The Queen (oao David Gate on behalf of Transport Solutions Fop Lancaster and Morecambe) v The Secretary of State for Transport v Lancashire County Council

Case No: CO/5073/2013

High Court of Justice Queen's Bench Division Administrative Court (sitting at Manchester Civil Justice Centre)

4 October 2013

[2013] EWHC 2937 (Admin)

2013 WL 5336083

Before: Mr Justice Turner

Date: 04/10/2013

Hearing dates: 22nd and 23rd July 2013

Representation

Mr Richard Turney (instructed by Leigh Day & Co) for the Claimant.
Mr Richard Kimblin (instructed by T/Sols) for the Defendant.
Mr Vincent Fraser QC (instructed by Lancashire County Council) for the Interested Party.

Approved Judgment

The Hon Mr Justice Turner:

The Background

1 For a very long time, Lancashire County Council ("Lancashire") has wanted to provide a road to link the M6 Motorway to the port of Heysham on Morecambe Bay. Its wish was eventually granted by The Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013 ("the Order"). The Order is now challenged by the claimant, Mr Gate, on behalf of a campaigning group called "Transport Solutions for Lancaster and Morecambe" the members of which are united in a common conviction that, whatever might be the right transport solution for Lancaster and Morecambe, this is not it. Fortunately, it is not the job of this court to decide if this proposed new road is a good idea but merely to determine whether or not the decision to make the Order permitting it to be built was lawful.

The Road

2 The development comprises a 4.8km (about three miles) long dual carriageway road. It connects a previously built length of the A683 Heysham to M6 Link, at its junction with the A589 Morecambe Road near Torrisholme, to junction 34 on the M6 near Halton. It includes a combined footway and cycleway along its full length and 23 major structures including bridges over the West Coast Mainline Railway, the Lancaster Canal and the River Lune. By way of convenient shorthand, I will refer to the project as a whole as the "Heysham/M6 development".

Grounds of Challenge

3 The claimant challenges the decision to give development consent on five grounds:

Ground One.

i) The defendant had no power to make the order.

Ground Two.

ii) The consultation process was flawed.

Ground Three.

iii) The defendant wrongly took into account inapplicable National Policy Statements.

Ground Four.

iv) The defendant wrongly dismissed alternative alignments of the proposed route.

Ground Five.

v) Inadequate consideration was given to otter welfare.

4 I propose to deal with each ground in turn.

Ground One

Development consent

5 The Planning Act 2008 ("the 2008 Act") introduced a new approach to the planning process applicable to certain types of development. The summary contained in the Explanatory Notes to the Act provides:

> "Parts 1 to 8 of the Act create a new system of development consent for nationally significant infrastructure projects. The new system covers certain types of energy, transport, water, waste water and waste projects. The number of applications and permits required for such projects is being reduced, compared with the position under current legislation."

6 Thus different consent regimes apply depending upon whether or not any given project falls within the scope of the 2008 Act. Lancashire and the defendant proceeded on the basis that the Heysham/M6 development qualified for consent under the 2008 regime and set about obtaining development consent on this basis. The claimant contends that the development fell outside the scope of the scheme of the 2008 Act and therefore the whole process was irremediably flawed.

7 To resolve this issue it is necessary to analyse the basis upon which it is to be determined whether or not any given project falls within the purview of the 2008 Act.

8 Section 115(1) of the Planning Act 2008 provides:

> "Development for which development consent may be granted
>
> (1) Development consent may be granted for development which is—
>
> (a) development for which development consent is required, or
>
> (b) associated development."

9 Section 115(2) of the 2008 Act provides insofar as is relevant:

> "(2) "Associated development" means development which—
>
> (a) is associated with the development within subsection (1)(a) (or any part of it)…"

10 This of course poses the question as to what types of development are those for which development consent is required. The answer is to be found in section 31 of the 2008 Act:

> "When development consent is required
>
> Consent under this Act ("development consent") is required for development to the extent that the development is or forms part of a nationally significant

infrastructure project."

11 Throughout the trial the term "nationally significant infrastructure project" was referred to as an NSIP (and pronounced en-sip).

12 Combining the effects of section 115 and 31 of the 2008 Act therefore generates three categories of development for which development consent may be granted:

i) development which is an NSIP,
ii) development which forms part of an NSIP, and
iii) associated development.

What is an NSIP?

13 Section 14 of the 2008 Act lists no fewer than sixteen types of project which are categorised as NSIPs. They include by way of example: the construction of railways, development relating to underground gas storage facilities, airport-related developments and the construction or alteration of hazardous waste facilities. The category with which this case is concerned is to be found in section 14(1)(h) : "highway-related development".

14 As one might reasonably expect, not every "highway-related development" falls within the 2008 regime, otherwise even the most trivial of works would automatically attract the full weight of a process designed to be proportionate only to cases involving nationally significant infrastructure. Accordingly, the 2008 Act imposes a narrow definition of "highway-related development" to retain the distinctive nature of NSIP projects.

15 Section 22 of the 2008 Act provides the relevant definition:

> "Highways
>
> (1) Highway-related development is within section 14(1)(h) only if the development is—
>
> (a) construction of a highway in a case within subsection (2),
>
> (b) improvement of a highway in a case within subsection (3), or
>
> (c) alteration of a highway in a case within subsection (4).
>
> (2) Construction of a highway is within this subsection only if the highway will (when constructed) be wholly in England and—

(a) the Secretary of State will be the highway authority for the highway, or

(b) the highway is to be constructed for a purpose connected with a highway for which the Secretary of State is (or will be) the highway authority.

(3) Improvement of a highway is within this subsection only if—

(a) the highway is wholly in England,

(b) the Secretary of State is the highway authority for the highway, and

(c) the improvement is likely to have a significant effect on the environment.

(4) Alteration of a highway is within this subsection only if—

(a) the highway is wholly in England,

(b) the alteration is to be carried out by or on behalf of the Secretary of State, and

(c) the highway is to be altered for a purpose connected with a highway for which the Secretary of State is (or will be) the highway authority."

16 In this case, paragraph 11 of the Order provides for the Secretary of State to be the highway authority for those roads described in Schedule 5 thereto. In effect, these roads are those relating to the link with the M6. Lancashire is to be the Highway Authority in respect of the rest of the development roads. Applying the section 22 definition, therefore, the claimant must concede that at least part of the Heysham/M6 development is an NSIP even if the rest is not. He is constrained to argue that there ought therefore to have been two processes for the obtaining of consent, one of which proceeded under the 2008 regime and the other outside it. To treat the whole of the development as falling within the provisions of the 2008 Act was, he argues, wrong in law.

The whole scheme approach

17 In an argument most fully developed on behalf of Lancashire, it is contended that the consented project was one complete scheme. The following points are made:

i) The layout of junction 34 is unsuitable for its current use. Over the last five years accidents involving injury have exceeded the rate of one every two months.
ii) The works relating to roads for which the defendant will be the highway authority are very considerable both in terms of the lengths of such roads and the proportionate cost of this part of the project.
iii) The development will involve works to the junction which are likely to take about two and a half years and will have an impact on very substantial volumes of traffic.
iv) The national importance of the development as a whole is reflected in the fact that 90% of the cost is to be borne by national government.
v) The 2008 Act was intended to provide a "one stop shop" and splitting up homogenous projects would be contrary to this policy aim.

18 Notwithstanding these features, I do not accede to the submission that the development as a whole should be treated as an NSIP. This is because:

i) The wording of section 14 of the 2008 Act establishes that a "nationally significant infrastructure project" means a project "which consists of any of the following…" In their ordinary meaning the words "consists of" require that the project must fall entirely within the relevant definition of an NSIP to fall within the scope of section 14 . Otherwise, the word "includes", or an equivalent, would have been used.
ii) Within the context of section 22(2)(a) of the 2008 Act, this development "includes" but does not "consist of" a highway in respect of which the defendant will be the highway authority.
iii) If it were possible to categorise a highway development as comprising an NSIP even when not all of the highway was intended to fall within the responsibility of the Secretary of State as highway authority then there would be no clear means of determining where the statutory line could be drawn.
iv) Section 22(2)(b) equips the decision maker to bring a project within the 2008 scheme where a highway is to be constructed which is for a purpose "connected with" a highway for which the Secretary of State is to be the highway authority. The application of a literal interpretation to section 22(2)(a) thus increases certainty in the scope of its application without undermining the greater level of flexibility introduced by section 22(2)(b) .

This, of course, raises the question of just how flexible section 22(2)(b) is intended to be.

Connected purpose

19 A central issue is thus whether, under section 22(2)(b) , that part of the Heysham/M6 development which does not fall within schedule 5 to the Order is a highway to be "constructed for a purpose connected with a highway for which the Secretary of State is (or will be) the highway authority."

20 Much time and energy was devoted in argument to the issue of what the words "a purpose connected with" mean. I was taken upon a jurisprudential voyage of discovery during the course of which I was afforded glimpses of cases variously involving a railway shed in New Zealand in the 1920s [1] and a schoolboy and others discovered in

possession of computer hard drives containing extreme political material [2] . Indeed, starting with section 44 of Chelsea and Kilmainham Hospitals Act 1826 there are no fewer than 464 examples in which this or a closely similar phrase has been deployed in statutes or subordinate legislation.

21 In addition, I was invited (and agreed *de bene esse*) to look at Hansard to see what light, if any, it might shed upon the proper interpretation of the section.

22 Ultimately, however, I conclude that:

i) "A purpose connected with" are ordinary English words which can and should be given an ordinary English meaning.
ii) The meanings of common words and phrases, particularly (as in this case) those which are conceptually abstract, may well vary in accordance with the statutory context in which those words are to be found. Divorcing interpretation from context may tend to mislead rather than to inform.
iii) There is no ambiguity, obscurity or absurdity about the language of the section which entitles me to have regard to Hansard (in any event, I did not find the passages which were brought to my attention to be of particular help).

> iv) If Parliament had intended to elaborate further upon the meaning of these words then it could easily have done so. I see no benefit, in the circumstances of this case, in attempting to put a gloss on the words themselves. In *Re Sevenoaks Stationers (Retail) Ltd [1991] Ch 164* , Dillon LJ, referred to judicial statements on section 6 of the Company Directors Disqualification Act 1986 which he described as "ordinary words of the English language", at page 176F: "Such statements may be helpful in identifying particular circumstances in which a person would clearly be unfit. But there seems to have been a tendency, which I deplore, on the part of the Bar, and possibly also on the part of the official receiver's department, to treat the statements as judicial paraphrases of the words of the statute, which fall to be construed as a matter of law in lieu of the words of the statute. The result is to obscure that the true question to be tried is a question of fact – what used to be pejoratively described in the Chancery Division as 'a jury question'."

In my view, these observations apply with equal force to the wording of section 22(2)(b) of the 2008 Act.

23 In the circumstances of this case I am entirely satisfied that the dual carriageway which is intended to fall within the auspices of Lancashire as highway authority ("the Lancashire highway") was indeed constructed for a purpose connected with the highway in respect of which the defendant is intended to be the highway authority (the defendant's highway").

24 These are my reasons:

i) Part of the purpose of the 2008 Act was to streamline the process of obtaining consent for national projects. By the operation of section 33 of the Act, where a proposed project falls within the parameters of "development consent" then it is not necessary to obtain any of that wide range of other consents, permissions and authorisations which would otherwise burden the developer. If section 22(2)(b) were given too narrow an interpretation then the danger would arise that many projects would be doubly encumbered by the need to obtain development consent in respect of

one part of it and the requirement to comply with the residual panoply of consents which would otherwise be covered by section 33 in respect of the rest. Far from being streamlined, the process would become unattractively more elaborate than under the old regime. This is precisely the result which would ensue if the claimant were to succeed on this point in the circumstances of this case.

ii) The purpose of a motorway is not fulfilled merely by the provision of junctions. The roads which lead from those junctions are all likely to be connected to the purpose of the junctions which they serve to a greater or lesser extent and over a distance which will vary from case to case. The point at which any given road leading from a motorway junction could be said to be sufficiently remote so as no longer to be connected with the purpose of the junction is a matter of judgment which the decision maker with the requisite combination of expertise and familiarity with the detail of the proposed development and its context will usually be best placed to judge. I would expect those circumstances in which such a decision would fall within the legitimate purview of judicial review to be rare.

iii) The facts of this case fully justify the inclusion of the Lancashire highway within the parameters of the application for development consent. The works to the motorway junction and the relatively short length of dual carriageway leading towards Heysham are to a significant degree mutually dependent for the fulfilment of their respective and overlapping purposes. To attempt to separate them would be wholly artificial.

25 By way of a postscript to this issue, I will refer to two distinct arguments ventilated on behalf of the claimant neither of which I found to be attractive.

26 Firstly, it was contended that the effect of section 33(4) of the 2008 Act, which precludes the making of an order under section 10 of the Highways Act 1980 that the Highway should become a trunk road, would in this case have the effect of preventing the defendant in perpetuity from becoming the highway authority in respect of the Lancashire highway. This, it is argued would produce absurd results. In my judgment, however, the role of section 33 is limited in operation to the statutory regime which may be deployed to obtain orders to permit the project to proceed and does not create a bar to the subsequent re-allocation of responsibilities between highway authorities thereafter in accordance with the established statutory regime. The risk of an absurd result does not therefore arise.

27 Secondly, it was contended that section 22 of the 2008 Act should be given a narrow construction because to develop without such consent is a criminal offence under section 160 . However, in this case, I find there to be no compelling argument for a narrow construction to be taken. The creation of the criminal offence is ancillary to the scheme of the 2008 Act and not vice versa. To find otherwise would be to allow the tail to wag the dog.

Alternative findings

28 If the claimant had persuaded me that it would be wrong to categorise the Lancashire highway as being constructed for a purpose connected with the defendant's highway I would not have gone on to find that the Lancashire highway was "associated with" the development of the motorway junction within the meaning of section 115 of the 2008 Act. The Department for Communities and Local Government Guidance provides at paragraph 10 that an associated development should be subordinate to the development itself. The examples given in the Guidance suggest that the associated

development will usually be of a type distinctly secondary in significance to the main development. I would not, therefore, have found that the Lancashire highway fell within this category.

29 Nevertheless, even if I had found that the Lancashire highway had fallen outside the scope of the 2008 Act, I would have declined to exercise my discretion to grant relief in this case. The application of the normal planning regime would have afforded little or no material advantage to objectors to the project generally or more specifically to the organisation which the claimant represents. Still less is it clear how partial deployment of the regime outside the 2008 Act would have benefitted legitimately interested members of the public generally. The development consent process is thorough and comprehensive and it is overwhelmingly likely that consent would have been given regardless of the route by which it had been achieved. The time, cost and inconvenience of re-starting the process would render judicial intervention at this stage to be wholly disproportionate.

Ground Two

The law

30 This ground is based on the contention that the decision making process was undermined by flawed consultation.

31 Section 47 of the 2008 Act provides in so far as is material:

> "Duty to consult local community
>
> (1) The applicant must prepare a statement setting out how the applicant proposes to consult, about the proposed application, people living in the vicinity of the land.
>
> (6) Once the applicant has prepared the statement, the applicant must publish it—
>
> (a) in a newspaper circulating in the vicinity of the land, and
>
> (b) in such other manner as may be prescribed.
>
> (7) The applicant must carry out consultation in accordance with the proposals set out in the statement."

32 Section 37(3) (3)(c) provides:

> "Applications for orders granting development consent
>
> (3) An application for an order granting development consent must—

(c) be accompanied by the consultation report…"

33 Section 49 of the 2008 Act imposes a duty to take into account responses to consultation.

34 Pursuant to section 50 of the 2008 Act, the Secretary of State for Communities and Local Government issued guidance on the pre-application consultation process which provides:

> "11. However, we recognise that NSIPs and the communities and environment in which they are located will vary considerably. The Government therefore believes that a 'one-size-fits-all' approach would not be appropriate and that promoters, who are best placed to understand the detail of their specific project proposals, and the relevant local authorities, who have a unique knowledge of their local communities, should as far as possible work together to develop plans for consultation…"
>
> "13. We also recognise that, whilst consultation should be thorough and effective, there will be a variety of possible approaches to discharging the requirements, and that consultation will need to be proportionate. We understand that promoters will have their own approaches to consultation, and already have a wealth of good practice on which to draw…"
>
> 19. It is important that, where possible, communities are able to participate early, when proposals and options are still being developed. People need to know that their participation can make a difference. This is challenging, and means that developers and consultees have to be ready to listen and adapt their own ideas.
>
> 20. Above all, it must be clear what is being consulted on. Promoters must be careful to make clear what is settled and why, and what remains to be decided, so that the expectations of consultees are properly managed."

35 In *R v North and East Devon HA ex p Coughlan [2001] QB 213* the Court of Appeal summarised the general principles relating to consultation within the context of administrative law:

> "108 It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

The complaint

36 The central criticism which the claimant makes of the consultation process is that it was launched on the assumption that the project would proceed along a particular geographical route and that contributions from the public would not be entertained to the extent that they related to the viability of alternatives.

37 In particular, the supporting information issued in conjunction with the statement of community consultation which had been provided in accordance with section 47 of the 2008 Act categorically stated:

> "Fixed design parameters
>
> The following element of the design will not be open for consultation or change for the reasons stated.
>
> Route & road type…"

38 This assumption is also reflected in the wording of the section 47 statement itself and in what was said by representatives of Lancashire to members of the public during the process of consultation.

39 On the face of it, it may seem very strange indeed that the consultation should be presented in such limited terms. However, it is necessary to look at the history of the matter to gain a complete picture.

History

40 As long ago as 1947 work began on a "Road Plan for Lancashire" then under the auspices of Lancashire County Council. In the following year, the Plan was published. It contemplated a link between the Morecambe-Heysham peninsula and what is now the M6 Motorway. The gestation period which followed must be one of the longest in the annals of road transport history a detailed account of which it is mercifully not necessary to relate in this judgment. Suffice it to say that it was not until 1992 that work began on phase 1 of the scheme the easternmost part of which is the point at which the link to the M6 is intended to be built. This work was completed and the road opened in 1994. It could not be claimed that matters thereafter proceeded with indecent haste.

41 By September 1995, the local authority was examining a recommendation that the most appropriate route by which phase 1 should be linked to the M6 was by way of what has become known as the northern route and which is at least broadly similar to that in respect of which the development consent was eventually obtained. The main rival route was the western route. At that stage there was a further option involving the construction of a new motorway junction which for the purposes of this judgment I need consider no further.

42 In October 1997 a consultation process was initiated which included the distribution of 11,000 copies of a brochure and questionnaire and open events at five different venues over a total period of twelve days. By a relatively small majority the western

route proved to be the most popular. However, the Local Plan Inspector subsequently reported that he had a number of reservations about this route and recommended that it should not be included in the Local Plan.

43 There followed a further period of consultation in July 2001 which included events at six different venues over seven days. However, it was considered that difficulties with advertising the venues and distributing the consultation booklets necessitated a further consultation.

44 In consequence, further well-advertised events were held at seven venues over a period of seven days and a MORI survey was commissioned the results of which demonstrated that the northern route was, by a narrow margin, now the more popular. More consultations took place in May 2005 at five venues over five days leading to some amendments of the proposals in respect of one of the affected areas.

45 The planning application for the northern route scheme was submitted in December 2005. The Inquiry took place over a period of five weeks and provided opportunities for long and intensive cross examination. Subsequently, planning permission was granted but the decision faced an immediate challenge by way of judicial review from "Transport Solutions for Lancaster and Morecambe" the organisation it will be recalled whose interests are represented by the claimant in the instant case.

46 In R (on the Application of Davies) v Secretary of State for Communities and Local Government [2008] EWHC 2223 (Admin) Sullivan J. (as he then was) held in characteristically trenchant terms that this challenge was without merit. It is to be noted that the claimant in that case did not allege that there had been a lack of consultation leading up to the decision.

47 Had the scheme thereafter proceeded in accordance with the consent already obtained then that would have been an end of the matter and the road would probably have been built by now. However, in pursuit of the objective of "best value" (the achievement of which was found to require, by way of example, alterations to plans relating to a roundabout and a shortening of the proposed slip road) it became necessary to apply afresh for consent. The route of the highway which received development consent in this case, however, follows precisely the same route as that in respect of which the original consent of 2007 had been given. In the light of what has followed it is tempting to doubt whether, in the event, any money at all has been saved by the "best value" amendments.

The consultation

48 It is easy to understand, against this background, why Lancashire was not eager to reopen the issue concerning the route which the new road would follow. Doubtless, it considered that the issue had been effectively disposed of in the laborious processes leading to the 2007 consent and may well have been suffering from consultation fatigue. Nevertheless, I consider that it would have been more appropriate for the consultation exercise to have been presented in terms which were not quite so unequivocally expressed. After all, this was a free standing application for consent in respect of which the outcome of the 2007 consent was not formally binding.

49 However, a decision following a consultation process is not unlawful simply because

it is possible in hindsight to conceive of a process that would have been an improvement on that which was actually carried out. In the circumstances of this case, I decline to conclude that the matters complained of by the claimant are of sufficient practical substance to render the decision unlawful. I note, in particular:

i) Notwithstanding the wording of the section 47 statement and supporting information, the local community (or, at least, the interested part of it) was undeterred in its determination to exhume the issue of preferred route which Lancashire thought had been put to rest in 2007. The section 37(3)(c) Consultation Report records that the most frequently raised issues included location of the route.

> ii) The Examining Authority, who was in a better position than this court to form a judgment on the issue, found at paragraphs 215 and 216 of his recommendation: "Some IPs raised concerns over the adequacy of the pre-application process. This was a matter considered at the acceptance stage. I am satisfied that even if some representatives of the consultants may have given unhelpful comments at public exhibitions and meetings, it was clear that the consultation process and the ability to make representations on the DCO did allow objections in principle and fundamental alternatives to be canvassed and not just minor alterations, notwithstanding the long history that had led to the DCO scheme…
>
> Moreover, I am satisfied that no persons have been precluded or hindered from making their cases against the proposal on whatever basis they consider relevant."

iii) The consultation process in respect of the proposed development was generally very thorough and robust including, as it did, five public exhibitions each lasting about six hours, meetings with affected parties and community groups, news letters and a website page.
iv) There was no evidence before the Examining Authority (or before me) to suggest that there had been any significant change in circumstances between 2007 and 2013 which would have been likely to justify a reversal of the arguments in favour of the western route.
v) There were clear arguments of proportionality which would justify the concentration of consultative minds on the proposed changes to the earlier project rather than radically different proposals which had very limited prospects indeed of displacing the favoured northern route.

50 In the circumstances, I am satisfied that, although in one limited respect the consultation process fell short of ideal, it is not the function of this court retrospectively to micromanage for perfection. Taken as a whole, the consultation process was a fair one and not susceptible to review.

Ground Three

The Complaint

51 The claimant contends that the defendant erred in basing its decision, at least in part, in reliance upon national policy statements which were not material to the type of development under consideration.

National policy statements

52 Section 5 of the 2008 Act provides:

> "National policy statements
>
> (1) The Secretary of State may designate a statement as a national policy statement for the purposes of this Act if the statement—
>
> (a) is issued by the Secretary of State, and
>
> (b) sets out national policy in relation to one or more specified descriptions of development.

53 Section 104 (2)(a) provides:

> "(2) In deciding the application the Panel or Council must have regard to—
>
> (a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),"

54 In this case, however, there is no directly relevant national policy statement as none has been designated specifically for highway projects.

55 Section 105(2) provides:

> "(2) In deciding the application the Secretary of State must have regard to—
>
> …(c) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision."

56 It must follow, and common sense would in any event dictate, that the decision maker is not precluded from taking into account matters incorporated within national policy statements which are not directly applicable to the development so long as he considers that they are both important and relevant to his decision.

57 The Examining Authority in this case specifically and accurately noted both the absence of a directly applicable national policy statement and the requirement to have regard to important and relevant matters under section 105 . He went on to refer to the national policy statements in respect of ports and of nuclear power generation in this specific context. Heysham is a port and the site of two nuclear power stations. There is a possibility that a third may in time be constructed there.

58 Against this background, it is clear that the Examining Authority was fully aware of the fact that the national policy statements had no direct application to this project. No objection could reasonably have been taken if the defendant had simply articulated matters relevant to Heysham's status as a port and site of nuclear power generation without reference to national policy statements and the fact that the national policy statements were referred to does not vitiate the relevance of the matters which they contain. Once the matters are correctly categorised as relevant then it is a matter for the defendant to determine what weight to give them subject to the very limited constraints of judicial review. In any event, it is clear that the Examining Authority went no further than to conclude at paragraph 52 of his report that the Port and Nuclear Power Policies provided "some support" for the scheme.

59 Accordingly, this ground is without merit.

Ground Four

60 This ground is based on the contention that the defendant wrongly rejected alternative routes on the basis that they would have adverse effects on European Protected Sites (EPSi) and Species (EPSp) and that the proposed development ran through green belt land.

61 The Examining Authority considered the issue of alternative sites in paragraphs 70 to 115 of his report. He observed that the decision to pursue the northern route was taken in the context of the previous application process upon the advice of leading counsel, Frances Patterson QC (as she then was), who had concluded that the western route could not lawfully be pursued. The comparative cost and performance projections were relevant but of particular importance were the findings of ADAS Ltd (formerly, prior to privatisation, the Agricultural Development and Advisory Service) on the likely ecological impact.

62 The claimant complains that the ADAS findings were not based on a full Habitats Regulations Assessment or Appropriate Assessment by a Competent Authority. The Examining Authority, however, recorded this fact but concluded, nevertheless, that the findings of ADAS were sufficiently robust to equip him to reach a professional judgment that the western route would indeed be likely to have a significant impact on the integrity of the EPSi. He noted that there had been no significant change in circumstances in the interim.

63 The following factors are material:

i) The proposed development did not threaten the integrity of an EPSi.
ii) Natural England (the statutory consultee on nature conservation matters) advised that the western route would be likely to cut off key feeding or nesting areas for characteristic listed bird species and thus have an adverse impact on the EPSi.
iii) The western route did not offer any overall advantages compared to the northern route and so the EPSi question was not, in any event, determinative of the issue of choice.

64 The Examining Authority was aware of and took into account the fact that the development would run through green belt land and that the western route would not. He made the important point, however, that "green belt" is not a designation reflecting

quality of the landscape but a categorisation applied to prevent urban sprawl. It is evident from the detail of his description of the landscape through which the alternative routes would pass that he was far better placed than this court to make a judgment on matters such as aesthetics, tranquillity and amenity.

65 Ultimately, it is neither necessary nor desirable that the consideration of possible alternative routes in the context of the determination of an application for development consent should be entered into with the same level of expert scrutiny and assessment as the development itself. Such an approach would be likely to be disproportionate in time, effort and expense. The Examining Authority set out his reasons for rejecting alternatives in coherent and compelling detail. His conclusions were neither unlawful nor irrational.

Ground Five

66 The final ground upon which the claimant criticises the defendant is based on the contention that the consent failed properly to deal with the potential impact of the development on the welfare of otters.

67 The proposed development involves building a new bridge across the River Lune. Otters live in the vicinity. Their population appears to be growing. There is some evidence that they may have resting sites in the vicinity of the site of the new bridge.

68 Under regulation 41 of the Conservation of Habitats and Species Regulations 2010 it is an offence deliberately to disturb a European protected species or to damage or destroy a breeding site or resting place of such an animal. The otter is a protected species. Under regulation 53 , however, the relevant licensing body (Natural England) may grant a licence for certain activities which would otherwise constitute an offence for a number of purposes including those comprising imperative reasons of overriding public interest. Under regulation 9(3) a competent authority (which includes the defendant in this case) "in exercising any of their functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions."

69 The challenge facing the Examining Authority was that otters are a mobile species and that there was no telling where they would be (or what they would be doing there) by the time the bridge was about to be constructed. Natural England, as licensing authority, indicated, reasonably enough, that they would not consider granting a pre-emptive shadow licence application. Lancashire, however, undertook to carry out further detailed surveys before construction was to be carried out and indicated that, if necessary, a licence would be applied for at that stage.

70 In *R (Morge) v Hampshire CC [2011] 1 WLR 268* the Supreme Court considered the proper scope of the European Directive which was subsequently to be implemented domestically in the form of the 2010 Regulations. Lord Brown held:

> "29 … the planning committee['s] only obligation under regulation 3(4) is, I repeat, to "have regard to the requirements of the Habitats Directive so far as [those requirements] may be affected by" their decision whether or not to grant a planning permission. Obviously, in the days when the implementation of such a permission provided a defence to the regulation 39 offence of acting

> contrary to article 12(1), the planning committee, before granting a permission, would have needed to be satisfied either that the development in question would not offend article 12(1) or that a derogation from that article would be permitted and a licence granted. Now, however, I cannot see why a planning permission (and, indeed, a full planning permission save only as to conditions necessary to secure any required mitigating measures) should not ordinarily be granted save only in cases where the planning committee conclude that the proposed development would both (a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers. After all, even if development permission is given, the criminal sanction against any offending (and unlicensed) activity remains available and it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of Natural England's own duty.
>
> 30 Where, as here, Natural England express themselves satisfied that a proposed development will be compliant with article 12, the planning authority are to my mind entitled to presume that that is so. The planning committee here plainly had regard to the requirements of the Directive: they knew from the officers' decision report and addendum report (see para 8 above and the first paragraph of the addendum report as set out in para 72 of Lord Kerr of Tonaghmore JSC's judgment) not only that Natural England had withdrawn their objection to the scheme but also that necessary measures had been planned to compensate for the loss of foraging…"

71 In this case, Natural England indicated that if a survey were to find that there were resting places in the vicinity of the bridge at the time work is shortly to commence then a licence application would probably not be required (presumably on the basis that such resting places would not be damaged or destroyed). In this case, it was open to the defendant to conclude that it was not likely that the proposed development would harm otters in those ways prohibited by the Regulations or that, even if it, did Natural England would be likely to issue a licence.

72 Thus the approach of the Examining Authority and the defendant on this issue was both pragmatic and in accordance with the Regulations. This ground, therefore, is rejected.

Conclusion

73 For the reasons given above, therefore, each of the five grounds relied upon by the claimant fails and the application for judicial review also fails.

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1. *Hatrick v R [1923] AC 213*

2. *R v Zafar [2008] QB 810*