the application based on the refusal to revoke was really a back-door attempt to try and achieve what the court had already refused to do, namely to permit a challenge to the validity of [*871](#) previous planning decisions in respect of which leave to apply for judicial review had been refused on grounds of delay.

B. Hazardous substances consent

138. [Section 4 of the Planning \(Hazardous Substances\) Act 1990](#) (the Hazardous Substances Act) provides that consent is required for the presence of a hazardous substance on, over or under land. As noted above, an application for consent must be made to the appropriate hazardous substances authority. The [Planning \(Hazardous Substances\) Regulations 1992](#) specify which substances are hazardous substances and the quantity of such substances which require prior consent under the [Hazardous Substances Act](#).

139. [Section 9 of the Hazardous Substances Act](#) allows the hazardous substances authority to impose such conditions on the grant of hazardous substances consent as it thinks fit. It may impose general conditions relating to the site and/or specific conditions relating to each substance included in the consent.

140. [Section 13](#) of the Act gives the hazardous substances authority the power to vary or revoke a condition to which hazardous substances consent was previously subject. It provides:

“(1) This section applies to an application for hazardous substances consent without a condition subject to which a previous hazardous substances consent was granted.

(2) On such an application the hazardous substances authority shall consider only the question of the conditions subject to which hazardous substances consent should be granted.

(3) If on such an application the hazardous substances authority determine—

(a) that hazardous substances consent should be granted subject to conditions differing from those subject to which the previous consent was granted; or

(b) that it should be granted unconditionally,

they shall grant hazardous substances consent accordingly.

(4) If on such an application the hazardous substances authority determine that hazardous substances consent should be granted subject to the same conditions as those subject to which the previous consent was granted, they shall refuse the application.”

141. [Section 14](#) allows the hazardous substances authority to revoke a hazardous substances consent or modify it to such extent as it considers expedient if it appears, having regard to any material consideration, that it is expedient to revoke or modify it.

142. Such decisions are, in principle, susceptible to judicial review. The Government did not provide details of any case in which judicial review of the exercise of these powers has been sought.

C. COMAH Regulations

143. The LNG terminals are subject to the COMAH Regulations as amended by the [Control of Major Accident Hazards \(Amendment\) Regulations 2005](#), which implemented Directive 96/82 on the control of major-accident hazards involving dangerous substances [1997] OJ L10/13 (the Seveso II Directive), as amended. *872

144. Regulation 4 of the COMAH Regulations provides for a duty on operators of installations to which the Regulations apply to take all measures necessary to prevent major accidents and limit their consequences to persons and the environment.

145. Pursuant to [reg.5](#), every operator must without delay and within a three-month deadline, prepare and thereafter keep a document setting out its policy with respect to the prevention of major accidents (MAPP document). The policy must be designed to guarantee a high level of protection for persons and the environment by appropriate means, structures and management systems. It must be revised as required by any modification of the installation, the processes carried out or the quantity of hazardous substances present.

146. In the preparation of the MAPP document, a number of principles must be taken into account. The document must be in writing and should identify and evaluate major hazards, which should include an assessment of their likelihood and severity. It should address the organisation of personnel and their roles and responsibilities; procedures and instructions for safe operation; and procedures for monitoring, auditing and review. It should also include details of planning for emergencies.

147. [Regulation 7](#) requires the operator of an installation to send to the competent authority a safety report, within a reasonable time and prior to the start of construction of the installation. The safety report must include, as a minimum, information on the management system and on the organisation of the establishment with a view to major accident prevention; a presentation of the environment of the establishment, including a description of the site, identification of installations and other activities of the establishment which could present a major accident hazard and a description of areas where a major accident could occur; a description of the installation, including the main activities which are important from the point of view of safety, sources of major accident risks and conditions under which a major accident could happen, together with a description of proposed preventive measures; an identification and accidental risks analysis and prevention methods, including a detailed description of the possible major accident scenarios and their probability or the conditions under which they occur including a summary of the events which may play a role in triggering each of these scenarios, the causes being internal or external to the installation and an assessment of the extent and severity of the consequences of identified major accidents; measures of protection and intervention to limit the consequences of an accident, including a description of the equipment installed in the plant to limit the consequences of major accidents, the organisation of alert and intervention; and a description of mobilisable resources, internal or external. The report must be reviewed and revised at five-yearly intervals at least.

148. [Regulation 9](#) requires operators to prepare an emergency plan. [Regulation 10](#) imposes a similar obligation on local authorities. The emergency plans must provide, inter alia, details of persons responsible for emergency procedures, the foreseeable conditions which could be significant in bringing about a major accident and how these conditions should be controlled and arrangements for limiting risks and providing warnings.

149. [Regulation 14](#) addresses the provision of information to the public. It provides:

“(1) The operator of an establishment shall–

- (a) ensure that persons who are likely to be in an area referred to in paragraph (2) are supplied, without their having to request *873 it, with information on safety measures at the establishment and on the requisite behaviour in the event of a major accident at the establishment;
- (b) make that information available to the public.”

150. The area to which [reg.14\(1\)](#) refers is:

“[A]n area notified to the operator by the competent authority as being an area in which, in the opinion of the competent authority, persons are liable to be affected by a major accident occurring at the establishment.”

151. The minimum content of such information includes confirmation that the establishment is subject to the Regulations; an explanation in simple terms of the activities undertaken at the establishment; general information relating to the nature of the major accident hazards, including their potential effects on the population and the environment; adequate information on how the population concerned will be warned and kept informed in the event of a major accident; adequate information on the actions the population concerned should take, and on the behaviour they should adopt, in the event of a major accident; and details of where further relevant information can be obtained. The emergency plans must be reviewed and modified as required.

152. [Regulation 18](#) requires the competent authority to prohibit the operation of any installation where the measures taken by the operator for the prevention and mitigation of major accidents are seriously deficient. It allows the competent authority to prohibit the operation of any installation where the operator has failed to submit the safety report within the time stipulated.

D. Milford Haven Port Authority

153. Milford Haven is the fourth largest port in the United Kingdom. Milford Haven Port Authority (MHPA) is a trust board which was established as an independent statutory body by the [Milford Haven Conservancy Act 1958](#). Its powers have since been extended by the Milford Haven Conservancy Act 1975, the Milford Haven Conservancy Act 1983, the Milford Haven Port Authority Act 1986 and the [Milford Haven Port Authority Act 2002](#) (the 2002 Act).

154. MHPA has the power to make byelaws to regulate the use of the haven, including the movement of vessels within it and the time, manner and condition in which vessels may enter or leave the haven. MHPA issued byelaws in 1984 and 1987 which apply to the sites on which the LNG terminals are located. Pursuant to the byelaws, the Harbourmaster of MHPA may give directions relating to activities covered by MHPA's statutory duties. The Harbourmaster can therefore regulate the movement, speed and mooring of vessels as well as the loading and unloading of goods. He may take such reasonable steps as he thinks fit where masters of vessels fail to comply with his directions. Further, the byelaws include provisions controlling how vessels are to be navigated and manoeuvred within the haven.

155. [Section 15](#) of the 2002 Act empowers MHPA to give directions for the purpose of promoting or securing conditions conducive to the ease, convenience or safety of navigation in the haven and its approaches. It may give general directions, applicable to all or to a specific class of vessels or, under [s.17](#) of the 2002 Act, special directions to a particular vessel. As from January 1, 2006, MHPA has introduced general directions under the 2002 Act which largely reflect the byelaws. *874

156. Vessels seeking to enter the haven must confirm that they are in possession of relevant certification before entry is allowed. In the case of vessels transporting LNG, this includes a certificate of fitness for the carriage of liquefied gases in bulk. Vessels carrying dangerous substances are prohibited from entering the haven if visibility falls below a specified level. Further, before such dangerous substances may be handled within a harbour area, the harbour authority must prepare an effective emergency plan and consult with emergency services and any other appropriate body.

157. The Port Marine Safety Code introduces a national standard for every aspect of port marine safety. MHPA took the necessary steps to comply with the Code by 2001. The Code is based upon the principle that the duties in relation to marine operations in ports are discharged in accordance with the safety-management system. The safety-management system is informed by, and based upon, a formal risk assessment. The aim is to establish a system covering all marine operations to ensure that the risks of such operations are both tolerable and as low as reasonably practicable, and to identify the means of reducing such risk. Safety-management plans include preparations for emergencies, and emergency plans need to be published.

158. The Code is supplemented by a *Guide to Good Practice on Port Management Operations* dealing with risk assessment and safety management. The risk assessment typically involves data gathering, familiarisation, hazard identification, risk analysis and assessment of existing measures and risk control. Risk is to be assessed in four ways, namely consequences to life, the environment, port authority operations and users.

159. The [Dangerous Substances in Harbour Areas Regulations 1987](#) cover liquid dangerous substances in bulk. Before such substances can be handled within a harbour area, the harbour authority must prepare an effective emergency plan and consult with the emergency services and any other body it considers appropriate. MHPA has prepared an emergency plan and consulted as required. The process of assessment is continuous and changes in the level of risk are identified and addressed.

E. Industry reports

160. SIGTTO (the Society of International Gas Tanker and Terminal Operators Ltd) is a non-profit-making company, formed to promote high operating standards and best practices in gas tankers and terminals throughout the world. It provides technical advice and support to its members and represents their collective interests in technical and operational matters. It has published several guidance papers on matters related to LNG.

1. SIGTTO Information Paper No.14, Site Selection and Design for LNG Ports and Jetties (1997)

161. The paper emphasises in its introduction that the level of marine risk is determined by the position chosen for the LNG terminal. As to jetty location, s.6 of the paper advises that they be placed “in sheltered locations remote from other port users”. Section 7 highlights the need for ignition controls extending around and beyond the immediate terminal area. *875

2. SITTCO LNG Operations in Port Areas: Essential Best Practices for the Industry (2003, Witherbys Publishing)

162. Section 1.1 of the paper notes:

“[T]he hazards arising from [LNG], should it escape to atmosphere are: the eventual prospect of a gas cloud, many times the volume associated LNG with an accompanying risk of fire or explosion ...

...

Release of LNG into the atmosphere of any area having within it low energy ignition agents carries with it a risk of fire or explosion. Such conditions will prevail in any port area where ignition agents are not effectively prohibited, as they are in installations specifically constructed for the handling of hydrocarbons.”

163. Section 1.3 highlights the risks occasioned upon collision between vessels:

“[I]t is clear, their inherently robust constructions notwithstanding, that LNG tankers are vulnerable to penetration by collisions with heavy displacement ships at all but the most moderate of speeds. Such incidents ought to be treated as credible within any port where heavy displacement ships share an operating environment with LNG tankers.”

164. Section 1.4 of the publication observes:

“Since there has never been a catastrophic failure of an LNG tanker’s hull and containment system there are no incident data upon which to construct scenarios following the release of large quantities of LNG into the atmosphere. However the behaviour of released LNG has been carefully studied in the light of certain important experiments involving controlled releases ...

After a release of liquefied gas a cloud will develop and travel horizontally from the spill point under the influence of prevailing winds. The cloud will contain the gaseous components of the LNG ... and air. Mixing with air the cloud will develop flammable properties [through] much of its volume ...

As it travels away from the spill point the cloud will warm, becoming progressively less dense. As it warms to ambient temperature it will become buoyant in air and disperse vertically. Pure methane is lighter than air ... but it is the temperature of the entire cloud, not just its gaseous component, [that] determines its behaviour. Other components too must warm to higher temperatures before vertical dispersal ensues. Meanwhile the cloud will continue to disperse in a generally horizontal direction, developing a shape similar to an elongated plume.

In practice the geometry and behaviour of a gas cloud will be determined by the specific circumstances of the release. The single biggest determinant will always be the volume of LNG released. Thereafter the shape and behaviour of the cloud will be determined by the rate at which liquid gas is released to the atmosphere. Dispersal in specific incidences will also be greatly influenced by wind conditions, atmospheric stability, ambient temperature and relative humidity. The topography and surface roughness of the terrain over which a cloud moves will greatly influence dispersal characteristics ... *876

When the gas cloud is no longer fed by fresh volumes of gas it will disperse in the atmosphere until its entire volume is diluted below the lower explosive limit for methane. Its flammable properties will then be extinguished and no further risk will remain.”

165. On assessing the cloud behaviour in a specific situation, Section 1.4 provides the following guidance:

“First there must be established a realistic estimate of the maximum credible release, or spill. Second, the released gas cloud is modelled using realistic values for air temperature, wind forces and atmospheric stability at the location in question. From such analysis it is possible to predict with credible accuracy the likely scenario following a worst probable gas release into the atmosphere.”

166. Section 1.5 observes:

“There has never been an incident involving the penetration or catastrophic failure of an LNG tanker’s containment system – indeed, the safety record for this class of ship is exemplary. Nevertheless, this safety record notwithstanding, the risk profile of LNG tankers presents a very serious residual hazard in port areas if the vital structure of the tanker is penetrated.”

167. Section 2 concludes:

“Risk exposures entailed in an LNG port project should therefore be analysed by a Quantitative Risk Assessment (QRA) study. Such a study must involve the operations at the terminal and the transit of tankers through the port.

Risk assessments do not of themselves improve safety, but they should be regarded as decision tools in order to satisfy company safety policy and the Authorities that risk is acceptable.”

168. The section specifies that QRA results should yield, as a minimum, a high confidence in there being a low risk of the tanker failing to maintain track during the transit; a high confidence of the tanker not encountering other vessels in situations that present risks of collision; no credible scenario leading to a high energy grounding that holds the prospect of the inner hull being penetrated; and no credible scenario that might lead to the tanker encountering a heavy displacement vessel in situations where the resulting collision impact could be sufficient to penetrate the transiting tanker’s inner hull.

169. Section 4 clarifies that:

“The most important single determinant of risk attached to LNG operations in port areas is the selection of the site for the marine terminal – the location of the tanker berth(s).”

170. It provides that whatever the prevailing circumstances, no terminal should be sited in a position where it may be approached by heavy displacement ships which have an inherent capability to penetrate the hull of an LNG tanker. It adds that all port traffic must be excluded from the environs of an LNG marine terminal, having regard to the assessment made of the maximum credible spill and likely dispersal of the gas. *877

F. Public access to environmental information

171. Aside from the provisions in the EIA Directive and the COMAH Regulations obliging states to ensure that certain information be made available to the public,¹⁹ a public right of access to environmental information is established by the [Environmental Information Regulations 2004](#). [Regulation 5](#) sets out a duty to make available environmental information on request:

“(1) Subject to ... [the provisions of the EIA Regulations], a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.”

172. Regulation 5(4) stipulates that where the information made available is compiled by or on behalf of the public authority, it must be up to date, accurate and comparable, so far as the public authority reasonably believes. Regulation 9 obliges the public authority to provide advice and assistance to applicants, so far as it would be reasonable to expect the authority to do so. Regulation 11 allows an applicant to make representations to a public authority in relation to his request for environmental information if it appears to him that the authority has failed to comply with a requirement of these Regulations in relation to the request.

173. Regulation 12(1) provides that a public authority may refuse to disclose environmental information requested if:

“(a) [A]n exception to disclosure applies under paragraphs (4) or (5); and
(b) in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.”

174. However, reg.12(2) stipulates that a public authority shall apply a presumption in favour of disclosure.

175. Regulation 12(4) provides that a public authority may refuse to disclose information to the extent that, inter alia:

“(b) [T]he request for information is manifestly unreasonable;
(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
...
(e) the request involves the disclosure of internal communications.”

176. Regulation 12(5) provides that a public authority may refuse to disclose to the extent that its disclosure would adversely affect, inter alia:

“(a) [I]nternational relations, defence, national security or public safety;
...
(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
(f) the interests of the person who provided the information where that person— *878
(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
(iii) has not consented to its disclosure; or
(g) the protection of the environment to which the information relates.”

177. Regulation 2 defines “environmental information” as having:

“[T]he same meaning as in Article 2(1) of the [EIA] Directive, namely any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)."

178. [Section 50 of the Freedom of Information Act 2000](#) (FOI Act) allows any person to apply to the Information Commission for a decision as to whether a request for information made to a public authority has been dealt with in accordance with the [FOI Act](#) or the [Environmental Information Regulations](#). The Information Commissioner has powers of enforcement if a public authority does not comply with the terms of decision notice. It is possible to appeal the decisions of the Information Commissioner to the First-tier Tribunal and a further appeal to the Upper Tribunal is available on points of law.

G. Time limits for bringing judicial review proceedings

179. [Section 31 of the Supreme Court Act 1981](#) provides that the High Court may refuse an application for judicial review where there has been undue delay. The relevant subsections provide as follows: ***879**

“(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—

- (a) leave for the making of the application; or
- (b) any relief sought on the application,

if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made.”

180. [Rule 54.5 of the Civil Procedure Rules](#) sets out specific time limits for filing a claim form in judicial review proceedings:

“(1) The claim form must be filed—

- (a) promptly; and
- (b) in any event not later than 3 months after the grounds to make the claim first arose.

(2) The time limit in this rule may not be extended by agreement between the parties.

(3) This rule does not apply when any other enactment specifies a shorter time limit for making the claim for judicial review.”

H. Re-opening of final appeals under rule 52.17 of the Civil Procedure Rules

181. [CPR r.52.17](#) permits the re-opening of final appeals in the Court of Appeal in exceptional circumstances. It provides as follows:

“(1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—

- (a) it is necessary to do so in order to avoid real injustice;
- (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
- (c) there is no alternative effective remedy.

(2) ... ‘appeal’ includes an application for permission to appeal.”

182. There is no further appeal from the decision of the judge on the application for permission.

JUDGMENT

I. Alleged violation of articles 2 and 8 of the Convention

A. Scope of the case

183. The applicants complained under [arts 2 and 8](#) of the Convention that the UK authorities had failed in their duties relating to the regulation of hazardous industrial activities because of their failure properly to assess the marine risks of the proposed LNG operations. They further complained about the lack of information disclosed regarding the risks associated with the LNG terminals in Milford Haven. *880

184. Being master of the characterisation to be given in law to the facts of the case,²⁰ the Court considers that in the light of its case law²¹ the applicants' complaints are most appropriately examined from the standpoint of [art.8](#) alone, which provides:

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. 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.”

B. Applicability of article 8

1. The parties' submissions

(a) The Government

185. The Government disputed that [art.8](#) was applicable in the circumstances of the case. It was clear from the Court's case law that [art.8](#) only applied to cases where severe environmental pollution was in fact occurring²² or where it had been determined that individuals were likely to be exposed to the dangerous effects of an activity in such a way as to establish a sufficiently close link with private and family life.²³ In the applicants' case, no severe environmental pollution had actually occurred, nor was there any likelihood of exposure to such pollution through the operation of the terminals. Their allegations were confined to the potential marine risks posed by the operation of the LNG terminals. In such a case, in order to show that [art.8](#) was applicable, the Government contended that the applicants had to be able to assert arguably, and in a detailed manner, that for lack of adequate precautions taken by the authorities, the degree of probability of the occurrence of damage was such that it could be considered to constitute a violation.²⁴ The applicants were not in that situation: the degree of probability of marine risks occurring and resulting in adverse consequences for the applicants was inevitably extremely small. In the Government's view, the mere possibility of harm was not sufficient for [art.8](#) to be applicable.

(b) The applicants

186. The applicants maintained that [art.8](#) was applicable in their case and argued that the Government had failed to put in place a scheme that would have allowed proper and transparent regulation of the hazardous activities. They emphasised that they were not able to demonstrate the level of risk posed to them by an LNG leak in the haven precisely because the relevant authorities had failed to assess the risks properly and had failed to inform them of the risks. They distinguished the case of *Asselbourg*, to which the Government referred, on the ground that in that case the applicants complained of a continuing nuisance without providing convincing *881 evidence of that nuisance. The present case, by contrast, concerned a continuing threat, and there was copious evidence that fears as to the consequences of an LNG spill were real. In particular, industry reports demonstrated that there was a risk arising from LNG operations. In the applicants' view, [art.8](#) had to be applied in a precautionary way, and it would render that article devoid of any purpose if it only applied after an accident which directly affected the applicants' private and family lives had occurred.

2. The Court's assessment

187. As the Court noted in *Fadeyeva v Russia*,²⁵ art.8 has been relied on in various cases in which environmental concerns are raised. However, in order to raise an issue under art.8 the interference about which the applicant complains must directly affect his home, family or private life.

188. In cases concerning environmental pollution, the pollution must attain a certain minimum level if the complaints are to fall within the scope of art.8.²⁶ The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects. The general context of the environment should also be taken into account. There would be no arguable claim under art.8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city.

189. The Court has also found art.8 to apply where the dangerous effects of an activity to which the individuals concerned are likely to be exposed have been determined as part of an environmental impact assessment procedure in such a way as to establish a sufficiently close link with private and family life for the purposes of art.8 of the Convention.²⁷ In the subsequent case of *Tătar v Romania*,²⁸ the Court found art.8 to be applicable in a case concerning a risk posed by a mineral extraction plant. In that case the absence of any internal decision or other official document indicating, in a sufficiently clear manner, the degree of risk which the hazardous activities posed to human health and the environment was held not to be fatal to the claim, given that the applicant had attempted to pursue domestic remedies, and that a previous incident involving an accidental spillage had resulted in a higher than usual reading of certain toxic products in the vicinity.²⁹

190. In the present case, there is no suggestion that the normal operation of the LNG terminals poses any risk to the applicants or to the environment. In particular, there is no allegation of any continuing pollution caused by the transport of LNG in Milford Haven. The risk, according to the applicants, arises from the possibility of a collision in the haven, leading to the escape of a large quantity of LNG and the potential for an explosion or a fire as a result of such an accident. The applicants allege that the possibility of collision and the risks and consequences associated with such an event have not been properly assessed.

191. The Court notes that in order to establish and operate the LNG terminals, the operators were required to obtain planning permission and hazardous substances consent.³⁰ The projects were of such a nature as to require, pursuant to the EIA Directive, that environmental impact assessments be prepared.³¹ The installations were classified as “top tier” for the purposes of the COMAH Regulations, entailing more onerous conditions on the operators.³² The SIGTTO guidance to which the applicants referred makes recommendations regarding the manner of selection of a site for an LNG terminal in order to minimise marine risks. It also makes reference to the risk of fire and explosion in the event of an escape of LNG into the atmosphere.³³ A report by the HSE, following an initial examination of the consequences of a major release from a delivery ship moored at the jetty, concluded that released LNG plumes would be capable of engulfing Milford Haven,³⁴ the town where both applicants reside.

192. In the circumstances, the Court is satisfied that the potential risks posed by the LNG terminals were such as to establish a sufficiently close link with the applicants' private lives and homes for the purposes of art.8. Article 8 is accordingly applicable.

C. The complaint under article 8 of the Convention regarding the safety of the LNG terminals

1. Admissibility

(a) The parties' submissions

(i) The Government

193. The Government argued that the applicants had failed to bring a relevant challenge in the domestic courts by way of judicial review within the procedural time limits. The courts had refused to grant permission to seek judicial review on well-established principles reflecting the importance of legal certainty having regard to the delay in bringing the challenge and the consequent prejudice and detriment to good administration that would have been caused by allowing their challenge to

proceed so long after the grant of the permissions. The applicants' allegations regarding public safety were not such as to override the public interest considerations, particularly having regard to the assessments carried out by the HSE and MHPA. Thus the refusal by the courts to allow the applicants to proceed out of time was for a legitimate public interest purpose and was proportionate.

194. In any event it was not appropriate to allow a late challenge to planning permission where the HSE and MHPA retained powers to prevent LNG activities taking place if any fundamental issue of public safety arose, and where the relevant authorities had the power to revoke consents. In this respect the Government emphasised that the applicants had failed to apply to the relevant authorities to take action in respect of the continued operation and regulation of the LNG terminals, notwithstanding the powers of those authorities to control the LNG operations and the supervisory jurisdiction by way of judicial review of the domestic courts over the exercise of those powers.³⁵ It highlighted the possibility of making representations to MHPA, as the port authority responsible for regulating activities at the port of Milford Haven, to perform further risk assessments; to the possibility *883 of applying to have the planning permissions and hazardous substances consents revoked based on alleged interferences with their Convention rights which they claim were not considered at the time the permissions were granted; and to the possibility of monitoring the actions of the HSE and the MCA and challenging them in the event of any failure to act in compliance with applicable regulations.

(ii) The applicants

195. The applicants accepted that powers existed to allow the authorities to revoke or vary consents or to curtail uses of property. However, the applicants could do no more than ask the authorities to revoke or vary the consents, a request which, according to the applicants, the authorities would be certain to reject. It was clear that these powers were rarely exercised in practice, first, because they generally required the decision-maker to acknowledge that a previous decision was wrongly made; and second, because compensation would have to be paid, and in the present case the level of compensation would be impossibly large.

196. The applicants considered the suggestion that they could judicially review a failure by the authorities to revoke or vary the various consents to be wholly unrealistic. In their view, the domestic courts had made their reluctance to assist in this case apparent, and the applicants referred in particular to the disclosure proceedings³⁶ where the Court of Appeal had refused permission to proceed on the basis that the disclosure application was intended to assist proving a case which had already been rejected in the original judicial review proceedings.

197. The applicants accepted that, in seeking to challenge such a project, it was sensible to challenge the actual grant of consent allowing the project to go ahead. However, they contended that this did not absolve the state from continuing to take steps to secure compliance with the rights in question, particularly if all necessary steps were not taken at the site selection stage.

(b) The Court's assessment

198. It is primordial that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. This must not usurp the role of contracting states whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a state are thus obliged to use first the remedies provided by the national legal system.³⁷

199. Article 35(1) requires that the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used.³⁸ It is incumbent on the government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect *884 of the applicant's complaints and offered reasonable prospects of success.³⁹ However, once this has been demonstrated it falls to the applicant to establish that the remedy was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement.

200. The Court agrees with the domestic courts that despite the way that their substantive judicial review claim was formulated, the applicants were in essence seeking to challenge the grants of planning permission in respect of the projects, and not the hazardous substances consents.⁴⁰ It observes that the High Court found that the applicants had known of the relevant decisions they wished to challenge in August to October 2004.⁴¹ The Court notes that, as the applicants' challenges to the grants of planning permission and hazardous substances consent were deemed to have been lodged with undue delay, they therefore failed to comply with the relevant procedural requirements set out in the [Supreme Court Act 1981](#) and the [CPR](#).⁴²

201. The Court further acknowledges the existence of powers to revoke, discontinue or vary the consents granted in respect of the LNG terminals and the availability of judicial review to challenge any perceived failure to comply with regulatory duties.⁴³ It seems, from the parties' observations and the judgments of the High Court and Court of Appeal, that rather than seeking to challenge the planning permissions in proceedings brought out of time, it would have been more appropriate for the applicants to seek to make use of the powers contained in the [Planning Act](#) and the [Hazardous Substances Act](#) to request revocation of the consents, or their variation to require that a marine risk assessment be carried out, failing which, to lodge judicial review proceedings of the authorities' decisions to refuse those requests. The applicants elected instead to challenge the original consent and have therefore failed to pursue remedies allowing consents to be revoked or modified

202. However, the Court notes that in reviewing the decision of the High Court that there was no public interest such as to justify an extension of the time-period for bringing a claim for judicial review in respect of the planning permissions and hazardous substances consents, the Court of Appeal considered the applicants' complaints regarding the alleged absence of an appropriate risk assessment. It observed that both the HSE and the MHPA had expressed their satisfaction as to the safety of the proposals and had advised the relevant decision-makers.⁴⁴ In the circumstances, it disagreed that the risk assessment had been inadequate.⁴⁵ In the subsequent proceedings brought by the applicants to seek disclosure of documents, both the High Court and the Court of Appeal referred to the undesirability of allowing the applicants to use the proceedings as an attempt to have re-examined a complaint already examined in detail by the courts.⁴⁶

203. It is therefore clear that notwithstanding the applicants' decision to bring out-of-time judicial review proceedings against the initial grants of planning permission and hazardous substances consents instead of seeking to have those ***885** consents revoked or modified, the domestic courts addressed their arguments as to the inadequacy of the risk assessments and expressed themselves to be satisfied with the assessments which had been conducted. That being the case, the courts have examined the applicants' complaints on the merits and any subsequent challenge would not, in the Court's view, offer reasonable prospects of success. In the circumstances the Court is satisfied that the applicants have exhausted available and effective domestic remedies. The Government's objection as to non-exhaustion is accordingly rejected.

204. The Court considers that this complaint is not manifestly ill-founded within the meaning of [art.35\(3\)](#) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) The parties' submissions

(i) The applicants

205. The applicants emphasised at the outset that they made no complaint about the assessment of the risks posed by the shore-side operations in respect of the LNG terminals. They accepted that the HSE, an independent statutory authority with a duty to provide safety advice, based on a QRA approach, had been fully involved in the assessment of the shore-side risks. The applicants' complaint concerned the assessment of the marine risks, in particular, the danger of a major release of LNG from a delivery ship. They argued that it was not obvious which body was responsible for assessing such risks in the context of advising the planning and hazardous substances authorities. Unlike the HSE, MHPA had commercial interests in the operation of the haven, and it was not clear if it was even a statutory consultee in relation to the applications for planning permission and hazardous substances consent. The applicants contrasted the risk assessment of the land-based risks by the HSE and the EA, under the Hazardous Substances Regulations and the COMAH Regulations, with the position regarding marine-based risks, where there was no equivalent assessment by an independent regulator and the COMAH Regulations

did not apply. In the applicants' view, it could not be assumed that because a gas leak on the shore had been assessed as "acceptable", a similar risk at sea was also acceptable, referring to the conclusions of their expert, Dr Cox.⁴⁷

206. The applicants accepted that some form of risk assessment had been conducted in respect of the Dragon Site but considered that the assessment of marine risks was limited and that the documents released indicated that the data were inadequate to reach any firm conclusions. They contended that no assessment at all of the marine risks had been undertaken in respect of the South Hook Site. In respect of both sites the applicants insisted that MHPA had not adopted the same rigorous QRA approach as the HSE had done.⁴⁸ They emphasised that the Government had failed to supply a copy of any QRA or other assessment which is said to have been carried out.

207. The applicants insisted that quantitative risk assessment, understood as an assessment which took the potential consequences from a range of scenarios and then attributed frequencies to them, was the "gold standard" for assessing risk. The *886 HSE used clearly published guidelines as to what level of risk was acceptable in advising planners. However, there was no evidence that MHPA had undertaken a QRA to determine whether the overall level of risk posed by the LNG terminals was acceptable, and references to any QRA carried out should be treated with extreme caution as it was clear that MHPA had advised on the safe management of shipping within the haven in the context of LNG terminals whose locations was already decided.⁴⁹

208. The applicants noted the position of SIGTTO that MHPA had done precisely what SIGTTO would expect to be done in undertaking risk assessment and planning for LNG shipping. However, they pointed out that the Government had not addressed the fact that the SIGTTO guidance required QRA of the marine operations and set out a series of minimum safety requirements.⁵⁰ The Government did not explain how these requirements were complied with, or why they were not complied with. Although the applicants accepted that there was no existing regulatory requirement for any particular format of risk assessment or berthing arrangements, the *Essential Best Practice Guidance* from SIGTTO⁵¹ was a material consideration and lack of adherence required an explanation from the Government. The applicants further contended that SIGTTO, the HSE, MCA and the relevant government department appeared never to have had sight of MHPA's risk assessment work, and were therefore in no position to assert that it was done correctly or at all. In particular, MHPA had entered into confidentiality agreement with developers which prevented it from releasing safety information either to the public or the planners.

209. As regards the Government's contention that the technical assessment of the operations was within their margin of appreciation and more specifically within the competence of MHPA, the applicants agreed with the statement insofar as the carrying out of day to day operations was concerned. However, they disputed that the margin of appreciation and the competence of MHPA were relevant to the failure of the regulatory process to assess the underlying risks of the LNG operation as a whole.

(ii) The Government

210. The Government contended that even if art.8 gave rise to positive obligations on the authorities to consider the marine risks, the obligation extended only to conducting appropriate investigations and studies so that the effects of the activities that might damage the environment and infringe individual rights could be predicted and evaluated in advance and a fair balance could accordingly be struck between the various interests at stake.

211. The Government insisted that the relevant authorities had complied with any duties arising under art.8 in respect of the regulation of hazardous industrial activities. It explained that there were many processes involved in LNG transportation and storage. A comprehensive regulatory regime was in place in the United Kingdom. The fact that there was more than one regulator did not reflect confusion but the robustness of the regulatory regime.

212. In the Government's submission, art.8 did not impose requirements on the authorities to conduct a marine risks assessment in any specific or prescribed *887 format. It was primarily a matter for the relevant authorities, subject to the wide margin of appreciation applicable in this area, to determine what was the appropriate assessment. There was no requirement for the assessment to take a particular form or to be in the form of a specific type of QRA which the applicants sought. MHPA was entitled to make an assessment based on a range of reports, research and data from various sources. The Government insisted that there could be no doubt that MHPA had made an assessment, having confirmed that they were satisfied that the LNG operations could be conducted safely in the haven in light of the reports and research it had conducted. In particular,

any obligation under art.8 did not mean that the authorities could take a decision only if comparable and measurable data were available in respect of each and every aspect of the matter to be decided.⁵²

213. The decisions to grant planning permission and hazardous substances consent were made by the relevant authorities following a comprehensive and detailed process of application, consultation, review and assessment. Both developments were the subject of environmental statements submitted to the relevant local planning authorities in compliance with applicable Regulations and the EIA Directive. They were detailed and lengthy documents assessing the main effects of the proposed development. The applications for planning permission were properly advertised and the environmental statements were made available for public inspection, including by way of public exhibition.⁵³ Relevant bodies acted on the advice of statutory consultees, including the HSE and MHPA, as to the acceptable risk of the applications. The Government confirmed that MHPA was a statutory consultee of the hazardous substances consent process. The absence of an HSE risk assessment of a discharge of LNG from a ship did not affect the fact that the HSE had carried out a risk assessment of an LNG vapour cloud release from the land and from the loading arm on a jetty far out in the haven, or from a rupture of the pipeline on the jetties, in which scenario the LNG would travel over water before arriving at the land.⁵⁴

214. According to the Government, MHPA had undertaken and facilitated a detailed assessment of the marine risks involved in the LNG terminal proposals. It referred to the Code,⁵⁵ the active participation of MHPA in the process of risk assessment undertaken by the developers in spring 2002 and the simulation tests and other training exercises. In particular, MHPA's range of risk assessment included the reports and assessments identified in the summary grounds.⁵⁶ SIGTTO had also worked with MHPA and confirmed to the best of its knowledge that the LNG terminal operators had done precisely what they would expect to be done in undertaking risk assessments and planning for LNG shipping.⁵⁷ It was logical and sensible that movements of shipping within the port should be subject to regulation, control and detailed assessment by MHPA. That body had considerable experience and knowledge of the port and these kinds of operations.

215. The Government argued that the authorities were entitled to rely on the advice of the consultees without requiring further environmental information or the detail of any of the studies. Such assessments were made in the context of the HSE's detailed assessment and acceptance of the risks, continuing regulatory duties, *888 MHPA's duties and the obvious interest of the operators in the safe operation of the Milford Haven Port. Both operators were under an obligation to provide safety reports pursuant to the COMAH Regulations, although these reports had not been made public for reasons of national security. The HSE reviewed the reports in respect of its regulation of the shore-side risks. In deciding whether it had enough information to permit the LNG terminals to proceed, the relevant authorities were entitled to weigh all the evidence before them and were entitled to conclude that the grant of permissions and consents struck a fair balance and was proportionate, bearing in mind the overall assessment of the acceptability of the LNG terminals.

216. The Government pointed out that the applicants had been able to bring a challenge in the domestic courts by way of judicial review of the decision to grant the permissions and consents. They had failed to bring their challenge in time and were therefore legitimately refused permission to proceed with their challenge. In deciding to refuse permission, both the High Court and the Court of Appeal had observed in full any procedural and substantive rights arising under art.8, giving careful consideration to the knowledge of the applicants of the relevant decisions at the time; whether there was any reasonable excuse for the delay; whether allowing the claim to proceed would cause prejudice or detriment to good administration; and whether the public interest justified permitting the claim to proceed.

(b) The Court's assessment

(i) General principles

217. The Court reiterates that in a case involving decisions affecting environmental issues there are two aspects to the inquiry which it may carry out. First, the Court may assess the substantive merits of the national authorities' decision to ensure that it is compatible with art.8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual.⁵⁸

218. It is for the national authorities to make the initial assessment of the "necessity" for an interference. They are in principle better placed than an international court to assess the requirements relating to the transport and processing of LNG in a particular local context and to determine the most appropriate environmental policies and individual measures while taking

into account the needs of the local community. The Court has therefore repeatedly stated that in cases raising environmental issues the state must be allowed a wide margin of appreciation.⁵⁹

219. As the Court has previously indicated, although art.8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and must afford due respect to the interests safeguarded to the individual by art.8.⁶⁰ It is therefore necessary to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making process and the procedural safeguards available.⁶¹ However, this does not mean *889 that the authorities can take decisions only if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided.⁶²

220. A governmental decision-making process concerning complex issues of environmental and economic policy must in the first place involve appropriate investigations and studies so that the effects of activities that might damage the environment and infringe individuals' rights may be predicted and evaluated in advance and a fair balance may accordingly be struck between the various conflicting interests at stake.⁶³

221. Finally, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process.⁶⁴

(ii) Application of the general principles to the facts of the case

222. The Court notes that the applicants' complaint concerns the alleged inadequacy of the authorities' assessment of the marine risks associated with the operation of the LNG terminals at Milford Haven. Bearing in mind the wide margin of appreciation accorded to the state in this area, the Court's starting point in assessing whether a fair balance has been struck between the public interest and the applicants' interests in the case is the legislative and regulatory framework which governed the hazardous activities at issue in the present case

223. In the first place, legislation was in place requiring the developers to obtain planning permission before proceeding with the development of the LNG terminals.⁶⁵ The legislation obliges the planning authorities to take into account relevant environmental information and to this end, the developers were required to prepare and submit an environmental impact assessment of the project, identifying, inter alia, matters of concern in respect of public safety and the environment.⁶⁶ A process of assessment by relevant bodies and examination of the application by the planning authorities followed. A separate application was required in respect of hazardous substances consent,⁶⁷ with a similarly detailed examination by the relevant authority and an assessment by statutory consultees, which included the HSE and MHPA. The COMAH Regulations imposed further stringent requirements on the operators of the Dragon and South Hook sites to take all measures necessary to prevent major accidents and to limit their consequences.⁶⁸ MHPA itself has powers to regulate the use of the port and to issue instructions and directions to users to ensure safety within the haven.⁶⁹ It has voluntarily complied with the Code, which provides further guidance to improve safety with port areas.⁷⁰ Vessels entering the haven are subject to a regime of certification to ensure that they are capable of carrying dangerous liquids.⁷¹ Industry reports *890 prepared by SIGTTO provide additional guidelines on selecting sites for LNG terminals and promoting best practice in the field.⁷² The Court is accordingly satisfied that an extensive legislative and regulatory framework is in place in the United Kingdom, and more specifically at Milford Haven Port, to promote safety and to limit the risks posed by the transfer and processing of LNG in the area.

224. The domestic authorities' evaluation of the assessments carried out by the developers, in co-operation with relevant authorities, is also of some importance. As the Court noted above, in refusing leave to the applicants to seek judicial review of the grants of planning permission and hazardous substances consent in respect of the Dragon and South Hook sites, the Court of Appeal examined the applicants' complaint regarding the alleged deficiencies in the marine risks assessment. The court made it clear that if there was evidence that public safety had been overlooked by the decision-makers then that might justify granting permission to seek judicial review, notwithstanding the delay.⁷³ However, it emphasised that MHPA was a statutory body with responsibility to ensure safety within its waters and that it had expressed itself to be satisfied as to the safety of the proposed LNG terminals. It considered that the local authorities were entitled to rely on the specialist advice received.⁷⁴

225. The judge went on to address the specific allegation made by the applicants, namely the absence of an adequate assessment of the marine risks.⁷⁵ He considered that the risk of collision had undoubtedly been dealt with by MHPA, as counsel for the applicants had conceded in the course of the hearing. In respect of the more specific allegation that there had been no assessment of the consequences of a release of LNG for the local population, the judge did not accept that the evidence before the court supported the argument that there had been a failure in this regard. He observed that the HSE had assessed both the consequences and likelihood of an escape of LNG for all land-based and jetty-based activities. Although he mistakenly believed at that time that this included a major release from a delivery ship while tied up at the jetty, he later explained that this error did not affect his conclusions that the risk assessments had been adequate. He noted that the HSE had carried out an assessment of the possibility of an LNG release on the shore, a location not obviously more distant from the areas of population than the proposed jetties.⁷⁶ The judge also referred to the assessment process in which MHPA had participated and to the various reports and exercises carried out so that it could fulfil its statutory responsibilities for safety, cited in its summary grounds. He noted that MHPA had been required to concentrate on the risk of a collision, and that it appeared to have done this. Taking into account the studies undertaken by the HSE, together with the assessments and exercises conducted by MHPA, the judge was satisfied that the relevant matters had been considered by the authorities.⁷⁷

226. In the court's subsequent decision on the re-opening application, the judge referred again to the range of studies carried out by MHPA, which he observed were largely directed towards an assessment of the marine risks. He noted that there was evidence before the court that there had never been an incident involving a major release from a ship to the external atmosphere. He emphasised that it was **891* principally for MHPA to decide what research was necessary for it to be satisfied as to the level of risk to public safety from the operation of the LNG terminals, and considered that the evidence fell "far short" of demonstrating that MHPA had neglected its statutory duties. Finally, he made reference to the power of the authorities to revoke the consents if evidence emerged that the risks posed by the unloading of LNG at the jetties were greater than they then appeared.⁷⁸

227. Turning to the assessments conducted by the relevant authorities, the Court observes that both sites were the subject of lengthy environmental statements, which identified potential risks from the operation of the LNG terminals and proposed mitigating measures.⁷⁹ In respect of the Dragon Terminal, the statement referred to MHPA's role in assisting Petroplus in planning the marine aspects of the project to ensure the safety of the proposal. It made reference to exercises to be conducted and to the need for consultation in respect of an assessment of the marine risks and during the design, construction and operational stages of the project.⁸⁰ A real-time simulation exercise was carried out, and conclusions regarding wind conditions were drawn from it.⁸¹ Consideration was given to the effects of the increase in traffic within the haven.⁸² Mitigation measures identified included continuing consultation and further simulation exercises.⁸³ In the context of the assessment for the South Hook Site, reference was made to a formal marine hazard exercise which identified potential mitigation measures which could be incorporated into the design of the terminal.⁸⁴ Specific hazards with the potential to extend beyond the boundaries of the site itself were also identified and safeguards were proposed.⁸⁵ In its submissions to the planning authorities and through correspondence and interviews in the media, MHPA explained that it was working with specialists to ensure the safe and effective management of large LNG vessels in the haven.⁸⁶ In particular the Chief Executive of MHPA identified possible measures which could reduce risks and explained that MHPA had been working with the developers to ensure that the possibility of a shipping incident was extremely low.⁸⁷ He emphasised that MHPA had the power to control the passage of LNG vessels through the haven by laying down conditions regarding, for example, the time of entry, state of the tide, the number of pilots and the number of tugs.⁸⁸ He and the Harbourmaster of the haven consistently referred to the risk assessment work undertaken by the developers, MHPA and other specialists.⁸⁹ In its summary grounds in the later judicial review proceedings, reference was made to a number of different reports and studies which had informed MHPA's view on the safety of the proposals and its strategy for managing the LNG vessels in the haven.⁹⁰

228. The Court notes that the applicants have provided a copy of a report and a letter from an expert originally instructed in 2008 in the context of a complaint made to **892* the European Commission.⁹¹ The expert expressed the view that there were a number of gaps in the risk assessment carried out, and that the information collated had never been pulled together in a clear and convincing analysis.⁹² However, it is clear that the report was prepared after the domestic proceedings had terminated, and the applicants appear to have lodged no expert report for consideration by the domestic courts in the context of their judicial review claim. If they consider that new expert evidence provides support for their claims regarding the assessment of

the marine risks, then it is open to them, as the Court of Appeal itself pointed out,⁹³ to apply to have the consents revoked. In such proceedings they could rely on any new expert evidence. In any event, the evidence merely expressed one view on a situation which was capable of multiple differing opinions, and as noted above, the courts were satisfied that on the basis of all the evidence before them, the assessments carried out were adequate.

229. The applicants further relied on the guidance of SIGTTO, which they claim was not followed by MHPA. However, the SIGTTO guidance is not binding and is only one factor to be taken into account in assessing the sufficiency of the assessments conducted. In any case, SIGTTO itself indicated that to the best of its knowledge MHPA had done everything that was expected of it in respect of risk assessment and planning for LNG shipping.⁹⁴

230. As regards the procedural aspects of the case, the Court notes that the applications for planning permission were publicised and that comments from members of the public were invited.⁹⁵ The applicants were able to seek judicial review of the impugned decisions, and even though they lodged their applications for judicial review late, the courts nonetheless examined their complaints and provided detailed factual and legal reasons for not extending the time, with reference to the courts' satisfaction with the assessment by the authorities of the safety of the LNG terminals. They had the benefit of three oral hearings in the context of their application for leave to seek judicial review.⁹⁶

231. The Court reiterates that the protection afforded by [art.8](#) in this area does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided. In the present case, there was a coherent and comprehensive legislative and regulatory framework governing the activities in question. It is clear that extensive reports and studies were carried out in respect of the proposed LNG terminals, by both HSE and MHPA, in co-operation with the developers. The planning and hazardous substances authorities as well as the domestic courts were satisfied with the advice provided by the relevant authorities. In the circumstances, it does not appear to the Court that there has been any manifest error of appreciation by the national authorities in striking a fair balance between the competing interests in the case.⁹⁷

232. The Court therefore considers that the respondent State has fulfilled its obligation to secure the applicants' right to respect for their private lives and homes. There has accordingly been no violation of [art.8](#) of the Convention. *893

D. The complaint regarding disclosure of information

233. The applicants also complained about the lack of information disclosed regarding the risks associated with the LNG terminals in Milford Haven.

1. Admissibility

(a) The parties' submissions

234. The Government contended that it was open to the applicants to pursue their complaints regarding access to information with the relevant domestic authorities. There was a specific domestic procedure covering access to environmental information, which provided the applicants with a right to seek information from MHPA or from any other relevant authority under the [Environmental Information Regulations](#). Indeed, they had already successfully invoked their rights against MHPA and obtained copies of two reports.⁹⁸ It was not clear what additional information the applicants still sought, if any. However, if they did require further information then the [Environmental Information Regulations](#) and the [FOI Act](#)⁹⁹ provided for a route of appeal via the Information Commissioner and the Information Tribunal, with a possible appeal to the Upper Tribunal and ultimately to the Court of Appeal.

235. The applicants emphasised that they had pursued their requests for data from MHPA, via judicial review and with the Information Commissioner. When MHPA had finally provided some of the data sought, it was heavily redacted. The applicants did not see what more they could possibly have done by way of seeking to obtain more information. They did not consider that additional information requests would have resulted in more useful results, and it was likely that MHPA would have strongly resisted any further efforts.

(b) The Court's assessment

236. The Court considers that the question whether the applicants have exhausted domestic remedies in respect of their complaint regarding access to information is closely linked to the merits of this complaint.¹⁰⁰ It therefore decides to join the objection to the merits.

237. The Court notes that this complaint is not manifestly ill-founded within the meaning of [art.35\(3\)](#) of the Convention, nor is it inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) The parties' submissions

(i) The applicants

238. The applicants referred to *Giacomelli v Italy* at [83], which they considered set out the legal principle regarding the provision of information. They claimed that the actions of the domestic authorities fell short of satisfying the requirements set out in that case, for several reasons.

239. First, although *Giacomelli* referred to “conclusions” of risk assessments being made available, the applicants considered that the term had to be seen in context. *894 Although it clearly did not require all raw data and calculations to be provided, the information made public had to be sufficient to enable the public to understand the basis on which the conclusions were reached. The applicants emphasised that the underlying principle was that members of the public should be able to assess themselves the danger to which they were exposed. In their case, the only conclusions provided were unsubstantiated assertions that the proposed development was safe. They noted that the Court in *McGinley* at [101], had said that where a state engaged in hazardous activities which had adverse consequences, [art.8](#) required that procedures be established to enable those potentially affected to seek all relevant and appropriate information.

240. Secondly, the applicants pointed out that the information eventually released by MHPA following the applicants' persistence before the Information Commissioner was heavily redacted. In their view the assessments carried out were in any event wholly insufficient to allow members of the public to assess the dangers to which they were exposed, and they referred in this respect to the conclusions of Dr Cox.¹⁰¹

241. Thirdly, it remained the applicants' case that no authority, including MHPA, had carried out a satisfactory assessment of the risks of an LNG release from a ship when manoeuvring or when tied to a jetty. Without that assessment, it was impossible for members of the public to evaluate the risks to themselves or their families.

(ii) The Government

242. The Government argued that any obligation arising under [art.8](#) did not extend to a right of access for the public to all studies used in the assessment process. The Court had referred in previous judgments to the importance of public access to conclusions and to information enabling members of the public to assess the danger to which they were exposed.¹⁰² In the Government's view, this obligation had been satisfied.

243. First, MHPA had made public its conclusions on the studies it had conducted, confirming that it considered that the LNG terminals could be operated safely. Secondly, the HSE had made public its assessments of the likelihood and consequences of particular incidents. Thirdly, MHPA had made known the conclusions of its risk assessments, and in particular as to the extremely small possibility of any incident occurring in the haven itself. There were considerable amounts of information in the environmental statements. Finally, the Government reiterated that the applicants had received access to two additional reports which they had specifically requested. It therefore insisted that the applicants had enjoyed access to a wealth of information, including the professional assessment of MHPA.

244. In the Government's submission, there was no basis for requiring the details of the risk assessments necessarily to be disclosed where the conclusions had been made public; the assessments contained detailed information which might be commercially confidential or pose a threat to national security if disclosed; and there was a fully established domestic system for individuals to seek disclosure. *895

(b) The Court's assessment

(i) General principles

245. In cases concerning hazardous activities, the importance of public access to the conclusions of studies undertaken to identify and evaluate risks and to essential information enabling members of the public to assess the danger to which they are exposed is beyond question.¹⁰³

246. The Court has previously indicated that respect for private and family life under [art.8](#) further requires that where a government engages in hazardous activities which might have hidden adverse consequences on the health of those involved in such activities, and where no considerations of national security arise, an effective and accessible procedure must be established which enables such persons to seek all relevant and appropriate information.¹⁰⁴

(ii) Application of the general principles to the facts of the case

247. The Court observes at the outset that the planning and hazardous substances applications were public documents and formed the subject of extensive public consultation.¹⁰⁵ The environmental statements accompanying the applications were also made available to the public and the applicants do not dispute that they had access to them. The MHPA responded to the consultations and in its response provided details of its conclusions regarding the safety of the proposals.¹⁰⁶ MHPA also responded to a number of queries by letter and in response to journalists' queries reiterating its conclusions on the risks posed by the terminals, and providing details of the simulation exercises conducted, involving MHPA pilots, under different weather and wind conditions.¹⁰⁷

248. The Court further notes that the provisions of the [Environmental Information Regulations](#) and the [FOI Act](#) establish an extensive regime to promote and facilitate public access to environmental information.¹⁰⁸ The definition of "environmental information" is relatively wide and can include information pertaining to public safety.¹⁰⁹ In the event that information requested is not provided by the relevant authority, a challenge to the Information Commissioner is possible, followed by an appeal to the Information Rights Tribunal, the Upper Tribunal and, ultimately, the Court of Appeal.¹¹⁰ Further requirements to provide specific information to the public are contained in the EIA Directive and the COMAH Regulations.¹¹¹ The applicants availed themselves of the possibilities afforded to them by this legislation, and obtained a favourable decision from the Information Commissioner ordering the release of two reports requested by them.¹¹² Insofar as they now seek to complain that the reports were heavily redacted, the Court observes that they have not suggested, nor have they provided any evidence to support the suggestion, that they made a complaint to the relevant domestic authorities regarding the information provided. It appears that [s.50 of the FOI Act](#) would have allowed the applicants to [*896](#) apply to the Information Commissioner for a ruling as to whether the information provided satisfied the obligations incumbent on MHPA pursuant to the [Environmental Information Regulations](#).¹¹³

249. The Court reiterates the importance of informing the public of the conclusions of studies undertaken and to other essential information to identify and evaluate risks. As the Information Commissioner explained in his decision notice,¹¹⁴ disclosure of environmental information of the type requested by the applicants can add significantly to public knowledge of the risks posed by the development and better inform public debate. However, the Court considers that in the present case, a great deal of information was voluntarily provided to the public by MHPA and the developers of the projects. The applicants have failed to demonstrate that any substantive documents were not disclosed to them. In any event, in respect of any information which they allege was not provided, they had access to a mechanism established by law to allow them specifically to seek particular information, a mechanism which they employed successfully. In the circumstances, the Court is satisfied that the authorities provided information as required by [art.8](#) and that there was an effective and accessible procedure by which the applicants could seek any further relevant and appropriate information should they so wish.

250. In conclusion, having regard to the information provided during the planning stage of the projects, to the provisions of the [Environmental Information Regulations](#) allowing access to environmental information and to the routes of appeal available in the [FOI Act](#), the Court finds that the respondent State has fulfilled its positive obligation under [art.8](#) in relation

to these applicants. There has accordingly been no violation of this provision. In view of this conclusion, it is not necessary for the Court to rule on the Government's preliminary objection. ¹¹⁵

II. Alleged violation of article 6(1) of the Convention

251. Relying on [art.6\(1\)](#) of the Convention, the applicants complained about the Court of Appeal panel's failure to recuse itself in the proceedings on whether to re-open its judgment in light of an error of fact.

252. The Court observes at the outset that the judgment of the Court of Appeal of March 17, 2006 was final as no further appeal was possible. The Court recalls that the Convention does not oblige states to allow individuals the opportunity to have their cases re-opened once a judgment has become final. ¹¹⁶ Moreover, [art.6\(1\)](#) of the Convention is not applicable to proceedings concerning an application for the re-opening of civil proceedings which have been terminated by a final decision. ¹¹⁷

253. The applicants' complaint under [art.6\(1\)](#) is accordingly incompatible *ratione materiae* with the provisions of the Convention and must be declared inadmissible pursuant to [art.35\(3\) and \(4\)](#) of the Convention.

III. Other alleged violations of the Convention

254. Lastly, the applicants complained under [art.6\(1\)](#) of the Convention that the domestic courts' failure to make a disclosure order in the judicial review ^{*897} proceedings concerning the grant of planning permission and hazardous substances consent and that the Court of Appeal's failure to hear arguments relating to an application for a protective costs order violated their right to a fair trial; and under [art.13](#) that the implementation by the Court of Appeal of the procedure under [r.52.17 CPR](#) had denied them an effective remedy in respect of their Convention complaints.

255. In the light of all the material in its possession, and insofar as the matters complained of are within its competence, the Court finds no appearance of a violation of the rights and freedoms set out in the Convention or its Protocols arising from these complaints.

Order

For these reasons, THE COURT unanimously:

(1) *Joins* to the merits the Government's non-exhaustion objection regarding the alleged denial of access to information and *declares* the applicants' complaint under [art.8](#) of the Convention admissible and the remainder of the application inadmissible.

(2) *Holds* that there has been no violation of [art.8](#) of the Convention.

(3) *Holds* that it is not necessary to rule on the Government's abovementioned objection. ^{*898}

Footnotes

- 1 See [26]–[27] above.
 2 See [80]–[94] below.
 3 See [179]–[180] below.
 4 See [72] above.
 5 See [93] above.
 6 See [181]–[182] below.
 7 See [171]–[177] below.
 8 See [172] below.
 9 See [178] below.
 10 See [72] above.
 11 See [173]–[177] below.
 12 See [177] below.
 13 See [173]–[176] below.
 14 *Giacomelli v Italy* (2007) 45
E.H.R.R. 38 .
 15 See [178] below.
 16 See [87] above.
 17 See [72] above.
 18 *R. v Hammersmith and
 Fulham LBC Ex p. CPRE
 London Branch* [2000] *Env.
 L.R.* 549; (2001) 81 *P. & C.R.*
 7 .
 19 See [133] and [149]–[151]
 above.
 20 See *Guerra v Italy* (1998)
 26 *E.H.R.R.* 357 at [44]; and
Tătar v Romania (67021/01)
 July 5, 2007 at [47].
 21 See *López Ostra v Spain*
 (1995) 20 *E.H.R.R.* 277
 at [51]; *Hatton v United
 Kingdom* (2003) 37 *E.H.R.R.*
 28 at [96]; *Guerra* (1998)
 26 *E.H.R.R.* 357 at [57];
Giacomelli v Italy (2007) 45
E.H.R.R. 38 at [77].
 22 Citing *López Ostra* (1995) 20
E.H.R.R. 277 at [51].
 23 *Taşkın v Turkey* (2006) 42
E.H.R.R. 50 at [113].
 24 Citing *Asselbourg v*
Luxembourg (29121/95) June
 29, 1999 .
 25 *Fadeyeva v Russia* (2007) 45
E.H.R.R. 10 at [68].
 26 See *López Ostra* (1995) 20
E.H.R.R. 277 at [51]; and
Fadeyeva (2007) 45 *E.H.R.R.*
 10 at [69]–[70].
 27 See *Taşkın* (2006) 42 *E.H.R.R.*
 50 at [113].
 28 *Tătar v Romania* (67021/01)
 January 27, 2009 .
 29 *Tătar v Romania* (67021/01)
 July 5, 2007 at [93]–[97].
 30 See [9]–[11], [129] and [138]
 above.
 31 See [130]–[131] above.
 32 See [46] above.
 33 See [161]–[170] above.
 34 See [33] above.

- 35 See [134]–[137] and [140]–
[142] above.
- 36 See [123]–[124] above.
- 37 See, amongst many
authorities, *Akdivar v Turkey*
(1997) 23 E.H.R.R. 143 at
[65]; and *Demopoulos v*
Turkey (2010) 50 E.H.R.R.
SE14 at [69].
- 38 See *Akdivar* (1997) 23
E.H.R.R. 143 at [66]; and
Cardot v France (1991) 13
E.H.R.R. 853 at [34].
- 39 See *Akdivar* (1997) 23
E.H.R.R. 143 at [68]; *Kennedy*
v United Kingdom (2011) 52
E.H.R.R. 4 at [109].
- 40 See [81] above.
- 41 See [81] above.
- 42 See [82] and [179]–[180]
above.
- 43 See [134]–[137] and [140]–
[142] above.
- 44 See [89] above.
- 45 See [93] above.
- 46 See [123]–[124] above.
- 47 See [127]–[128] above.
- 48 See [55] above.
- 49 See [66] above.
- 50 See [165] and [167]–[169]
above.
- 51 See [162]–[170] above.
- 52 Citing *Giacomelli* (2007)
45 E.H.R.R. 38 at [82]; and
Taşkın (2006) 42 E.H.R.R. 50
at [118].
- 53 See [17], [29]–[30], [37],
[43]–[44] and [53] above.
- 54 See [93], [97] and [101]
above.
- 55 See [157]–[158] above.
- 56 See [72] above.
- 57 See [74]–[75] above.
- 58 See, mutatis mutandis, *Hatton*
(2003) 37 E.H.R.R. 28 at [99];
Giacomelli (2007) 45 E.H.R.R.
38 at [79]; and *Taşkın* (2006)
42 E.H.R.R. 50 at [115].
- 59 See *Hatton* (2003) 37 E.H.R.R.
28 at [100]; *Giacomelli* (2007)
45 E.H.R.R. 38 at [80]; *Taşkın*
(2006) 42 E.H.R.R. 50 at
[116].
- 60 See *Giacomelli* (2007) 45
E.H.R.R. 38 at [82]; and *Taşkın*
(2006) 42 E.H.R.R. 50 at
[118].
- 61 See *Hatton* (2003) 37 E.H.R.R.
28 at [104]; *Giacomelli* (2007)
45 E.H.R.R. 38 at [82]; and
Taşkın (2006) 42 E.H.R.R. 50
at [118].
- 62 See *Giacomelli* (2007) 45
E.H.R.R. 38 at [82]; and *Taşkın*
(2006) 42 E.H.R.R. 50 at
[118].
- 63 See *Hatton* (2003) 37 E.H.R.R.
28 at [128]; *Giacomelli* (2007)
45 E.H.R.R. 38 at [83]; *Taşkın*
(2006) 42 E.H.R.R. 50 at
[119]; *Dubetska v Ukraine*

- (30499/03) February 10, 2011 at [143]; and *Grimkovskaya v Ukraine* (38182/03) July 21, 2011 at [67].
- 64 See, *mutatis mutandis*, *Hatton* (2003) 37 E.H.R.R. 28 at [128]; *Taşkın* (2006) 42 E.H.R.R. 50 at [118]–[119]; and *Giacomelli* (2007) 45 E.H.R.R. 38 at [83].
- 65 See [9] and [129] above.
- 66 See [130]–[132] above.
- 67 See [10]–[11] and [138]–[139] above.
- 68 See [144]–[148] and [152] above.
- 69 See [154]–[155] above.
- 70 See [157]–[158] above.
- 71 See [156] above.
- 72 See [161]–[170] above.
- 73 See [88] above.
- 74 See [89] above.
- 75 See [93] above.
- 76 See [101] above.
- 77 See [93] above.
- 78 See [101] above.
- 79 See [17]–[25], [30]–[32] and [44]–[48] above.
- 80 See [21] above.
- 81 See [22] above.
- 82 See [23] and [31] above.
- 83 See [23] above.
- 84 See [47] above.
- 85 See [48] above.
- 86 See [26]–[27], [40], [49], [55]–[56], [64]–[66] and [68]–[70] above.
- 87 See [55]–[56] above.
- 88 See [64] above.
- 89 See [55]–[56], [65]–[66] and [68]–[69] above.
- 90 See [71]–[72] above.
- 91 See [125]–[128] above.
- 92 See [127]–[128] above.
- 93 See [101] above.
- 94 See [74]–[75] above.
- 95 See [17], [29]–[30], [37], [43]–[44] and [53] above.
- 96 See [78], [86] and [98] above.
- 97 See *Fadeyeva v Russia* (2007) 45 E.H.R.R. 10 at [105].
- 98 See [107]–[120] above.
- 99 See [171]–[178] above.
- 100 See *McGinley v United Kingdom* (1999) 27 E.H.R.R. 1 at [75].
- 101 See [125]–[128] above.
- 102 Citing *Guerra* (1998) 26 E.H.R.R. 357 at [60]; and *McGinley* (1999) 27 E.H.R.R. 1 at [97].
- 103 See, *mutatis mutandis*, *Guerra* (1998) 26 E.H.R.R. 357 at [60]; *McGinley* (1999) 27 E.H.R.R. 1 at [97]; *Giacomelli* (2007) 45 E.H.R.R. 38 at [83]; and *Taşkın* (2006) 42 E.H.R.R. 50 at [119].
- 104 See *McGinley* (1999) 27 E.H.R.R. 1 at [101]; and *Roche*

- v United Kingdom (2006) 42 E.H.R.R. 30* at [162].
- 105 See [17], [29], [37], [43] and [53] above.
- 106 See [26]–[27], [49] and [55] above.
- 107 See [40], [56], [64]–[66] and [68]–[70] above.
- 108 See [171]–[178] above.
- 109 See [177] above.
- 110 See [178] above.
- 111 See [133] and [149]–[151] above.
- 112 See [119]–[120] above.
- 113 See [178] above.
- 114 See [119] above.
- 115 See [236] above.
- 116 See, most recently, *Vainio v Finland* (62123/09) May 3, 2011 ; and *Kolu v Finland* (56463/10) May 3, 2011 .
- 117 See, inter alia, *Surmont v Belgium* (13601/88 and 13602/88) July 6, 1989 ; *Helmers v Sweden (1998) 26 E.H.R.R. CD73* ; and *Vainio* (62123/09) May 3, 2011 ; and *Kolu* (56463/10) May 3, 2011 .

In the Matter of an **Application** by **HM**, A **Minor**, by **PM**, **Her Father** and **Next Friend** for **Judicial Review**



No Substantial Judicial Treatment

Court

Court of Appeal (Northern Ireland)

Judgment Date

16 January 2007

Ref: KERF5719

Court of Appeal in Northern Ireland

[2007] NICA 2, 2007 WL 4368153

Before Kerr LCJ , Nicholson LJ and Campbell LJ

Delivered: 16/1/07

Judgment

Kerr LCJ

Introduction

1. This is an appeal from the judgment of Weatherup J dismissing an application that challenged the decision of the Department of the Environment for Northern Ireland to grant O2 UK Ltd planning permission to erect at Forestview, Purdy's Lane, Castlereagh three equipment cabinets and three flagpoles designed to conceal three mobile telephone antennae. These are located close to the appellant's home. She is the eldest of four children who live with their parents at Newtownbreda, Belfast.

Factual background

2. O2 applied for planning permission on 22 November 2002. The application was advertised on 29 November 2002 and neighbour notices were issued on 6 December 2002. The appellant's father wrote to the department on 18 December 2002 objecting to the development. In January 2003 the development control group of the Planning Service of the department met and decided that further information was required from O2. After this had been provided, the application was re-advertised on 11 April 2003. Further neighbour notification took place on 9 April 2003.

3. The department's development control group considered the application again at a meeting on 15 May 2003. Objections to the development were deemed to fall into three principal categories, namely, health concerns, visual amenity and procedures. After considering these, the development control group concluded that the application should be approved. This opinion was then considered at a meeting of Castlereagh Borough Council on 22 May 2003. It was decided that the council should postpone further consideration of the application until a site meeting had taken place. Following the site meeting, on 20 June 2003, the council wrote to the department expressing concern about the health implications of telecommunications equipment in an area of residential property. The department duly reconsidered the application on 16 July 2003 and confirmed its original view that permission should be granted. At a meeting on 24 July 2003, the council expressed its opposition to the proposed development. On 15 August 2003, Philip Arnold, the Principal Planning Officer in the Divisional Planning Office in Belfast, made the final decision on behalf of the department to approve the application for planning permission. An earlier grant of

planning permission on 18 October 2001 was taken into account as establishing the acceptability of such a development on the application site.

Statutory Background

The Planning (Northern Ireland) Order 1991

4. Article 3(1) of the 1991 Order specifies one of the general functions of the department in relation to the development of land:—

(1) The Department shall formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development”.

5. Article 20(1) requires that all applications for planning permission should observe the prescribed form and contain the prescribed particulars, as follows:—

“(1) Any application to the Department for planning permission—

(a) shall be made in such manner as may be specified by a development order;

(b) shall include such particulars, and be verified by such evidence, as may be required by a development order or by any directions given by the Department thereunder”.

6. Article 22 provides that every application for planning permission must be served on specified persons and article 21(1) of the 1991 Order requires the department to publish notice of every planning application. It is in the following terms:—

(1) ...where an application for planning permission is made to the Department, the Department—

(a) shall publish notice of the application in at least one newspaper circulating in the locality in which the land to which the application relates is situated; and

(b) shall not determine the application before the expiration of 14 days from the date on which notice of the application is first published in a newspaper in pursuance of sub-paragraph (a)”.

7. Article 25(1) deals with the way in which the department must consider and determine applications for planning permission:—

“(1) [The department must] have regard to the development plan, so far as material to the application, and to any other material considerations, and—

...

(a) may grant planning permission, either unconditionally or subject to such conditions as it thinks fit; or

(b) may refuse planning permission”.

8. Article 25A of the 1991 Order gives the department a power to decline to determine applications, as follows:—

“(1) The Department may decline to determine an application for planning permission for the development of any land if—

(a) within the period of 2 years ending with the date on which the application is received—

(i) the Department has refused a similar application under Article 31; or

(ii) the planning appeals commission has dismissed an appeal against the refusal of a similar application; and

(b) in the opinion of the Department there has been no significant change since the refusal or, as the case may be, dismissal mentioned in sub-paragraph (a) in the development plan, so far as material to the application, or in any other material considerations”.

9. Article 25(2) provides that, in determining planning applications:—

“...the Department shall take into account any representations relating to that application which are received by it before the expiration of the period of 14 days from the date on which notice of the application is first published in a newspaper”.

The Planning (General Development) Order (Northern Ireland) 1993

10. Article 7(1) of the 1993 Order requires that an application for planning permission shall:—

“(a) be made on a form issued by the Department;

(b) include the particulars specified in the form and be accompanied by a plan which identifies the land to which it relates and any other plans and drawings and information necessary to describe the development which is the subject of the application; and

(c) be accompanied by 6 additional copies of the form, plans and drawings submitted with it, except where the Department indicates that a lesser number is required”.

11. Article 7(4) of the 1993 Order enables the department to obtain further information from an applicant in respect of an application:—

“(4) The Department may by direction in writing addressed to the applicant require such further information as may be specified in the direction to enable it to determine any application”.

12. Article 15(a) of the 1993 Order requires consultation with the district council in relation to applications for planning permission:—

“15. Before determining an application for planning permission the Department shall –

(a) consult the district council for the area in which the land to which the application relates is situated and shall, in determining the application, take into account any representations received from the council....”.

Planning Policy Statements

Planning Policy Statement 1 – General Principles

13. PPS1, issued in March 1998, contains the general principles which the department observes in carrying out its planning functions. Paragraph 3 sets out the purpose of the planning system:—

“3. The town and country planning system exists to regulate the development and use of land in the public interest. The public interest requires that all the development is carried out in a way that would not cause demonstrable harm to the interests of acknowledged importance. It is important to distinguish those matters which planning can influence from those which are outside its control. The central concerns of the planning system are to determine what kind of development is appropriate, how much is desirable, where it should best be located and what it looks like”.

14. Paragraphs 8 and 9 deal respectively with the role of the district councils and public participation of individuals and groups at key stages of the planning process:—

“8. The Department has a statutory duty to consult the relevant Council about every planning application it receives and to consult the Council during the preparation of a development plan. This consultation forms an important part of the Department's decision making process...

9. The Department recognises that individuals and groups have important contributions to make at key stages in the planning process.In addition to advertising applications as required by law, the Planning Service will continue to implement a neighbour notification scheme. The Planning Service will continue to examine ways of improving public consultation and participation”.

15. Paragraph 59 of PPS1 reiterates the department's guiding principle in determining planning applications:—

“59. The Department's guiding principle in determining planning applications is that development should be permitted, having regard to the development plan and all other material considerations, unless the proposed development will cause demonstrable harm to interests of acknowledged importance. In such cases the Department has power to refuse planning permission. Grounds for refusal will be clear, precise and give a full explanation of why the proposal is unacceptable to the Department”.

Planning Policy Statement 10 Telecommunications

16. PPS10, issued in April 2002, sets out the department's planning policies for telecommunications development. It embodies the government's commitment to facilitate the growth of new and existing telecommunications systems whilst keeping the environmental impact to a minimum. Paragraph 6.16 states:—

“In order to limit visual intrusion the Department attaches considerable importance to keeping the numbers of radio and telecommunications masts, and the sites for such installations to a minimum, consistent with the efficient operation of the network”.

17. Paragraphs 6.17 and 6.18 of PPS10 encourage the sharing of masts if that is the best environmental option:—

“6.17 The sharing of masts will be strongly encouraged where it represents the best environmental option in a particular case....

6.18 Depending upon the characteristics of the location, site sharing (both rooftop and ground based sites) as opposed to mast sharing may represent a more appropriate solution. A second installation located alongside or behind the principal location may, for example, provide a more beneficial solution in environmental and planning terms”.

18. Paragraph 6.19 provides that evidence in relation to alternative options must accompany applications for new masts:—

“All applications for new masts will need to be accompanied by evidence that the possibility of erecting antennae on an existing building, mast or other structure has been explored and should outline the specific reasons why this course of action is not possible. Where the evidence regarding the consideration of alternative options is not considered satisfactory, planning permission may be refused”.

19. PPS10 also addresses health issues associated with telecommunications development. Paragraphs 6.28 to 6.31 of PPS10 provide:—

“6.28 Health considerations and public concern can in principle be material considerations in determining applications for development proposals. Whether such matters are material in a particular case is ultimately a matter for the courts. It is for the decision-maker (normally the Department) to determine what weight to attach to such considerations in any particular case.

6.29 However, it is the Department's firm view that the planning system is not the place for determining health safeguards. It is for the Department of Health, Social Services and Public Safety (DHSSPS) to decide what measures are necessary to protect public health.

6.30 As regards health concerns raised about emissions associated with mobile telecommunications, DHSSPS while conscious of the need for further research and contributing financially towards the same, considers that the guidelines of the International Commission on Non-Ionising Radiation Protection (ICNIRP) for public exposure to electromagnetic fields, as accepted by the World Health Organisation, are based on the best evidence available to date. Accordingly where concern is raised about the health effects of exposure to electromagnetic fields, it is the view of DHSSPS that if the proposed mobile telecommunications development meets the ICNIRP guidelines in all respects it should not be necessary for the Department to consider this aspect further.

6.31 All new mobile phone base stations in the UK are expected to meet the ICNIRP public exposure guidelines.....”.

20. In relation to the control of telecommunications development, Policy TEL 1 of PPS10 provides:—

“The Department will permit proposals for telecommunications development where such proposals, together with any necessary enabling works, will not result in unacceptable damage to visual amenity or harm to environmentally sensitive features or locations.

Developers will therefore be required to demonstrate that proposals for telecommunications development, having regard to technical and operational constraints, have been sited and designed to minimise visual and environmental impact.

Proposals for the development of a new telecommunications mast will only be considered acceptable by the Department where the above requirements are met and it is reasonably demonstrated that:

- (a) the sharing of an existing mast or other structure has been investigated and is not feasible; or
- (b) a new mast represents a better environmental solution than other options.

Applications for telecommunications development by Code System Operators or broadcasters will need to include:

- (1) information about the purpose and need for the particular development including a description of how it fits into the operator's or broadcaster's wider network;
- (2) details of the consideration given to measures to mitigate the visual and environmental impact of the proposal; and
- (3) where proposals relate to the development of a mobile telecommunications base station, a statement:
 - indicating its location, the height of the antenna, the frequency and modulation characteristics, details of power output; and

- declaring that the base station when operational will meet the ICNIRP guidelines for public exposure to electromagnetic fields.

Where information on the above matters is not made available or is considered inadequate the Department will refuse planning permission.”

The European Convention on Human Rights and Fundamental Freedoms

21. Article 8 of ECHR provides:—

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. 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”.

The judgment at first instance

22. The respondent had contended before Weatherup J that the application should be dismissed because it had not been made promptly. The judge did not agree. He was satisfied that the applicant had acted promptly in making the application for judicial review and that, in any event, there was good reason to extend time to make the application for judicial review. Such delay as had occurred he considered was caused by difficulties in the processing of legal aid applications. The judge accepted that there would be some measure of financial and operational prejudice if the decision to permit the development was quashed but decided that, such was the scale of O2's operations, this could not be regarded as significant. Moreover, the notice party had proceeded with the application and the erection of the masts while aware of the opposition to the proposed development and the possibility of statutory objection or proceedings for judicial review.

23. An issue in the case (as we shall discuss below) was whether the department was legally empowered to consider amendments to planning applications. The judge found that such a power was implicit in the legislation. He held, however, that where the amendments were substantial a fresh application was required. In the present case he considered that the amendments did not fall into that category. The only obligation that arose, therefore, was one of procedural fairness. This required that interested parties be afforded the opportunity to respond to amendments to the application. Depending on the particular circumstances of the case, the opportunity to respond might require re-advertising of the application, further neighbourhood notices, or for the objector to have the opportunity to refer to the planning file.

24. The judge held that since in this instance there had been re-advertising and further neighbour notification this was sufficient to satisfy the requirements of procedural fairness. He concluded, therefore, that O2 was entitled to furnish additional information and to amend their application and that the procedural requirements associated with that amendment had been satisfied.

25. Another argument advanced by the appellant before the judge at first instance was that the department had failed to take the requirements of PPS 10 into account. On this point Weatherup J said:—

“[24] ... There is no requirement in the PPS that the required information must only accompany the original application, nor do I consider it to be a necessary implication ... In the absence of any express provision to the contrary, compliance with the requirements of the application remains to be satisfied until the decision has been made.....

[25] It is not in issue that the applicant made significant amendments on several occasions in purported compliance with PPS 10. To the extent that the applicant purported to achieve compliance with PPS 10 by way of amendment to the planning application and the supply of additional information, I am satisfied that the applicant was entitled to do so, and that the respondent could properly consider the applicant as being entitled to achieve compliance with PPS 10 by amendment of the application and the supply of additional information.

[26] The applicant further contends that the respondent failed to treat the PPS as a material consideration in failing to assess the operator's compliance with PPS. While the respondent states that the requirements of the PPS were a material consideration and compliance with those requirements was taken into account, the applicant contends that it is insufficient for a respondent to so state and that evidence of such consideration must be adduced. I do not accept that such a burden is placed on respondents, but rather the applicant is obliged to point to evidence or a basis for a reasonable inference that a matter has not been considered”.

26. A separate argument was mounted about the application of PPS10 to the development. It was suggested that there had been an unlawful fettering of the department's discretion and an unlawful delegation of powers in relation to health issues to the Department of Health and Personal Social Services (DHPSS). This argument had been prompted by the evidence of Mr Arnold, the principal planning officer in the Department of the Environment, that it had taken into account the view of DHPSS as to the dangers of the erection of mobile telephone masts. The judge held that the respondent could not do other than take advice on health issues from the appropriate experts. It was appropriate to have regard to the advice of DHPSS.

27. On the issue of the earlier grant of planning permission, Mr Arnold stated that the department had taken this into account as establishing the acceptability of such a development on the application site. He also said, however, that the department had regard to the differences between the development that had been permitted by the prior approval and the development for which permission was sought. Weatherup J commented on this in the following passage:—

“[37] ... Where a previous permission will not be put into effect, for whatever reason, the weight to be attached to the existence of the permission will be limited and may be nil. However the weight to be attached to the principle of prior permission is a matter for the decision maker and in the present case it has not been established that inordinate weight was accorded to that consideration. It is the principle of telecommunications development on site that was a material consideration. The differences between the prior approval and the application were taken into account. I do not accept that the prior approval was an irrelevant consideration”.

28. The appellant had also argued that the department failed to take into account a number of relevant considerations including, objections raised by Castlereagh Borough Council, the concerns about risks to health, alternative locations for the proposed development and the need to discover the best position for the proposed development. In paragraphs [38] to [44] of his judgment, Weatherup J dealt with these arguments. He rejected the claim that the burden was on the respondent to demonstrate that all relevant matters had been considered. He said that the burden was on the applicant to make good these assertions and that “there must be some basis in evidence or by reasonable inference that such has not been the case for the applicant to make out the ground of challenge”. He found that no such basis had been demonstrated. On the specific allegation that the respondent had failed to consider public concern about the health risks posed, as opposed to the objective evidence in relation to these, the judge said that it had not been shown that the department had failed to distinguish between these and that it had taken the concern of the public into account.

29. In relation to the appellant's contention that the respondent had failed to properly consider alternative locations Weatherup J referred to Mr Arnold's affidavit and correspondence from the operator which, he found, showed that mast site sharing and alternative sites had been considered and that the alternatives were either considered unavailable or unsuitable. Weatherup J concluded that the department's decision on the matter of alternative sites could not be challenged:—

“[44] ...While the respondent did not in terms ask “Is this the best location?” it is apparent that the respondent was satisfied that there was no alternative location. I am not satisfied that the respondent's conclusion in relation to any alternative should be set aside. I have not been satisfied that the information supplied or the respondent's assessment of that information or the respondent's conclusion is other than in accordance with PPS 10”.

30. The appellant alleged that the respondent had failed to act in compliance with her right to respect for private and family life under [article 8 of ECHR](#) . Weatherup J dealt with this argument in the following passage:

“[47] It is doubtful if the applicant can be said to be “particularly badly affected” by the proposed development in the present case so as to engage Article 8 . However on the assumption that Article 8 is engaged I am satisfied that there is no breach of the applicant's right to respect for private and family life. As stated by Carswell LCJ in *Re Stewart's Application* the type of balancing exercise that is required to satisfy Article 8 is an inherent part of the planning process in which the planning authorities balance public and private interests.

[48] ...For the reasons discussed above I am satisfied that the planning authorities have taken into account the genuine concerns that arise in respect of health issues and have addressed that concern in an appropriate and proportionate manner”.

The issues and the arguments of the parties

(i) *The planning policy statements*

31. Two principal issues arise in relation to PPS1 and PPS10 TEL. It was argued firstly that the material stipulated in these policies (particularly PPS10) must accompany the planning application at the time that it is submitted to the planning authority. On that basis Mr Michael Lavery QC, who appeared for the appellant, suggested that the planning service could not lawfully entertain the application for planning permission in this case as, at the time it was submitted, much of the required material had not been supplied. Failure to provide information required by PPS10 gave rise, he said, to a breach of article 20(1) (b) of the 1991 Order and article 7(1) (b) of the 1993 Order. Secondly, Mr Lavery contended that the department had failed to have proper regard to the requirements of both policies. It was submitted that, in the present case, the absence of any detailed evidence that the department had paid anything other than cursory attention to these policies brought about a transfer of the onus of proof to the department. It had failed to discharge the evidential burden of showing that proper consideration of the policies had taken place, Mr Lavery claimed.

32. For the respondent Mr McCloskey QC submitted that the contention that the statutory requirements were mandatory could not be sustained in light of the contemporary rejection of the former mandatory/directory dichotomy approach to issues of statutory interpretation in, for example, *Re Robinson's Application* [2002] NI 390 and *R v Soneji* [2005] UKHL 49 . He suggested that Soneji in particular heralded a more flexible approach to this question. In any event, he argued, *Inverclyde District Council v Lord Advocate* [1981] 43 P and CR 375 , laid this particular argument to rest in the planning context. In that case Lord Keith held that the requirement for particulars, plans and drawings was directory and that, in respect of amendments to the application, the planning authority must deal with the application procedurally in a way that was just to the applicant in all the circumstances. Mr McCloskey claimed that the legislature had clearly intended to create a fair, sensible and viable arrangement where there was some evolution of the planning application. He accepted, however, that this was subject to the public interest and the interest of objectors but suggested that these could be properly catered for in appropriate cases by re-advertising the application or permitting those who might be affected by the development to respond on an informal basis.

33. In relation to the argument that the planning authority had failed to have regard to the planning policies Mr McCloskey referred to Mr Arnold's statement that PPS10 had been considered by the development control group in determining the application. In reliance on *Inland Revenue Commissioners -v- Coombs* [1991] 2 AC 283 , counsel argued that, in the absence of proof to the contrary, where a public officer swears that he or she has done or considered something, it should generally be accepted by the court that such officer has done so with honesty and discretion. The respondent also relied on the decision of

this court in *Re SOS* [2003] NIJB 257, where it was held that it was incumbent on an applicant in judicial review proceedings to establish by "... evidence or a sufficient inference ..." that the respondent failed to consider a specified material factor.

(ii) *The power to amend*

34. The arguments on this issue focused primarily on the question whether it was implicit in the legislation that a planning application could be amended. Mr Lavery accepted that a statutory power carried with it all incidental powers necessary for its operation but suggested that such powers could only be implied in limited circumstances. This was permitted where it was necessary to do so in order to give effect to the expressed intention of the legislature. In the absence of clear evidence of Parliament's intention, the court was not entitled to reach its own conclusion as to what powers the legislature must have or would have intended. A power to amend a planning application should not be implied, therefore.

35. By way of alternative, counsel submitted that, if there was power to amend the application, the planning service should not be permitted a discretion to determine when amendments were to be allowed or when a new application was required. The proper approach was that if the errors in the original planning application were more than trivial, a fresh application should be required which embodied the agreed revised plan and fresh notices should be given to relevant third parties. This, it was asserted, promoted one of the primary objectives of the legislation, namely that any third parties or objectors who might be adversely affected by the revised planning proposals would have an opportunity to make representations.

36. Relying on such decisions as *McClurg and Spiller -v- DOE* [1990] 2 NIJB 68, *Re Nelson's Application* [1997] 9 BNIL 102 and *Re Rowsome's Application* [2004] NI 82 Mr McCloskey countered these arguments suggesting that it was now well settled that a planning application could lawfully be amended. He referred in particular to what he described as "the pertinent observation" in *British Telecom -v- Gloucester City Council* that it was in the public interest that planning applications should be susceptible of modification and improvement during the decision-making process. In respect of the present case, it was submitted that the department's judgment that the revisions to the planning applications did not constitute an overwhelming change in the planning application could be upset only on the ground of *Wednesbury* irrationality.

(iii) *Consideration of alternative locations and previous grants of planning approvals*

37. On the issue of alternative location Mr Lavery relied on the approach of the High Court in England in *Phillips v Secretary of State* [2003] EWHC 2415 (Admin) which, he said, had determined that the planning authority was required to decide whether the proposed location was the best possible site for the development rather than merely acceptable. He claimed that the planning service had failed to follow this approach and that the judge ought to have quashed its decision on that account alone.

38. Mr McCloskey disputed the appellant's interpretation of the decision in *Phillips*, suggesting that the "best location" test espoused in that case related to the several locations considered in the submission and processing of the planning application involved. Every planning application must be determined by reference to the practicalities and realities associated with its particular circumstances.

39. In relation to the previous planning approval Mr Lavery argued that, in finding that the earlier grant of planning permission for radio masts on the Forestview site was relevant, Weatherup J had wrongly relied on the decision in *Re Foster's application* [2004] NI QB 1. In that case, Mr Lavery suggested, the relevant planning guidelines had not been changed in the three years between the two grants of permission whereas, in the present case, the prior approval related to equipment approved before the introduction of PPS10 standards.

40. Mr McCloskey's riposte to this argument was that that PPS10 did not exclude consideration of the previous grants of planning permission and that Article 25(1) of the 1991 Order obliged the department to have regard to the development plan and "any other material considerations". The previous planning approval was plainly a material consideration. Whether to have regard to this matter was a question of planning judgment. As such, it was entirely proper that the respondent should take it into account, provided all other material considerations were also considered. In any event it was, Mr McCloskey said, clear from Mr Arnold's affidavit that the prior approval was considered only to the extent that it established the acceptability, in principle, of telecommunications development on the site.

(iv) *Duty to consult and taking into account the views of the council*

41. It was submitted that the planning service had not complied with its statutory duty to consult the local council before reaching a decision pursuant to article 15(a) of the 1993 Order. It had failed to comply with the basic requirements of

consultation as propounded in *Devon CC ex p Baker [1995] 1 All ER 73*, these being that consultation must take place at a time when proposals were still at a formative stage; that the proposer must give sufficient reasons for any proposal in order to allow intelligent consideration and response; that adequate time must be given for such consideration and response; and that the product of any consultation must be conscientiously taken into account in finalising any statutory proposals.

42. On the issue whether the views of the council had been taken into account it was submitted that the learned trial judge had misdirected himself on the onus of proof by determining that the burden was on the appellant to disprove Mr Arnold's assertion that the council's views had been properly taken in to account.

43. Once again the respondent relied on the affidavit evidence filed on its behalf which, it was claimed, established clearly that the exercise of consultation with the council was a serious and effective one, with both the department and the council actively and assiduously discharging their respective duties. The respondent also relied again on the principle enunciated in *Re SOS* to resist the claim that the onus of establishing that it had taken the views of the council into account lay with the planning authority.

(v) *Fettering of discretion*

44. In advancing the case that the respondent had unlawfully fettered its discretion Mr Lavery relied on the decisions in *R v Hampshire CC ex p W [1994] ELR 460, 476B* and *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble Fisheries (Offshore) Ltd [1995] 1 All ER 714* in which Sedley J stated that a policy should not be applied rigidly; instead each case should be considered in light of the policy designed to deal with decisions of the type under challenge. The policy should not be applied in an inflexible manner so that its terms automatically determined the outcome. It was argued that the planning service had adopted a rigid approach in respect of PPS10 by leaving health issues to the Department of Health, Social Services and Personal Safety. This was not only an unlawful fettering of discretion but also an unwarranted and illegitimate delegation of powers.

45. In resisting this argument, Mr McCloskey drew our attention to the decision in the English *Court of Appeal in T-Mobile UK Limited, Hutchinson 3G UK Limited and Orange Personal Communications Services Limited v The First Secretary of State and Harrogate Borough Council [2004] EWCA Civ 1763* where, it was claimed, Laws LJ espoused an interpretation of the English equivalent policy PPG8 which supported Weatherup J's approach to PPS10. In any event, said Mr McCloskey, it was plainly wrong to suggest that the policy could operate as a fetter on discretion since all planning policy statements derived from the function conferred on the department by article 3(1) of the 1991 Order. A broad discretion was bestowed and, potentially, a very wide range of factors could be properly considered by the department in the formulation of planning policy statements. The appellant's attack on this issue partook of a challenge to PPS10 itself and leave to promote such a challenge had neither been sought nor given. It was not open to the appellant, Mr McCloskey claimed, to advance this case.

(vi) *Human rights*

46. The appellant submitted that her rights under [article 8 of ECHR](#) had been interfered with because of the intrusion into home, in particular her bedroom, of electro-magnetic radiation and because of her anxiety due to her genuine concerns in respect of the risks to her health from such radiation. In considering the appellant's convention rights the department failed to address the question whether her genuine fear gave rise to a possible breach of article 8. On account of that failure alone, the decision should be quashed.

47. An interference with the appellant's article 8 rights could only be justified if the grant of planning permission was necessary and proportionate. This required the department to conduct a balancing exercise. Such an exercise was, Mr Lavery argued, very different from that conventionally required in article 8 cases where the affected individual's rights were customarily pitted against the public interest. Here the competing interest was that of a commercial undertaking

48. The respondent, relying on the decision of this court in *Re Stewart's Application [2003] NI 149*, suggested that article 8 was only engaged in the planning context where the person claiming to have been the victim of a violation of that provision could show that she had been "particularly badly affected by development carried out in consequence of a planning decision made by the State ...". In relation to alleged adverse effects of environmental pollution, the governing principle was that there must be a certain minimum level of interference — *Fadeyeva -v- Russia [Application No. 55723/00 — 9 June 2005]*. It was argued that the evidence adduced on behalf of the appellant failed to establish either of these requirements.

49. Alternatively, it was submitted that, if there had been an interference with the appellant's article 8 rights, such interference was justified under article 8 (2). In particular, the economic well-being of the country and the protection of the rights and

freedoms of others warranted the grant of planning permission. The balancing exercise to be conducted under this provision required the pitting of the purely private interests of the appellant against the broader public interests at play in permitting the development. Viewed thus, there could be no dispute that such interference as may have occurred was plainly justified.

Conclusions

Delay

50. Weatherup J's approach to this issue was, we consider, impeccable. It is clear that much of the delay could be accounted for by the processing of legal aid applications. Given the time that these required we agree with the judge that there was no real lack of promptitude on the appellant's behalf. Moreover, for the reasons that he gave, we are satisfied that no prejudice accrued to the respondent or the notice party.

The planning policy statements and the power to amend the application

51. Must all of the material described in PPS1 and PPS10 TEL accompany the planning application on its first submission to the planning authority? We have concluded that to impose such a rigid requirement would defeat the purpose of the planning legislation in relation to development. Developmental control in the public interest lies at the heart of the legislation. The department has a statutory duty to determine every planning application and, as indicated in paragraph 59 of PPS1, the guiding principle is that development should be permitted unless it will cause demonstrable harm to interests of acknowledged importance. Against this background, many applications are organic, subject to alteration and modification as a result of exchanges of information between the planning service and the applicant and to meet objections to the application.

52. The mandatory and directory debate does not therefore, in our opinion, find a ready place in the field of planning law where unyielding, technical rules are inappropriate. If it is necessary that information be obtained in order to determine a planning application, it is inconceivable that Parliament would have intended that there should be a once-only opportunity to provide it. We consider that the proper construction of article 20 (1) (b) of the 1991 Order is that outlined by Lord Keith of Kinkel in *Inverclyde District Council v Lord Advocate and Others* (1981) 43 P.&C.R. 375 at 395/6 where he said:—

“...as regards the requirement of particulars, plans and drawings, I am of the opinion that this is clearly directory in nature, and not mandatory, in the sense that if it is not complied with the proceedings are invalid. It is not necessary to the achievement of any of the purposes of the relevant legislation that all such particulars, plans and drawings as may be required to enable the application to be dealt with should be submitted at the same time as the application itself. The nature of the requirement is that it can be seen to be concerned with administrative convenience only. It can readily be envisaged that in many cases the authority may require further particulars in addition to those originally made available, and there is no good reason why these should not be allowed to be proffered at a later stage ...”

53. We have concluded therefore that the planning service was right to solicit and to receive further information from O2 and to consider this in dealing with the planning application. No other sensible approach to the transaction of planning applications is feasible. PPS10 does not expressly or by implication prohibit the provision of further material or information after the planning application has been submitted and it should be construed in a way to reflect the primary purpose of the legislation. That purpose is to permit decisions on planning applications to be taken on a properly informed basis. To deny a developer the opportunity to submit further material that was relevant to the planning decision and, perhaps more importantly, to prohibit the planning authority from seeking such material would frustrate the obvious policy behind the legislation and the planning policy statements. It is moreover quite obviously in the public interest that planning applications should be susceptible of modification and improvement during the decision-making process.

54. On the specific issue of the amendment of a planning application the following passage from the speech of Lord Keith in the *Inverclyde District Council* case remains pertinent:—

“Finally, it is necessary to consider the question whether it was within the powers of the first respondent to call for the submission of further detailed plans and information, which would have the effect of amending the original application... This is not a field in which technical rules would be appropriate, there being no contested lis between opposing parties. The planning authority must simply deal with the application procedurally in a way which is just to the applicant in all the circumstances. That being so, there is no good reason why amendment of the application should not be permitted at any stage, if that should prove necessary in order that the whole merits of the application should be properly ascertained and decided upon. There is, however, one obvious limitation upon this freedom to amend, namely that after the expiry

of the period limited for application for approval of reserved matters...an amendment which would have had the effect of altering the whole character of the application, so as to amount in substance to a new application, would not be competent [pp 396/7]”.

55. More recently, in *British Telecommunications Plc & Anor v Gloucester City Council* [2001] EWHC Admin 1001, Elias J dealt with the question whether amendments to planning applications required the submission of a fresh planning application:

“33. It is inevitable in the process of negotiating with officers and consulting with the public, that proposals will be made or ideas emerge which will lead to a modification of the original planning application. It is plainly in the public interest that proposed developments should be improved in this way. If the law were too quick to compel applicants to go through all the formal stages of a fresh application, it would inevitably deter developers from being receptive to sensible proposals for change...”

34. I would add that of course the interests of the public must also be fully protected when an amendment is under consideration. They were, however, fully protected in this case by the detailed consultation that took place in respect of the amendments”.

56. We are in complete agreement with the opinions expressed in these passages. We are satisfied that the planning service's decision to consider further material from O2 and to permit the amendment of its application did not have the effect of ‘altering the whole character of the application’ nor did it create any disadvantage for the appellant or other objectors. As Mr Arnold has made clear, the revised planning application was re-advertised; fresh neighbour notifications were made, the statutory consultees were consulted again and all the representations about health matters were considered.

57. The claim that the department had failed to take the relevant planning policies into account must be rejected. As this court said in *Re SOS*, such a claim cannot be sustained by mere assertion. It is incumbent on the person who asserts a failure to have regard to a relevant consideration to establish that claim by evidence or sufficient inference. In the present instance, the claim is in direct conflict with the contrary averment in Mr Arnold's affidavit. We can find no reason to discount his statement that PPS10 was taken into account.

Consideration of alternative locations and previous grants of planning approvals

58. We do not accept Mr Lavery's characterisation of the decision in *Phillips v Secretary of State* as requiring the planning authority to reject a proposed location unless it is shown to be the best possible site for the development. It is true that in paragraph 39 of his judgment Richards J said:—

“The question, as it seems to me, is not just “is this an acceptable location?”, but “is this the best location?”, and for the purpose of answering that question one can and should look at whatever alternative possibilities there may be.”

But we do not interpret this passage as meaning that every suitable location for a development must be rejected unless it is also demonstrably the best. If, contrary to our view, this was what Richards J intended, we would not be disposed to follow it.

59. The relevant dispute in *Phillips* focused on the significance of alternative sites to the planning debate. Richards J attached particular importance to the final sentence of the planning policy PPG8 which provided that “local planning authorities and operators should seek together to find the optimum environmental and network solution on a case-by-case basis”. It does not appear to us that this injunction requires of a planning authority that it be satisfied that there are no feasible alternative sites that could be said to be superior in planning terms to the proposed location.

60. It is clear that the department in the present case was alive to the question of alternative locations and concluded that no acceptable alternative had been identified. We consider that this conclusion cannot be challenged.

61. On the issue of previous grants of planning permission we are satisfied that the department was entitled to take these into account. They were not precluded from doing so by the terms of PPS10 and the fact that this policy was not in force at the time that the earlier permissions were granted cannot, of itself, rob them of their potential relevance. We agree with Mr McCloskey's submission that they were plainly material considerations within the terms of article 25 of the 1991 Order. The

weight to be attached to them – or indeed whether any weight whatever be given to them – was a matter for the department. As it happens, they were considered only to the extent that they established the acceptability in principle of telecommunications development on the site. This was plainly a relevant consideration but it did not alone determine the outcome of the application for it is clear from Mr Arnold's affidavit that the differences between the development permitted by the prior approvals and that in O2's application were recognised and considered.

Consulting and taking into account the views of the council

62. This claim must be rejected for essentially the same reasons as that made in relation to the avowed failure of the department to take account of the relevant planning policies *viz* that there is simply no evidence to support it. On the contrary there is contemporaneous material in the form of correspondence passing between the council and the department about the various concerns that had been raised. Moreover, it is positively asserted by Mr Arnold that these concerns were conscientiously and scrupulously addressed. Unless we were persuaded that the department had cynically resolved to ignore the representations made by the council while creating the false impression that they had done so, it is impossible to accept the appellant's arguments on this issue. There is no basis on which we could possibly reach such a conclusion.

Fettering of discretion

63. A similar argument to that advanced on behalf of the appellant in the present case was dealt with by the *Court of Appeal in England in T-Mobile UK Ltd, Hutchinson 3G UK Ltd, Orange Personal Communications Services Ltd v The First Secretary of State and Harrogate Borough Council [2004] EWCA Civ 1763*. In that case, the court considered the provisions in PPG8 regarding the planning authority's responsibility in respect of health risks due to telecommunication, (the English counterpart of paragraph 6.30 of PPS10). At paragraphs 18 *et seq* Laws LJ said:—

“18 ...in [paragraph] 98 the policy is expressed that if in any given case the ICNIRP guidelines are met the planning authority should not have to look further in relation either to an actual health risk or perceived health risks. The rationale of the policy is the first sentence which, to my mind, is important for an understanding of the whole. There, the Secretary of State says this:

“...it is the Government's firm view that the planning system is not the place for determining health safeguards.”

19. What follows is drawn in the light of that first statement. It seems to me plain that that is as much policy as anything else in the document. Certainly the text leaves open the possibility...that there might be a case in which the planning authority would be justified in looking further and, to that extent, departing from the policy. But that would be an exceptional course which would have to be specifically justified, as the judgment of Woolf J (as he then was) in *Gransden v Secretary of State for the Environment [1986] JPL 519* ...amply demonstrates.

20 ...Once one recognises the thrust given to paragraph 98 by its first sentence, this is simply a classic piece of planning policy.

21 ...Thus there is, as I have indicated, nothing in paragraphs 11-14 to show why, on the facts of this particular case, compliance with the ICNIRP guidelines was insufficient to allay perceived fears about health issues”.

64. We agree with this analysis. The department was entitled – indeed obliged — to apply the policy enunciated in the words of paragraphs 6.29 and 6.30 of PPS10 that the planning context was not the forum for debate on the overall health risks represented by the erection of mobile telephone masts. An alternative and more appropriate arena for the assessment of those risks exists. We are satisfied that the department was not required, in the particular circumstances of this case, to depart from the policy as set out in PPS10.

65. Weatherup J dealt with the issue in the following passages of his judgment:—

“[29] The applicant contends that PPS 10 represents an unlawful fettering of discretion and delegation of powers by leaving health issues to the Department of Health, Social Services and Personal Safety. In so doing it is said that the respondent is not considering the circumstances of each case and is not taking into account emerging evidence on health risks. Mr Arnold, on behalf of the respondent, distinguishes between the issue of health risks, which is regarded as a matter of assessment and expert opinion by the Department of Health, Social Services and Personal Safety, and the

issue of public concern about health risks, which is regarded as a material consideration in planning applications and a matter for the respondent. Mr Arnold in his affidavit further states that the concern for health risks, as expressed by the applicant and the applicant's father and other objectors and Castlereagh Borough Council, was a material consideration which could count against the development. In addition he states that there was no evidence that caused the respondent to reject the view of the Department of Health, Social Services and Personal Safety.

[30] John Lindon is a Principal Planning Officer in Planning Service Headquarters, Belfast and a member of the team that drafted PPS 10. He refers to research programmes that have been undertaken since the Stewart Report and his responsibility to liaise with other government departments and agencies including the Department of Health, Social Services and Personal Safety. A joint Government/industry research programme has been set up, known as the Link Mobile Telecommunications and Health Research Programme (MTHR), and it is described as a key part of the precautionary approach. It is designed to ensure that this area is kept under review and that Government and the public are kept up to date with new research findings. Mr Lindon states that he has not become aware of any development that has led him to recommend any change to the approach set out in PPS 10. The applicant and her father have also kept abreast of developments in relation to health risks, and it is clear that the evidence remains inconclusive on the issue.

[31] The respondent cannot do other than take advice on health issues from the appropriate experts. Mr Arnold indicates that there have been no grounds not to accept the DHSSPS view, thereby indicating the absence on any absolute position on the advice received. There is monitoring of developments on health issues so the respondent is kept up to date and receives advice on current research. Mr Lindon has not seen fit to recommend any change to the present approach to the issue, thereby indicating the absence of any absolute position on the present structures and a preparedness to seek a change of approach if that were to be thought appropriate. The circumstances of the applicant and the developing research have been considered. I am satisfied that the approach to health issues does not involve any unlawful fettering of discretion or delegation of powers.”

66. We consider that the judge correctly recognised that this challenge was not so much based on the claim that the department had fettered its discretion as on an attack on the propriety of PPS10 itself. In fact the appellant had not sought or been granted leave to mount such a challenge but we are in any event satisfied that it must fail. There is nothing impermissible – or even untoward – in government allocating to a particular sphere debate about an issue such as the threat posed to health by the erection of mobile telephone masts and excluding it from the planning context.

Human rights

67. The arguments based on the appellant's convention rights were somewhat differently pitched from the way in which they had been presented to Weatherup J. Before him it had been argued that there had been a violation of both [articles 2 and 8 of ECHR](#). On the appeal, the appellant concentrated on the proposition that the failure of the department to consider whether her apprehension that the mobile telephone mast *might* have a deleterious effect on her health gave rise to a possible violation of her rights under article 8 and rendered its decision unlawful.

68. Properly understood, therefore, the appellant's argument on this issue is not strictly speaking a claim based on a convention right. Rather it is a contention that the department failed to have regard to a relevant consideration *viz* the appellant's fear that her health may be affected by the proximity of the mast. But there is nothing in the jurisprudence of ECtHR which suggests that something imperceptible, intangible and having no effect on the senses can potentially infringe article 8. It is a prerequisite of such a violation that it be shown that there was an actual interference with the appellant's private sphere and that a level of severity was attained (the test in *Fadeyeva v Russia*). The appellant has failed to establish that there was such an interference and the department cannot be faulted for having failed to take an apprehension that there might have been into account.

69. The appeal is dismissed.

Crown copyright

All England Official Transcripts (1997-2008)*

Lough and another v First Secretary of State and another

[2004] EWCA Civ 905

(Transcript: Smith Bernal)

COURT OF APPEAL (CIVIL DIVISION)

PILL, KEENE, BAKER LJJ

12 JULY 2004

Town and country planning – Right to private life – Balancing exercise – Right of landowner to make beneficial use of land to be balanced against rights of people in vicinity – European Convention on Human Rights, art 8, First Protocol, art 1.

12 JULY 2004

R Clayton QC and C Zwart for the Appellant

N Lieven for the Respondent

M Lowe QC and Mr Wolton QC for the Interested Party

Steele & Co; Treasury Solicitor

PILL LJ:

[1] This is an appeal against a decision of Collins J whereby, on 21 January 2004 he refused an application by Mr David Lough and others made on behalf of themselves and as Officers of BROAD (“The Bankside Residents for Appropriate Development”), an unincorporated association, (“the Appellants”) to quash a decision of the First Secretary of State (“the Respondent”) whereby on 9 June 2003 he granted Bankside Developments Ltd (“the interested party”) planning permission to redevelop a site in the Bankside area of Southwark between Blackfriars Bridge and Southwark Bridge. Acting by an Inspector appointed by him, the Respondent allowed an appeal against a refusal of planning permission on 18 October 2002 by the Council for the London Borough of Southwark (“the Council”). The permission was for demolition of existing buildings and redevelopment to provide a 20-storey building with 28 dwellings and shops and restaurants on the ground floor, and associated facilities.

THE DECISION

[2] The Inspector conducted a local public enquiry at which over 30 witnesses were called, including 12 expert witnesses. The Appellants were objectors to the proposal. They were concerned, amongst other things,

to protect the amenities of residents at Bankside Lofts and Falcon Point, which are near the site, and the amenities of the Tate Gallery of Modern Art (“the Tate Modern”) into which the former Bankside Power Station, very close to the site, had been converted.

[3] One of the Council's reasons for refusing permission had been that the proposal breached policy E3.1 of its Unitary Development Plan. That policy provides:

“Protection of Amenity

Planning permission for any development or change of use will not normally be granted where it would involve nuisance or loss of amenity to adjacent users, residents and occupiers of the surrounding area.

Reason: to protect the amenity of the area and of the people living, or working in, or visiting the area. “

[4] The Inspector, at para 15 of his Decision, identified what he considered to be the main issues:

“Whether or not the proposed development would: firstly, affect the residential amenities of any neighbouring dwellings; secondly, affect the amenities of the Tate Modern; and thirdly, if such amenities are adversely affected, whether or not there is justification to allow the appeal and grant planning permission. In the light of evidence and submissions made by BROAD I have identified a main issue of equal importance, namely whether or not the design of the proposed development is of sufficiently high quality in relation to the location of the site in the Bankside area and adjacent to Tate Modern.”

The Inspector resolved the last of those main issues in favour of the interested party and further consideration of it is unnecessary for present purposes.

[5] The Inspector referred to [s 54A](#) of the Town and Country Planning Act 1990 (“the 1990 Act”) which provides:

“where, in making any determination under the planning acts, regard is to be had to the development plan, a determination shall be made in accordance with the plan unless material considerations indicate otherwise.”

In relation to the first of the main issues he had identified, the Inspector concluded, first (para 43), that “dismissal of the appeal for reasons relating to privacy and overlooking is not justified”. However, he also concluded (para 48) that “insofar as the matters of daylight, sunlight and overshadowing are concerned, the proposed development is not consistent with the relevant part of UDP Policy E3.1” He was not convinced that the proposed development caused unacceptable harm to Tate Modern and its facilities. As to the third issue, and having referred to what he considered to be a breach of Policy E3.1, the Inspector stated, at para 54:

“However, by virtue of the technical evidence produced by the [interested party] at the inquiry I am not convinced that this issue is of such force as to warrant dismissal of the appeal when weighted against the advantages that would result from the proposed development.”

He stated, at para 55, that the loss of daylight “would not be so great as to render the affected rooms [in the neighbouring dwellings] incapable of continued beneficial use. . . .The loss of daylight and sunlight to neighbouring residential properties and their overshadowing are regretted, but from the evidence before me I am not persuaded that the effects would be so great as to prove unacceptable.”

[6] At para 56, the Inspector stated:

“Set against the effects on these neighbouring dwelling are the advantages that would stem from the proposed development. In addition to compliance with the general thrust of national, regional and local planning policies the Appellants list them as:

- a) the removal of an unsightly building;
- b) the construction of a building of substantial design quality;
- c) the provision of sustainable residential development;
- d) the efficient use of previously developed land;
- e) the provision of affordable housing;
- f) the provision of funds for environmental improvement by means of a Section 106 planning obligation;
- g) the erection, potentially, of a beautiful building that would make a positive contribution in urban design terms;
- h) a contribution to the regeneration of this area of London.

I accept that these are indeed benefits that would result from erection of the proposed building. Having weighed the degree to which the proposed development fails to comply with UDP Policy E3.1 against all the other issues and foregoing matters, especially the advantages that would stem from the proposed development, I find that there is justification to warrant an exception to UDP Policy E3.1. In the circumstances I am disposed to allow the appeal and to grant planning permission.”

[7] Before setting out his formal decision, and the conditions to which the permission was to be subject, the Inspector then inserted the heading “Consideration of issues raised by reference to the [Human Rights Act 1998](#)”. Having referred to the Appellants' wish to protect their amenities, to the imposition of conditions, and to other matters not now said to be relevant, the Inspector concluded, at para 60:

“Bearing all these matters in mind I conclude that no interference with the European Convention on Human Rights [“the Conventon”] has been established. Accordingly, insofar as Articles 1, 6 and 8 of the Convention are concerned, I am satisfied that the rights of the residents of Falcon Point, and also the residents of Bankside Lofts, have not been violated.”

(The reference to art 1 was clearly intended to be a reference to art 1 of the First Protocol).

The Inspector added, at para 64:

“Matters of property valuation and the financial status of the [developers] were raised at the enquiry, but I place no importance on them as they do not amount to material planning considerations.”

That proposition is not challenged but it is submitted that the diminution in value is relevant to the extent mentioned in para 11 of this judgment.

SUBMISSIONS AND JUDGMENT OF COLLINS J

[8] Permission to appeal was sought from, and granted by, Collins J only on the ground that there had been a breach of the [Human Rights Act 1998](#) (“the 1998 Act”). It is submitted that art 8, and possibly art 1 of the First Protocol, which form part of the law of England and Wales by virtue of ss 1 and 6 of the 1998 Act, were infringed by the Respondent’s decision. Article 8 was engaged by a departure from the development plan involving loss of privacy, mutual overlooking, loss of a view and loss of light at Bankside Lofts and Falcon Point, the interference with television reception at Falcon Point for a year and the diminution in value in the properties at Bankside Lofts.

[9] It is further submitted that the Respondent acted unlawfully in failing to address or apply, when making his decision, the proportionality principle. It is submitted that the loss of amenity represents an infringement of the neighbouring residents’ right to respect for their private and family life and their homes. It is submitted, in the alternative, that the diminution in value of the homes infringes the right, under art 1 of the First Protocol, to the peaceful enjoyment of them. The Inspector erred, it is claimed, in failing to consider three of the complaints made by the Appellants: loss of a view, interference with television reception at Falcon Point during the construction of the proposed building and the diminution in value of 15% to 20% in the properties at Bankside Lofts. Evidence of diminution to that extent appeared in a surveyor’s report submitted in writing by the Appellants to the Inspector, though not agreed and indeed challenged by way of comment during submissions.

[10] Having considered authorities, the judge concluded:

“28. A balance has to be struck in planning decisions such as the present between the rights of the developer and the rights of those affected by the proposed development. If an adjoining occupier seeks to build on or change the use of his land, an individual is likely to be affected and his enjoyment of his property may be interfered with. In addition, the public generally may be affected if, for example, conservation areas or the green belt is affected. These various matters have all to be weighed and that is what a local planning authority or an inspector will do. In the vast majority of cases, that exercise will deal with all matters which are relevant in deciding proportionality within the meaning of Article 8 or Article 1 of the First Protocol. While no doubt it would be sensible to refer explicitly to proportionality so as to avoid challenges such as this, it is not in my view necessary provided it is clear that all relevant factors have indeed been considered and the result would not be any different.

29. It is difficult not to sympathise with the claimants. Those who live in Falcon Point have had to put up with the disruption of the building of Bankside Lofts and the construction work at Tate Modern. Their amenities will be adversely affected. But in an urban setting it must be anticipated that development may take place and that high rise buildings are inevitable having regard to building costs and the value of city centre land. Further, it is in the public interest that residential developments take place in urban areas if possible. It is clear that the inspector did consider the advantages of the proposed development against the disadvantages to the claimants. It is inconceivable that he would have reached any different conclusion if he had specifically dealt

with proportionality. The obstruction of views for some and any diminution in value would not have affected the position having regard to the inspector's findings in relation to the desirability of this development. In reality, the inclusion of Article 1 of the First Protocol adds nothing since any diminution in value is an effect of the loss of amenity: see *Malster* at para 89 per Sullivan J. [*R (on the application of Malster) v Ipswich Borough Council* [2002] PLCR 251].

30. While it may be correct to say that it is unnecessary to look for a threshold, it makes no difference in practice. If the interference is slight, it will be very easy to show that it is proportionate. The inspector has not erred in his approach to the balancing exercise required by the planning legislation. There is no possibility that he would or should have reached a different conclusion had he specifically referred to proportionality. "

[11] It is submitted that the loss of privacy, overlooking, loss of light, loss of a view and interference with television reception all constitute breaches of art 8. As to diminution in value, in his main submissions, Mr Clayton QC, for the Appellants stated that he was content to treat it as a measure of the loss of amenity relevant for the purposes of art 8. However, in his reply, he argued that a broader view should be taken of the diminution as an interference with the right of respect for the Appellants' homes. In the alternative, it amounted to a partial taking of property under art 1 of the First Protocol. As to television, Condition 20, proposed to be imposed on the planning permission, acknowledges the possibility of interference, during construction, with television reception at Falcon Point. Interference with television reception may be a serious matter, especially for the aged, the lonely and the bedridden (*Hunter v Canary Wharf Ltd* [1997] AC 655, [1997] 2 All ER 426 at 684 per Lord Goff of Chieveley). It is submitted that in deciding whether a Convention right is engaged, the threshold is a low one. Human Rights instruments should be given a broad and generous interpretation.

[12] It is further submitted that the Inspector has erred in law in not expressly addressing the question of proportionality. It is for the planning authority to show that the loss of amenity is justified by the importance of the objective sought by the interference, that the means used is no more than is necessary to achieve that objective and that the interference does not have an excessive or disproportionate effect on the affected individuals. The Appellants have been deprived of an adjudication on whether or not the development fell on the wrong side of the line of proportionality. The balancing exercise was in any event wrongly conducted in that several aspects of loss of amenity and value were not considered.

[13] Further, the balancing test conducted by the Inspector, it is submitted, is not equivalent to applying the principle of proportionality. That requires a more structured and a narrower approach. A balancing exercise conducted for the purposes of s 54A of the 1990 Act is insufficient in the context of art 8 of the Convention which is now part of the law. The judge erred, it is submitted, in holding that all relevant factors were considered and also in holding that it is inconceivable that the Inspector's conclusion would have been different if he had specifically dealt with proportionality.

[14] As to diminution in value, Miss Lieven, for the Secretary of State, adopts the approach of Collins J in para 29 of his judgment. She also submits that the balancing of property rights involved in art 1 of the First Protocol would necessarily be met if the art 8 balance is met.

CONSIDERATIONS OTHER THAN ART 8

[15] Even though permission to appeal is limited to a consideration of the decision in relation to the provisions of 1998 Act, points have been taken which could have been taken had the Statute not been enacted. It is accepted that amenity considerations would have been relevant in any event, although it is claimed that diminution in value is a consideration rendered material by the statute. It is also submitted that, quite apart from the 1998 Act, the balancing of interests was unsatisfactory in that, at para 43, the Inspector had excluded some of the material considerations from the balance. I reject that submission. It is clear that in reaching

his conclusion at para 56, the inspector had regard to all the matters to which he had referred in the earlier paragraphs, including para 43.

[16] Subject to a consideration of the impact of the 1998 Act, I can see no possible grounds for challenging the decision of the First Respondent. As fact finding tribunal and planning authority, the Inspector found facts, set out the material considerations and made the judgment expressed at para 56 of his report. The material considerations in his view indicated that it was appropriate to permit a departure on the appeal site from the development plan. The court is invited to consider the impact of the 1998 Act, and in particular art 8 of the Convention which the Act incorporates into English law, upon the way in which planning decisions, and in particular this planning decision, are taken.

SUBMISSIONS ON THE TEST TO BE APPLIED

[17] I have summarised the general submissions made on behalf of the Appellants. On the particular facts, Mr Clayton submits that the effects of the proposed development on the amenities of the Appellants were of sufficient gravity to engage art 8. It created a qualified and not an absolute right but unless the interference is minimal, the Article is engaged. That being so, the decision maker must consider and expressly state whether the interference with art 8 rights is necessary and proportionate. The judge was wrong to conclude that, had he applied the correct test, the Inspector would have reached the same conclusion. A broad brush approach to the issues must be supplemented by the detailed analysis described in the judgment of Dyson LJ in *R (on the application of Samaroo) v Secretary of State for the Home Department* [2001] UKHRR 1622.

[18] The applicant *Samaroo* was convicted of serious drug offences and made subject to a deportation order. He challenged the order on the ground that it would involve an interference with the right to family life under art 8(1) of the Convention and that such interference was not justified under art 8(2). Dyson LJ referred to the doctrine of proportionality, as explained by Lord Steyn in *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, (*Daly* involved an examination of the privileged correspondence of a prisoner.) Both *Samaroo* and *Daly* involved a direct issue between state powers and individual rights. In *Samaroo*, Dyson LJ stated, at para 19, that “in deciding what proportionality requires in any particular case, the issue will usually have to be considered in two distinct stages. At the first stage, the question is: can the objective of the measure be achieved by means which are less interfering of an individual's rights ? . . . The essential purpose of this stage of the enquiry is to see whether the legitimate aim can be achieved by means that do not interfere, or interfere so much, with a person's right under the Convention.”

[19] At para 20, Dyson LJ stated:

“At the second stage, it is assumed that the means employed to achieve the legitimate aim are necessary in the sense that they are the least intrusive of Convention Rights that can be devised in order to achieve the aim. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons ?”

Dyson LJ concluded, at para 25:

“I would, therefore, hold that in a case such as the present, where the legitimate aim cannot be achieved by alternative means less interfering with a Convention Right, the task for the decision maker, when deciding whether to interfere with the Right, is to strike a fair balance between the legitimate aim on the one hand, and the affected person's Convention Rights on the other.”

[20] That test has been applied, Mr Clayton submits, in the field of planning law in subsequent cases. In *Egan v Secretary of State for Transport Local Government and the Regions* [2002] EWHC 389 Admin, the applicant challenged the non-determination of an application for planning permission for a 12 pitch caravan site in a Green Belt. A proportionality test was applied by the Secretary of State. Sullivan J, having cited *Samaroo*, stated, at para 50:

“Article 8 rights are not absolute. They are qualified in the sense that they do require a balance to be struck, and it is not submitted that Article 8 rights are of a special importance by comparison with other rights guaranteed by the Convention.”

At para 51, the judge referred to factors which “point towards a considerable measure of deference being accorded to the judgment of the decision-taker as to proportionality, it having been established that the necessity threshold has been crossed.”

[21] Similarly in *R (on the application of Gosbee) v The First Secretary of State* [2003] EWHC 770 Admin, a bungalow was not demolished as required by a condition when planning permission for a new dwelling was given. An enforcement notice was issued requiring the demolition of the bungalow. Elias J stated, at para 24, that “in determining whether the interference is proportionate both parties accept, and I agree in this case, that the Court should adopt the two-fold test adumbrated by Dyson LJ in [*Samaroo*]”. Considering the facts, the judge accepted that the Inspector had not in terms disentangled the two questions referred to in *Samaroo* but stated that the key issue was whether the proper balancing of factors had taken place. Elias J concluded, at para 32:

“I do not think there can be any real doubt that the inspector considered both that the condition was the least intrusive interference to achieve the policy of one for one replacement, as he put it, and that the environmental interest which he assessed to be very important outweighed the Article 8 interest in the circumstances of this case. This was essentially a balancing exercise for him in the light of the information he had.”

[22] Mr Clayton submits that the two limbs of the *Samaroo* test should have been applied by the Inspector in the present case. That would have involved enquiring whether the aim to be achieved could be achieved by means which interfered less with the Appellants' rights. It was necessary to consider whether the commercial objectives of the interested party could be achieved by a less intrusive design and whether the residential accommodation could be situated elsewhere in the locality so as to avoid the adverse impact on third parties. Only when that enquiry had been conducted, did the second stage, the fair balance test, arise. At that stage, it is accepted that the decision-maker may be entitled to a significant margin of discretion, as accepted in *Samaroo* at para 39. However, in this case, such deference cannot rectify a decision which is legally flawed because the correct test has not been applied. Moreover, at the second stage the Court must carefully scrutinise the weight given by the Inspector to each factor and, in accordance with *Daly*, interfere if it is concluded that the weight accorded to a factor is unfair and unreasonable.

THE SCOPE OF ART 8 IN CONTEXT

[23] It is necessary to consider the scope of art 8 and its relevance and application in a situation where there are competing private interests between landowners and also a public interest in beneficial land use.

[24] Article 8 of the Convention provides:

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

2 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.

Article 1 of the First Protocol to the Convention provides:

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

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

[25] That environmental considerations may involve a breach of art 8 is clear from the decisions of the European Court of Human Rights in *Lopez Ostra v Spain* [1994] 20 EHRR 277 and *Guerra & Others v Italy* [1998] 26 EHRR 357. In *Lopez Ostra*, a waste treatment plant was built close to the applicant's home in an urban location and the plant released fumes and smells which caused health problems to local residents. The Court held, at para 51:

“Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.”

At para 58, the Court stated:

“Having regard to the foregoing, and despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant - and the applicant's effective enjoyment of her right to respect for her home and her private and family life.”

[26] In *Guerra*, the applicants lived about 1km from a chemical factory which produced fertilizers and other chemicals and was classified as “high risk” in criteria set out by Presidential Decree. The Court stated, at para 58:

“The Court considers that Italy cannot be said to have “interfered” with the applicants' private or family life; they complained not of an act by the State but of its failure to act. However, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life .”

The Court stated, at para 60:

“The Court reiterates that severe environmental pollution may affect individuals' well being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. . . .The Court holds, therefore, that the respondent State did not fulfil its obligation to

secure the applicants' right to respect for their private and family life, in breach of Article 8 of the Convention. “

[27] In *Hatton v United Kingdom* [2003] 37 EHRR 28, the Court had to consider, in the context of art 8, the level of noise caused by night flights at Heathrow Airport and its effect on nearby residents. A scheme limiting the number of aircraft movements at night had been introduced by the Government. The case was referred to the Grand Chamber in accordance with art 43 of the Convention.

[28] The Court stated, at para 96:

“Article 8 protects the individual's right to respect for his or her private and family life, home and correspondence. There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Art.8.”

Having cited *Lopez Ostra and Guerra*, the Court stated:

“97. At the same time, the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy maker should be given special weight.

98. Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure properly to regulate private industry. Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under para 1 of Art.8 or in terms of an interference by a public authority to be justified in accordance with para 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Art 8, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance.”

That paragraph restates what the Court had stated in *Powell & Rayner v United Kingdom* [1990] 12 EHRR 355, at para 41.

[29] The Court repeated the above propositions at para 119 and stated:

“The question is whether, in the implementation of the 1993 policy on night flights at Heathrow Airport, a fair balance was struck between the competing interests of the individuals affected by the night noise and the community as a whole.”

[30] It was stated that it was legitimate for the Government to have taken economic interest into consideration in the shaping of its policy and that environmental protection should be taken into consideration by Governments acting within their margin of appreciation and by the Court in its review of that margin. The Court added, at para 122:

“ . . . It would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights. In this context the Court must revert to the question of the scope of the margin of appreciation available to the State when taking policy decisions of the kind at issue.”

Having considered the evidence, the Court concluded, at para 129, and by a majority of 12 to 5:

“In these circumstances the Court does not find that, in substance, the authorities overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home, and the conflicting interests of others and of the community as a whole, nor does it find that there have been fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights.”

[31] That approach reflects the statement of the Court in *Soering v United Kingdom* (1989) 11 EHRR 439, at para 89:

“inherent in the whole of the Convention is a search for fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's human rights”

[32] In *Connors v United Kingdom* (Application No. 66746/01) (Judgment 27 May 2004), the Court considered the procedure by which possession orders were obtained against gypsies resident on gypsy sites run by local authorities. The facts and issues were different from those in the present case but in its statement of “general principles”, the Court referred to art 8. The Court stated, at para 82:

“On the other hand, in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide, as in the planning context where the Court has found that “[i]n so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation (*Buckley v the United Kingdom, judgment of 26 September 1966, Report of Judgments and Decisions 1966-IV, p.1292, 75 in fine*). . . .Where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant (*Hatton and others v the United Kingdom*,[GC] no. 365022/97, ECHR 2003-. . . , 103 and 123) “

[33] *Hatton* was considered in the House of Lords in *Marcic v Thames Water Utilities Ltd* [\[2003\] UKHL 66](#), [\[2004\] 2 AC 42](#), [\[2004\] 1 All ER 135](#). It was argued that escapes from the public authority's surface water sewers flooding the claimant's garden, and due to overloading of a section of the sewage system, constituted an interference with the claimant's rights under Article 8 and of Article 1 of the First Protocol. The argument was rejected unanimously. Lord Nicholls of Birkenhead referred to the statutory scheme under which Thames Water was operating the offending sewers. Lord Nicholls stated, at para 37:

“Direct and serious interference of this nature with a person's home is prima-facie a violation of a person's right to respect for his private and family life (Article 8) and of his entitlement to peaceful enjoyment of his possessions (Article 1 of the First Protocol). The burden of justifying this interference rests with Thames Water. “

[34] Having cited *Hatton*, Lord Nicholls stated, at para 42:

“In the present case the interests Parliament had to balance included, on the one hand, all the other customers of a company whose properties are prone to sewer flooding and, on the other hand, all the other customers of the company whose properties are drained through the company's sewers. The interests of the first group conflict with the interests of the company's customers as a whole in that only a minority of customers suffer sewer flooding but the company's customers as a whole meet the cost of building more sewers. As already noted, the balance struck by the statutory scheme is to impose a general drainage obligation on a sewerage undertaker but to entrust enforcement of this obligation to an independent regulator who has regard to all the different interests involved. Decisions of the director are of course subject to an appropriately penetrating degree of judicial review by the Courts.”

Lord Nicholls concluded, at para 43, that “in principle this scheme seems to me to strike a reasonable balance. Parliament acted well within its bounds as policy maker.”

[35] Lord Hoffmann also cited *Hatton*. He added, at para 71:

“... That decision makes it clear that the Convention does not accord absolute protection to property or even to residential premises. It requires a fair balance to be struck between the interests of persons whose homes and property are affected and the interests of other people, such as customers and the general public. National institutions, and particularly the national legislature, are accorded a broad discretion in choosing the solution appropriate to their own society or creating the machinery for doing so.”

[36] I also refer to the decision of the House of Lords in *Harrow London Borough Council v Qazi* [\[2003\] UKHL 43](#), [\[2004\] 1 AC 983](#), [\[2003\] 4 All ER 461](#) where the effect of art 8 was considered. The context is different both from that in the present case and that in *Marcic*, where it was not cited. Mr Qazi resisted an order for possession obtained by the local housing authority, as freehold owners of the house where he lived, on the grounds that there was a breach of art 8. It was held, by a majority, that having regard to its object, art 8 could not be relied on to defeat proprietary or contractual rights to possession. Lord Scott of Foscote stated, at para 144 that:

“... If Article 8 does not vest in the home-occupier any contractual or proprietary right that he would not otherwise have, and does not diminish or detract from the contractual or proprietary rights of the owner who is seeking possession, the problem identified by Waller LJ [in the Court of Appeal] does not arise. The fate of every possession application will be determined by the respective contractual and proprietary rights of the parties. Article 8 can never constitute an answer.”

[37] In reaching that conclusion, Lord Scott considered, at para 119 and following, the history of art 8. He stated, at para 122:

“As to the right to respect for home life provided by Article 8 of the Convention, its progenitor is article 12 of the Universal Declaration [of Human Rights, 1948] which says that “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence. ...” Neither this language, nor the language of Article 8 can, in my opinion, be read as authorising any deprivation of the property rights of others.”

Article 17 of the International Covenant on Civil and Political Rights (1966), ratified by the United Kingdom in 1976, provides that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family,

home or correspondence. . .” Thus the wording of the international instruments is consistent though the word “unlawful”, which does not require analysis for present purposes, has been added in the Covenant.

[38] Lord Scott stated, at para 123, that the intention of the Universal Declaration and the European Convention “was to enshrine fundamental rights and freedoms. It was not the intention to engage in social engineering in the housing field”. Lord Scott concluded, at para 125:

“ . . . to hold that Article 8 can vest property rights in the tenant and diminish the landlord's contractual and property rights, would be to attribute to Article 8 an effect that it was never intend to have. Article 8 was intended to deal with the arbitrary intrusion by State or public authorities into a citizen's whole life. It was not intended to operate as an amendment or improvement of whatever social housing legislation the signatory State had chosen to enact. There is nothing in Strasbourg case law to suggest the contrary. “

[39] Lord Hope stated, at para 82:

“I believe that the key to a proper understanding of the issues in this case lies in an appreciation of the fact that Article 8 regards a person's home as an aspect of his right to privacy. The interpretation which I would give to the concept of a person's home in this context is broad enough to give a full measure of protection in a wide range of circumstances that may be envisaged where a person's right to respect for his home is interfered with by the public authorities. The issue which arises in this case is, by way of contrast, a very narrow one which has much more to do with the law relating to property rights than respect for a person's privacy.”

[40] Lord Millett stated, at para 100:

“ . . .Article 8(1) does not give a right to a home, but only to “respect” for the home. This meaning of “respect” for the home cannot be understood in isolation; it can be understood only if Article 8(1) is read together with Article 8(2). This forbids interference with the right conferred by Article 8(1) except in the circumstances specified. By explaining the circumstances in which there may be lawful interference with the right to “respect”, Article 8(2) gives meaning to that concept and limits the scope of the Article.”

Having referred to art 8(2), Lord Millett stated, at para 102:

“Consideration of the question whether interference with the right is “necessary for the protection of the rights and freedoms of others” may also call for a balance to be struck, but it need not do so. A person's right to respect for his home includes his right to listen to music, but not to music so loud that it disturbs his neighbour's sleep at 3.00am. Our ordinary law of nuisance requires the court to conduct a balancing exercise between the competing rights of neighbours to enjoy their respective properties. By carrying out that exercise the court will inevitably be concluding, whether consciously or not, whether its interference with one party's right to respect for his home is necessary to protect his neighbour's rights and freedoms. Provided that it carries out the exercise properly and in accordance with the ordinary law, there is no need to give separate consideration to Article 8.”

[41] While the point at issue in *Qazi* was quite different from that in the present case, the statements of principle do demonstrate the purpose and scope of art 8. While it requires respect for the home, it creates no absolute right to amenities currently enjoyed. Its role though important must be seen in the context of competing rights, including rights of other landowners and of the community as a whole.

[42] The ECHR case of *Hatton* demonstrates the discretion available to national authorities in striking a fair balance between competing interests. In *Connors*, the expression “wide margin of appreciation” was used in relation to planning policies. Moreover, while stating, at para 98 of *Hatton*, that the applicable principles were broadly similar, the court recognised the concept of balance under para 1 of art 8, without reference to para 2, by referring to the requirement to “take reasonable and appropriate measures” to secure the rights under the paragraph. I acknowledge that, in *Qazi*, Lord Millett at para 100, went straight to art 8(2) when considering an alleged breach of art 8(1). His analysis at para 102 and the general approach of the majority in *Qazi*, however, implement the principle that art 8(1) does not create an absolute right but a balancing of interests is appropriate in deciding whether there has been a breach. Where a breach of art 8(1) has been found to exist, as in *Lopez Ostra*, *Guerra and Marcic*, where there was direct and serious interference with a person's home due to flooding with sewage, the effect on amenity has been a serious one. In *Hatton*, it was stated that an issue may arise under art 8 where an individual is “directly and seriously affected” by noise or other pollution.

[43] It emerges from the authorities:

- (a) art 8 is concerned to prevent intrusions into a person's private life and home and, in particular, arbitrary intrusions and that is the background against which alleged breaches are to be considered.
- (b) Respect for the home has an environmental dimension in that the law must offer protection to the environment of the home.
- (c) Not every loss of amenity involves a breach of art 8(1). The degree of seriousness required to trigger lack of respect for the home will depend on the circumstances but it must be substantial.
- (d) The contents of art 8(2) throw light on the extent of the right in art 8(1) but infringement of art 8(1) does not necessarily arise upon a loss of amenity and the reasonableness and appropriateness of measures taken by the public authority are relevant in considering whether the respect required by art 8(1) has been accorded.
- (e) It is also open to the public authority to justify an interference in accordance with art 8(2) but the principles to be applied are broadly similar in the context of the two parts of the Article.
- (f) When balances are struck, the competing interests of the individual, other individuals, and the community as a whole must be considered.
- (g) The public authority concerned is granted a certain margin of appreciation in determining the steps to be taken to ensure compliance with art 8.
- (h) The margin of appreciation may be wide when the implementation of planning policies is to be considered.

[44] I add that the present alleged breach of art 8 is based on a departure from the development plan but, following the reasoning in *Hatton*, where a government scheme regulating movement of aircraft was under consideration, the Court would adopt the same approach whether it is in a departure from the development plan or an application of the development plan itself which is alleged to be in breach of art 8. Of course, the contents of the development plan, and the procedure by which it is adopted, should be Convention compliant.

CONCLUSIONS

[45] In the light of the authorities, and the Inspector's findings of fact, art 8 made no significant impact upon the task to be performed by the Inspector. Article 8 does not achieve the radical change in planning law inherent, although not acknowledged as such by the Appellants, in the submission summarised at para 22 of this judgment that consideration should have been given to the possibility that the benefits achieved by the grant of permission could have been achieved in some other way or on some other site. Article 8, with its reference to the protection of the rights and freedoms of others, and art 1 of the First Protocol with its reference to a person's entitlement to the peaceful enjoyment of his possessions, acknowledge the right of a landowner to make beneficial use of his land subject, amongst other things, to appropriate planning control. As Sullivan J stated in *Malster*, at para 89, in relation to art 1, the prospective developer "is equally entitled to the enjoyment of its possessions."

[46] I am far from persuaded that, in circumstances such as the present, domestic law in general, and the planning process followed in this case in particular, fail to have regard to the art 8 rights of people in the vicinity of the appeal site, including the Appellants. Departure from a development plan, even if it is from a provision entitled 'Protection of Amenity' does not of itself involve a breach of art 8. In his approach to his task, the Inspector struck a balance which was entirely in accord with the requirements of art 8 and the jurisprudence under it. There has been nothing arbitrary about the procedure followed and the striking of the balance provided that reasonable and appropriate measures were taken to secure the Appellants' rights in accordance with art 8(1). The approach the Court should adopt was stated by Lord Bingham of Cornhill in *Daly* at para 23:

"Domestic courts must themselves form a judgment as to whether a Convention right has been breached (conducting such inquiry as is necessary to form that judgment). . ."

[47] I find no breach of art 8(1). Resort to art 8(2) is not in my judgment necessary to uphold the decision, for the reasons I have given, but, if I am wrong about that, it provides, on the Inspector's findings, justification for the permitted development. I refer to the findings at para 56 of the Inspector's decision together with an acknowledgement of the right of a landowner to make use of his land, as a factor to be considered.

[48] Recognition must be given to the fact that art 8 and art 1 of the First Protocol are part of the law of England and Wales. That being so, art 8 should in my view normally be considered as an integral part of the decision maker's approach to material considerations and not, as happened in this case, in effect as a footnote. The different approaches will often, as in my judgment in the present case, produce the same answer but if true integration is to be achieved, the provisions of the Convention should inform the decision maker's approach to the entire issue. There will be cases where the jurisprudence under art 8, and the standards it sets, will be an important factor in considering the legality of a planning decision or process. Since the exercise conducted by the Inspector, and his conclusion, were comfortably within the margin of appreciation provided by art 8 in circumstances such as the present, however, the decision is not invalidated by the process followed by the Inspector in reaching his conclusion. Moreover, any criticism by the Appellants of the Inspector on this ground would be ill-founded because he dealt with the Appellants' submissions in the order in which they had been made to him.

[49] The concept of proportionality is inherent in the approach to decision making in planning law. The procedure stated by Dyson LJ in *Samaroo*, as stated, is not wholly appropriate to decision making in the present context in that it does not take account of the right, recognised in the Convention, of a landowner to make use of his land, a right which is, however, to be weighed against the rights of others affected by the use of land and of the community in general. The first stage of the procedure stated by Dyson LJ does not require, nor was it intended to require, that, before any development of land is permitted, it must be established that the objectives of the development cannot be achieved in some other way or on some other site. The effect of the proposal on adjoining owners and occupants must however be considered in the context of art 8, and a balancing of interests is necessary. The question whether the permission has "an excessive or disproportionate effect on the interests of affected persons" (Dyson LJ at para 20) is, in the present context, no different from the question posed by the Inspector, a question which has routinely been posed by decision makers

both before and after the enactment of the 1998 Act. Dyson LJ stated, at para 18, that “it is important to emphasise that the striking of a fair balance lies at the heart of proportionality.”

[50] I am entirely unpersuaded that the absence of the word “proportionality” in the decision letter renders the decision unsatisfactory or liable to be quashed. I acknowledge that the word proportionality is present in the post-*Samaroo* decisions and the judgments of Sullivan J in *Egan* and Elias J in *Gosbee* but I do not read the conclusion reached by either judge as depending on the presence of that word or on the existence of a new concept or approach in planning law. The need to strike a balance is central to the conclusion in each case. There may be cases where the two-stage approach to decision making necessary in other fields is also appropriate to a decision as to land use, and the concept of proportionality undoubtedly is, and always has been, a useful tool in striking a balance, but the decision in *Samaroo* does not have the effect of imposing on planning procedures the straight-jacket advocated by Mr Clayton. There was no flaw in the approach of the Inspector in the present case.

[51] There remains the discrete question on the Inspector's finding “that matters of property valuation” do not amount to material planning considerations, and its bearing on Convention rights. I readily accept that a diminution in value may be a reflection of loss of amenity and may be taken into account as demonstrating such loss and its extent but, in his reply, Mr Clayton, as I understand it, sought to create diminution of value as a separate and distinct breach of art 8 and art 1 of First Protocol. Having regard to the background and purpose of each Article, I do not accept that submission. A loss of value in itself does not involve a loss of privacy or amenity and it does not affect the peaceful enjoyment of possessions. Diminution of value in itself is not a loss contemplated by the Articles in this context.

[52] I do not underestimate the importance to landowners of a loss of value caused by neighbouring developments but it does not in my view constitute a separate or independent basis for alleging a breach of the Convention rights involved. The weighing of interests should not be converted into an exercise in financial accounting to determine the loss to the respective landowners and to the community.

[53] I would uphold the conclusion and reasoning of the judge and dismiss the appeal.

KEENE LJ:

[54] I agree that this appeal should be dismissed for the reasons given by Pill LJ. Not every adverse effect on residential amenity will amount to an infringement of the right to respect for a person's home under art 8(1), as the Strasbourg jurisprudence makes clear. The inspector's findings in the present case suggest that that threshold level of impact would not be reached as a result of the proposed development, but it is clear from those findings that, even if there was a *prima facie* infringement, it was justified under art 8(2) once one took into account the need to protect “the rights and freedoms of others”. Those others would include the owners of the appeal site as well as the public in general.

[55] I agree with Pill LJ that the process outlined in *Samaroo*, while appropriate where there is direct interference with art 8 rights by a public body, cannot be applied without adaptation in a situation where the essential conflict is between two or more groups of private interests. In such a situation, a balancing exercise of the kind conducted in the present case by the inspector is sufficient to meet any requirement of proportionality.

BAKER LJ:

[56] I agree with both judgments.

Appeal dismissed.