The interface between Community and Administrative law:

Environmental law

Richard Harwood

This paper considers how British public authorities, lawyers and judges have adjusted to the incorporation of European environmental legislation into the well-established land-use planning regime.

British land-use planning

The introduction of comprehensive planning control over land use and development was by the Town and Country Planning Act 1947, developed from earlier legislation, in particular the Town and Country Planning Act 1932. The present regime is contained in the Town and Country Planning Act 1990, heavily amended in 1991 and 2004.

The legislation is in a framework form, in that it sets out the authorisations required and the procedures in the planning process, but does not indicate what the aim of the regime is. There is very limited assistance in the legislation as to what matters are relevant to planning decisions. The legislation did not contain an objective or purpose for the planning system. The Planning and Compulsory Purchase Act 2004 introduced a requirement to contribute to sustainable development in preparing policy, but there is no objective for determining applications.

A consequence has been that the courts have shied away from a hard-edged approach to planning decisions and have treated planning merits as matters entirely for the decision maker. Some domestic planning cases raise issues within the competence of the Court, such as the interpretation of a planning permission, but often the Court's approach is a more reduced, *Wednesbury* unreasonableness analysis. The interpretation of policy is a matter for the decision maker, also subject to *Wednesbury* challenge.

Environmental Impact Assessment and Habitats protection

The European regimes which have provoked the most caselaw are the Environmental Impact Assessment Directive 85/337/EEC (amended by 97/11/EC and 2003/35/EC) and the Habitats regime (which appears in the Birds Directive 79/409/EEC and the Habitats Directive 93/43/EEC).

Environmental Impact Assessment is a process, the essential elements of which are:

- Projects of certain types are required to have EIA if they are likely to have significant effects on the environment;
- Where projects require EIA the developer should produce an environmental statement when the application is made, explaining the scheme, the environment which may be affected, the likely significant effects on the

environment, the mitigation proposed and the alternatives considered. With the environmental statement should be summary, written in non-technical language;

- Public authorities, interest groups and the public at large should be able to comment on the environmental statement;
- The decision maker will make a decision whether to allow the project to proceed.

The Habitats and Birds Directive protect particular sites and species, requiring 'appropriate assessment' before sites are significantly affected by activities. Projects affecting the integrity of those sites (or harming protected species or destroying their resting places) are only permitted if there is no suitable alternative and 'imperative reasons of overriding public interest'.

Implementation of the European regimes

Several different techniques have been applied to implement European Environmental Directives into UK law.

(i) Adding processes to existing consents

The EIA Directive was implemented by deciding what consents covered the projects in the Directive and then devising an EIA process to fit in with that regime. Regulations were adopted for consents including planning permission, harbours, highways, the Electricity Act, Transport and Works Act and salmon farming. One danger of the approach is of missing particular consents. The most high-profile case was the House of Lords ruling in *R v North Yorkshire County Council ex p Brown*[1] that reviews of old mining permissions should be subject to the EIA regime. Other omissions included decommissioning nuclear reactors, intensive agricultural, water abstraction and development on Crown land.

(ii) Replacement consents

Creating an entirely fresh consent, which replaces any domestic legislation, ensures that the new regime is noticed, and can be started afresh. The pollution, prevention and control is a useful illustration.

(iii) Additional approvals

An additional approval could be created to address the European law issue. However, that can be an unnecessary duplication and risks issues falling between two or more regimes and regulators and not being properly considered. The most pointless of the additional approvals are greenhouse gas emissions permits which could have been integrated with pollution prevention and control.

(iv) Parallel processes

[1] [2000] 1 A.C. 397.

The other mechanism is to establish a set of requirements which can be operated alongside an existing regime. This approach is adopted for Strategic Environmental Assessment of plans and programmes (essentially, the adoption of policy affecting land use). The Environmental Assessment of Plans and Programmes Regulations 2004 which implement SEA apply to all policies which meet certain criteria, and must then follow a generalised process. This avoids legislative gaps, but does mean that public authorities and practitioners have to decide whether a particular policy falls under the Regulations and then to apply the SEA Regulations alongside the domestic procedures for adopting that policy. Since there is no agreed list of which policies could require SEA, there may be troubles ahead.

It's all Wednesbury?

A frequent issue in EIA litigation has been whether decision making, or enhancements to procedural requirements have been a matter of discretion, reviewed on narrow Wednesbury grounds, or are hard-edged. The Courts have tendered, at least at first, to treat EIA issues as subject to *Wednesbury* review, rather than as matters of law or jurisdictional fact.

What projects must be considered for EIA:

If a development falls into particular categories of projects then the authority must decide whether the particular scheme requires EIA. In *R v Swale BC ex p RSPB*[2] Simon Brown J said the decision whether any project is within the EIA Regulations is 'exclusively for the planning authority in question, subject only to Wednesbury challenge'. *R(Goodman) v London Borough of Lewisham and Big Yellow Property Company*[3] concerned a proposal for a 'Big Yellow Warehouse'. The Council considered that a 'storage and distribution use' did not fall into the categories of projects (such as 'urban development projects') which need to be considered under the Directive. The High Court followed *Swale*. The Court of Appeal disagreed, saying that the meaning of the categories was a matter of law, although Buxton LJ said, 'The meaning in law may itself be sufficiently imprecise that in applying it to the facts, as opposed to determining what the meaning was in the first place, a range of different conclusions may be legitimately available. That approach to decision-making was emphasised by Lord Mustill, speaking for the House of Lords, in *R v Monopolies Commission ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23 at p 32G, when he said that there may be cases where the criterion, upon which in law the decision has to be made

> " may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational."'

The Courts have been determined to say that whether a project is likely to have significant effects on the environment is judged on a *Wednesbury* basis.

[2] [1991] 1 PLR 6.
[3] [2003] J.P.L. 1309.

Amendments to Environmental Statements

There is no mechanism in the EIA Regulations for a developer to amend an Environmental Statement once it has been submitted (although the public authority can request more information). How then to deal with an informal amendment? In *R(Burkett) v London Borough of Hammersmith and Fulham*, the High Court relied on informal steps:

> "The information was provided by a series of updates which were volunteered by the developer. The letters were placed on the public register and were available for public comment. Further, the letters were referred to in the officer's report prior to the committee meeting convened to determine the application for planning permission. There was neither a breach of the Regulations nor any unfairness nor any impediment to the public's opportunity to make meaningful representations."

The contrary view is that amendments must accord with the requirements of the Directive, and so advertised in the same way as an original environmental statement. This is the view of the British government whose advice since 2002 has been to readvertise the environmental statement as a new ES when amendments are made.

Problems with concepts – development consent

The English courts and the European Court of Justice have diverged most dramatically over the question of which decisions are subject to the EIA regime. EIA is required of a 'development consent', which is defined as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'.[4] The UK legislation treats applications for planning permission as development consents and subject to the EIA regime. However other approvals may be required under a planning permission before the scheme can proceed. Commonly these are the reserved matters (siting, design, external appearance, means of access and landscaping) for buildings when outline planning permission has been granted, and details under individual conditions.

The English courts rejected repeatedly the submission that reserved matters approvals were part of a development consent, and so subject to EIA. In *R v London Borough of Hammersmith and Fulham ex p CPRE* Singer J said in the Court of Appeal 'I categorise this submission as unarguable.'[5] The same argument was rejected by the High Court and the Court of Appeal in *R(Barker) v London Borough of Bromley.*[6] The House of Lords granted leave to appeal, following an intervention by the Secretary of State in support of the Court of Appeal, and referred questions to the ECJ. At around the same time, the European Commission brought infraction proceedings against the UK for not subjecting reserved matters to the EIA process. In the meantime the ECJ had ruled in *Wells* that the imposition of new conditions on a mining permission and the approval of details under those conditions was part of a composite development consent.

[4] EIA Directive, Article 1(2).
[5] [2000] Env L.R. 549.
[6] [2001] EWCA Civ 1766.

Judgments were handed down in the *Barker* and *Commission* cases on 4th May 2006.[7] In the *Commission* case the ECJ ruled:

> "101 In the present case, it is common ground that, under national law, a developer cannot commence works in implementation of his project until he has obtained reserved matters approval. Until such approval has been granted, the development in question is still not (entirely) authorised.
>
> 102 Therefore, the two decisions provided for by the rules at issue in the present case, namely outline planning permission and the decision approving reserved matters, must be considered to constitute, as a whole, a (multi-stage) 'development consent' within the meaning of Article 1(2) of Directive 85/337, as amended."

Barker followed a similar approach.

The approach to procedural error

The Administrative Court has a discretion whether to quash an unlawful decision, whether acting in judicial review or a statutory appeal. The initial approach to EIA cases was to exercise the discretion on domestic principles and uphold permissions even where there had been an unlawful failure to carry out EIA on the basis that the decision would have been unchanged.[8] This doctrine reached its height when the Court of Appeal *Berkeley v Secretary of State for the Environment* in upheld planning permission for the redevelopment of Fulham Football Club despite finding that the Secretary of State failed to consider whether EIA was required.

The House of Lords reversed the decision. Lord Bingham of Cornhill held:[9]

> "Even in a purely domestic context, the discretion of the court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow. In the Community context, unless a violation is so negligible as to be truly de minimis and the prescribed procedure has in all essentials been followed, the discretion (if any exists) is narrower still: the duty laid on member states by article 10 of the EC Treaty, the obligation of national courts to ensure that Community rights are fully and effectively enforced … all point towards an order to quash as the proper response to a contravention such as admittedly occurred in this case."

This approach has been contentious with lower courts.[10] Carnwath LJ has been keen to emphasise that the developer had dropped out of *Berkeley* before the Lords hearing and there was no reference to prejudice to the club.[11]

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[7] C-508/03 *Commission v United Kingdom;* C-290-03 *R(Barker) v London Borough of Bromley*.
[8] *R* v *Poole Borough Council ex parte Beebee* [1991] 2 PLR 27; *Wychavon DC* v *Secretary of State for the Environment and Velcourt Ltd* [1994] Env LR 239.
[9] [2001] 2 A.C. 603 at 608.
[10] There have been a number of first instance judicial attempts to limit the *Berkeley* principle on discretion: see *Berkeley v. SSETR and LB of Richmond upon Thames and Berkeley Homes (West London) Ltd* [2001] J.P.L. para 49-58; *R(Murray) v Derbyshire County Council* [2001] J.P.L. 730; *R (Smith) v SSETR* [2001] EWHC Admin 1170 para 70-76.

The assumption of lawful implementation

Sometimes the Courts have considered that if the Directive was found to have been implemented correctly in one case, it was implemented correctly in all respects. For example, *R(Barker) v London Borough of Bromley* per Brooke LJ:[12]

> "I do not consider that the history of this case discloses any grounds for supposing that Lord Bingham of Cornhill and all the counsel involved in the *Berkeley* case were wrong when they accepted that the Directive was correctly transposed into our domestic law by the 1988 Regulations"

Given the multiplicity of issues which have arisen and continue to arise on the EIA regime, and that many cases can be pursued without alleging a failure of transposition, a court's determination that implementation has been effective is good only for the particular point in issue.

The approach to correcting errors and revocation

In *R v London Borough of Hammersmith and Fulham ex p CPRE* it was claimed that the decision not to require EIA of a major development at White City was unlawful because the council officers concerned did not have delegated authority. The point was raised several years after the grant of planning permission. It was contended that the council's pre-emptory refusal to consider revoking the planning permission because of this alleged error was unlawful. Harrison J rejected the challenge and considered that there was no need to even consider revocation:[13]

> "In my view, the inclusion, in that application, of the refusal to revoke the outline planning permission in reality constitutes an avoidance of the time limits which relate to the substantive decision not to require an environmental assessment. That substantive decision affects the question of the validity of the outline planning permission ... There seems to me to be substance in the submission made on behalf of both the first and second respondents that this part of the application -- the revocation issue -- is really a back-door attempt to try and achieve what the court has already refused to do, namely to permit challenge to the validity of those planning decisions."

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[11] *R (Jones) v. Mansfield District Council* [2003] EWCA Civ 1408, para 59; *Bown v. Secretary of State* [2003] EWCA Civ 170, para 47 ("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."); *R(Burkett) v London Borough of Hammersmith and Fulham* [2004] EWCA Civ 105.

[12] [2002] Env LR 25.

[13] [2000] Env LR 565.

The European Court of Justice took a diametrically opposed position in *R(Wells) v Secretary of State for Transport, Local Government and the Regions*:[14]

> "it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment ... Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337."

The argument of legal certainty was relied upon by the Court in *CPRE* in rejecting consideration of revocation. The ECJ rejected the argument in the circumstances of *Wells*, where revocation had been requested before details had been approved under the conditions, saying:

> "It cannot therefore be contended that revocation of the consent would have been contrary to the principle of legal certainty."

The legal certainty argument is unconvincing in any circumstances. The domestic law provides for revocation of planning permissions subject to compensation. Revocation or modification can occur at any stage, even in respect of the unbuilt elements of an incomplete scheme. After a scheme has been built out, discontinuance is still possible. That position is entirely certain.

Objectives and the weight of considerations

The domestic approach in planning is that the weight to attach to a relevant consideration is a matter for the decision maker subject to *Wednesbury* irrationality *Tesco Stores v Secretary of State for the Environment* [1995] 2 All E.R. 636 (Lord Hoffmann):

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration there fore involves no view about the part, if any, which it should play in the decision-making process.
>
> This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of

[14] C-201/02, [2004] JEL 261.

> British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."

Planning and environmental law has not been used to ascribing greater weight or importance to particular considerations. The legislation does not indicate the result to be achieved. However, European legislation sometimes does do. The Waste Framework Directive sets objectives including a waste hierarchy (reduce, reuse, recycle, derive energy, landfill) and identifies various environmental harms to avoid. The UK has adopted policy under the Directive to give effect to these aims. In *R v Derbyshire County Council ex p Murray* Maurice Kay J treated these objectives as mere considerations:[15]

> "the judicial creation of a special category of consideration attracting substantial weight as a matter of law would represent a radical departure from first principles in this area and would also generate numerous disputes as to what is "substantial weight" in the context of a particular case."

However in subsequent cases the Court of Appeal has held that 'substantial weight' should be attached to these objectives.[16] Landfill decisions must be 'in line with' these objectives, under the Landfill Directive, although that does not require that the objectives are achieved.[17]

The Courts are still grappling with the language and the practice of dictating the weight to be attached to these considerations and how decisions will be reviewed. In these limited but important cases the *Tesco* mantra that weight is for the decision maker does not apply.

Richard Harwood
39 Essex Street
London

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[15] [2001] J.P.L. 730. Following *R v Bolton Metropolitan Borough Council ex parte Kirkman* [1998] JPL 787 and *R v Leicestershire County Council ex parte Blackfordby & Boothorpe Action Group* [2001] Env LR 2.
[16] *Thornby Farms v Daventry District Council* [2002] EWCA Civ 31; *R(Blewett) v Derbyshire County Council* [2004] EWCA Civ 1508, [2005] J.P.L. 620.
[17] *R(Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin).