# R. (ON THE APPLICATION OF MORGE) v HAMPSHIRE COUNTY COUNCIL

COURT OF APPEAL

Ward, Hughes and Patten L.JJ.: June 10, 2010

[2010] EWCA Civ 608; [2011] 1 P. & C.R. 13

Conservation; Environmental impact assessments; EU law; Habitats; Planning authorities' powers and duties; Planning permission; Protected species

H1 *Planning permission—presence of bats on the site—art.12 of EC Habitats Directive 92/43—deliberate disturbance of a protected species—deterioration or destruction of breeding sites or resting places—environmental impact assessment.*

H2 Hampshire County Council ("HCC") granted planning permission for a bus route along the track of an old railway line which had been closed since 1969. Both sides of the old cutting and embankments had become thickly overgrown with shrubs and trees and the area was a useful wildlife habitat and an ecological corridor for various flora and fauna. Several species of European protected bats and nationally-protected badgers lived and/or foraged in this area. There was concern for them because it would be necessary to cut a swathe approximately 8 to 9 metres wide through this vegetation to allow for the new hard surfacing and associated linear drainage. HCC had notified Natural England of the proposals and responded to their specific objections by commissioning a detailed and expert updated bat survey ("UBS"). On the basis of this Natural England had withdrawn its objection. On July 29, 2009, the planning committee of HCC resolved to grant planning permission subject to conditions. The planning committee also resolved to adopt a screening opinion that the proposed development was not an Environmental Impact Assessment ("EIA") development.

H3 Mrs Morge, a local resident, brought a claim for judicial review to quash the planning permission on the grounds that it breached the requirements of the EC Habitats Directive 92/43 ("the Directive") and the Conservation (Natural Habitats, & etc) Regulations 1994 as amended ("the Habitats Regulations"). She also asserted that the planning committee had acted unlawfully and/or irrationally in deciding that, although it was a Sch.2 development, it was nonetheless unlikely to have significant environmental effects and so it was not necessary to treat the proposal as an EIA development under the Town and Country Planning (Environmental Impact Assessment)(England and Wales) Regulations 1999 ("the EIA Regulations"). Her claim for judicial review was dismissed by the High Court.

H4 On appeal the issues for determination were: (1) What was the scope of art.12(1)(b) of the Directive and what was meant by "deliberate disturbance" of a protected species? (2) What was the scope of art.12(1)(d) of the Directive and in

particular was it necessary to consider indirect as well as direct impact on the deterioration or destruction of the bats' breeding sites or resting places? (3) Did the planning committee have due regard to the Directive as required by reg.3(4) of the Habitats Regulations? (4) Did the planning committee act rationally in deciding not to treat a proposal as extensive as this as EIA development?

H5 **Held**, dismissing the appeal,

H6 (1) Article 12(1)(b) was concerned with deliberate disturbance of the species, not with specimens of the species. Deliberately disturbing one bat or even more than one bat might not amount to a disturbance of the species which was the activity prohibited by art.12(1)(b). The meaning of the word "deliberate" had been decided by the European Court of Justice ("ECJ"). For the condition as to "deliberate" action in art.12(1)(a) of the Directive to be met, it had to be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing. If that definition applied to art.12(1)(a), it had to equally apply to art.12(1)(b). The word "disturbance" had to be given an autonomous meaning across the European board consistent with and informed by the broad aims of the Directive. Activity would not amount in law to disturbance at all if it was de minimis. For the purposes of art.12(1)(b), the disturbance did not have to be significant but there had to be some room for manoeuvre which suggested that the threshold was somewhere between de minimis and significant. Given that there was a spectrum of activity, the decision maker had to exercise his or her judgment consistently with the aim to be achieved. It was a matter of fact and degree in each case.

H7 (2) For there to be disturbance within the meaning of art.12(1)(b) that disturbance had to have a detrimental impact so as to affect the conservation of the species at population level. Whether the disturbance would have a certain negative impact which was likely to be detrimental had to be judged in the light of and having regard to the effect of the disturbance on the conservation of the species, i.e. how the disturbance affected the long-term distribution and abundance of the population of bats. In this case it was necessary to distinguish between the loss of foraging habitat and the action taken by the bats to compensate that loss. The issue was whether the clearing of the vegetation constituted a disturbance, directly or indirectly. The loss of woodland and scrub vegetation could well result in a reduction in the abundance of invertebrates and a decrease in the quality of the foraging habitat available for bats. That loss was a loss of habitat and was not of itself within art.12.

H8 (3) With regard to art.12(1)(d) of the Directive, the deterioration or destruction did not need to be deliberate. The proposed development had to be judged in the light of whether it would directly or indirectly result in deterioration or destruction. Indirect deterioration or destruction was sufficient. Article 12(1)(d) required the strict protection of defined elements of the habitat, namely actual breeding sites and resting places. It did not cover the loss of a potential site if the ecological functionality was safeguarded as, on the evidence here, it would be. There were plenty of other tress in which the bats could roost in addition to the bat boxes that would be provided. To suggest that because the development would affect a potential breeding site or resting place, that development would breach art.12(1)(d) went too far. The loss of potential breeding sites or resting places did not contravene art.12(1)(d).

H9 (4) The planning committee did have due regard to the requirements of the Directive. It knew of the UBS. The officer's report sufficiently informed the members of the presence of the bats and the need for their protection for which appropriate measures of mitigation were in place. They were aware of Natural England's original opposition but its later withdrawal of any objection to this scheme. There was ample material before them to conclude that the planning committee did have due and sufficient regard to the requirements of the Directive.

H10 (5) The court rejected the submission that the planning committee did not act rationally in deciding not to treat the proposal as an EIA development. The matter was far from clear cut and there was no certain answer. Views could reasonably differ. This was a matter for the planning committee to exercise its planning judgment and form its independent opinion. In those circumstances, it could not be said that the decision was irrational.

H11 **Cases referred to:**

1. *Commission of the European Communities v Germany (C-98/03)* [2006] E.C.R. I-53; [2006] Env. L.R. 36
2. *Commission of the European Communities v Greece (C-103/00)* [2002] E.C.R. I-1147
3. *Commission of the European Communities v Spain (C-227/01)* [2004] E.C.R. I-8253; [2005] Env. L.R. 20
4. *Commission of the European Communities v United Kingdom (C-508/03)* [2006] E.C.R. I-3969; [2007] Env. L.R. 1
5. *Commission of the European Communities v United Kingdom (C-6/04)* [2005] E.C.R. I-9017; [2006] Env. L.R. 29
6. *Ecologistas en Accion-CODA v Ayuntamiento de Madrid (C-142/07)* [2009] P.T.S.R. 458; [2008] E.C.R. I-6097; [2009] Env. L.R. D4
7. *Oxton Farms v Selby District Council* April 18, 1997, not yet reported
8. *R. v Camden LBC Ex p. Cran* [1995] R.T.R. 346; 94 L.G.R. 8
9. *R. v Mendip DC Ex p. Fabre* (2000) 80 P. & C.R. 500; [2000] J.P.L. 870; [2000] C.O.D. 372
10. *R. (on the application of Dicken) v Aylesbury Vale DC* [2007] EWCA Civ 851; [2008] Env. L.R. 20; [2008] J.P.L. 1575
11. *R. (on the application of Jones) v Mansfield DC* [2003] EWCA Civ 1408; [2004] Env. L.R. 21; [2004] 2 P. & C.R. 14
12. *R. (on the application of Miller) v North Yorkshire CC* [2009] EWHC 2172 (Admin)
13. *R. (on the application of Woolley) v Cheshire East BC* [2009] EWHC 1227 (Admin); [2010] Env. L.R. 5

H10 **Legislation referred to:**

Conservation of Habitats and Species Regulations 2010 SI 2010/490
Conservation (Natural Habitats, &etc) Regulations 1994 SI 1994/2716
Directive 79/409
EC Habitats Directive 92/43
Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 SI 1999/293
Wildlife and Countryside Act 1981

H11 *Appeal* by the appellant, Vivienne Morge, from the decision of H.H. Judge Bidder QC, sitting as a Deputy High Court Judge, dismissing her claim for judicial review of the grant of a planning permission by Hampshire County Council for a bus route along an old railway track between Fareham and Gosport. The facts are as stated in the judgment of Ward L.J.

H12 *C. George QC* and *S. Sackman*, instructed by Messrs Swain, for the appellant.
*N. Cameron QC* and *S. White*, instructed by Hampshire County Council, for the respondent.

**WARD L.J.:**

**Introduction**

1 This is a case about bats and badgers, Beeching and bus-ways. In 1969 Lord Beeching caused the closure of the 128-year old railway line between Fareham and Gosport in Hampshire. Since then it has become overgrown with trees, shrubs and other vegetation. Bats and badgers have moved in. Now Hampshire County Council has granted Transport for South Hampshire planning permission for a bus route along the old track. A local resident, Mrs Vivienne Morge, challenges that permission asserting that it will disturb the bats and badgers and have a serious adverse impact on the environment. H.H. Judge Bidder QC, sitting as a Deputy High Court Judge of the Queen's Bench Division, dismissed her claim for judicial review but Sullivan L.J. has given her permission to appeal.

2 Transport for South Hampshire, a creature of the Hampshire County Council, working in conjunction with the adjoining highway authorities is responsible for delivering the transport requirements for the area in order to implement the regional spatial strategy as contained in the South East Plan. At present the main access into the area is by way of a single carriageway which is already extremely congested with traffic and by 2011 it is expected that two thirds of the route will be over-capacity. In order to improve that access, Transport for South Hampshire has sought to provide an alternative form of transport to the private car. An idea to reintroduce a light railway had to be abandoned. The present proposal is to use 4.7 km of the old railway line as a bus-way 6.2 metres wide connected to the present road system by a series of new or altered junctions. If it is completed in its entirety it will provide a rapid bus service and cycle lane as the alternative form of transport to the private car in South East Hampshire.

3 Whilst that may be environmentally desirable, the scheme may have an environmental disadvantage. Although most of the scheme will lie within a built up area, designated nature conservation sites such as the Portsmouth Harbour Site of Special Scientific Interest and the Oakdene Woods and Fareham Grasslands Site of Importance for Nature Conservation are close by. As already noted, both sides of the old cutting and embankments have become thickly overgrown with shrubs and trees, some of which are now quite mature. This vegetation currently provides amenity value to the surrounding residential and industrial area as a linear green space dividing and softening the surrounding built-up environment. Consisting largely of native species, the area is a useful wildlife habitat and an ecological corridor for various flora and fauna. Of importance in the context of this appeal is the fact that several species of European protected bats and nationally protected

badgers live and/or forage in this area. There is concern for them because it will be necessary to cut a swathe approximately 8 to 9 metres wide through this vegetation to allow for the new hard surfacing and associated linear drainage.

4 The scheme is supported by the Fareham and Gosport Borough Councils. Following extensive consultation in October 2008, the public reaction was mainly positive. There were, however, 291 objections, one of whom is Mrs Morge who lives close to the junction of one of the access roads with the proposed rapid transport road.

5 On July 29, 2009, after an earlier site visit, the planning committee of the Hampshire County Council met to determine whether or not to grant permission for the scheme. The discussion lasted from 10.30am to 1.30pm. The committee resolved by a majority of 6 to 5 with 2 abstentions to grant planning permission:

> "in respect of the South East Hampshire Bus Rapid Transit Phase 1 Fareham to Gosport from Redlands Lane, Fareham South by a disused railway corridor to Military Road, Gosport ... for the reasons in the report and subject to the conditions in appendix B to the report."

The Committee also resolved by 7 votes to 5 with 1 abstention to adopt a screening opinion that the proposed development was not an Environmental Impact Assessment ("EIA") development.

6 Mrs Morge then brought her claim for judicial review to quash the planning permission on grounds that it breached the requirements of the EC Habitats Directive 92/43 of May 21, 1992 on the conservation of natural habitats and of wild fauna and flora ("the Directive") and the Conservation (Natural Habitats, &c) Regulations 1994 as amended ("the Habitats Regulations") which transpose the Directive into English law in relation to protection of bats which are strictly protected under European law. She also asserted that the planning committee had acted unlawfully and/or irrationally in deciding that, although it was a Sch.2 development, it was nonetheless unlikely to have significant environmental effects and so it was not necessary to treat the proposal as an EIA development under the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (the "EIA Regulations"). On November 17, 2009 H.H. Judge Bidder QC dismissed her claim for judicial review.

**The issues**

7 Four main questions arise in this appeal:

(1) What is the scope of art.12(1)(b) of the Directive and what is meant by "deliberate disturbance" of a protected species?
(2) What is the scope of art.12(1)(d) of the Directive and in particular is it necessary to consider indirect as well as direct impact on the deterioration or destruction of the bats' breeding sites or resting places?
(3) Did the Planning Committee have due regard to the Directive as required by reg.3(4) of the Habitats Regulations?
(4) Did the Planning Committee act rationally in deciding not to treat a proposal as extensive as this as an EIA development?

As Sullivan L.J. observed when granting permission, questions (1) and (2) raise points of principle of some importance.

no evidence which would allow the Planning Committee to conclude that the long-term distribution and abundance of the bat population is at risk. There is no evidence that they will lose so much energy (as they might when disturbed during hibernation) that the habitat will not still provide enough sustenance for their survival, or their survival would be in jeopardy. There is no evidence that the population of the species will not maintain itself on a long-term basis. There is therefore no evidence of any activity which would as a matter of law constitute a disturbance as the word has to be understood.

75 As I have already concluded, the risk of collision cannot amount to a disturbance and art.12(1)(b) is not engaged in that respect.

76 As for art.12(1)(d), although the judge misdirected himself, in not taking indirect effects into account, already set out, the felling of trees which are potential breeding site or resting place is not enough: what is material is only direct or indirect deterioration or destruction of actual breeding sites or resting places. The risk of collision is not a matter which falls within art.12(1)(d).

77 I am reinforced in these conclusions by the very firm response of Natural England. Moreover, if, contrary to my view, this were a disturbance, it is overwhelmingly likely that Natural England would grant a licence for the work to be done and planning permission can be granted accordingly.

78 In the light of those conclusions the first and second grounds of appeal fail.

**The fourth issue: did the Planning Committee act rationally in deciding not to treat a proposal as extensive as this as an EIA development?**

79 Since this development was, as is agreed, a Sch.2 development for the purposes of the EIA Regulations, the issue was, therefore, whether the development was an EIA development within the meaning of reg.2(1) of the EIA Regulations, i.e. was the development likely to have significant effects on the environment by virtue of factors such as its nature, size or location? This was a question for the planning authority to answer.

80 In their propositions of law agreed by counsel for both parties, reference was made to the authorities, for example, *R. (on the application of Jones) v Mansfield DC* [2003] EWCA Civ 1408; [2004] 2 P. & C.R. 14 per Dyson L.J., *R. (on the application of Dicken) v Aylesbury Vale DC* [2007] EWCA Civ 851 per Laws L.J., *R (on the application of Miller) v North Yorkshire CC* [2009] EWHC 2172 (Admin) per Hickinbottom J. and *Ecologistas en Acción-CODA v Ayuntamiento de Madrid* (C-142/07) [2008] E.C.R. I-6097. Mr Cameron also relied on *Commission of the European Communities v United Kingdom* (C-508/03) [2006] E.C.R. I-3969. The salient features to draw from those authorities can be very broadly stated as follows. Whether the proposed development is likely by virtue of its size, nature or location to have significant effects on the environment within as well as around the area of the proposed roadway involves an exercise of planning judgment or opinion involving a consideration both of the chance of an effect occurring and also the consequences of it were it to occur. There may well be a range of valid answers to that question. Being a transposition of the EIA Directive which is wide in scope and broad of purpose, it must be implemented in that spirit. Thus "likely" connotes real risk and not probability. In judging whether the effects are "significant" regard may be had to mitigating measures taken or to be taken to alleviate the harm. The focus is on the adverse effects: environmentally beneficial effects are irrelevant.

Importantly for the court reviewing the decision, the test is rationality or in the parlance of the ECJ, manifest error. If the Local Planning Authority ask the right question and arrive at an answer within the bounds of reason and the four corners of the evidence before it, the decision cannot be categorised as unlawful. The question must be considered on a case-by-case basis. Size is not determinative (cf. the White City development project).

81 The ground upon which this challenge is mounted by Mr George is that the members of the Planning Committee could not rationally have concluded that the environmental effects on (i) the bats, (ii) the badgers and (iii) the local amenity (having regard to the impact of noise, the construction work and the visual consequences) were not significant when the material in the various reports to which the Committee had access expressly stated that the impacts would be significant. In his oral submission Mr George posed, as a matter "of pure law" the question: in circumstances that expert consultants for the Planning Authority have reported to it that there will be certain significant effects, is it open to the Planning Authority to reach the contrary conclusion? He submits that the Local Planning Authority must be guided by its experts and that it is irrational to disagree with them. This point underpins his whole submission.

82 It is an attractive but beguiling submission. In my judgment, however, it goes too far. It confuses a conclusion which is reached against the weight of evidence and a conclusion which is unlawful. The foundation of the argument is the assumption that reaching a contrary conclusion constituted an error of law because as a matter of law the Committee must willy nilly accept the experts' opinions, no other option being available to it. That must be wrong because it would emasculate the members' duty themselves to decide the question. It is their decision to make, not the experts. Whilst of course they must pay high regard to the evidence before them, they are not bound to follow it. The weight to give the reports is a matter for the members to assess. "Significant" is, after all, a value laden word and views may reasonably differ as to whether an effect truly is significant or not. The members must exercise their independent judgment about the significance of the effects looking at the information overall. I can readily accept that if Mr George had been presenting the evidence to them, he may well have procured some change of view. He may even have persuaded me. But seven members were not persuaded on the day and only five thought that the proposal was an EIA development. That disparity of view makes it in my judgment a case more accurately characterised as one where there is a generous ambit for reasonable disagreement, and not a case where no reasonable member could have concluded that the effects were other than significant. If I am right about this, it may of itself dispose of the third ground of appeal.

83 Nonetheless let me look at the points made by Mr George in detail. His first challenge relates to the bats. He accepts that the judge was correct to hold in [198] of his judgment that the detrimental effect on the bats was "a weighty factor" for the Local Planning Authority, not a conclusive one. He submits, however, that the judge was wrong to accept that the conclusion to the Updated Bat Survey was that the bats were not likely to be significantly adversely affected by the proposals. He points out that whilst the Executive Summary to the UBS concluded that "with successful mitigation the long-term impact of the works is anticipated to be slight adverse, with no significant impacts … anticipated", it was also accepted that "it is probable that there will be a short-term moderate adverse impact on bats which

additional noise insulation. It was for the Planning Committee to judge the visual impact.

**Conclusion on the third issue**

90 This brief recitation of the arguments for and against serves only to convince me that the matter was far from clear cut. There was no certain answer. Views may reasonably differ. That is demonstrated by the votes cast. This was quintessentially a matter for the Committee to exercise its planning judgment and form its independent opinion. In those circumstances it cannot be said that the decision was irrational.

**The result of this appeal**

91 I am satisfied that the appeal must be dismissed. I see no reason to refer any question to the European Court of Justice.

**HUGHES L.J.:**

92 I agree.

**PATTEN L.J.:**

93 I also agree.