Current Issues in EIA: Discretion not to quash

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Introduction

1. Is a Court entitled retrospectively to dispense with the requirement for an EIA on the ground that the outcome would have been the same or that the decision-maker had all the information necessary to enable them to reach a proper decision on the environmental issues? In ***Berkeley (No. 1)*** [2001] 2 A.C. 603, Lord Hoffmann was emphatic at p.616: it cannot.

2. However, in June 2015 – only a couple of weeks ago – in ***R (Champion) v North Norfolk District Council*** UKSC 2014/0044, Christopher Lockhart-Mummery QC and I made the opposite submission to the Supreme Court, relying particularly on Lord Carnwath's analysis in ***Walton v Scottish Ministers*** [2013] P.T.S.R. 51 and the ECJ's judgment in ***Gemeinde Altrip v Land Rheinland-Pfalz*** (C-72/12) [2014] P.T.S.R. 311.

3. Judgment is awaited in ***Champion***, but this paper considers how matters have moved on since ***Berkeley***, and where the law stands today on discretion not to quash in EIA cases. It assesses the three key authorities on that question (***Berkeley***, ***Walton*** and ***Altrip***), then notes some of the current cases to watch.

The General Approach

4. For domestic law challenges, the general position was summarised in ***De Smith's Judicial Review***, 6th ed. (2006), at §17-025:

> "Normally in applications to quash, for the claimant to succeed in quashing the decision he must have been 'substantially prejudiced' by the failure to comply with the statute's procedural conditions. Under both substantive and procedural grounds of review the courts possess a residual discretion not to quash a decision where there has been no prejudice or detriment to the claimant and to refuse relief in exceptional circumstances."

That summary was approved by Lord Carnwath in ***Walton***.

5. For an example of that general approach in domestic law, and a helpful comparison with the approach in EIA cases, note ***R. (Edwards) v Environment Agency (No.2)*** [2008] Env. L.R. 34, and Lord Hoffmann's comments at §63-§65:

> "63. It is well settled that "the grant or refusal of the remedy sought by way of judicial review is,

> in the ultimate analysis, discretionary" (Lord Roskill in ***Inland Revenue*** **Commissioners** ***v National Federation of Self- Employed and Small Businesses Ltd*** [1982] AC 617, 656.) But the discretion must be exercised judicially and in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it. So in ***Berkeley v Secretary of State for the Environment*** [2001] 2 AC 603 it was conceded, and the House decided, that the Court of Appeal had been wrong to refuse to quash a planning permission granted without the impact assessment required by the EIA directive on the ground only that the outcome was bound to have been the same. The relevant domestic legislation provided that in such a case the grant of permission was to be treated as not within the powers of the Town and Country Planning Act 1990 . Lord Bingham of Cornhill said (at p.608) that even in a domestic context, the discretion of the court to do other than quash the relevant order "where such excessive exercise of power is shown" is very narrow. The Treaty obligation to give effect to European law reinforces this conclusion. I made similar observations at p. 616. But I agree with the observation of Carnwath LJ in ***Bown v Secretary of State for Transport, Local Government and the Regions*** [2004] Env LR 509, 526, that the speeches in Berkeley need to be read in context. Both the nature of the flaw in the decision and the ground for exercise of the discretion have to be considered. In Berkeley, the flaw was the complete absence of an EIA and the sole ground for the exercise of the discretion was that the result was bound to have been the same.
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> 64. In the present case, by contrast, there was no breach of European law and the only breach of domestic law was the failure to disclose information about the predicted effect of LLPS emissions of PM10 on the EQS. Since then, however, the actual emissions from the plant have been monitored. In August 2004 the company produced a report in accordance with condition 9.1.1.13 of its licence (see [24] above). Rugby Borough Council commissioned consultants, Faber Maunsell, to make a detailed assessment of particulate emissions around the works. They produced a report in 2005. Both reports confirmed that the EQS was not being exceeded. Faber Maunsell recommended that the Council should not designate an air quality management area around the works for PM10. The Council has accepted this advice. In November 2007 they published a draft Air Quality Action Plan which designates Rugby an Air Quality Management Area in respect of nitrogen dioxide (mainly caused by road traffic) but not in respect of PM10. The Plan says "studies have shown no exceedances as a result of the Cemex plant or their operations of the PM10 National Air Quality Objectives."
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> 65. Thus the relevance of the AQMAU reports has been completely overtaken by events. We no longer need to rely upon predictions. We know what has actually happened. As Auld L.J. said in the Court of Appeal (at [126]) "it would be pointless to quash the permit simply to enable the public to be consulted on out-of-date data." To this pointlessness must be added the waste of time and resources, both for the company and the Agency, of going through another process of application, consultation and decision. In my opinion, therefore, the judge and the Court of Appeal were right to exercise their discretion against quashing the permit. I would dismiss the appeal."

6. Key points in Lord Hoffmann's analysis are that:

   (i) The grant or refusal of a remedy in judicial review is discretionary;

   (ii) In most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it; however

   (iii) The nature of the flaw in the decision and the ground for exercise of the discretion have to be considered.

7. How does that analysis apply in an EIA case? The starting point is to return to ***Berkeley***.

(1) *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)* [2001] 2 A.C. 603

(a) Facts

8. ***Berkeley*** concerned the redevelopment of the Fulham Football Club stadium on the Middlesex bank of the Thames between Hammersmith Bridge and Putney Bridge. To briefly state its facts:

(i) Fulham intended to build a new stadium which incorporates and improves the listed buildings and to finance the project by building a block of flats on its boundary overlooking the river.

(ii) An environmental statement did not accompany the applications and the local planning authority was not asked to express an opinion on whether one was required. But the application was advertised as an ordinary application and representations were received from a large number of local residents.

(iii) There was some possible harm to the habitats of plants, invertebrates, fish and birds in the river as a result of a proposed of a proposed vertical wall along the bank. A series of environmental bodies were consulted. Several recommended refusal.

(iv) An officer's report recommended a grant of permission. The application was called in by the Secretary of State. No ES was required. A public inquiry was held. The Inspector recommended grant of permission, and that recommendation was accepted by the Secretary of State.

(ii) Judgments

9. The central question for the Court was whether a grant of planning permission by the Secretary of State for a redevelopment of the site should be quashed because he failed to consider whether there should have been an environmental impact assessment.

10. At p.613, Lord Hoffmann said that:

> "The judge said that, in the alternative, even if an EIA should have been required, he would as a matter of discretion refuse to quash the permission. The reason was that in his opinion the absence of the EIA "had no effect on the outcome of the inquiry and could not possibly have done so". It was on this ground that the Court of Appeal upheld his decision. Pill LJ said, at p 53, that he was unpersuaded that an EIA "could have had any effect on the course of events or was prejudicial to objectors or the quality of the decision". Thorpe LJ said, at p 54, that the existence of the discretion "necessarily entails some review of the probable outcome had the proper procedures been observed" and that the procedures actually adopted, though flawed, were "thorough and effective to enable the inspector to make a comprehensive judgment on all the environmental issues affecting the Thames".
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> Before your Lordships, Mr Elvin has not attempted to support this reasoning. He accepts that the

fact that a court is satisfied that an EIA would have made no difference to the outcome is not a sufficient reason for deciding, as a matter of discretion, not to quash the decision. The argument which he submitted to your Lordships was a different one, namely that there had on the facts been substantial compliance with the requirements of the Directive. So the narrow issue argued before your Lordships was whether the objectives of the Directive as transposed into domestic law by the Regulations had been substantially satisfied.

Although it was a matter of concession that the grant of planning permission was ultra vires and that it could not be validated by a court as a matter of discretion merely on the ground that the outcome would have been the same, these points are of such importance that I think I should say briefly why I think that Mr Elvin was right to concede them."

11. So the analysis on discretion in ***Berkeley*** was predicated on that concession by the Secretary of State. That point was picked up by Lord Carnwath in subsequent cases.

12. Lord Hoffmann continued at pp.615-616:

"The directly enforceable right of the citizen which is accorded by the Directive 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 in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues. In a later case (***Aannemersbedrijf P K Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland*** (Case C-72/95) [1996] ECR I-5403 , 5427, para 70), Advocate General Elmer made this point again:

> "Where a member state's implementation of the Directive is such that projects which are likely to have significant effects on the environment are not made the subject of an environmental impact assessment, the citizen is prevented from exercising his right to be heard."

Perhaps the best statement of this aspect of an EIA is to be found in the UK government publication "Environmental Assessment: A Guide to the Procedures " (HMSO, 1989), p 4:

> "The general public's interest in a major project is often expressed as concern about the possibility of unknown or unforeseen effects. By providing a full analysis of the project's effects, an environmental statement can help to allay fears created by lack of information. At the same time it can help to inform the public on the substantive issues which the local planning authority will have to consider in reaching a decision. It is a requirement of the Regulations that the environmental statement must include a description of the project and its likely effects together with a summary in non-technical language. One of the aims of a good environmental statement should be to enable readers to understand for themselves how its conclusions have been reached, and to form their own judgments on the significance of the environmental issues raised by the project."

A court is therefore not entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same or that the local planning authority or Secretary of State had all the information necessary to enable them to reach a proper decision on the environmental issues.

Although section 288(5)(b), in providing that the court "may" quash an ultra vires planning decision, clearly confers a discretion upon the court, I doubt whether, consistently with its obligations under European law, the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the Directive. To do so would seem to conflict with the duty of the court under article 10 (ex article 5) of the EC Treaty to ensure fulfilment of the United Kingdom's obligations under the Treaty. In classifying a failure to conduct a requisite EIA for the purposes of section 288 as not merely non-compliance with a relevant requirement but as rendering the grant of permission ultra vires, the legislature was intending to confine any discretion within the narrowest possible bounds. It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to

> be ultra vires: see ***Glidewell LJ in Bolton Metropolitan Borough Council v Secretary of State for the Environment*** (1990) 61 P & CR 343, 353 Mr Elvin was in my opinion right to concede that nothing less than substantial compliance with the Directive could enable the planning permission in this case to be upheld."

13. Also note the comment of Lord Bingham at p.608:

> "Even in a purely domestic context, the discretion of the court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow. In the Community context, unless a violation is so negligible as to be truly *de minimis* and the prescribed procedure has in all essentials been followed, the discretion (if any exists) is narrower still."

14. However, Lord Hoffmann's gloss on his findings in ***Berkeley*** set out in ***R. (Edwards) v Environment Agency (No.2)*** [2008] Env. L.R. 34 at §65, set out above. By the time ***Berkeley*** reached the House of Lords, the developer was no longer represented and, on Lord Hoffmann's analysis in ***Edwards***, "the flaw was the complete absence of an EIA and the sole ground for the exercise of the discretion was that the result was bound to have been the same".

(2) *Walton v Scottish Ministers* [2013] P.T.S.R. 51

(i) Facts

15. Mr Walton challenged the validity of schemes and orders made by the Scottish Ministers under the Roads (Scotland) Act 1984 to allow the construction a "western peripheral route" around Aberdeen on the basis of failure to comply with SEA Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

16. An inquiry was held to consider objections to the scheme. The scope of the inquiry was limited to exclude whether there was a need for the route in principle. That was already accepted. The Ministers only wished to be advised on the technical elements of route choice.

17. The Ministers decided to allow the relevant schemes and orders.

18. The Court held that even if the original regional transport strategy was a plan within the meaning of the SEA directive, the decision to proceed with the scheme was not a modification of that plan. In consequence, the appeal failed.

(ii) Discretion

19. The the Ministers accepted that, if there had been a substantial failure to accord Mr Walton proper participation as required under EU law, then the court should not withhold a remedy, at least if it were satisfied that he was "a person aggrieved" in respect of the particular breach

found. So in ***Walton***, like in ***Berkeley***, the key analysis on discretion was predicated on a concession.

20. Lord Reed reserved his position on discretion at §77 noting that fuller consideration of the point would be required in another case.

21. Lord Carnwath agreed with Lord Reed, but went onto consider discretion at some length. At §127, Carnwath said of Lord Hoffmann's comments in ***Berkeley*** that:

> "127. Although of course these statements carry great persuasive weight, care is needed in applying them in other statutory contexts and other factual circumstances. Not only did they rest in part on concessions by counsel for the Secretary of State, but the circumstances were very unusual in that, by the time the case reached the House of Lords, the developer had abandoned the project, and the decision had lost any practical significance.
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> 128. In ***Bown v Secretary of State for Transport, Local Government and the Regions*** [2004] Env LR 509, 526 I said (with the agreement of Lord Phillips of Worth Matravers MR and Waller LJ), at para 47:
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> > "The speeches [in ***Berkeley*** [2001] 2 AC 603] need to be read in context. Lord Bingham emphasised the very narrow basis on which the case was argued in the House: pp 607F–608A. The developer was not represented in the House, and there was no reference to any evidence of actual prejudice to his or any other interests. Care is needed in applying the principles there decided to other circumstances, such as cases where as here there is clear evidence of a pressing public need for the scheme which is under attack."
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> 129. That passage was noted with approval by the House of Lords in ***R (Edwards) v Environment Agency*** [2009] 1 All ER 57 , paras 63–65.
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> […]
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> 131. In the present case, both the statutory context and the factual circumstances are again distinguishable from those applicable in ***Berkeley*** . The factual differences are dramatic. In Berkeley there was no countervailing prejudice to public or private interests to weigh against the breach of the Directive on which Lady Berkeley relied. The countervailing case advanced by the Secretary of State was one of pure principle. Here by contrast the potential prejudice to public and private interests from quashing the order is very great. It would be extraordinary if, in relation to a provision which is in terms discretionary, the court were precluded by principles of domestic or European law from weighing that prejudice in the balance.
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> 132. The statutory context, as I have explained it above, is also significantly different from that applicable in ***Berkeley***. First, under the 1984 Act, even in respect of EIA, a breach of the Regulations does not, as under the planning Acts, render the subsequent decision outside the powers of the Act. It is a breach of the requirements laid down by section 20A , and as such is within the second ground of challenge, but is thus also subject to the need to show "substantial prejudice". Secondly, and more importantly for the purposes of this case, there is nothing to assimilate the requirements of the SEA Directive to the requirements of the 1984 Act, breach of which alone may give rise to a challenge under that procedure. No doubt the adoption of a plan or programme in breach of the SEA Directive would be subject to challenge by judicial review at the appropriate time. But the legislature has not thought it necessary to provide for a separate right of challenge on those grounds in relation to the approval of a subsequent project made under the 1984 Act.
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> 133. Accordingly, subject to any overriding principles emerging from the European authorities (see below), it seems to me that, even if (contrary to what appears to be the effect of the statute) breach of the SEA Directive were a ground of challenge under the 1984 Act procedure, the court would retain a discretion to refuse relief on similar grounds to those available under domestic law.

22. Note the analysis of the Roads (Scotland) Act 1984 at §132. Query how that analysis applies to the planning acts, albeit – as below – that is question that should be resolved through the ***Champion*** case.

23. In ***R (Wells) v Secretary of State for Transport, Local Government and the Regions*** (C-201/02) [2005] All ER (EC) 323, the ECJ noted at §69 that failure to comply with EIA directive could, if the affected individual agreed, be dealt with by way of compensation.

24. Lord Carnwath commented on ***Wells*** at §135 of ***Walton***:

> "However, it is of interest that the court envisaged the payment of compensation, if possible under national law, as a possible alternative to revoking the consents. It is not entirely clear why that should have depended on her agreement, rather than being a matter for the court's discretion. However, that possibility indicates that the public interest in nullifying an action taken in breach of European law is not absolute, and that the remedy may in some circumstances be tailored to the extent of the practical damage, if any, suffered by a particular applicant."

25. In ***Inter-Environnement Wallonie ASBL v Region Wallonne*** (C-41/11) [2012] 2 C.M.L.R. 21, the main issue was the application of the SEA Directive to a government order relating to protection of waters against pollution by nitrates. Having found a breach, the ECJ accepted that, to avoid a "legal vacuum" (§ 1), the order in question could "exceptionally" (§62) be left in operation for the short period required to carry out the SEA.

> "The effects of such a national measure can be exceptionally maintained only for the period of time which is strictly necessary to adopt the measures enabling the irregularity which has been established to be remedied."

26. Lord Carnwath commented on both European authorities from §138 of ***Walton***:

> "138. It would be a mistake in my view to read these cases as requiring automatic "nullification" or quashing of any schemes or orders adopted under the 1984 Act where there has been some shortfall in the SEA procedure at an earlier stage, regardless of whether it has caused any prejudice to anyone in practice, and regardless of the consequences for wider public interests. As ***Wells*** [2005] All ER (EC) *323* makes clear, the basic requirement of European law is that the remedies should be "effective" and "not less favourable" than those governing similar domestic situations. Effectiveness means no more than that the exercise of the rights granted by the Directive should not be rendered "impossible in practice or excessively difficult". Proportionality is also an important principle of European law.
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> 139. Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source.
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> 140. Accordingly, notwithstanding Mr Mure's concession, I would not have been disposed to accept without further argument that, in the statutory and factual context of the present case, the factors governing the exercise of the court's discretion are materially affected by the European source of the environmental assessment regime."

27. Lord Hope said at §158 that:

> "156. The scope for the exercise of that discretion in that context is not therefore as narrow as the speeches in ***Berkeley*** might be taken to suggest. The principles of European law to which Lord Carnwath JSC refers, in para 138, support this approach. Where there are good grounds for thinking that the countervailing prejudice to public or private interests would be very great, as there are in this case, it will be open to the court in the exercise of its discretion to reject a challenge that is based solely on the ground that a procedural requirement of European law has been breached if it is satisfied that this is where the balance should be struck."

(3) *Gemeinde Altrip v Land Rheinland-Pfalz* (C-72/12) [2014] P.T.S.R. 311

28. ***Altrip*** was concerned with the 2003 insertion of Article 10a of the EIA Directive:

> "**Article 10a**
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> Member states shall ensure that, in accordance with the relevant national legal system, members of the public concerned: (a) having a sufficient interest, or alternatively, (b) maintaining the impairment of a right, where administrative procedural law of a member state requires this as a precondition, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive. Member states shall determine at what stage the decisions, acts or omissions may be challenged. What constitutes a sufficient interest and impairment of a right shall be determined by the member states, consistently with the objective of giving the public concerned wide access to justice."

(i) Facts and questions for the ECJ

29. An action was brought against a German planning approval decision, adopted under the relevant water legislation by the *Land* of Rheinland-Pfalz, relating to the construction of a flood retention scheme to the south of the cities of Mannheim and Ludwigshafen on the Upper Rhine.

30. The applicants claimed that the EIA was carried out incorrectly. However, the relevant provision in German law only allowed a challenge to be brought if the EIA was not undertaken *at all*.

31. The ECJ was asked, inter alia, whether Article 10a should be interpreted as meaning that member states were required to extend the applicability of the rules of national law adopted in implementation of that article for the purpose of challenging the procedural legality of a decision to include cases in which an environmental impact assessment was carried out but was irregular? The answer was yes.

32. Further, German caselaw on procedural errors in public law challenges set a requirement for a a "causal link", i.e. if a decision is to be successfully challenged on the basis of a procedural error, there must, in the circumstances of the case, be a definite possibility that the contested decision would have been different without the procedural error.

33. The ECJ was asked:

> "3. […] in cases in which, in accordance with sub-paragraph (b) of the first paragraph of article 10a of Directive 85/337 , the administrative procedural law of a member state lays down in principle that access to a judicial review procedure for members of the public concerned is conditional on maintaining the impairment of a right, is article 10a of Directive 85/337 to be interpreted as meaning: (a) that a challenge before a court to the procedural legality of decisions to which the provisions of that Directive which relate to public participation are applicable can be successful and lead to the decision's being annulled only if, in the circumstances of the case, there is a definite possibility that the contested decision would have been different without the procedural irregularity and if, at the same time, that procedural irregularity affected a substantive legal position of the applicant's; or (b) that, in judicial proceedings challenging the procedural legality of decisions to which the provisions of that Directive relating to public participation are applicable, it must be possible for procedural irregularities to lead to annulment on a greater scale?"

(ii) Judgment

34. AG Cruz Villalon advised at §AG102 that members states' discretion under the EIA Directive is sufficient to allow a "causal link" provision, so long as regard is had to the principle of effectiveness (i.e. the provision must not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order).

35. The ECJ decided that:

> "48. Moreover, given that one of the objectives of that Directive is, in particular, to put in place procedural guarantees to ensure the public is better informed of, and more able to participate in, environmental impact assessments relating to public and private projects likely to have a significant effect on the environment, it is particularly important to ascertain whether the procedural rules governing that area have been complied with. Therefore, as a matter of principle, in accordance with the aim of giving the public concerned wide access to justice, that public must be able to invoke any procedural defect in support of an action challenging the legality of decisions covered by that Directive.
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> 49. Nevertheless, it is unarguable that not every procedural defect will necessarily have consequences that can possibly affect the purport of such a decision and it cannot, therefore, be considered to impair the rights of the party pleading it. In that case, it does not appear that the objective of Directive 85/337 of giving the public concerned wide access to justice would be compromised if, under the law of a member state, an applicant relying on a defect of that kind had to be regarded as not having had his rights impaired and, consequently, as not having standing to challenge that decision.
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> 50. In that regard, it should be borne in mind that article 10a of that Directive leaves the member states significant discretion to determine what constitutes impairment of a right: see the ***Bund für Umwelt case*** [2011] ECR I-3673 , para 55.
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> 51. In those circumstances, it could be permissible for national law not to recognise impairment of a right within the meaning of sub-paragraph (b) of article 10a of that Directive if it is established that it is conceivable, in view of the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked.
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> 52. It appears, however, with regard to the national law applicable in the case in the main proceedings, that it is in general incumbent on the applicant, in order to establish impairment of a right, to prove that the circumstances of the case make it conceivable that the contested decision would have been different without the procedural defect invoked. That shifting of the burden of proof onto the person bringing the action, for the application of the condition of causality, is capable of making the exercise of the rights conferred on that person by Directive

85/337 excessively difficult, especially having regard to the complexity of the procedures in question and the technical nature of environmental impact assessments.

53. Therefore, the new requirements thus arising under article 10a of that Directive mean that impairment of a right cannot be excluded unless, in the light of the condition of causality, the court of law or body covered by that article is in a position to take the view, without in any way making the burden of proof fall on the applicant, but by relying, where appropriate, on the evidence provided by the developer or the competent authorities and, more generally, on the case file documents submitted to that court or body, that the contested decision would not have been different without the procedural defect invoked by that applicant.

54. In the making of that assessment, it is for the court of law or body concerned to take into account, inter alia, the seriousness of the defect invoked and to ascertain, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making in accordance with the objectives of Directive 85/337."

36. In the UK, the relevance of a causal link is now on a statutory footing: see s.84 Criminal Justice and Courts Act 2015, inserting the following into section 31 of the Senior Courts Act 1981:

> "(2A) The High Court—
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> (a) must refuse to grant relief on an application for judicial review, and
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> (b) may not make an award under subsection (4) on such an application,
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> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
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> (2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.
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> (2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."[1]

37. So long as, in an EIA case, the Court operates that power in accordance with the approach in ***Altrip*** (i.e. without placing the burden of proof on the applicant), the judgment in ***Altrip*** suggests that the Court's s.31(2A) discretion falls within the legitimate discretion of member states.

Cases to watch

(i) ***R (Champion) v North Norfolk District Council*** UKSC 2014/0044

38. ***Champion*** involves an application for a development at Great Ryburgh in Norfolk Christopher Lockhart-Mummery QC and I represented the Respondents. Part of the argument before the Supreme Court (a court which included Lord Carnwath) that the approach in ***Walton*** ought to be followed in a case where a failure to screen for either EIA or Appropriate Assessment had made no difference to the overall outcome. Judgment is awaited, and expected before the

[1] NB Those provisions do not apply to judicial review proceedings filed before **13.4.15**: Criminal Justice and Courts Act 2015 (Commencement No. 1, Saving and Transitional Provisions) Order 2015, Schedule 2, paragraph 6.

end of term. Among other points, this will be a chance also for the Supreme Court to reconcile ***Walton*** and ***Altrip***.

(ii) ***Gerber v Wiltshire Council***

39. ***Gerber*** (citation at first instance [2015] EWHC 524 (Admin), Dove J.) relates to the installation of photovoltaic arrays in Broughton Gifford, Wiltshire. The claimant contends that he first became aware of the development when it was being constructed. He had not objected to it nor had he participated in the decision making process leading to the grant of planning permission by the defendant:

    (i) Permission was granted on 25.6.13.

    (ii) C became aware of construction of project on 19.3.14.

    (iii) Proceedings were issued as late as 20.8.14, well over a year after permission. Indeed, it was after not only construction commenced but had been completed in June 2014 at a cost of over £10million.

40. Various grounds have been taken against the grant of permission, including failure to consult English Heritage, failure to discharge duty under s.66 of the Planning (Listed Buildings and Conservation Areas) Act 1990, breach of statement of community involvement, and a flawed EIA screening opinion. Having found for C on a number of the substantive grounds, Dove J found at §82-§87 that:

    (i) C was wholly unaware of the grant of the planning permission which is impugned until 19th March 2014 when construction was underway.

    (ii) Thereafter, albeit there was some delay, clear that clear that C was consistently and energetically pursuing all avenues which he could to dispute the development.

    (iii) When he received advice that it was susceptible to judicial review he and those who had provided that advice acted promptly to bring the claim.

41. Overall, taking account of a number of factors including failure to comply with the EIA Directive (to which Dove J gave "significant weight" §105), he found at §111 that:

> "The exercise of the discretion as to whether or not to quash a decision of this kind is obviously highly fact sensitive. Standing back from the detailed examination of each of those considerations and weighing them in the round in my view on balance, and it is a fine balance, the factors which weigh in support of what Carnwath LJ described as the normal approach namely quashing the decision outweigh those which oppose that approach. The proper consideration of the interests of a nationally protected heritage asset and observing the requirements of EU environmental law are, in my view, or particular importance to the question of discretion in this case. In the circumstances I am satisfied that it is appropriate for the planning permission to be quashed, rather than declaratory relief granted."

42. That rather extreme set of facts is being challenged in the Court of Appeal on the exercise of Dove J's discretion.

Conclusions

43. The competing strands in the cases have not yet been resolved. The limitations of the *dicta* in ***Berkeley*** have been set out above, and have been noted particularly by Lord Carnwath in several decisions. But ***Walton*** too requires further clarification. That is in part because, due to the primary finding in ***Walton*** that there had been no breach of the SEA directive, Lord Carnwath's comments on relief were *obiter*. In addition, Lord Carnwath's reasoning at §132 does not appear to fully embrace planning legislation, and its associated regulations on environmental assessment.

44. Nonetheless, Lord Carnwath's approach to discretion in ***Walton*** has been followed in a number of first instance decisions[2] and the Court of Appeal recently accepted in an SEA case, following ***Walton***, that "the court retains its traditional discretion in the matter, provided that the substance of a claimant's EU rights is met": see Richards LJ in ***Ashdown Forest Economic Development Llp v Wealden District Council*** [2015] EWCA Civ 681 at §52. However, note the contrast with the concession recorded in ***R. (Larkfleet Homes Ltd) v Rutland CC*** [2015] EWCA Civ 597at §30. Again, the position has not yet been settled.

45. Subject to the gloss in ***Altrip*** that the burden of proving "no difference" cannot rest on the applicant, there appears now to be little if any principled distinction to be made between the operation of discretion on remedies in EIA cases against conventional domestic law challenges. In future judicial review challenges, defendants will no doubt seek to avail themselves of the new provisions in section 31(2A) of the Senior Courts Act 1981 and the courts may need to consider how the operation of that provision is consistent with the authorities discussed above. In any event, the forthcoming decision in ***Champion*** should be an opportunity for the Supreme Court to resolve some of the unanswered questions which remain after ***Berkeley***, ***Walton***, and ***Altrip***.

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[2] E.g. ***R. (Gibson) v Harrow DC*** [2013] EWHC 3449 (Admin); ***West Kensington Estate Tenants and Residents Association v Hammersmith and Fulham LBC*** [2013] EWHC 2834 (Admin); ***Wokingham BC v Oxford Diocesan Board of Finance*** [2013] J.P.L. 1285; ***R. (HS2 Action Alliance Ltd) v Secretary of State for Transport*** [2013] EWHC 481 (Admin)

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