

# Land of special scientific interest

## QUEEN'S BENCH DIVISION

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### Fisher and Others v English Nature

Before Mr Justice Lightman  
*Judgment July 4, 2003*

If English Nature remained of the opinion that the statutory criteria for a site of special scientific interest were satisfied, it had no discretion to decline to confirm an earlier notification to that effect on the basis of some collateral reason.

Mr Justice Lightman so held in the Queen's Bench Division when dismissing an application made by the claimants, Mr Patrick Fisher and the trustees of the Hon P. V. Fisher's Children's 1986 Settlement, for judicial review of the decision of the defendant, English Nature, to confirm its earlier notification to them that land in the claimants' ownership formed part of a site of special scientific interest.

The claimants submitted, inter

alia, that the confirmation breached section 6 of the Human Rights Act 1998, which rendered it unlawful to act in a way incompatible with article 1 of the First Protocol to the European Convention on Human Rights safeguarding the right to property.

They argued that the confirmation was incompatible because the decision occasioned a disproportionate interference with the peaceful enjoyment of their possessions.

**Mr David Holgate, QC and Mr Daniel Kolinsky** for the claimants; **Mr John Howell, QC and Ms Jane Collier** for the defendant.

MR JUSTICE LIGHTMAN said that the grievance of the claimants was that the area could have been classified as a special protection area, a different category of environmental protection which was less onerous to landowners and thus a more proportionate interference with their rights.

Alternatively, the site could have been sufficiently protected by concluding voluntary agreements with the landowners.

A question to be decided was whether it was open to English Nature to decide not to confirm the notification for those reasons.

English Nature had a duty under section 28(1) of the Wildlife and

Countryside Act 1981, as substituted by section 75 of, and Schedule 9 to the Countryside and Rights of Way Act 2000, to notify an area of land as an area of special scientific interest if it held the opinion that the statutory criteria were satisfied. Section 28(1) afforded scope for judgment, but no scope for discretion.

English Nature had thereafter within nine months to decide whether to withdraw the notification or confirm it or it would lapse.

Although section 28(5) in setting out the alternative courses available to English Nature used the word "may", a term which ordinarily connoted a discretion, notwithstanding what was said in *R v Nature Conservancy Council, Ex parte London Brick Property Ltd* ([1996] Env LR 1) to the contrary, if English Nature continued to be of the opinion that the statutory criteria were satisfied, the discretion could only be lawfully exercised one way, that was, in favour of confirming the notification.

Any other course than confirmation would bring into play once again the immediate duty of English Nature to make the notification, and the legislature could not sensibly have intended that roundabout method of continuing the legal consequences of the continuing opinion of English Nature that the statutory criteria were satisfied.

Accordingly, if English Nature was of the opinion that the statutory criteria were satisfied, it had no discretion to decline to confirm by reason of a preference for the application of some other statutory or non-statutory scheme or by reason of any objection to or dissatisfaction with the legal consequences of confirmation.

It followed that the claimants' allegation that the confirmation of English Nature's notified opinion was disproportionate was unmaintainable because English Nature was duty bound to confirm the notification if it still held that opinion.

Accordingly, its decision could only be incompatible with Convention rights if the underpinning statutory provisions were incompatible, and, in the present case, the claimants had disavowed any such challenge to the legislation.

His Lordship said that, in any event, the claimants could not have successfully contended that the mere notification or confirmation by English Nature would in itself be incompatible with their Convention rights for English Nature's opinion, representing as it did only its opinion, did not interfere with the peaceful enjoyment of the claimants' possessions.

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