Neutral Citation Number: [2018] EWCA Civ 231

Case No: C1/2016/4317

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PLANNING COURT SITTING AT CARDIFF
(Hickinbottom J)
[2016] EWHC 2581

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2018

Before :

LORD JUSTICE LEWISON
LORD JUSTICE FLOYD
and
LORD JUSTICE PETER JACKSON

- -

Between :

R (ota MYNNYD Y GWYNT LTD)	**Appellant**
- and -	
SECRETARY OF STATE FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY	**Respondent**

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Richard Kimblin QC (instructed by **Aaron & Partners LLP**) for the **Appellant**
Richard Moules (instructed by **the Government Legal Department**) for the **Respondent**

Hearing dates: 13-14 February 2018

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Approved Judgment

Lord Justice Peter Jackson:

Introduction

1. This appeal arises from a challenge to the refusal of planning consent for the construction of an onshore wind farm. The Secretary of State refused consent because she was not satisfied that the project would not have a detrimental effect on a protected population of red kite as a result of the risk of collision with turbine blades. The issue on this appeal is whether that was a valid decision.

2. On 30 July 2014, the Appellant company applied for permission to build and operate a 27-turbine wind farm on a site in Mid-Wales. As a generating station of this size, the proposal amounted to a Nationally Significant Infrastructure Project and required a Development Consent Order ("DCO") under section 37 of the Planning Act 2008 ("the 2008 Act"). On 20 November 2015, the Secretary of State refused to grant a DCO. The Appellant challenged that decision by way of judicial review under section 118, and the case was heard by Hickinbottom J (as he then was), sitting in the Planning Court at Cardiff on 19 October 2016. By his decision, which is to be found at [2016] EWHC 2581, he dismissed the application. It is against that decision that the Appellant now appeals.

3. The proposed development site adjoins the Elenydd Mallaen Special Protection Area ("the SPA"), which covers most of the Cambrian Mountains. SPAs, also known as "European Sites", are areas that are strictly protected under the Habitats Directive, both in relation to development within them and development in neighbouring areas. One of the conservation objectives of this SPA was to support at least 15 pairs of breeding red kite, or 0.5% of the British population. The main issues facing the Secretary of State on this aspect of the application concerned (1) reliability of the bird survey data; (2) whether red kite observed on the application site came from the SPA or elsewhere; (3) the effectiveness of proposals for mitigation; and (4) in-combination effects on the red kite population from the project site taken together with other wind farms in the area.

The law

4. The decision of the Secretary of State was subject to Article 6 of EC Council Directive 92/43/EEC on the conservation of natural habitats and wild fauna and flora ("the Habitats Directive"), which was at the relevant time transposed into domestic law by the Conservation of Habitats and Species Regulations 2010 (SI 2010 No 490) ("the 2010 Regulations")[1]. The regulations applied to this project because the development site adjoins the SPA.

5. Article 6(3) of the Habitats Directive is reflected in regulation 61 of the 2010 Regulations, which provides:

[1] Since repealed and replaced in materially the same terms by the Conservation of Habitats and Species Regulations SI 2017/1012

Assessment of implications for European sites and European offshore marine sites

61.—(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 for that site in view of that site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required.

(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 specify.

(4) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given.

(7) …

(8) …

6. The Secretary of State was therefore obliged by subsection (1) to make "an appropriate assessment" of the implications for the site's conservation objectives of any project that was "likely to have a significant effect" on the neighbouring SPA. The Appellant was obliged by subsection (2) to provide such "information" as the Secretary of State reasonably required. The Secretary of State was obliged by

subsection (3) to consult the appropriate nature conservation body (in this case Natural Resources Wales, or "NRW") and to have regard to any representations from them. By subsection (5), consent could only be given, absent overriding public interest considerations, if the Secretary of State ascertained that the project would not adversely affect the integrity of the SPA's conservation objectives.

7. The decision-making framework is not prescribed by the Habitats Directive, but is contained in the 2008 Act, and was described by the judge in this way:

> "Part 6 of the 2008 Act imposes a rigid procedure on the decision-making process for DCOs, including pre-application consultation and examination subject to a strict timetable lasting no longer than six months, with representations being mainly in written form at successive "deadline" dates, with few and short issue specific hearings. From 2009, the examiner appointed in any case has been drawn from the Planning Inspectorate. He makes a recommendation to the Secretary of State, who then takes the final decision on whether a DCO should be made."

8. The proper approach to the Habitats Directive has been considered in a number of cases at European and domestic level, which establish the following propositions:

(1) The environmental protection mechanism in Article 6(3) is triggered where the plan or project is likely to have a significant effect on the site's conservation objectives: Landelijke: Vereniging tot Behoud van de Waddenzee v Staatsscretaris van Lanbouw (Case C-127/02) [2005] All ER (EC) 353 at [42] ("*Waddenzee*").

(2) In the light of the precautionary principle, a project is "likely to have a significant effect" so as to require an appropriate assessment if the risk cannot be excluded on the basis of objective information: *Waddenzee* at [44].

(3) As to the appropriate assessment, "appropriate" indicates no more than that the assessment should be appropriate to the task in hand, that task being to satisfy the responsible authority that the project will not adversely affect the integrity of the site concerned. It requires a high standard of investigation, but the issue ultimately rests on the judgement of the authority: R (Champion) v North Norfolk District Council [2015] UKSC 52; [2015] 1 WLR 3710, Lord Carnwath at [41] (*"Champion"*).

(4) The question for the authority carrying out the assessment is: *"What will happen to the site if this plan or project goes ahead; and is that consistent with maintaining or restoring the favourable conservation status of the habitat or species concerned?"*: Sweetman v An Bord Pleanàla (Case C-258/11); [2014] PTSR 1092, Advocate General at [50].

(5) Following assessment, the project in question may only be approved if the authority is convinced that it will not adversely affect the integrity of the site concerned. Where doubt remains, authorisation will have to be refused: *Waddenzee* at [56-57].

(6) Absolute certainty is not required. If no certainty can be established, having exhausted all scientific means and sources it will be necessary to work with probabilities and estimates, which must be identified and reasoned: *Waddenzee*, Advocate General at [107] and [97], endorsed in *Champion* at [41] and by Sales LJ in Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174 at [78] ("*Smyth"*).

(7) The decision-maker must consider secured mitigation and evidence about its effectiveness: Commission v Germany (Case C-142/16) at [38].

(8) It would require some cogent explanation if the decision-maker had chosen not to give considerable weight to the views of the appropriate nature conservation body: R (Hart District Council) v Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin) at [49].

(9) The relevant standard of review by the court is the *Wednesbury* rationality standard, and not a more intensive standard of review: *Smyth* at [80].

9. Drawing matters together, the task of the decision-maker is first to consider whether the risk of the project having a significant effect on the site's conservation objectives can be excluded. If it cannot, an assessment must be undertaken to ascertain the impact of the project and identify whether it is consistent with maintaining the site's conservation status. Mitigation measures must be taken into account and considerable weight should be attached to the views of the nature conservation body. Once the assessment has been carried out, approval can only be given if the authority is convinced that the project will not adversely affect the integrity of the site concerned. Absolute certainty is not required, and where it cannot be achieved after all scientific efforts, the decision-maker must work with reasoned probabilities and estimates; but where doubt remains, authorisation will be refused.

The examination of the application

10. The application having been issued on 30 July 2014, a planning inspector was appointed by the Secretary of State on 27 October 2014 to be the examining authority. His examination began on 20 November 2014 and was completed on 20 May 2015 after a number of hearings and site inspections and the submission of many documents, particularly from the Appellant and NRW.

11. The examination covered a large number of issues, of which the impact on the red kite population was but one. Added to that, the arguments on that issue evolved in a way that was not altogether straightforward. When filing its application, the Appellant submitted a Habitats Regulation Assessment Screening Report ("the screening report"). This included 2005, 2009-10 and 2010-11 red kite survey data and collision risk modelling based upon "vantage point" surveys from November 2009 and November 2010, which concluded that the predicted collision risk was less than one pair of birds per year. This data led the Appellant to argue that there was no real risk that the integrity of the red kite population in the SPA would be adversely affected by the project: in other words, that because of the distances there was no "connectivity".

12. NRW's initial response was to agree. However, by December 2014, it had withdrawn from this position and raised concerns about the age and methodology of the surveys

underpinning the screening report. This led to a detailed rebuttal from the Appellants' expert in the same month, and from then on battle was joined. In January 2015, NRW raised the possibility of connectivity and in March it expressed the view that the project could not be shown to have no likely significant effect on the SPA alone or in combination with other projects. For its part, the Appellant commissioned further survey data in March and April and provided a revised screening report in May, to which NRW responded, maintaining its position in relation to the effects of the project alone or in combination with other windfarms. Its conclusion was not that there was a real risk to the kite population, but rather that the Appellant had not provided enough evidence to show that there was not. (On this appeal, there has been some discussion of whether NRW's opposition related only to in-combination effects; the examiner considered that it did, while the Secretary of State and the Judge interpreted NRW's stance as referring to both. Having reviewed the sequence of submissions before and after May 2015, it seems to me that NRW was maintaining its submissions in relation to both aspects.)

13. The examiner's substantial report, dated 20 August 2015, was accompanied by a Report on the Impact on European Sites. His conclusion was that that the Appellant's survey data from March/April 2015 provided a reasonable degree of certainty that red kite on the project site did not originate from the SPA or its buffer zone and that consequently the project would not result in a likely significant effect, either alone or in combination with other windfarms. He therefore recommended approval, but nevertheless advised the Secretary of State that in the light of the concerns expressed by NRW she might decide that an appropriate assessment was necessary.

14. On 14 September 2015, the Secretary of State requested further information from NRW and from the Appellant, including further information about red kite mortality rates in combination with other windfarms. This was correctly interpreted by the judge as being a request made under regulation 61(2) for information for the purposes of an appropriate assessment.

15. In a letter of 28 September 2015, the Appellant responded to some of the issues raised by the Secretary of State, but provided no further information about red kite. For its part, NRW reiterated that the available information did not enable a decision to be taken that there was no adverse effect on the integrity of the red kite population from this project alone or in combination with other windfarms.

16. The decision of the Secretary of State was based upon the examiner's report and the subsequent correspondence. It was expressed in a decision letter of 20 November 2015, which was accompanied by a detailed document ("Record of the Habitats Regulations Assessment"), which constituted the appropriate assessment. These are detailed documents, with the treatment of the red kite issue extending to nine pages.

17. The issue was dealt with in paragraphs 6.4-6.34 of the Record. In essence, the Secretary of State accepted the advice of NRW to the effect that:

    - It had not been proven beyond reasonable scientific doubt that red kite using the project site do not come from the SPA.

- There was no certainty that the mitigation proposed by the Appellant (reducing the availability of carrion that might attract foraging birds) would be effective.

- There were concerns about the age and methodology of the surveys produced by the Appellant.

- Information had not been provided by the Appellant about the in-combination impact of the project with other windfarms.

18. In the decision letter, the Secretary of State noted that the burden of proof was on the Appellant to demonstrate that the proposed development would not adversely affect the SPA, rather than on statutory advisers to demonstrate that harm will occur. She recorded that she could only grant consent for an application where there was a positive assessment of no adverse effect on the integrity of the site, and considered that she did not have that information. She concluded that under regulation 61(5) she could not grant development consent and therefore refused the application.

The decision of Hickinbottom J

19. The Appellant challenged the decision of the Secretary of State on three grounds: (1) that she had made no proper appropriate assessment: had she done so she would (or at least, may) have been convinced that there was no real risk to the red kite population; (2) that there was inconsistency in applying guidance on foraging distances in this case compared to others; and (3) that no proper consideration had been given to granting consent on the grounds of the overriding public interest. Each of these challenges was dismissed by the judge, and only the first, and to an extent the second, are taken forward on this appeal.

20. The judge dealt in considerable detail with the first ground. He noted that the examiner had accepted that there was no risk to red kite within the SPA and that an appropriate assessment was not necessary. However, the Secretary of State had preferred the alternative view of the NRW that the evidence for this conclusion did not exist. She had received very little help from the examiner's report, which did not engage with the issue, or from the Appellant who had made no substantive representations about it following her request in September 2015. She undertook her assessment, as expressed in the decision letter *"as far as she is able to in the light of the absence of the required information referred to above".* She was not, the judge considered, obliged to go further by making assumptions in relation to matters that were uncertain, such as the mortality rate from the proposed turbines, the proportion of those red kite that would come from the SPA, and the "acceptable" mortality rate that would leave the integrity of the SPA population unaffected. The burden was on the Appellant to provide the necessary information and analysis; it had had reasonable opportunities to do so; reasonable assumptions needed to be made where certainty was impossible, but these needed to be based on reasoned material; here, there were a substantial number of important unknowns; and the Secretary of State was entitled to perform the evaluative balancing exercise on the very limited information that was available.

21. In summary, the judge considered at [67(xvi)] that the effect of the Secretary of State's decision, read fairly and as a whole, was this:

> "The Claimant had failed to provide information reasonably required to determine the appropriate assessment. The Secretary of State had, however, done the best she could on the available information. In line with advice from NRW, she had concluded that there was some risk of red kite on the Application Site originating from the SPA. Again in accordance with advice from NRW, she was not convinced that the project in combination with other wind farms would not pose a risk to the red kite population of the SPA in terms of the conservation objectives, and thus was not convinced that it would not result in adverse effects that would impact on the integrity of the SPA. Given the absence of reasoned estimates and probabilities, she was also not convinced that there would be no risk looking at the effects of the project alone."

The appeal to this Court

22. Before this court, as before the judge, Mr Kimblin QC accepts that notwithstanding the Appellant's case on connectivity and likely significant effect, the Secretary of State had been entitled to decide that an appropriate assessment should be undertaken. His argument is that she did not in reality make such an assessment at all. In particular, she had gone wrong by:

    1) Requiring certainty in relation to each element of the data, instead of using the available information and making a reasoned judgement, always taking the precautionary approach.

    2) Reaching an inconsistent conclusion about the in-combination level of risk to the red kite population in this SPA to those reached in relation to other Mid-Wales windfarm proposals.

    3) Not referencing or showing that she had considered the Appellant's December 2014 response to NRW's concerns about survey methodology.

23. As for the judge, Mr Kimblin argues that he was wrong to have rejected the above points, and that his "fair reading" of the decision letter and the Record was unduly indulgent. Further, and as a matter of law, the judge required too much of the Appellant by extending the meaning of "information" in regulation 62(2) to include not only information but assessment.

24. When granting permission to appeal, Lindblom LJ considered that the grounds were properly arguable and potentially raised issues of wider significance. However, he acknowledged that the Secretary of State's understanding of the Habitats Directive and the 2010 Regulations may prove to have been entirely sound, that she did not err in her approach to appropriate assessment, and that the Appellant's only real grievances relate simply to unimpeachable findings of fact.

Conclusions

25. I shall examine each of the Appellant's arguments in more detail below, but will first state my overall conclusion. For this appeal to succeed, it must be shown that the judge was wrong not to have concluded that the Secretary of State's decision was

unlawful on *Wednesbury* principles – that she had taken account of irrelevant matters or failed to take account of relevant matters, or that her decision was so unreasonable that no reasonable authority could have made it.

26. For my part, I am not persuaded that the Secretary of State's decision was unlawful, nor that the judge's careful review of the decision was wrong. The Secretary of State was required to exercise a judgement at the junction between two important social objectives – renewable energy and species protection. She was faced with a conflict of views between her statutory conservation adviser and her examiner. She asked for further assistance: NRW responded, the Appellant did not. I accept that the Secretary of State might have been persuaded by the arguments that found favour with the examiner, but in the overall circumstances I consider that she was entitled to accept the advice of NRW and conclude that she did not have the information necessary to enable her to grant the application. In reaching this conclusion, I have taken full account of the Appellant's arguments, to which I now turn.

"Information"

27. I start with the interpretation of regulation 62(2). The judge said at [20(viii)] that *"Information is a broad concept, stretching beyond relevant raw material: it includes appropriate analysis."* and at [67(i)] *"That obligation extended to any appropriate analysis of (or assumptions or estimates drawn from) raw material, upon which the Claimant relied."*

28. Mr Kimblin accepts that it is for applicants to provide information and that it is not for decision-makers to undertake surveys. However, he says, that there is no obligation upon applicants to go further than that and to provide assessments. To this, Mr Moules, for the Secretary of State, replies that the judge did not require the Appellant to produce an assessment. The evaluative assessment remains a matter for the Secretary of State to undertake, but it may be reasonable for her to ask an applicant to explain how it says the data should be interpreted and applied to lead to a positive appropriate assessment. None of this is burdensome on applicants and it is commonly carried out, including by this applicant when providing its screening report.

29. In my view, this issue is of no direct relevance to the present case. In her September letter, the Secretary of State asked for *"additional information… which could be used to inform an appropriate assessment"*. This concerned in-combination mortality rates and the maximum level of mortality that could occur without adverse effect on the integrity of the SPA. There was nothing objectionable about that request. It seems to me that Mr Kimblin's argument is really another way of expressing his more fundamental point about the level of certainty required by the Secretary of State. Nonetheless, since the point has arisen, and in agreement with the judge, I can see no reason to put a limit on what "information" might entail. Using the normal meaning of the word, it can clearly extend beyond raw data to explanation, analysis and professional opinion, depending on the context of the case. As Lewison LJ observed in the course of argument, the ultimate assessments are made by a range of administrative decision-makers, from the Secretary of State to planning inspectors to local councillors, none of whom are conservation experts, and the regulation must be interpreted in a way that ensures that each decision-maker is able to lay hold of the information that is needed. To this I would add that the regulation itself only requires the applicant to provide *"such information as the competent authority may reasonably*

require." If a request is unreasonable, the applicant can say so. But that is not what happened in this case.

"Burden of proof"

30. During the course of his submissions, Mr Kimblin drew attention to the use of the concept of a "burden of proof" by both the Secretary of State and the judge. He referred to the decision in Pye (Oxford) Estates Ltd v SSE [1982] JPL 577, in which it was stated that the term "burden of proof" is not appropriate in the context of planning appeals. Once again, this was not a central plank of his argument, but an adjunct to his main submission about certainty.

31. I agree that the use of the expression "burden of proof" in this context is not helpful. The task of the decision-maker is to make an assessment on the basis of all the available information, applying the appropriate legal test. In the present case, there was a default position by virtue of regulation 61(5). But that is not the same thing as a legal burden of proof weighing upon one party to the process. It means no more than that it is in the interests of the applicant, who will self-evidently want the application to succeed, to provide the information necessary to enable a favourable decision to be made. It is clear that the judge did not mislead himself in this respect, because he described the "burden of proof" upon the applicant in this way: *"In effect, the burden upon him is to ensure that the competent authority is provided with sufficient information to convince the authority…"*

"Certainty"

32. Mr Kimblin's central submission is that the Secretary of State and the judge effectively required the applicant to prove a negative beyond reasonable doubt. That, he says, is inconsistent with *Waddenzee* and *Champion* (see 8(6) above). It led to the Secretary of State failing to engage with the real issues, including the dispute about the validity of the survey methodology, and the reality of the large numbers of red kite known to be outside the SPA. A further example is the Secretary of State's position on mitigation. By alighting on the fact that there was no certainty about the effectiveness of the mitigation, she overlooked the fact that the minimisation of carrion on the project site would be bound to have some effect, but that this would be difficult to quantify.

33. In response, Mr Moules says that the judge was right to say that the Secretary of State did not require certainty, but rather, as the judge found, she reasonably required the probabilities, assumptions and estimates necessary to perform an appropriate assessment. In particular, the Secretary of State was entitled to identify a number of "unknowns", recorded by the judge at [67x], and it was reasonable for her not to go beyond the evidence and representations and make assumptions.

34. My conclusion is that the judge dealt comprehensively and correctly with this issue, which he described as the core issue, at paragraphs 46 to 79 of his judgment. In my view, the Secretary of State was not asking for absolute certainty about the red kite population. Rather, she required clarity. She was entitled to take the view that did not emerge from the information before her. Insofar as it takes matters further, I also reject the submission that the judge characterised the decision in an unduly generous way.

Inconsistency

35. Mr Kimblin points to the outcomes of two other inquiries: the Mid-Wales Inquiry, where the Secretary of State had on 7 September 2015 concluded that there was no likely significant effect upon the red kite population in combination with the proposed development in this case, and the Bryn Blaen decision, given in April 2016, where the Welsh Ministers reached a similar conclusion. Mr Moules responds that the Mid-Wales decision is not inconsistent as there was no "connectivity" between those application sites and the SPA, and because the advice of NRW was different in that case. As to the Bryn Blaen decision, the Appellant accepts that a later decision cannot of itself vitiate the Secretary of State's decision in this case.

36. It is easy to see why the juxtaposition of two nearly contemporaneous decisions has been galling for the Appellant, but I cannot accept that they are irreconcilable, for the reasons given by Mr Moules. I also consider that the Secretary of State was entitled to note that she had not received further information from the Appellant on this very issue in response to a specific request.

The December 2014 submission

37. Finally, Mr Kimblin argues that the Secretary of State did not show any regard to the Appellant's December 2014 submission, which came into being as a first response to NRW's concerns about survey methodology. This submission rests upon the absence of any specific reference to that particular document in the Record or the decision letter. Mr Moules replies that the Secretary of State specifically identified NRW's response to the document. Further, the Appellant had not disputed the age of its surveys or the fact that that they did not comply fully with the terms of the relevant guidance.

38. Having now had the advantage of following the entire sequence of submissions on this issue, it is clear to me that the interested parties, the examiner, and the Secretary of State were all aware of the full documentation that had been provided, and the issues that arose from them. The absence of specific reference to a document filed so long before the examiner's report and the Secretary of State's decision does not take the Appellant any further forward.

39. For all of these reasons, I would dismiss this appeal.

Lord Justice Floyd:

40. I agree.

Lord Justice Lewison:

41. I also agree.