Neutral Citation Number: [2022] EWCA Civ 1640

Case No: CA-2021-001940

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
HHJ Worster (sitting as a judge of the High Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 December 2022

Before :

LORD JUSTICE SINGH
LORD JUSTICE ARNOLD
and
LORD JUSTICE LEWIS

- -

Between :

R (DAVID SAHOTA)	**Appellant**
- and –	
HEREFORDSHIRE COUNCIL	**Respondent**
- and -	
JOHN MORGAN	**Interested Party**

- -
- -

Alex Goodman (instructed by **Leigh Day LLP**) for the **Appellant**
Matthew Henderson (instructed by **Herefordshire Council**) for the **Respondent**
The **Interested Party** did not appear and was not represented

Hearing date: 15 November 2022

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on 13 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Singh:

Introduction

1. This appeal arises from the Respondent's grant of planning permission, on 4 June 2020, to the Interested Party (Mr John Morgan), to which the Appellant (Mr David Sahota) objects. The Appellant brought a claim for judicial review to challenge the grant of planning permission but that claim was dismissed by HHJ Worster (sitting as a judge of the High Court) ("the judge"), in a judgment given on 25 August 2021.

2. The issues on this appeal are: (1) whether the judge erred in admitting the evidence of Mr James Bisset, the ecology officer at the Respondent authority; and (2) whether the Respondent's planning committee was misled into believing that there was no need for a Habitats Regulations Assessment ("HRA").

3. At the hearing we heard from Mr Alex Goodman for the Appellant and Mr Matthew Henderson for the Respondent. I express the Court's gratitude to them both for their written and oral submissions.

Factual Background

4. On 30 July 2019 the Interested Party applied to the Respondent for planning permission for the proposed development, which was for the erection of a cattle shed and an extension to an existing agricultural building. The site of the proposed development is located within the upper Golden Valley in western Herefordshire in the rural parish of Dorstone. The River Wye is a Special Area of Conservation ("SAC") and is also a Site of Special Scientific Interest ("SSSI").

5. The Appellant is concerned that, as the proposed development contemplates the expansion of livestock farming, this would increase manure production and the spreading of manure on the surrounding fields, which would run off into nearby watercourses, in particular the River Wye.

6. The Respondent's planning committee considered the application and resolved to grant planning permission following a meeting on 3 June 2020. The committee's resolution was in accordance with the recommendation of the Respondent's officers, as contained in their report to the committee.

7. On 20 August 2019, Mr Bisset had been consulted by the Respondent's case officer about the application for planning permission. Mr Bisset is a qualified ecology officer with over 35 years' professional experience. He provided written advice to the planning officer, which stated:

> "The additional cattle shed has a floor area of 465.5msq. This falls under any trigger sizes (500msq) for air pollution emissions in regards to any Sites of Special Scientific Interest as identified through [N]atural England's details SSSI Impact Risk Zone data set. Based on this information no detailed air emissions assessment is required for this specific development at this location. No likely significant effects on any relevant

> SSSI have been identified. There are no further ecology comments on this ... development within an existing developed farm complex."

8. That advice was inserted verbatim into the officers' report to the planning committee, at para. 4.2. I will set out other relevant parts of the report below.

9. In the course of these proceedings in the High Court, the Respondent filed a witness statement from Mr Bisset, dated 23 October 2020. Objection was (and is) taken to the admission of that statement. I will refer to Mr Bisset's evidence in more detail below.

10. In his judgment the judge rejected the objection to the admission of the evidence of Mr Bisset. He then dismissed the claim for judicial review on its merits.

The planning officers' report

11. As I have mentioned, para. 4.2 of the officers' report set out verbatim the advice which had been received from the ecology officer.

12. At paras. 6.24-6.26, under the heading 'Ecology and Biodiversity', the report said:

> "6.24 Policy E1 of the DNDP [Dorstone Neighbourhood Development Plan] sets out that development proposals should not have any adverse impacts on the River Wye Special Area of Conservation (SAC), echoing the requirements set out in more detail at Policy SD3 and SD4 of the CS [Core Strategy].
>
> 6.25 The applicant has advised that given the building would be for the housing of cattle, all manure will be solid with no slurry given that the cattle would be on straw, as is standard practice.
>
> 6.26 The Council's Ecologist has commented that the additional cattle shed would have a floor area of 464.5msq. This falls under any trigger sizes (500msq) for air pollution emissions in regards to any Sites of Special Scientific Interest as identified though natural England's details SSSI Impact Risk Zone data set. Based on this information, there is no detailed air emissions assessment required for this development at this location. Noting that the site is outside the River Wye Special SAC, there are no other triggers for a Habitat Regulations Assessment (HRA) process and there are therefore no likely significant effects on any other relevant SSSI."

13. The report concluded, at para. 6.30, as follows:

> "The application would result in the modest expansion to a small scale rural enterprise, fulfilling economic objectives of sustainable development. The proposed buildings, by virtue of their design, scale and siting would positively respond to the existing and established complex of buildings and are not considered to cause harm to the wider landscape setting. Moreover, no harm to ecological networks or the local highway network is identified. Overall, the proposal is considered to accord with the provisions of the Dorstone Neighbourhood Development Plan, the Herefordshire Local Plan – Core Strategy and the National Planning Policy Framework. The proposal is therefore considered a sustainable form of development and is accordingly recommended for approval subject to the conditions as set out below."

14. It appears from the transcript of the meeting of the planning committee on 3 June 2020 that members of the committee asked questions of the planning officers about ecology matters. The answers in substance repeated what had been said in writing, that the advice from the ecology officer was that there was no cumulative impact assessment of what the site could produce because the ecologist had taken the view that there is no objection to the proposal.

Material legislation

15. Regulation 63 of the Conservation of Habitats and Species Regulations 2017 (SI 2017 No. 1012) ("the Habitats Regulations") transposed article 6(3) of Council Directive 92/43/EEC (the Habitats Directive) into domestic law. The Habitats Regulations remain part of domestic law although the United Kingdom has now left the European Union.

16. Regulation 63 provides that:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
>
> (a) is *likely to have a significant effect on a European site* or a European offshore marine site (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of that site, must make *an appropriate assessment* of the implications of the plan or project for that site in view of that site's conservation objectives. [...]
>
> (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any

representations made by that body within such reasonable time as the authority specifies [...]" (Emphasis added)

Grounds of Appeal

17. Although the initial grounds of appeal were not drafted in this way, the Appellant has adopted what was said by Stuart-Smith LJ in granting permission to appeal on 19 January 2022 and has formulated the issues which arise on this appeal in the following way:

(1) The judge's decisions (a) to admit the evidence of Mr Bisset and then (b) to dismiss the claim relied critically on erroneous and/or irrational interpretations of the evidence (including the evidence of Mr Bisset itself) and of the argument advanced to the judge and further, his decision is unjust (see 52.21(3)(b)) in admitting Mr Bisset's evidence and in the reliance he placed on it ("Issue 1").

(2) The judge erred in law in deciding that, prior to granting planning permission, the Respondent had complied with regulation 63 of the Habitats Regulations ("Issue 2").

Issue 1: the admissibility of Mr Bisset's evidence

18. The authorities on the admissibility of "*ex post facto*" evidence in judicial review proceedings were summarised by this Court (comprising Bean LJ, Sir Keith Lindblom SPT and Sir Stephen Irwin) in *R (United Trade Action Group Ltd) v Transport for London* [2021] EWCA Civ 1197, [2022] RTR 2, at para. 125. The authorities, many of which were cited to us also, include *R v Westminster City Council, ex parte Ermakov* [1996] 2 All ER 302; *R (Lanner Parish Council) v Cornwall Council* [2013] EWCA Civ 1290; *R (Watermead Parish Council) v Aylesbury Vale District Council* [2017] EWCA Civ 152, [2018] PTSR 43; and *Kenyon v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 302, [2021] Env LR 8. It is unnecessary to recite all of the seven principles which were identified by the Court in *United Trade Action Group* but several pertinent points can be derived from them.

(1) The court has a discretion whether to admit evidence that has come into existence after the decision under review was made, as a means of elucidating, correcting or adding to the contemporaneous reasons for it.

(2) Evidence directly in conflict with the contemporaneous record of the decision-making will not generally be admitted. The touchstone is whether the evidence is elucidation not fundamental alteration, confirmation not contradiction.

(3) Sometimes, even where the evidence is merely explanatory, the court will have to ask itself whether it would be legitimate to admit the explanation given. Circumstances will vary. For example, when the court is dealing with a challenge to a planning inspector's decision it will have in mind that there is an express statutory duty on the inspector to give reasons for his decision. As was common

ground before us, there is no similar statutory duty on a local planning authority in a case such as the present. There was such a duty at one time but that has been abrogated: see the Town and Country Planning (General Development Procedure) (England) (Amendment) Order 2003 (SI 2003 No. 2047), article 5, which was brought into force on 5 December 2003 and was repealed with effect from 25 June 2013 by the Town and Country Planning (Development Management Procedure) (England) (Amendment) Order 2013 (SI 2013 No. 1238), article 7. The history is set out more fully in *Dover District Council v Campaign to Protect Rural England (Kent)* [2017] UKSC 79, [2018] 1 WLR 108, at paras. 28-30 (Lord Carnwath JSC).

19. It follows from what I have said so far that the basis on which this Court can interfere with the judge's decision to admit Mr Bisset's evidence in the present case is a limited one. As was common ground before us, the role of this Court is its usual one when sitting as an appellate court. It is not our function simply to substitute our own decision for that of the judge. We must ask ourselves whether the judge exercised his discretion wrongly. In particular, did the judge fall into error as a matter of principle? And, even if he did not, was the conclusion to which he came one that was not reasonably open to him?

20. When approached in that way, I am unable to accept Mr Goodman's submissions. In my view, the judge did not fall into error as a matter of principle. He correctly directed himself as to the relevant principles and the authorities on this topic. He reminded himself of the need for caution before admitting Mr Bisset's evidence. Furthermore, I do not think that the conclusion to which he came was one which was not reasonably open to him. To the contrary, I agree with the judge that it was helpful in this case to admit Mr Bisset's evidence in order to elucidate what had been before the committee. Indeed, as will become apparent later when I address Issue 2, it could be said that it is in the Appellant's interests, and not necessarily the Respondent's, for Mr Bisset's evidence to be admitted, since this enables Mr Goodman to attack the reasoning in that evidence which would not have been apparent on the face of the officers' report to the planning committee.

21. Mr Goodman made three fundamental submissions before us in support of his argument on Issue 1. The first submission is that there was a structural defect in the judge's reasoning. By this Mr Goodman means that, since the decision-maker was the planning committee and not Mr Bisset, it was not open to the judge to admit his evidence by way of elucidation of the committee's reasons for granting planning permission. In support of that submission Mr Goodman relied on the decision of the High Court in *R (Shasha) v Westminster City Council* [2016] EWHC 3283 (Admin), [2017] PTSR 306, in particular at paras. 42-43 and 56 (Mr John Howell QC, sitting as a deputy High Court judge).

22. This submission comes up against the problem that it is well established that, although one is concerned with the members' reasons and not the planning officer's, where a planning officer makes a recommendation which is followed by the members, the reasonable inference is that the members did so for the reasons advanced by the officer, unless there is some indication to the contrary: see *R v Mendip District Council, ex parte Fabre* (2000) 80 P & CR 500, at 511 (Sullivan J), a passage cited with approval by this Court in *R (Palmer) v Herefordshire Council* [2016] EWCA Civ 1061, [2017] 1 WLR 411, at para. 7 (Lewison LJ). In the present case, I can see no

reason to avoid drawing the reasonable inference that the planning committee did grant planning permission for the reasons advanced by the officers in their report to it. Accordingly, the suggested distinction between the committee's reasons and those of the officers (including Mr Bisset) falls away.

23. Mr Goodman's second submission is that Mr Bisset's evidence was not simply elucidation but rather contradicted what had been said to the committee in the officers' report. I disagree. In my view, it was open to the judge to conclude that the evidence of Mr Bisset simply set out his "workings", which helped to understand why he had reached the conclusion which he had, and which had been fairly and fully set out in the officers' report to the committee. In this context it is important to bear in mind what Sullivan J said in *Fabre*, at page 509: part of a planning officer's expert function in reporting to the committee must be to make an assessment of how much information needs to be included in the report in order to avoid burdening a busy committee with excessive and unnecessary detail. Furthermore, as was said in *Fabre* and has frequently been reiterated in similar cases, it should be borne in mind that the planning committee comprises local councillors, who are likely to be familiar with their own local area. In the present case that is clear from the transcript of the planning committee meeting which we have before us. For example, the local councillor in whose ward the proposed development site is located made detailed and pertinent remarks at that meeting.

24. In this context it is also important to bear in mind what was said by Lady Hale JSC in *R (Morge) v Hampshire County Council* [2011] UKSC 2, [2011] 1 WLR 268, at paras. 35-36. As Lady Hale emphasised in that passage, in this country planning decisions are taken by democratically elected councillors, who are responsible to, and sensitive to the concerns of, their local communities. They have professional advisers who investigate and report to them. Those reports must 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 court 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. Lady Hale also emphasised that democratically elected bodies go about their decision-making in a different way from courts. It is their job, not the court's, to weigh the competing public and private interests involved.

25. Mr Goodman's third submission is that the judge's decision to admit Mr Bisset's evidence in this case goes "against the grain" both of the nature of judicial review proceedings; and the nature of planning decision-making in this country.

26. I do not agree that what the judge did in this case goes against the grain of judicial review proceedings. He was well aware of the need for caution before admitting this type of evidence but was entitled to do so consistent with the nature of judicial review proceedings. In this context Mr Goodman placed reliance on what was said by Coulson LJ in *Kenyon*, at para. 28, that in judicial review proceedings it is generally inappropriate to seek to rely on documents which were not available to the decision-maker. In my view, Coulson LJ's particular concern in that passage was that admitting *ex post facto* documents risks undermining the process of judicial review because the court will be asked to conduct a kind of "rolling review", in which nothing is ever finalised or settled. This serves only to encourage the attitude that it is always possible to "have another go." Although I agree with Coulson LJ about the

risks of permitting a "rolling review" they do not arise on the facts of the present appeal. What Mr Bisset's evidence does is not to refer to information which has arisen after the decision under challenge was taken. Rather it refers to material which he had in his mind at the time and which helps to explain how he reached the conclusion which he did and which was then conveyed to the planning committee through the officers' report.

27. Turning to the "grain" of the planning system, I accept Mr Henderson's submission for the Respondent, that Mr Goodman has simply been unable to identify any legal obligation which was breached by the procedure adopted in this case. Although it is true that in a general lay-person's sense, the planning system is open to public scrutiny, there are specific legal obligations, for example to consult the public in certain contexts, which simply do not arise in the present context. By way of example, Mr Henderson showed us Article 15 of the Town and Country Planning (Development Management Procedure) England Order (SI 2015 No. 595). Article 15 requires a planning application to be publicised. That was done in the present case and has nothing to do with the admissibility of Mr Bisset's evidence.

28. Further, there is a provision in regulation 63(4) of the Habitats Regulations themselves which requires a competent authority to consult the public ("take the opinion of the general public") if it thinks it appropriate to do so: as Mr Henderson pointed out, this shows that, when the legislator wished to cater for public participation in the decision-making process, it did so. The fact that there is no specific provision which deals with the present situation is telling.

29. For the above reasons I would reject the Appellant's submissions on Issue 1.

Issue 2: whether an appropriate assessment was required

30. On behalf of the Appellant Mr Goodman submits that the officers' report misled the planning committee by advising that an HRA was not required in this case. He submits that regulation 63 of the Habitats Regulations requires a competent authority to undertake an "appropriate assessment" before giving consent to any project likely to have a significant effect on a European site. It is common ground that the River Wye SAC is such a site. It is also common ground that an appropriate assessment did not take place; this is because it was considered to be unnecessary by the Respondent, on the advice of its officers.

31. Mr Goodman submits that the test under regulation 63 is whether scientific doubt can be excluded as to the possibility that the proposal could, in combination with other developments, have an adverse effect on the River Wye SAC. He submits that the officers' report did not properly advise the planning committee of that test, and the report's reasoning that, because the site was not itself within the SAC, there were "therefore no likely significant effects" was wrong in law. This was because the site and all run off from it is hydrologically connected to the River Wye SAC, so that the mere fact that the site was not within the SAC was not determinative of the potential impacts as the advice seemed to suggest. Furthermore, as Mr Goodman emphasised before us, the Appellant's fundamental complaint is that the officers, including Mr Bisset, did not consider what would be the *cumulative* impact of the increase in

manure production at the proposed development site when combined with the manure produced and spread in other parts of the farmholding.

32. In this context Mr Goodman showed us the witness statement of Simon Maiden-Brooks. The judge permitted the Appellant to rely on that statement only to a limited extent, going to the issue under section 31 of the Senior Courts Act 1981 (which is no longer a live issue before this Court). The judge did not permit the Appellant to rely on the witness statement for wider purposes. Nevertheless, Mr Goodman referred us to that statement, in particular paras. 35-36, which state:

> "35. In simple terms, the whole issue is that when manure is spread within the hydrological catchment area, the rain causes that to run off, in part as surface run-off. The manure is nutrient-rich, and it is this increase in nutrients which causes the problem with the River Wye SAC. I have concluded that all of the land on which the manure is being spread is within the hydrological catchment area of the River Wye SAC.
>
> 36. Notwithstanding this, on the Council's case, some of the land is within the purple shaded area, which leads to the conclusion that (even on the Council's case) some of the manure spreading areas will potentially cause problems to the River Wye SAC. I am therefore unclear as to why an HRA wasn't carried out."

33. I will return to that evidence below when I set out my conclusions on Issue 2.

34. Before us particular reliance was placed by Mr Goodman on *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, [2015] PTSR 1417, at para. 83, where Sales LJ said:

> "I agree with Mr Jones's submission, to the extent that he argued that it would not comply with the relevant standards of evidence indicated by the Court of Justice for a national competent authority simply to rely for its screening opinion or 'appropriate assessment' under article 6(3) on a mere assertion by an expert, unsupported by consideration of any background facts and without reasoning to explain the assertion made. If such a case arose, evidence of that character could fairly be described as merely subjective, and as material which failed to qualify as something which could be regarded as 'the best scientific knowledge in the field'. However, *such a case will be rare*. Expert witnesses know that it is incumbent on them to refer to relevant underlying evidence and to explain their opinions, and typically do so." (Emphasis added)

35. Mr Goodman submits that the present case was not one of those "rare" cases in which it was "obvious" that no appropriate assessment was required. He also emphasised before us that the threshold for an HRA is a very low one. For that proposition he relied in particular on the Opinion of Advocate General Sharpston in *Sweetman v An Bord Pleanála* (C-258/11) EU:C:2013:220, [2014] PTSR 1092, at paras. 47-49, where she said that the "possibility" of there being a significant effect on a European site will generate the need for an appropriate assessment for the purposes of article 6(3) of the Habitats Directive.

Relevant legal principles

36. It was common ground before us that the principles which govern this kind of challenge were summarised by Lindblom LJ in *R (Mansell) v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, [2019] PTSR 1452, at para. 42. As Lindblom LJ put it at para. 42(2):

> "The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made."

As Lindblom LJ emphasised in the same passage, the officers' report is not to be read with undue rigour but with reasonable benevolence and bearing in mind that it is written for councillors with local knowledge. Minor or inconsequential errors may be excused.

37. It is also important to keep in mind the points emphasised by Lindblom LJ in para. 41. First, the Planning Court (and this Court also) must always be vigilant against excessive legalism infecting the planning system. The courts must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but (at local level) to elected councillors with the benefit of advice given to them by planning officers. Further, they are entitled to expect good sense and fairness in the court's review of a planning decision, not the hypercritical approach which the court is often urged to adopt.

38. In the specific context of the Habitats Regulations, Lindblom LJ gave the following guidance in *R (Lee Valley Regional Park Authority) v Epping Forest District Council* [2016] EWCA Civ 404, [2016] Env LR 30, at para. 65:

> "… It must be remembered, as Sullivan J said in *R. (on the application of Hart District Council) v Secretary of State for Communities and Local Government* [2008] 2 P. & C.R. 16 (in para. [72] of his judgment), that the Habitats Directive is 'intended to be an aid to effective environmental decision making, not a legal obstacle course'. Judging whether an appropriate assessment is required in a particular case is the responsibility not of the court but of the local planning authority, subject to review by the court only on conventional

> *Wednesbury* grounds (see the judgment of Sales LJ, with whom Richards and Lewison LJJ agreed, in *R. (on the application of Dianne Smyth) v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, at [78]–[81]). „„

39. As Sir Keith Lindblom SPT pointed out in *R (Wyatt) v Fareham Borough Council* [2022] EWCA Civ 983, at para. 9, there is a wealth of case law relevant to article 6(3) of the Habitats Directive and regulation 63 of the Habitats Regulations, both in the Court of Justice of the European Union ("the CJEU") and in domestic courts. Some basic points emerge, which he then helpfully set out in ten sub-paragraphs. It is unnecessary for present purposes to recite those in full although I have them all in mind. Particular points arising from them deserve emphasis in the present appeal.

40. First, the duty imposed by article 6(3) and regulation 63 rests with competent authorities and not with the courts. Whether a plan or project will adversely affect the integrity of a European protected site is always a matter of judgment for the competent authority itself. That is an evaluative judgment, which the court is neither entitled nor equipped to make for itself. In a legal challenge to a competent authority's decision, the role of the court is not to undertake its own assessment, but to review the performance by the authority of its duty under regulation 63. The court's function is supervisory only.

41. As was said by Sir Keith Lindblom in *Wyatt*, at para. 9(3), when reviewing the performance by a competent authority of its duty under regulation 63, the court will apply ordinary public law principles, conscious of the nature of the subject-matter and the expertise of the competent authority itself. If the competent authority has properly understood its duty under regulation 63, the court will intervene only if there is some *Wednesbury* error in the performance of that duty.

42. As he continued, at para. 9(4), a competent authority is entitled, and can be expected, to give significant weight to the advice of an expert national agency with relevant expertise in the sphere of nature conservation, such as Natural England. Although the authority may lawfully disagree with, and depart from, such advice, if it does so, it must have cogent reasons for doing so. Further, the court for its part will give appropriate deference to the views of expert regulatory bodies.

43. In *R (Champion) v North Norfolk District Council* [2015] UKSC 52, [2015] 1 WLR 3710, at para. 35, Lord Carnwath JSC pointed out that there is an important distinction between the Habitats Directive/Habitats Regulations on the one hand and the Environmental Impact Assessment ("EIA") Regulations on the other: the former contain no equivalent to "screening" under the EIA Regulations. As he pointed out at para. 39, at least in this country the use of the term "screening" in relation to the Habitats legislation is potentially confusing, because of the technical meaning it has under the EIA Regulations. The formal procedures prescribed for EIA purposes, including "screening", preparation of an environmental statement, and mandatory public consultation, have no counterpart in the Habitats legislation.

44. At para. 40 Lord Carnwath cited with approval the decision of this Court in *No Ad Astral New Town Ltd v Suffolk Coastal District Council* [2015] EWCA Civ 88, [2015]

Env LR 28, at paras. 63-69. There Richards LJ considered the language of article 6(3) of the Habitats Directive and noted the absence in the Court's judgment in *Sweetman* of any support for the contention that there must be a screening assessment at an early stage in the decision-making process. At para. 41, Lord Carnwath continued that the process envisaged by article 6(3) should not be overcomplicated. As Richards LJ had pointed out, in cases where it is not "obvious", the competent authority will consider whether the "trigger" for appropriate assessment is met. But this "informal threshold decision" is not to be confused with a formal "screening opinion" in the EIA sense. The operative words are those of the Habitats Directive itself. All that is required is that, in a case where the authority has found there to be a risk of significant adverse effects to a protected site, there should be an "appropriate assessment".

45. Before us Mr Goodman placed emphasis on the decision of the Divisional Court (Leggatt LJ and Carr J) in *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649, in particular at para. 98, where, in giving the judgment of the Court, Carr J explained that a public authority's decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it, for example that a significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error. Mr Goodman submits that this is just such a case, because both the officers' report to the planning committee and the evidence of Mr Bisset (if it is admissible) contain a demonstrable flaw in the reasoning process.

46. In order to assess that submission it is important to look at the guidance given by Natural England as to the methodology to be used, on which Mr Bisset relied when he considered the issues on which his advice was sought in the planning process.

Natural England's User Guidance on Impact Risk Zones for Sites of Special Scientific Interest

47. Although the guidance from Natural England, which is dated 3 June 2019, is expressly concerned with SSSIs it was common ground before us that it also covers European sites such as the SAC in the present case.

48. At page 2 the Guidance states as follows:

> "The Impact Risk Zones (IRZs) are a GIS tool developed by Natural England to make a rapid initial assessment of the potential risks to SSSIs posed by development proposals. They define zones around each SSSI which reflect the particular sensitivities of the features for which it is notified and indicate the types of development proposal which could potentially have adverse impacts. The IRZs also cover the interest features and sensitivities of European sites, which are underpinned by the SSSI designation and 'Compensation Sites', which have been secured as compensation for impacts on European/Ramsar sites.

> Local planning authorities (LPAs) have a duty to consult Natural England before granting planning permission on any development that is in or likely to affect a SSSI. The SSSI IRZs can be used by LPAs to consider whether a proposed development is likely to affect a SSSI and determine whether they will need to consult Natural England to seek advice on the nature of any potential SSSI impacts and how they might be avoided or mitigated. The IRZs do not alter or remove the requirements to consult Natural England on other natural environmental impacts or other types of development proposal under the Town and Country Planning (Development Management Procedure) (England) Order 2015 and other statutory requirements – see the gov.uk website for further information."

49. In a table, under the heading 'Important Notes', the Guidance states, at para. 2, that the IRZs seek to guide consultations relating to the likely impacts of development on SSSIs under Schedule 4(w) to the Town and Country Planning (Development Management Procedure) (England) Order 2015.

50. Appendix 2 of the Guidance states that Natural England's local team staff have reviewed the IRZs and where necessary they have been varied to reflect specific local circumstances "such as known water quality issues".

51. Natural England also makes available information to local planning authorities which is not in the public domain. It is clear on the evidence before us that Mr Bisset relied on such non-public data in the present case. I turn to his evidence now.

The evidence of James Bisset

52. At para. 11 of his witness statement Mr Bisset said that:

> "Amongst other matters, the non-public Natural England data shows IRZs as specific to a particular Special Area of Conservation or specified Site(s) of Special Scientific Interest – including the hydrological catchment area for the River Wye SAC where discharges may affect the SAC. As in the Council's earlier documents, I will refer to this latter area as 'the NE hydrological catchment area'."

53. At paras. 13-16 Mr Bisset continued as follows:

> "13. This detailed IRZ provided the response for the location of the development as shown in (Exhibit JBB02). This response details the nature and scale of development that Natural England consider could affect the specified designated site in

> relation to specific types of potential effect. In this case, the response showed that the Site is outside of the NE hydrological catchment area, and therefore the information on the response relates to the River Wye's other designation as a SSSI.
>
> 14. This IRZ output provided a clear basis that allowed me to further assess any potential effects on the River Wye SAC/SSSI from the proposed development. The only relevant 'trigger' identified that might relate to the Site was for air pollution. The IRZ identifies that Natural England only consider livestock and poultry units with an area over 500m2 as requiring further consideration (this includes all aspects related to air emissions including the stock themselves and any manure created within the development). In the Application the actual floor area of the shed holding stock that could potentially create any relevant air emissions is clearly identified in the application information as being only 464.5m2.
>
> 15. Having given this information from the statutory nature conservation body significant weight in my considerations, and based on the IRZ guidance published by Natural England (Exhibit JBB03) that clearly identifies that in these circumstances no consultation with Natural England was appropriate or required, *I was able to reach my own professional judgment that there was no effect on the River Wye SAC from the proposed development*. I considered this to be clear and obvious.
>
> 16. Having identified that there was no effect on the River Wye SAC from the proposed development, it was not necessary to consider any 'in combination' or 'cumulative' effects as the development had no identified effects when considered 'alone'. *In short, there was no effect which could operate 'in combination' with another project*." (Emphasis added)

The Respondent's position statement

54. It is also helpful in this context to refer to the Herefordshire Council position statement on development in the River Lugg catchment area (February 2020). In relation to Habitat Regulations Assessments, the position statement says that the Respondent (in its role as competent authority) must carry out such an assessment on any relevant planning application that falls within the red and purple areas shown on the attached plan. Where there is a likely significant effect the council must carry out an appropriate assessment.

55. It is common ground before us that the application site in the present case does not itself fall within either the red zone or the purple zone on the attached plan but that part of the farmholding does fall within the purple zone.

56. The position statement also states that, where certain criteria are in place, phosphates would be unlikely to reach the river as there is no pathway for impacts. With no pathway for impacts there is no need for a further Habitats Regulations Assessment. Before us Mr Henderson submitted that that is the situation in the present case.

The position statement of Natural Resources Wales

57. By way of contrast to the position in England, Mr Goodman drew our attention to the position statement of Natural Resources Wales in relation to SAC designated rivers and phosphates. There it is stated:

> "New development within *any* part of the catchment which will increase the amount or concentration of wastewater effluent or organic materials discharged directly or indirectly into the catchment's waterbodies has the potential to increase phosphate levels within those waterbodies." (Emphasis added)

Under the heading of 'Habitats Regulations Assessment' it is stated:

> "*Any* proposed development within the Wye catchment that *might* increase the amount of phosphate within the catchment could lead to additional damaging effects to the SAC features and therefore such proposals should be screened through a HRA to determine whether they are likely to have a significant effect on the SAC condition. Once issued by NRW, this position statement in combination with the Compliance Assessment Report, applies to all development that is yet to be determined by the relevant planning authority." (Emphasis added)

58. The summary of Natural Resources Wales's current position is as follows:

> "A large number of water bodies on the Wye are failing their phosphate targets. Even where they are passing, there is generally little headroom. For this reason we are unable to rule out the possibility that additional phosphate input on any part of the River Wye SAC will further damage the SAC. We therefore recommend that *any* proposed new development that *might* otherwise result in increasing the amount of phosphate within the SAC either by direct or indirect discharges must be able to demonstrate phosphate neutrality or betterment." (Emphasis added)

59. Interesting though it is to be shown what the position would be if the proposed development site were on the other side of the border between England and Wales,

this is simply not relevant to this appeal. It is inherent in the scheme of devolution that there may be different laws and policies in England and Wales.

My assessment

60. I accept Mr Henderson's submission (summarised at para. 56 above), essentially for the reasons which are set out in the evidence of Mr Bisset. In particular Mr Bisset's reasons at paras. 15-16 of his witness statement make it clear that there were no relevant effects of the proposed development on the River Wye SAC, whether taken in isolation or in combination with other plans or projects. As he expressly stated at para. 15 of his statement, Mr Bisset's conclusion was based on his own expert experience. Further, it was based on the methodology recommended by the expert body in this field, Natural England.

61. On analysis, the Appellant's real complaint on this appeal is not so much that the planning committee was misled by the officers' report (the advice of Mr Bissett was accurately relayed to the committee by it); nor even that Mr Bissett's evidence was wrongly admitted by the judge (the subject of Issue 1), since it may assist the Appellant if the court is able to have regard to Mr Bisset's evidence. It is rather that Mr Bissett's advice was wrong.

62. But in order to succeed in that argument the Appellant would have to do more than show that others (including other experts such as Mr Maiden-Brooks) might take a different view. What has to be shown is that there are public law grounds which would entitle the court to intervene by way of judicial review, in particular that there was a demonstrable error in the reasoning process; or that the conclusion was irrational.

63. Having regard to the appropriate standard of review and on the evidence which I have summarised above, I have reached the conclusion that there are no such public law grounds in this case. Accordingly, I would reject the Appellant's submissions on Issue 2.

Conclusion

64. For the reasons I have given I would dismiss this appeal.

Lord Justice Arnold:

65. I agree.

Lord Justice Lewis:

66. I also agree.