Communication ACCC/C/2017/156 - Case-Law Update

England and Wales

1. ***R (on the Application of Elizabeth Wingfield) v Canterbury City Council and HNC Developments LLP (Interested Party) [2019] EWHC 1975 (Admin)***

The claimant applied for a Judicial Review of Canterbury City Council's grant of planning permission for a mixed-use development on a site near her home.

Another mixed-use development had been proposed for an adjacent site under different ownership which was being promoted by another developer. The local authority issued a screening opinion which found, applying the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, that that development was an environmental impact assessment (EIA) development and so required an environmental statement. The developer of that site made an application for outline planning permission which was accompanied by an environmental statement assessing the environmental effects of the development, including cumulative and in-combination effects with other development, including the development challenged by the claimant. The LPA granted permission for the adjacent site. The local authority had found that the development on the instant site was EIA development. The developer applied for outline permission and submitted an environmental statement which included an assessment of the development's cumulative impact with other development, including that on the adjacent site. The local authority granted permission.

The claimant argued that the local authority should have assessed the developments as a single project for the purposes of the Regulations; its failure to do so meant that the environmental statement submitted for the instant site was inadequate in its assessment of the cumulative effect of the two developments.

The Court held that the question of what constituted the "project" for the purposes of the Regulations was a matter of judgement for the competent authority, subject to challenge on grounds of *Wednesbury* irrationality or other public law error (see para 97). Application refused.

2. ***R (on the Application of Kate Broad) v Rochford District Council and Sanctuary Group (Interested Party) [2019] EWHC 628 (Admin)***

The claimant applied for a JR of Rochford District Council's decision to grant planning permission for the demolition of a number of garages and their replacement with six social housing units.

The claimant lived in a property close to the development, for which planning permission had previously been refused. Following objections, including on grounds of overlooking and overshadowing, the developer submitted amended plans. The claimant argued that the local authority had failed properly to understand and assess the impact of the amended Block B on her property, and that the local authority had acted unlawfully in approving the amended plans without consulting her.

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The High Court upheld the LPA's approach to overlooking. The issue of whether the revised proposals were sufficiently harmful in terms of overlooking, loss of privacy and similar concerns was a matter of planning judgment. The case fell short of meeting the high standard of irrationality (see paras 56-57 of judgment) and the local authority's view (set out in the report) that the changes were not fundamental so as to prevent amendment of the plans was not *Wednesbury* unreasonable.

3. ***R (on the Application of Thomas Langton) v (1) Secretary of State for the Environment, Food & Rural Affairs (2) Natural England [2019] EWCA Civ 1562***

The Secretary of State had adopted a policy to permit licensed culling of badgers, which could carry and transmit bovine TB to cattle. The Protection of Badgers Act 1992 s.10(2)(a) vested a power in the Secretary of State to grant a licence for badger culling for the purposes of preventing the spread of disease. The Secretary of State had authorised Natural England to perform that function. In 2017, the Secretary of State issued guidance, empowering Natural England to issue licences allowing supplementary culling to take place to prolong the disease control benefits achieved by earlier intensive culls. The judge concluded that the Secretary of State had acted for the proper purpose for which the legislative power in s.10(2)(a) had been conferred and that in approving the guidance, his actions, subjectively, and judged by their intended effect, were to prevent the spread of bovine TB.

The appellant submitted that the judge had erred in finding that the question of whether the guidance was lawful turned on the Secretary of State's subjective view of whether it would prevent the spread of disease. He argued that there was no objective or scientific evidence to support the policy, and that the judge's approach was inconsistent with that of the *R. (on the application of Badger Trust) v Welsh Ministers* [2010] EWCA Civ 807 which commented on the need for "scientific evidence" when considering the lawfulness of an order made by the Welsh Government, authorising destruction of badgers under the Animal Health Act 1981 s.21(2).

The Court held that the appellant had been wrong to contend that the guidance could only be rendered unlawful if the Secretary of State's true purpose was other than to prevent the spread of disease. The judge had considered whether, in acting as he did under this statutory power, the Secretary of State's actions were otherwise flawed in public law terms. He had concluded that they were not. He had not failed to take account of relevant factors or taken account of irrelevant factors. His policy could not be said to be irrational. He had not treated the issue solely as one of improper purpose, nor was the guidance ultra vires due to an absence of evidence. Unsurprisingly, s.10(20(a) did not specify the nature or quality of evidence necessary to support the grant of a licence for the purpose of preventing the spread of disease. That reflected the fact that it was an area of developing scientific knowledge. The evidence before the Secretary of State was that the disease control benefits achieved at the conclusion of an intensive cull were known to decline over time and would be eliminated over a period of seven and a half years. No viable alternative to supplementary culling had been identified. The Secretary of State had been faced with a choice between trying it or doing nothing. Direct evidence on the effect of supplementary culling could not be obtained without undertaking supplementary culling in an area which had completed an intensive cull. The Secretary of State and the judge had accepted that supplementary culling was untested. However, scientific judgements of the chief veterinary officer, Defra's chief scientific adviser and other experts had concluded that there was a logical and defensible rationale for licensing it and had recommended it. The Secretary of State had been entitled to rely upon such independent and informed scientific opinion. By its very nature, scientific knowledge was a developing concept. It could not always deliver certainty. Experts might not know that a scientific experiment would achieve an identified result, but based on their experience and expert

knowledge they were properly able to conclude that an experiment was logically justified on the information available. What was proposed was an adaptive process which would add to existing knowledge of the effect of supplementary culling as a means of controlling the spread of disease. There was nothing in s.10 which stated that the procedure was lawful only if the outcome was certain. There had been relevant evidence and informed scientific opinion before the Secretary of State, and he had been entitled to act upon it (paras 65-70).

Section 21(2) of the 1981 Act was markedly different from s.10(2) of the 1992 Act, and the comments in *Badger Trust v Welsh Ministers* related to the test under s.21. However, they recognised that permissible extrapolation from existing scientific evidence would provide a sufficient basis for an order even under the more restrictive s.21 test. The guidance was not based upon any impermissible or irrational inference (paras 71-72). Appeal dismissed.

4. ***R (on the Application of Langton) v (1) Secretary of State for the Environment, Food & Rural Affairs (2) Natural England [2018] EWHC 2190 (Admin)***

In 2011, the Secretary of State had adopted a policy to permit licensed culling of badgers, which could carry and transmit bovine TB to cattle, as part of a strategy to achieve an officially bovine TB free status for England. The power in the Protection of Badgers Act 1992 s.10(2)(a) to grant a licence for badger culling, to prevent the spread of disease, was vested in the Secretary of State, but he had authorised Natural England to perform that function. In 2016 the Secretary of State reviewed the approach to culling and considered whether supplementary maintenance culling should take place to prolong the disease control benefits of intensive culls. Before giving further guidance to Natural England on the issuing of supplementary licences, the Secretary of State issued a consultation document as required by the Natural Environment and Rural Communities Act 2006 s.15(3). In 2017, following the end of the consultation, the Secretary of State issued guidance to Natural England setting out the criteria for issuing supplementary licences. The claimant challenged the lawfulness of the guidance and the subsequent issue by Natural England of two supplementary licences and six standard licences.

The claimant argued that the consultation had been unlawful because the Secretary of State had failed to consult at a formative stage, had provided misleading information and had failed to take responses into account; by issuing the guidance the Secretary of State had exceeded his licence-granting power under s.10(2)(a) of the 1992 Act; Natural England had breached the Conservation of Habitats and Species Regulations 2010 by failing to carry out appropriate assessments before issuing the further licences, in particular with regard to the increased risk to bird populations from foxes in areas where badger populations were reduced, and disturbance to bird populations caused by culling operations.

Licence-granting power under s.10(2)(a) – The High Court held that the Secretary of State had acted for the proper purpose for which the legislative power in s.10(2)(a) had been conferred, namely to prevent the spread of disease. In approving the policy on supplementary culling, and guidance to Natural England, his actions subjectively, and judged by their intended effect, were to prevent the spread of bovine TB. He had not acted irrationally in the public law sense; a policy of maintaining a reduced badger population through supplementary culling was not irrational when coupled with a commitment to change tack as evidence became available (paras 95(9) and 123-124). Application refused.

5. ***R (on the Application of Lasham Gliding Society Limited) v Civil Aviation Authority v TAG Farnborough Airport Limited*** **[2019] EWHC 2118 (Admin)**

The Claimant challenged a decision by the Civil Aviation Authority, the statutory regulator of UK airspace, to permit the introduction of air traffic controls in airspace around Farnborough Airport, on the basis that this breached s.70 of the Transport Act and was irrational. The Claimant raised safety concerns, including the possibility of collisions between gliders and aircraft in consequence of this policy. The Claim was dismissed.

The Court held that the Defendant had acted lawfully in respect of section 70, and had not acted irrationally. In relation to the irrationality challenge, emphasis was placed on the high threshold faced by a Claimant. The Judge held that where a decision has been made by a public body in good faith, it is not enough for the Claimant to show that a mistake had occurred [43]. They held further, that the Court should be wary of invitations to engage in detailed analysis of phraseology used, and of drawing fine distinctions between different parts of what may be long and complex reasoning [43]. Following *R(Mott) v Environment Agency*, they held that Defendant in this case was entitled to an enhanced margin of appreciation [52]. Further, they held that the Court should be astute to avoiding the danger of substituting its views for those of a decision-making body, and of contradicting a conscientious decision maker acting in good faith and with knowledge of the facts [53]. In a judicial review challenge, it is not the Court's function to assess the merits of competing tenable opinions on highly technical issues like airspace design [53].

6. ***R (on the Application of Friends of the Earth) v The Environment Agency v Cuadrilla Bowland Limited* [2019] EWHC 25 (Admin)**

Friends of the Earth argued that the Environment Agency ("EA") had breached the Environmental Permitting (England and Wales) Regulations 2016 and Directive 2006/21, by varying a licence to frack granted to Cuadrilla without considering whether electrocoagulation would constitute the best available technique ("BAT") for the treatment and re-use of flowback fluid. The application for judicial review was dismissed.

Any application for a permit under Art.7 of the Directive and Sch.20 para.3 of the Regulations had to be accompanied by a waste management plan (WMP). The Court held that the circumstances in which an approved WMP must be reviewed or amended are set out exhaustively in Article 5(4) of the Directive: either (1) after five years, or (2) where there are "substantial changes to the operation of the waste facility". Therefore, the EA was not required to reconsider or review the WMP in this case, because there had been no substantial changes to the operation of the waste facility [40]. The Claimant also argued that the WMP did not specifically contemplate multiple stage fracking per day, and therefore the EA had committed an error of fact, but this was dismissed by the Court. Supperstone J held that there was no error of fact, because the WMP imposes no constraint on the number of stages of fracking per day [43].

The Claimant also contended that the variation decision had a highly significant substantive effect, because it removed the limit on the number of fracking stages that could take place each day. Supperstone J held that this argument must necessarily be based on Wednesbury irrationality, and that this is a high hurdle when challenging the decision of an expert regulator in a complex technical field [44].

Northern Ireland

7. **In the Matter of an Application by Res UK and Ireland Limited for Judicial Review and in the Matter of Decisions of the Planning Appeals Commission Dated 26 June 2017 (References 2015/A012/A0168 and 2015/A0169) [2018] NIQB 16**

The applicant applied for judicial review of decisions of the planning appeals commissioner refusing planning permission for a wind farm. The applicant had sought permission to build seven wind turbines but the Commissioner refused permission because the proposal would damage priority habitat on the site including

wet heathland. The Court quashed the Commissioner's decisions on two grounds. We draw your attention to paragraph 37, below:

[37] I observe at the outset that this court is exercising a supervisory jurisdiction. I am not trying the case on the merits or making a planning decision. There are many areas that are exclusively within the judgment of the adjudicator in the planning world as reflected in established authority. But the court can correct errors of law by virtue of judicial review and deal with inadequacy of reasons. This case has been argued with sharp focus in relation to these two issues.

8. **In the Matter of an Application by Belfast City Council for Judicial Review sub nom Belfast City Council and Planning Appeals Commission [2018] NIQB 17**

A local authority applied for judicial review of a decision of the Planning Appeals Commission to grant planning permission to a developer for the construction of student accommodation. The Court discusses the role of irrationality in paragraph 30, below:

[30] Against this framework there is, in many cases, a substantial element of evaluative judgment on the part of decision makers. All of this is reflected in the legal truism that if a judicial review challenge materialises, the Court will be obliged to give effect to the entrenched principle that judicial intervention in matters of planning judgment, typically the weight accorded by the decision maker to specified material considerations, is appropriate only on the intrinsically limited ground of irrationality: the "Tesco Stores" principle. (Tesco Stores v Secretary of State for the Environment [1995] 1 WLR 759).

9. ***In the Matter of an Application by Elizabeth Conlon for Judicial Review v Belfast City Council [2018] NIQB 49***

On 5 June 2017 Belfast City Council acceded to the recommendation of its Planning Committee to grant full planning permission in respect of a major office development on a site in Belfast. The Council's grant of planning permission was challenged by Ms Conlon on behalf of a number of local residents concerned, primarily, about overshadowing. The applicant was successful on three grounds but both grounds of alleged irrationality failed. Paragraphs 72 and 80 (below) are particularly germane (see also paras 84-86):

"*72. Having scrutinised the material parts of the evidence with care, I am unable to identify any indicators of irrationality. The elevated threshold which this public law ground of challenge engages requires a lapse of significant proportions on the part of the decision-making authority. The 2015 refusal was properly brought to the attention of the PC members and there was in my view, sufficient accompanying information to enable them to rationally determine whether this factor, either alone or in combination with others, should attract sufficient weight to impel to refusal of a significantly different development proposal for the same site. This required of the decision makers the formation of an evaluative judgment involving a margin of appreciation. It may be said that the breadth of this margin of appreciation is the notional distance which separates the primary decision maker from the superintending court of review in matters of this kind. I conclude that irrationality is not demonstrated and this ground fails accordingly.*

80. "I consider that lying at the heart of this discrete issue is a paradigm illustration of an evaluative planning judgment on the part of the officer concerned … The formulation of the Applicant's pleading (supra) recognises, correctly, that irrationality is the legal touchstone which this ground engages … Matters of planning judgment rarely succumb to this species of challenge. The breadth of the discretion available to the officer concerned is one of the prominent themes of the jurisprudence belonging to this field … Mr Worthington's opinion while doubtless respectable, albeit expressed in

fairly lean terms, does not suffice to overcome the steep threshold which this ground of challenge involves. I conclude that it is without substance".

10. ***In the Matter of an Application by Stuart Knox for Judicial Review sub nom Stuart Knox v Causeway Coast and Glans Borough Council [2019] NIQB 34***

The applicant sought JR of a local authority's decision to grant planning permission for the conversion of a barn close to his home into a detached dwelling.

The development site lay within the "distinctive landscape setting" of the Giants Causeway and Causeway Coast World Heritage Site. The planning application was considered by the local authority's planning committee, which had before it a planning officer's report. The report recommended refusal on three grounds. The committee disagreed, resolving to approve the application for three reasons (the conversion of the barn was acceptable in principle; there was no policy requirement for private amenity space; and the proposed development would be an improvement on what was currently on site). The applicant sought JR on the basis that the committee had failed to provide adequate reasons for its decision.

The Court held that the duty to give reasons was a facet of procedural fairness, and the court had to form its own view as to the adequacy of any reasons given. The question was not whether the committee's actions fell outside the range of courses rationally available to it, but whether there had been procedural unfairness. While the parties could adduce evidence from planning experts to the effect that the committee's reasons were or were not adequate, the utility of such evidence might well be minimal (paras 48-49). In terms of the required standard of the reasons, it did not matter that the applicant had only participated in the decision-making process to a limited extent and had not attended the committee's public meeting. The local authority's legal duties were immutable.

11. ***In the Matter of an Application by Dean Blackwood (representing River Faughan Anglers Ltd) for Judicial Review sub nom Blackwood (Representing River Faughan Anglers Ltd) v Derry City and Strabane District Council [2018] NIQB 87***

Please see paragraphs 32, 64, 73 and 84.

The claimant applied for a JR of the local authority's decision to grant the interested party developer planning permission for six holiday chalets and a manager's dwelling at a riverside location for tourism/fishing use. Planning permission for six self-catering anglers' chalets and a related manager's dwelling had been granted in 2009. The parties disputed whether works to implement that permission had been commenced within the statutory five-year period. The local authority made the impugned grant of planning permission in January 2018.

The claimant contended that the local authority had (1) wrongly taken into account the 2009 permission, which was an immaterial consideration because it had lapsed, having not been commenced in time; (2) alternatively, breached the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 reg.45, reg.46, reg.50 and reg.51 by failing to undertake a review of the previous planning permission; (3) breached reg.6(3) and reg.43(1) of the Regulations by failing to carry out any, or any adequate, habitats assessments; (4) breached reg.3(4) of the Regulations by failing to consider the impact of the proposed development on a protected species, namely bats; (5) breached the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2012 reg.4(1) by failing to require the provision of an environmental statement; (6) infringed sundry policies enshrined in the local area plan.

Implementation of 2009 permission - The Court held that the claimant bore the burden of establishing that works designed to implement the earlier planning permission had not been commenced within the required period. Even taking his case at its zenith, he had failed to discharge that burden. Considering the material evidence in its totality, it was more likely than not that commencement to the required legal standard, namely a "material start", had been achieved prior to the expiry date (paras 21). *Wednesbury* unreasonableness is the alternative, but as the applicant had failed to establish the above ground of challenge (which is less exacting than *Wednesbury*), it follows both logically and inexorably that he had failed to reach the *Wednesbury* standard). Application refused.

12. **In the Matter of an Application by Paul McNamara for Judicial Review sub nom Paul McNamara v Lisburn & Castlereagh City Council [2018] NIQB 22**

The applicant applied for judicial review of the respondent local authority's decision to grant outline planning permission authorising a development entailing an infill dwelling and garage on the lane where he lived. The Court held that the local authority had not erred in law in its construction and application of Planning Policy Statement No.21 and the discrete policy CTY8 in granting outline planning permission for an infill dwelling. The local authority's planning case officer had not impermissibly conflated ribbon development with the exception to the general rule. See para 17, below:

> *[17] In the context of this challenge the governing legal principles can be stated succinctly. The interpretation of any planning policy is a question of law for the Court; exercises of interpretation should not treat planning policies as a statute or contract or any comparable instrument; a similar approach to the reports of planning case officers is to be adopted; and decisions involving predominantly matters of evaluative judgement are vulnerable to challenge on the intrinsically limited ground of Wednesbury irrationality only.*

13. **In the Matter of an Application by Dermot Nesbitt for Judicial Review and in the Matter of a Decision of Newry and Mourne and Down District Council made on 2 June 2017 to Grant Outline Planning Permission Reference LA07/2016/0991/0**

A property owner who lived adjacent to the site of a proposed residential development applied for judicial review of the local authority's decision to grant outline planning permission for the development. The Court held that planning permission had been lawfully granted and reiterated the starkness of irrationality in paragraph 59, below:

> *[59] In this case it is important to state that the court is exercising a supervisory function and is not undertaking a merits review. The court cannot substitute its own view. The court is only empowered to review the legality of the decision-making process. Issues of weight and evaluative planning judgment rest with the decision maker. The court will not interfere with the exercise of the planners' discretion on the weighing of factors subject to a rationality challenge in the Wednesbury sense. However, for a decision to be lawful it must take into account all material considerations. I must be satisfied that the decision maker has asked the correct questions in reaching its determination. In that regard planning policies are broad guidance documents which assist planners in reaching their decision.*

<u>Scotland</u>

14. **Grahams the Family Dairy Limited and MacTaggart & Mickel Homes Limited (Appellants) v The Scottish Ministers [2019] CSIH 3**

The case concerned an appeal against a decision of the Scottish Ministers dated 18 June 2018, dismissing an appeal against Stirling Council's decision to refuse planning permission for a development in the green belt. The development was for 600 housing units (including affordable housing), a public park, commercial space (neighbourhood centre), improvements to road and drainage, and a new primary school, located between Bridge of Allan and Causewayhead. The primary issue for the Inner Court of Session was whether the Scottish Ministers failed to take into account a relevant consideration (or took into account an irrelevant one) notably in connection with the outcome of a local development plan process, which had occurred between the date of a reporter's recommendation to the respondents and their decision which was taken about a year later. The Appeal was allowed. Paragraph 30 of the judgment reaffirms the appropriate intensity of review in planning cases:

*[30] The court is concerned only with the legal validity of the respondents' decision and not with matters of planning judgment. A decision will be regarded as invalid where the decision maker has failed to take account of a relevant consideration or taken into account an irrelevant one (**Wordie Property Co v Secretary of State for Scotland** 1984 SLT 345, LP (Emslie) at 347-8). The respondents' decision is contained exclusively in their letter of 18 June 2018, which adopted the reporter's conclusions and recommendations simpliciter. The questions then are, first, whether the material considerations, which were taken into account by the reporter, and which had been so adopted, remained relevant at the time of the decision and, secondly, whether there were material considerations, which had emerged since the report, which were not taken into account by the respondents. If one or more of the reporter's material considerations had become irrelevant, but was still taken into account by the respondents, or if a new material consideration had emerged which was not taken into account by them, the decision would be invalid.*

15. **Persimmon Homes Limited v The Scottish Ministers [2019] CSIH 30**

An appeal under s.239 of the Town and Country Planning (Scotland) Act 1997, against the Scottish Minister's refusal of an appeal against the decision of Dundee City Council to refuse the appellants' application for planning permission. The permission sought was for residential development and the issues under examination in the Inner Court of Session were whether the Scottish Minister's Reporter: (1) failed to take account of material considerations contained in a report by the Council's Director of City Development; (2) erred in his interpretation of the relevant Local Development Plan; and/or (3) failed to give proper, adequate and intelligible reasons for his decision. Appeal allowed. The limit of the Court is highlighted in paragraph 34, below:

*[34] That is sufficient to determine the appeal and to quash the decision given the failure to take this material consideration into account (**Wordie Property Co v Secretary of State for Scotland** (supra), LP (Emslie) at 348). However, it may be helpful if the court were to express its views on the meaning of the relevant policies as a matter of law for the benefit of the Reporter in the event of re-consideration. In doing so, the court remains anxious not to trespass into the field of planning judgment.*

<u>European Union</u>

16. **Case C-723/17 Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Others - [2019]**

This case concerned an action brought by a number of residents and an environmental organisation against the Brussels-Capital Region in connection with the assessment of ambient air quality, as per Directive 2008/50/EC. The dispute concerned the obligation of the Brussels Institute for Environment

Management to develop an air quality plan for the Brussels zone and to install the sampling points legally required to monitor air quality. A request for a preliminary ruling was made in respect of the interpretation of various Articles of the TFEU, and provisions of the Directive.

The ECJ held that where an application is submitted by individuals directly affected the exceedance of the limit values referred to in Article 13(1) of the Directive, it is for the national court to verify whether the sampling points located in a particular zone have been established in accordance with the criteria laid down in the Directive. If this has not been done, then to take all necessary measures in respect of the competent national authority, such as, if provided for by national law, an order with a view to ensuring that those sampling points are sited as per the Directive's criteria.

In relation to the standard of review, or rigour, to be applied to national decisions adopted pursuant to an act of EU law, the ECJ held at [46] that it is necessary to take into account the purpose of the act and to ensure that its effectiveness is not undermined. At [54] it held that national courts and tribunals' procedural rules governing the safeguarding of rights derived from EU law must not make the exercise of those rights impossible in practice or excessively difficult, as per the principle of effectiveness.

The Opinion of Advocate General Kokott found at [40] that "*regard must be had to the principle of effectiveness, that is to say, what standard of judicial review is necessary so that reliance on the applicable provisions of EU law is not rendered excessively difficult*". Whilst in complex scientific assessments, there is generally a broad discretion, "*that discretion must be reviewed more intensively, in particular where there are particularly serious interferences with fundamental rights*" [43].

AG Kokott identified [53] that the Directive puts into effect the EU's obligations in respect of the fundamental right to life pursuant to Article 2(1) of the Charter, and the high level of environmental protection required under Article 3(3) TEU, Article 37 of the Charter and Article 191(2) of the TFEU. Therefore, the measures which may impair the effectiveness of the Directive are comparable in their significance with measures which seriously interfere with fundamental rights, and upon which basis the Court has ruled that decisions relating to call data are subject to strict review [53]. Where the protective aims/ objectives of the Directive are called into question, then a more intensive standard of review is required [56].