

EIA and Judicial Review: Some Recent Trends

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1. The reception of the Environmental Assessment Directive² of 1985 into English law reveals a broad trend in recent years away both from a suspicion of EC legal hegemony and from an early technocratic paternalism towards an appreciation of the value of participatory democracy, no longer seen predominantly as an unwelcome obstacle to enterprise. This latter change in approach, at least in the higher echelons of the judiciary, belatedly reflects the observation of the Royal Commission on Environmental Pollution in its Tenth Report, Cmnd 9149 (1984), para. 2.24 that:

“in democracy it is an unhealthy sign when authority claims omniscience and dismisses grass roots concerns as irrational.”

It also reflects Rio Principle 10 of the Rio de Janeiro Declaration³ which acknowledged that:

“environmental issues are best handled with the participation of all concerned citizens.”

2. The 1985 Directive⁴ implicitly recognised both that a right to participate in making decisions on complex environmental issues is illusory without access to relevant data presented in a systematic way, and that imbalance in resources between entrepreneurs and regulatory bodies can render the right of access ineffective. The Directive therefore imposed on developers the burden of assembling the necessary material to assess significant environmental effects in an organised fashion. Article 6 required that detailed arrangements be made for the developer’s information to be made available to the public and to ensure that:

“the public concerned is given the opportunity to express an opinion before the project is initiated.”

3. The principal transposing legislative measures, the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1985/1199),⁵ were accompanied by Department of the Environment Circular 15/88. The tone of this government advice was distinctly wary. Paragraph 8 stated:

“It has been the Government’s aim in implementing the requirements of the Directive to ensure that no unnecessary additional burdens are placed on either developers or authorities. . . . it is important that [environmental statements] should be prepared on a realistic basis and without undue elaboration; and that the additional costs imposed on developers by the requirement to provide information . . . should be kept to the minimum consistent with compliance with the Directive.”

1. I have benefited from discussions with Dr Liz Fisher of Corpus Christi College and Gregory Jones of 2 Harcourt Buildings, Temple in writing this article; errors are, of course, my own. I welcome comments at RobertMcCracken@compuserve.com.

2. Directive 85/337/EEC on assessment of effects of certain public and private projects on the environment (OJ 1985 L175/40).

3. UN Doc A/CONF. 151.5, 14 June 1992.

4. Subsequently amended by Directive 97/11/EEC (OJ 1997 L73/5).

5. Now replaced by the Town and Country Planning (Environmental Impact Regulations) (England and Wales) Regulations 1999 (SI 1999/293).

4. The early decisions of the courts displayed an apparent lack of enthusiasm for the principle of informed popular participation as one which has intrinsic value. A telling example is the decision in *Wycharon v Secretary of State for the Environment and Velcourt* [1994] Env LR 239. The decision does not embrace the idea that the Directive should redress the potential imbalance in information and resources between entrepreneur and community and ensure that the latter's approach is well informed. A planning inspector granted permission on appeal for poultry houses for intensive broiler production. His decision was challenged on the basis that formal environmental assessment had been required. The judge rejected that challenge as bad in law but observed (at p. 251) that he would have refused to quash in any event because:

"it became apparent that there was material available to the Inspector which although not put in the form of an environmental impact assessment (sic), covered all the matters that such a statement would have provided . . . it was open to the applicants as respondent to the appeal to have led evidence to the effect that had an environmental impact assessment been carried out, it would have shown that there were solid grounds for the Inspector to have refused the appeal."

5. This approach had been taken in other cases such as *R v Poole Borough Council ex p. Beebee* [1991] 2 PLR 27. The High Court (at p. 36A) refused to quash a permission granted by the council to itself for housing development on heathland recently notified as being of special scientific interest for, *inter alia*, smooth snakes, sand lizards and the Dartford warbler, even though the council had failed even to consider whether or not to have a formal environmental assessment:

"The substance of all the environmental information which was likely to emerge from going through the formal process envisaged by the regulations had already emerged and was apparently present in the council's mind."⁶

6. The *Wycharon* decision⁷ attracted criticism from commentators, especially the holding that no part of the Directive could have direct effect because some parts of it were insufficiently precise. The authors of one of the leading textbooks⁸ on environmental law state:

"The initial response of the UK courts to possible direct effect of Directive 85/337/EEC . . . at worst displayed an alarming ignorance of general principles of EC law."

7. Consistently with this general reluctance to offer a wholeheartedly warm welcome to the Directive and the EC legal system underlying it, the Court of Appeal, in *R v London Borough of Hammersmith and Fulham ex p. CPRE* [2000] Env LR 549 (the *White City* case) held that it was not arguable that formal environmental assessment could be required at reserved matters stage because (at para. 56):

"Furthermore the wording of the 1988 Regulations seems to me to militate against the position adopted by the CPRE. For it would be necessary to construe the 'applications for planning permission' . . . as extending to the decision at reserved matters stage, but as excluding the prerequisite application for planning permission."

The possibility of direct effect was apparently beyond the contemplation of the court. The House of Lords has subsequently given leave to appeal in another case, *R (Barker)*

6. Decisions such as *R v Rotherham Metropolitan Borough Council ex p Rankin* [1990] 1 PLR 93 follow the same lines, which prevailed until 2000.

7. The *Wycharon* view was not shared by all judges. There was some inconsistency of approach (see, e.g. *Twyford Down PC v Secretary of State for the Environment, Transport and the Regions* [1992] Env LR 37; and, in Scotland, *Kincardine and Deeside v Forestry Commission* [1992] Env LR 151), but surprisingly no reference to the European Court of Justice.

8. S Bell and D McGillivray, *Ball and Bell on Environmental Law* (5th edn, Blackstone Press, 2000), p. 350.

v London Borough of Bromley [2001] EWCA Civ 1766 (the *Crystal Palace* case) on the substantive point as to whether the preclusion by the English Regulations of formal environmental assessment at the reserved matters stage is compatible with the Directive. The European Commission has initiated infringement proceedings against the United Kingdom in respect, *inter alia*, of the White City development.

8. Similarly, the Court of Appeal held in *R v Secretary of State for the Environment, Transport and the Regions ex p. Marson* [1998] 3 PLR 90 that it was not arguable that the Secretary of State had a duty to give reasons for deciding not to direct that formal environmental assessment should take place. The court rejected the applicability to the citizen's rights under the Directive of the doctrine of the ECJ laid down in Case C-70/95 *Sodemare v Lombardia* [1997] ECR I-3395 (para. 19), following Case 222/86 *UNCTEF v Heylens* [1987] ECR 4097, as a general principle of Community law, that reasons must be given for decisions adversely affecting individuals in the exercise of fundamental Community law rights in respect of which they have a judicial remedy.
9. Standing has not generally been an obstacle for challengers. Some wry amusement was felt by some, however, at the first instance decision in *R v NW Leicestershire District Council ex p. Moses* [2000] JPL 733. The application for permission to seek judicial review failed, *inter alia*, because the original complainant had moved away from the relevant area and therefore ceased to have standing; the neighbour who wished to be substituted was held to be out of time in seeking judicial relief.
10. A greater willingness to intervene judicially to ensure the effective implementation of the Directive became apparent in decisions at the end of the decade, such as *R v St Edmundsbury ex p. Walton* [1999] Env LR 879 where Hooper J quashed a planning permission because the decision that no significant effects were likely from a Sched. 2 project had been made by an officer without properly delegated authority. The judge observed (at p. 884) that "There can be no doubt that the decision whether or not to require an applicant to submit an environmental statement is an important one". In *R v Rochdale Metropolitan Borough Council ex p. Tew* [2000] Env LR 1 Sullivan J quashed a bare outline planning permission for a business park on the basis that the environmental statement considered an illustrative masterplan rather than that which had actually been permitted. In *R v Rochdale Metropolitan Borough Council ex p. Milne* [2001] Env LR 407 the judge made it clear, however, that outline permissions could be granted, provided the planning authority was satisfied that matters subsequently to be determined were sufficiently controlled by conditions. It had to be satisfied that there were not likely to be significant environmental effects of which full knowledge had not been acquired and an assessment undertaken (at para. 126). Harrison J in *R v Cornwall County Council ex p. Hardy* [2001] Env LR 473 held that it was not open to authorities to defer research into important effects on bats which might be breeding in old mine-shafts until after the grant of permission because the data had to be assembled and evaluated before the grant of permission.
11. Other countries had, however, been willing to refer to the ECJ. Two major Luxembourg decisions transformed the English approach. The ECJ declared in Case C-72/95 *Kraajveld v Zuid Holland* [1996] ECR I-5403 (the *Dutch Dykes* case) that the Directive had "wide scope and a broad purpose". It appeared also to hold (but not unambiguously) that the Directive was directly effective. The point was then generally, but not universally, conceded in England. Thus, the House of Lords decided *R v North Yorkshire County Council ex p. Brown and Cartwright* [1999] 1 PLR 116, on a concession of direct effect, that the Directive applied to the determination of conditions for old mineral permissions even though no transposing legislation so required in English law. The ECJ put the matter beyond doubt in Case C-435/97 *WWF v Bozen* [1999] ECR I-5613. Its later

decision in Case C-287/98 *Luxembourg v Linster* [2001] Env LR D4 restricting the scope of the legislative authorisation exemption to the Directive showed a healthy appreciation of the limitations of representative democracy in this field.

12. Nonetheless, the High Court held in *R v Durham County Council ex p. Huddleston* [2000] 1 WLR 1484 that the immediate neighbour of a quarry could not rely directly on the inadequately transposed Directive on the basis that this would amount to inadmissible horizontal direct effect. The Court of Appeal ([2000] 1 WLR 1484), however, recognised the value of informed participation in decision-making. Brooke LJ suggested (at para. 43) that the citizen should be able to say this:

“I, an individual citizen, should have had a valuable opportunity to take part in an informed consultation in relation to an extraction project which will detrimentally affect my home and environment in which I live.”

13. The House of Lords, in *Berkeley v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 1012 [2001] 2 AC 603, emphatically rejected the approach which had hitherto prevailed as to the existence of a broad discretion not to quash decisions in which the prohibition on granting planning permission without formal environmental assessment had not been respected.⁹ Lord Bingham of Cornhill described (at p. 608G) as the “cornerstone” of the regime the developer’s environmental statement which draws to the attention of the interested public the developer’s assessment of significant factors and relevant data. Lord Hoffmann observed (at p. 615G) that:

“The directly enforceable right of the citizen . . . is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive [for the] public, however misguided or wrongheaded its views may be . . .”

14. Subsequent decisions reflected a warmer approach to the Directive. Thus, Elias J rejected (and was upheld on appeal) in *BT and Bloomsbury LI v Gloucester City Council* [2000] EWHC Admin 1001, para. 42, the idea that if mitigation could, in the view of the planning authority, reduce the adverse environmental effects to an insignificant level there was no need for a formal assessment pursuant to the Directive. Sullivan J followed this in *R (Lebus) v South Cambridgeshire District Council* [2002] EWHC 2009 (Admin).
15. The House of Lords has again acknowledged, in *R (Burkett) v London Borough of Hammersmith and Fulham* [2002] UKHL 23 [2002] 1 WLR 1593 the obligation on national courts to ensure that the individual’s rights given by the Directive are “fully and effectively protected” (at para. 15). In that case it held¹⁰ that the time period under CPR 54 for challenging a planning permission started at, not before, the grant of planning permission. Lord Steyn’s observation (at para. 15) that:

“The Directive seeks to redress to some extent the imbalance in resources between promoters of major developments and those concerned, on behalf of individual or community interests, about the environmental effects of such projects”

reflects an appreciation of the value of participatory democracy and the economic obstacles to its realisation in practice.

9. See also the article by Lidbetter and Buchner, at p. 36 below.

10. The House also finally resolved the problems caused by *Re Poh* [1983] 1 WLR 2 and held that where permission to appeal to the Court of Appeal from refusal of permission to seek judicial review had been given then a further appeal would lie to the House of Lords.

16. Lord Steyn recognised that the substantial costs associated with judicial review means that access to justice¹¹ may involve the risk of loss of the citizen's home (at para. 50). The Aarhus Convention¹² may, of course, force some changes on our practices as to costs. Sir Stephen Sedley, speaking extra-judicially at an Environmental Law Foundation conference in Lincoln's Inn, recently perceptively observed that:

"Aarhus is . . . pathbreaking in the depth to which it seeks to democratise environmental debate and protection. . . . Now that the defendant public authority gets prior notice of a permission application and is able to put its response to the court, a grant of permission in an environmental judicial review case can more readily carry with it – provided clear guide lines are put in place – an order which tells the parties in advance how costs are going to be allocated in the absence of misconduct or surprises, including a no-costs provision in worthwhile cases."

17. Professor Paul Craig has argued persuasively that a view of the political theory which society espouses is a necessary prerequisite to an informed understanding of the nature and purpose of administrative law. He has cogently highlighted the dangers of "implicit ideas . . . concealed and untested".¹³ The nature, value and justification for democracy and its relationship to the rule of law has received considerable recent judicial attention in a general context. It formed the basis of Sir John Laws' recent reflective ALBA lecture delivered in the Inner Temple. Lord Hoffmann included an eloquent and justly celebrated passage about the value of judicial respect for democratically answerable decision-making in *R (Holding & Barnes plc) v Secretary of State for the Environment, Transport and the Regions* [2000] UKHL 23 [2001] 2 WLR 1389 (*Alconbury*), paras 69–73. Schiemann LJ acknowledged, in *R (Armstrong Braun) v Flintshire County Council* [2001] EWCA 345, para. 34, the value of participation in decision-making by the initially isolated eccentric:

"I would not go so far as the gentleman in 'An enemy of the people' who said 'the minority is always right'; but there are plenty of cases where a lone person starts a crusade and eventually the world is convinced of the wisdom of his point."

18. More, no doubt, remains to be said. But there appears to be discernible in recent environmental assessment decisions a broad trend of movement from technocratic paternalism in the direction of participatory democracy.

11. The implications of the Aarhus Convention on the present costs regime will be considered by the present author in a forthcoming article in the *Journal of Planning and Environmental Law*.

12. Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters (Aarhus, 1998). The United Kingdom has signed but not yet ratified the Convention.

13. PP Craig, *Administrative Law* (4th edn, Sweet and Maxwell, 1999), p. 11.