R (on the application of Champion) (Appellant) v North Norfolk District Council And Another (Respondents) [2015] UKSC 52

Habitats Directive "screening", EIA screening, reliance on mitigation measures and the discretion to grant relief.

Background

The appeal concerned a proposed development by Crisp Maltings Group Ltd ("CMGL") in Norfolk, for two large silos, and a lorry park with wash bay and ancillary facilities, on a site close to the River Wensum – a Special Area of Conservation, protected under the EU Habitats Directive (Directive 97/62/EC), implemented by the Conservation and Habitats Species Regulations 2010 ("the Habitats Regulations").

Concerns were raised by the Appellant (Mr Champion), inter alia, that the development could cause pollution due to the hydrological connectivity with the site.

The planning application process had begun in 2009 – several years before final planning permission was granted. In 2010, the council issued a "negative" screening opinion that an Environmental Impact Assessment (EIA) was not required. In the intervening years before a final decision on the application, the statutory consultees - Natural England and the Environment Agency – at first objected to the development due to the possibility of pollution, but later withdrew their objections, partly as a result of further reports provided by consultants for the developer and recommendations made to provide mitigation measures if planning permission were granted.

In 2011, at the end of the process, the planning officer advised that "no appropriate assessment is required "in light of all the information that now exists" and " there would not be a likely significant effect on the River Wensum SAC". He added that, the proposal is not EIA development on the basis that there are not likely to be significant environmental effects", a view which was supported by Natural England's later view that: "there would not be a likely significant effect on the River Wensum SAC … as a result of this proposal if the proposed mitigation measures are put in place".

Ultimately, after consideration by the planning committee, permission was granted in 2011.

The Appellant then issued proceedings in the High Court on the basis that that the council failed to comply with the procedures required by the regulations governing EIA and "appropriate assessment", respectively under EIA and Habitats Regulations. The decision to grant planning permission was quashed by the High Court. However, the Defendant won at the Court of Appeal, following which Mr Champion, appealed to the Supreme Court.

Environmental Impact Assessment

The EIA Directive requires that where projects fall under the first of two annexes, an Environmental Impact Assessment should be undertaken. Where projects fall under annex II, then they require a "determination" by the "competent authority" whether it is likely to have a significant effect on the environment so as to require an EIA.

In the United Kingdom the environmental assessment procedure falls under the implementing Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 2011 (the Regulations) in which schedules 1 and 2 correspond to Annex I and II respectively.

Determination of whether a full EIA is required for the project is achieved through a "screening" process set out in the Regulations.

Carnwath turned to the earlier case of R (Lebus) v South Cambridgeshire DC [2002]

"Whilst each case will no doubt turn upon its own particular facts, and whilst it may well be perfectly reasonable to envisage the operation of standard conditions and a reasonably managed development, the underlying purpose of the Regulations in implementing the Directive is that the potentially significant impacts of a development are described together with a description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment. Thus the public is engaged in the process of assessing the efficacy of any mitigation measures". [Lebus para 45]

However, the reliance on mitigation where likely significant impacts can be identified is not acceptable:

"It is not appropriate for a person charged with making a screening opinion to start from the premise that although there may be significant impacts, these can be reduced to insignificance as a result of the implementation of conditions of various kinds. The appropriate course in such a case is to require an environmental statement setting out the significant impacts and the measures which it is said will reduce their significance ..."[Lebus para 46]

Lord Carnwath added that the line of cases from Gillespie v First Secretary of State [2003] Env LR 30 to R (Catt) v Brighton and Hove City [2007] EWCA simply illustrated "the point that each case must depend on its own facts..."

Applying those principles to the present case, he commented that the evidence of likely significant effects was such that a screening opinion should have been decided in the alternative (i.e. positively for an EIA) and there were issues left unresolved in relation to, for instance, measures to prevent pollution via the maintenance regime. But the fact that the issues were ultimately resolved to the satisfaction of Natural England and others did not mean that there had been no need for EIA.

He concluded, "The failure to treat this proposal as EIA development was a procedural irregularity which was not cured by the final decision."

Discretion

Having found a "legal defect" in the procedure leading to the grant of permission, Lord Carnwath went on to consider the remedy.

He commented that, following the decision in Walton v Scottish Ministers [2012] UKSC 44, [2013] PTSR 51, even where a breach of the EIA Regulations is established, the court retains a discretion to refuse relief if the applicant has been able in practice to "enjoy the rights conferred by European legislation, and there has been no substantial prejudice".

However, this now needs to be seen in the light of the subsequent judgment of the CJEU in Gemeinde Altrip v Land Rheinland-Pfalz (Case C-72/12) [2014] PTSR 311.

In that case, the CJEU judges had ruled that:

"... it does not appear that the objective of Directive 85/337 of giving the public concerned wide access to justice would be compromised if, under the law of a member state, an applicant relying on a defect of that kind had to be regarded as not having had his rights impaired and, consequently, as not having standing to challenge that decision".

However, the CJEU added that such an approach must not shift the burden onto the claimant of proving that the decision under challenge would have been different without the procedural defect. Carnwath commented that:

"I find nothing in this passage inconsistent with the approach of this court in Walton. It leaves it open to the court to take the view, by relying "on the evidence provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court" that the contested decision "would not have been different without the procedural defect invoked by that applicant". In making that assessment it should take account of "the seriousness of the defect invoked" and the extent to which it has deprived the public concerned of the guarantees designed to allow access to information and participation in decision-making in accordance with the objectives of the EIA Directive". [para 58]

Applying the test to the circumstances of the case, he concluded that the court should exercise its discretion to refuse relief.

That was because there was nothing to suggest that the decision would have been different had the investigations and consultations over the preceding year taken place within the framework of the EIA Regulations. Additionally,

"... the public were fully involved in the process and their views were taken into account. The Appellant was given the opportunity to raise any specific points of concern not covered by Natural England before the final decision".

Delay

Carnwath went on to comment on the delay in the challenge. The defects in the screening opinion – which formed the basis of the legal challenge – were not challenged until more than a year later.

"The formal provision, in both the EIA Directive and the Regulations, for a decision on this issue at an early stage seems designed to provide procedural clarity for the developer and others affected. It is in no-one's interest for the application to proceed in good faith for many months on a basis which turns out retrospectively to have been defective."

The principle established in R (Burkett) v Hammersmith and Fulham LBC [2002] 1 WLR 1593) and applied analogously in R (Catt) v Brighton & Hove City Council [2007] Env LR 32, is that a "timeous legal challenge" to a defect in the process which leads to a final decision (e.g. a committee resolution in Burkett or a screening opinion in Catt) is possible without delay being at issue. However, Carnwath seemed to cast doubt on this;

"Although we have not been asked to review that decision, I would wish to reserve my position as to its correctness. I see no reason in principle why, in the exercise of its overall discretion, whether at the permission stage or in relation to the grant of relief, the court should be precluded from taking account of delay in challenging a screening opinion, and of its practical effects (on the parties or on the interests of good administration)."

He concluded overall:

"In future cases, the court considering an application for permission to bring judicial review proceedings should have regard to the likelihood of relief being granted, even if an irregularity is established. (I emphasise that this is said without any reference to the new section 31A(2) of the Senior Courts Act 1981, which as is agreed does not apply to this appeal)".

Comment

Firstly, the judgment clarifies that there is no requirement for a screening stage in the Habitat's Directive process where projects are to be considered for their likelihood of significant effect on the environment and an appropriate assessment undertaken.

Secondly, it re-iterates the principle from the line of cases from Lebus that although leaving issues of potential effects on the environment to mitigation measures later in the process can form part of the EIA screening process, it cannot correct defects in that process where an EIA should have been required.

Thirdly, non-EIA related investigations undertaken after an earlier, defective screening exercise will not remedy the defects in the screening.

However, and most importantly, even if there is such a defect, whether there should be a remedy – i.e. a quashing order - depends on the circumstances. Carnwath refers to the recent introduction of a statutory requirement at s 84 of the Criminal Justice and Courts Act 2015 for a "no difference" test to be applied at the permission and substantive phases of judicial review.

The same rules apply in all judicial reviews – even where EIA issues or other European Directives are invoked. In other words, there is no special class of cases where the sensitivities of community law dictate in absolute terms that where a required process is defective a remedy should follow. There may be a defective screening process but unless it makes a difference to the outcome, a remedy may not be forthcoming.

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