COURT OF JUSTICE
OF THE
EUROPEAN COMMUNITIES

Registry

Received 31/3/08.

26/03/08

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GB-Cambridge CB1 1JP

- 793602 EN -

Preliminary reference C-75/08
Mellor
(Referring court: Court of Appeal (Civil Division) - United Kingdom)

Notification of the request for preliminary ruling

The Registrar of the Court of Justice of the European Communities encloses a copy of the request for preliminary ruling lodged pursuant to Article 234 EC in the abovementioned case.

Pursuant to the second paragraph of Article 23 of the Protocol on the Statute of the Court of Justice, the parties in the case before the national court, the Member States, the Commission and, where appropriate, the European Parliament, the Council and the European Central Bank are entitled to submit written observations to the Court on the requests for preliminary ruling within **two months** of this notification.

Further, pursuant to the third paragraph of Article 23 of that Protocol, the States, other than the Member States, which are parties to the Agreement on the European Economic Area, as well as the EFTA Surveillance Authority, may, within two months of notification, where one of the fields of application of that Agreement is concerned, submit written observations.

The above time-limit of two months, which may **not** be **extended**, may be increased by a single period of **ten days** on account of distance as provided for by Article 81(2) of the Rules of Procedure.

The Registrar draws your attention to the fact that all the documents relating to the case must be placed on the court file during the written procedure.

COMMVNITATVM EVROPEARVM CVRIA

Manuela Ferreira
Principal Administrator

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Court of Justice of the European Communities
Registry
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C-75/08-1.

MONDAY 21ST JANUARY 2008

Her Majesty's Court of Appeal 08 FEB 2008

IN THE COURT OF APPEAL

Order No. 5429

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

CO14242007

COURT 72
Appeal No.

C1/2007/0780

BEFORE LORD JUSTICE WALLER Vice President of the Court of Appeal, Civil Division
LADY JUSTICE ARDEN
And LORD JUSTICE TOULSON

Registered at the Court of Justice under No. 791687
Luxembourg 25-02-2008
For the Registrar
Fax / E-mail: ....
Received on: 21.02.08
Lynn Hewlett
Principal Administrator

IN THE MATTER OF a claim for judicial review

B E T W E E N

THE QUEEN ON THE APPLICATION OF CHRISTOPHER MELLOR

CLAIMANT/
APPELLANT

- and -

SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT

DEFENDANT/
RESPONDENT

ON READING the Appellant's Notice sealed on the 18th April 2007 filed on behalf of the Appellant on appeal from the order of Mr Justice Owen dated 28th March 2007

AND ON HEARING Mr Richard Harwood counsel on behalf of the Appellant and Mr James Maurici counsel on behalf of the Respondent

IT IS ORDERED that

The following questions be referred to the European Court for a preliminary ruling under article 234 of the Treaty establishing the European Community:

"1. Whether under Article 4 of Council Directive 85/337/EEC as amended by directives 97/11/EC and 2003/35/EC ("the Directive") Member States must make available to the public reasons for a determination that in respect of an Annex II project there is no requirement to subject the project to assessment in accordance with

Articles 5 to 10 of the Directive?

2. If the answer to Question 1 is in the affirmative whether that requirement was satisfied by the content of the letter dated 4 December 2006 from the Secretary of State?

3. If the answer to Question 2 is in the negative, what is the extent of the requirement to give reasons in this context?"

That the reference be in the form agreed at the hearing and that a copy of the Court's judgment be attached to it

Costs in the case

By the Court

[The Court Sat from 10:47 to 11:30]

MONDAY 21ST JANUARY 2008
IN THE COURT OF APPEAL
ON APPEAL FROM THE
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
IN THE MATTER OF a claim for judicial review

CHRISTOPHER MELLOR

- and -

SECRETARY OF STATE FOR COMMUNITIES
& LOCAL GOVERNMENT

ORDER

Copies to:

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Ref: JMB/GTI/21259/27*

* This order was drawn by Ms S Ahmed (Court Associate) to whom all enquiries regarding this order should be made. When communicating with the Court please address correspondence to Ms S Ahmed , Civil Appeals Office, Room E328, Royal Courts of Justice Strand London WC2A 2LL (DX44450 Strand) and quote the Court of Appeal reference number. The Associates telephone number is 0207 947 6284.

Draft 17th January 2008 (RH)

R(Christopher Mellor) v Secretary of State for Communities and Local Government

Reference by the Court of Appeal to the European Court of Justice for a preliminary ruling under Article 234 EC.

I. Introduction and Summary

1. These proceedings concern screening decisions as to whether Environmental Impact Assessment is required of applications for development consent for projects falling within Annex II of Council Directive 85/337/EEC as amended by 97/11/EC and 2003/35/EC. In the present case the Secretary of State determined that EIA was not required on a planning application for a medium secure hospital unit at HMS Forest Moor, Menwith Hill Road, Harrogate, North Yorkshire.

2. The issues which arise are whether the Secretary of State was required to give reasons for deciding that Environmental Impact Assessment was not required and, if so, whether her decision provided adequate reasons.

The remaining sections of this document are as follows:

II. Formal questions in the reference.

III. Agreed facts

IV. Summary of applicable national law.

V. Summary of provisions of EC law.

VI. Summary of Mr Mellor's case.

VII. Summary of the UK Government's case.

II. Formal questions in the reference.

1. Whether under Article 4 of Council Directive 85/337/EEC as amended by directives 97/11/EC and 2003/35/EC ("the Directive") Member States must make available to the public reasons for a determination that in respect of an Annex II project there is no requirement to subject the project to assessment in accordance with Articles 5 to 10 of the Directive?

2. If the answer to Question 1 is in the affirmative whether that requirement was satisfied by the content of the letter dated 4 December 2006 from the Secretary of State?

3. If the answer to Question 2 is in the negative, what is the extent of the requirement to give reasons in this context?

III. Agreed facts

(a) The Site and its location

1. HMS Forest Moor is a former naval base located in the open countryside of the Nidderdale Area of Outstanding Natural Beauty ("Nidderdale AONB") about 12 kilometres west of Harrogate in North Yorkshire. The site occupies an area of about 8 hectares. The whole site is surrounded by a security fence about 3 metres tall, with floodlights positioned around the perimeter at regular intervals.

2. The site is very open to the south, where it backs onto open fell. The main public views into the site are from the approaches along Menwith Hill Road and there are also clear views from a bridleway by the western boundary of the site.

3. An extensive range of buildings occupy the north and east section of the grounds. These are mainly single storey, but with some two-storey elements. The tallest and most prominent building is a sports hall, which fronts onto the road. There is a gatehouse on the other side of the main entrance, with kennels and tennis courts behind. There are two storage sheds in the south-east corner of the site. All the buildings are contained in the lower part of the site, the higher ground being used as a sports field.

(b) The original application and High Court proceedings.

4. Partnerships in Care ("PiC") applied to the local planning authority, Harrogate Borough Council ("the Council"), in October 2004 for planning permission to construct a medium secure hospital unit at HMS Forest Moor. Planning permission was granted in August 2005. Judicial review proceedings were brought by a local resident and on 5th April 2006 the planning permission was quashed by the High Court by consent on grounds including the failure of the Council to adopt an Environmental Impact Assessment screening opinion: *R(Whitton) v Harrogate Borough Council* CO/9248/05.

(c) The present planning application

5. The 2004 planning application was not pursued following the quashing of the planning permission.

6. On 7th July 2006 PiC's planning consultants applied to the Council for a screening opinion under regulation 5 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the EIA Regulations"). Residents for the Protection of Nidderdale wrote on 24th July 2006 to the Council arguing that Environmental Impact Assessment was required. The

Council issued its screening opinion, which was five pages long, on 25th August 2006.

7. The screening opinion described the proposal as:

> "It is proposed to use the site as a medium secure hospital unit. This would involve the demolition of part of the existing building to the rear and the erection of three, single storey 'V'-shaped wings attached to the spine of the existing building. Each wing would be self-contained and would house 16 patients. Two sheds in the southeast corner of the site would also be demolished.
>
> Each 'V'-shaped wing would measure approximately 37m deep and 54m across the open end of the 'V'. They would be about 7m to ridge height, no higher than the existing buildings. The open end of the 'V' would be enclosed by a 5.2m high security fence.
>
> The proposed development would make full use of all the other facilities on site, including the sports hall and the catering and recreational facilities provided in the main building. It is intended that the sports hall, tennis courts and football pitch will be made available for use by the local community.
>
> The perimeter fencing would remain around the site, but the floodlights would be removed. Fencing would be erected around the football pitch.
>
> In a letter dated 24 August 2006, the applicants confirm that the horticultural area and polytunnel will not form part of the application."

8. The screening opinion said the proposal was an urban development project under Schedule 2 of the EIA Regulations. It said that as the Nidderdale AONB was a sensitive area a screening opinion had to be adopted.

9. The screening opinion noted that there would be a 47% increase in the footprint of the existing building but this of itself did not require EIA. The production of waste and the generation of traffic were considered not to be significantly different from the previous use. The Council considered that there was potential for bat roosts and breeding sites in the existing buildings but did not know whether bats were present. It 'considered that the potential impact on any bats on site does not constitute a significant effect on the environment such as to warrant an Environmental Impact Assessment'.

10. Whilst the site 'occupies a large area of land in a relatively exposed location in the Nidderdale AONB' the Council considered that the proposed development would not have a significant effect on the landscape of the AONB.

11. The screening opinion continued:

> "The proposed use of the site is as a residential medium secure hospital. The Town and Country Planning (Use Classes) Order 1987 was amended with effect from 7 June 2006 with the effect that a new Use Class C2A was created. In land use planning terms the proposed use of the site as medium secure hospital is in this same Use Class as its former use as a military base. The proposed use is unlikely to have any complex, long-term or irreversible

impacts and is such that it is not considered to have a significant effect on the environment."

12. The screening opinion concluded that 'having regard to the selection criteria set out in Schedule 3 of the Regulations, it is considered that the proposed development would not have a significant environmental effect. It is the opinion of the Council that an Environmental Impact Assessment is therefore not required in this case.'

13. On 4th September 2006, Mr Mellor wrote on behalf of Residents for the Protection of Nidderdale arguing that the screening opinion was flawed. The three page letter was accompanied by a 13 page statement. Mr Mellor said that there were various errors and omissions in the screening opinion. Another local resident, Mr Austin, also criticised the screening opinion in a letter to the Council, on 12th September, saying, amongst other points, that a bat survey for PiC had identified a bat roost in the building to be demolished and that the polytunnel and horticultural area should have been considered.

14. On 3rd October 2006 PiC submitted the present planning application.

15. PiC's planning consultants had been informally told that the Council was changing its mind on the need for EIA and on 20th October 2006 they wrote to the Government Office for Yorkshire and the Humber to ask the Secretary of State for a screening direction. The letter said:

> **"Land at Forest Moor, Menwith Hill Road, Harrogate**
>
> A planning application has been submitted for the conversion of the above former naval base into a medium secure mental health unit.
>
> The site is located in an Area of Outstanding Natural Beauty but is identified as a major developed site in the adopted local plan. It contains a number of buildings and is enclosed by an existing boundary fence and floodlights.
>
> The conversion works comprise alterations, partial demolition and the erection of three wings of accommodation and some additional car parking. The existing boundary fence will remain unaltered but some additional fencing will be erected within the site to provide secure gardens to each of the accommodation wings. The existing floodlighting will be removed altogether.
>
> Prior to submission a screening opinion was sought from Harrogate BC under Regulation 5(1). The authority initially determined that an EIA was not required but we have now been advised that they intend to alter that decision and consequently, the Secretary of State's opinion is sought.
>
> I enclose the information that was submitted to the authority namely the covering letter, the layout plans and landscape plans and I also enclose a copy of the bat survey and drainage consent plans for your assistance.
>
> I also attach the authority's opinion in response to the screening request but reiterate that we have been advised that they have changed their mind since they are of the opinion that any future decision on the planning application might be open to legal challenge if an EIA had not been supplied.

Finally I enclose an appeal decision that may be of assistance. This was for a similar but much larger development in the metropolitan green belt and the Secretary of State determined that it would not have a significant effect on the environment.

I confirm that a copy of this letter has been sent to the local authority."

16. On 23rd October 2006 the Council issued a fresh screening opinion, considering that Environmental Impact Assessment was required. It described the proposal as:

"Change of use and extensions to form medium secure hospital unit, with the erection of 5.2m and 3m fencing, formation of car parking spaces, and various hard and soft landscaping"

17. The screening opinion said:

"Notwithstanding the Council's earlier Screening Opinion it has now been decided that the application should be accompanied by an Environmental Impact Assessment. Since the Screening Opinion was issued the Council has taken further legal opinion on this matter and decided that an Environmental Impact Assessment is required for the following reasons.

1) The impact of the proposed horticultural area and polytunnel need to be taken into account at this stage. It is not sufficient simply to omit these elements as suggested in your letter dated 24 August 2006.

2) Although reserved for Phase II of the development, the environmental impact of the fourth wing needs to be taken into account at this stage.

3) Local Plan Policy C1 states that proposals for large-scale development in the AONB will not be permitted unless the environmental impact has been fully assessed. Whilst not of itself requiring an EIA, for the proposed development to comply with the Development Plan, it is necessary to assess fully the environmental impact, which can be achieved by the submission of an EIA.

Taking into account these additional elements, it is now considered that the proposed development is likely to have a significant effect on the environment, specifically because of its location and its impact on the landscape of the AONB, which is classed a sensitive area for the purposes of the EIA Regulations.

If you do not agree with the Council's opinion on this matter, you may apply to the Secretary of State for a Screening Direction under Regulation 5(6).

With regard to Environmental Impact Statement, this should include an assessment of the following issues:-

Landscape impact (full details of the proposed lighting scheme should be provided)

Surface water drainage

Foul water drainage

Clinical waste management

Traffic assessment

Protected species (bats)

With regard to the description of the proposed development, this has been altered to refer to a change of use. Since adopting the original Screening Opinion the Council has taken further legal advice and does not accept that the current use of the site is as a military barracks, and so does not fall within Use Class C2A. The proposed use as a medium secure hospital would therefore entail a change of use.

As you will be aware from our recent meetings, issues of Public Safety will be dealt with in a separate Risk Assessment."

18. On 12th November 2006 the Residents for the Protection of Nidderdale wrote to the Government Office saying that EIA was required and making particular reference to bats and drainage.

(d) The Secretary of State's screening direction

19. The Secretary of State issued a screening direction on 4th December 2006 in these terms:

"I refer to your client's application for planning permission made to Harrogate Borough Council on 3 October 2006, reference number 06/05096/FULMAJ and to your request received on 20 October 2006 under the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (S.I. 1999/293) ("the 1999 Regulations"), for the Secretary of State's screening direction on the matter of whether or not the development you proposed is 'EIA development' within the meaning of the 1999 Regulations.

The development proposed, namely conversion and extensions to form medium secure hospital unit, with the erection of 5.2m and 3m fencing, formation of car parking spaces and various hard and soft landscaping on land at HMS Forest Moor, Menwith Hill Road, Darley, Harrogate falls within the description at paragraph 10(b) of Schedule 2 to the 1999 Regulations and is located in a "sensitive area" within the meaning of paragraph 2(1)(h) of the 1999 Regulations.

Therefore the Secretary of State considers your proposal to be "Schedule 2 development" within the meaning of the 1999 Regulations.

However, in the opinion of the Secretary of State and having taken in to account the selection criteria in Schedule 3 to the 1999 Regulations and the representations made by Mr C Mellor on behalf of Residents for the Protection of Nidderdale, the proposal would not be likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

Accordingly, in exercise of the powers conferred on him by regulation 6(4) of the 1999 Regulations the Secretary of State hereby directs that the proposed development described in your request and the documents submitted with it, is not "EIA development" within the meaning of the 1999 Regulations. Any permitted development rights which your proposal may enjoy under the Town and Country Planning (General Permitted Development) Order 1995 are therefore unaffected.

Having regard to the above direction the planning application mentioned may proceed without submission of an environmental statement.

You will bear in mind that the Secretary of State's opinion on the likelihood of the development having significant environmental effects is reached only for the purposes of this direction.

I am sending a copy of this letter to Harrogate Borough Council."

(e) The current proceedings

20. Following an exchange of correspondence between solicitors under the Judicial Review Pre-Action Protocol, Mr Mellor brought a claim for judicial review against the Secretary of State on 20th February 2007. The Council and PiC were made interested parties but have chosen to take no part in the proceedings. The proceedings sought the quashing of the Secretary of State's screening direction on the grounds:

(i) she was required to give reasons for making the negative screening direction, but failed to do so;

(ii) if reasons were given, the reasons were inadequate.

21. Mr Mellor took the unusual step of immediately asking the High Court to refuse permission to apply for judicial review so he could appeal to the Court of Appeal. The reason was that the Court of Appeal had decided in *R v Secretary of State for the Environment, Transport and the Regions ex p Marson* [1998] Env LR 761 that reasons did not have to be given for refusing to direct that EIA was required and if they were required then the Secretary of State's reasons in that case were adequate. The High Court in *R(Probyn) v Secretary of State for Communities and Local Government* [2006] EWHC 398 (Admin) had refused permission to apply for judicial review in another EIA reasons case, holding that the overwhelmingly like result was that the High Court would consider itself either bound or extremely persuaded by *Marson* and that the parties should be enabled to take the case straight to the Court of Appeal.

22. At that time permission to appeal had been granted in *Probyn* and the case was due to be heard in the Court of Appeal.

23. The Secretary of State argued that *Mellor* should be stayed but on 28th March 2007 Mr Justice Owen refused permission to apply for judicial review and

ordered the Secretary of State to pay the costs of the hearing [2007] EWHC 1339 (Admin).

24. The *Probyn* appeal was subsequently withdrawn due to changed circumstances on the site and in relation to the client.

25. On 13th August 2007 Lord Justice Auld granted permission to appeal.

26. A complaint was made to the EC Commission as regards the Court of Appeal's decision in *Marson*. Some time ago the Commission sent a reasoned opinion under Article 226(1) of the EC Treaty to the United Kingdom in respect of the *Marson* complaint (the contents of which are confidential). It is understood that the Commission now intend to bring the matter before the ECJ under Article 226(2) of the EC Treaty, although no proceedings have as yet been commenced.

IV Summary of applicable national law

27. Under the Town and Country Planning Act 1990 'development' is the carrying out of building, engineering, mining or other operations or the making of any material change in the use of any buildings or other land: section 55. With immaterial exceptions, planning permission is required for the carrying out of development: section 57.

28. The Environmental Impact Assessment regime was originally implemented for planning applications by the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988. Following the amendments in Directive 97/11/EC these were replaced by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. Whilst the amendments to the EIA Directive made by Directive 2003/35/EC were required to be implemented by 25th June 2005 at the latest, implementation with respect to planning applications did not take place until 15th January 2007 (by the Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2006.)

29. The EIA Regulations provide for determinations to be made whether planning applications should be subject to Environmental Impact Assessment and for the carrying out of such assessments. Planning applications for projects falling within the descriptions in Schedule 1 of the EIA Regulations may not be approved unless they have been subject to EIA. The present project is not within Schedule 1.

30. Screening is required of planning applications for 'Schedule 2 development'. Schedule 2 development is defined by Regulation 2(1) as development:

> "...of a description mentioned in Column 1 of the table in Schedule 2 where:
>
> (a) any part of that development is to be carried out in a sensitive area; or
>
> (b) any applicable threshold or criterion in the corresponding part of Column 2 of that table is respectively exceeded or met in relation to that development."

31. The table in Schedule 2 has two columns: column 1 contains a type of development and column 2 any size, threshold or other criterion applicable to that type. In paragraph 10 column 1 contains '(b) Urban development projects, including the construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas' and column 2 has a corresponding threshold: 'the area of the development exceeds 0.5 hectare'.

32. Sensitive areas are sites with specified national or international designations including areas of outstanding natural beauty: Regulation 2(1)).

33. Regulation 2(1) also provides that 'EIA application' means 'an application for planning permission for EIA development.' 'EIA development' means development which is either:

> "(a) Schedule 1 development; or
>
> (b) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location."

34. Planning permission may not be granted pursuant to an EIA application unless an environmental statement has been produced, consulted upon and the information produced considered in accordance with the EIA Regulations: regulation 3(2).

Screening opinions and screening directions

35. Determinations whether EIA is required are made by local planning authorities as screening opinions and by the Secretary of State as screening directions.

36. A screening opinion is (regulation 2(1)):

> "a written statement of the opinion of the relevant planning authority as to whether development is EIA development"

37. A screening direction is (regulation 2(1)):

> "a direction made by the Secretary of State as to whether development is EIA development"

38. A development is determined to be EIA development if the applicant submits an environmental statement for the purpose of the EIA Regulations or a local planning authority adopts a screening opinion that the development is EIA development (regulation 4(2)). However by regulation 4(3) a screening direction by the Secretary of State shall determine whether development is EIA development, over-riding any conclusion reached under regulation 4(2).

39. A person 'who is minded to carry out development' may ask the local planning authority to adopt a screening opinion (regulation 5(1)). A request for a screening opinion shall be accompanied by:

> "(a) a plan sufficient to identify the land;
>
> (b) a brief description of the nature and purpose of the development and of its possible effects on the environment; and

(c) such other information or representations as the person making the request may wish to provide or make."

40\. ~~39.~~ The local planning authority are required to request more information if they do not have sufficient material to adopt an opinion (regulation 5(3)).

41\. The screening opinion should be adopted within three weeks, or any longer period agreed (regulation 5(4)).

42\. If a planning application for Schedule 1 or Schedule 2 development is submitted and it has not been subject to a screening opinion or screening direction and is not accompanied by an environmental statement, then the local planning authority is required to adopt a screening opinion under regulation 5(4): regulation 7(1).

43\. If no screening opinion is adopted with the statutory timescale or the screening opinion is that the development is EIA development, the person who requested the opinion (or the applicant for planning permission) may ask the Secretary of State for a screening direction (regulation 5(6)). The person requesting the screening opinion shall provide (regulation 6(1)):

"(a) a copy of his request to the relevant planning authority under regulation 5(1) and the documents which accompanied it;

(b) a copy of any notification under regulation 5(3) which he has received and of any response;

(c) a copy of any screening opinion he has received from the authority and of any accompanying statement of reasons; and

(d) any representations that he wishes to make."

44\. If the Secretary of State considers that she has insufficient information then she is obliged to request additional information from the applicant and may ask the local planning authority for information (regulation 6(3)).

45\. The Secretary of State is also required to adopt a screening direction if she receives an appeal or calls in an application for her determination for Schedule 1 or Schedule 2 development without any environmental statement, screening opinion or screening direction (regulations 8, 9).

46\. The Secretary of State may make a screening direction of her own motion (regulation 4(7)). In practice this means that any person may request a screening direction. The Secretary of State may also direct that a class of development within column 1 of the table to Schedule 2 of the EIA Regulations is EIA development (Town and Country Planning (General Development Procedure) Order 1995, Article 14(2).

47\. Where a screening opinion or screening direction is adopted to the effect that development is EIA development (regulation 4(6)):

"that opinion or direction shall be accompanied by a written statement giving clearly and precisely the full reasons for that conclusion"

4¶. By regulation 4(5) screening decisions must take into account the screening criteria contained in Schedule 3 of the EIA Regulations:

> "Where a local planning authority or the Secretary of State has to decide under these Regulations whether Schedule 2 development is EIA development the authority or Secretary of State shall take into account in making that decision such of the selection criteria set out in Schedule 3 as are relevant to the development."

10. Schedule 3 provides:

"1 **Characteristics of development**

The characteristics of development must be considered having regard, in particular, to—

(a) the size of the development;

(b) the cumulation with other development;

(c) the use of natural resources;

(d) the production of waste;

(e) pollution and nuisances;

(f) the risk of accidents, having regard in particular to substances or technologies used.

2 Location of development

The environmental sensitivity of geographical areas likely to be affected by development must be considered, having regard, in particular, to—

(a) the existing land use;

(b) the relative abundance, quality and regenerative capacity of natural resources in the area;

(c) the absorption capacity of the natural environment, paying particular attention to the following areas—

(i) wetlands;

(ii) coastal zones;

(iii) mountain and forest areas;

(iv) nature reserves and parks;

(v) areas classified or protected under Member States' legislation; areas designated by Member States pursuant to Council Directive 79/409/EEC on the conservation of wild birds and Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora;

(vi) areas in which the environmental quality standards laid down in Community legislation have already been exceeded;

(vii) densely populated areas;

(viii) landscapes of historical, cultural or archaeological significance.

3 Characteristics of the potential impact

The potential significant effects of development must be considered in relation to criteria set out under paragraphs 1 and 2 above, and having regard in particular to—

(a) the extent of the impact (geographical area and size of the affected population);

(b) the transfrontier nature of the impact;

(c) the magnitude and complexity of the impact;

(d) the probability of the impact;

(e) the duration, frequency and reversibility of the impact."

49. A copy of any screening opinion or screening direction and any written statement of reasons must be placed on Part I of the Planning Register (Regulation 20).

V Summary of provisions of EC law

The following provisions of Community Law are relevant[1] to this application:

1. EC Treaty, Articles 2, 3, 6, 10, 174-176, 234 and 249

2. Charter of Fundamental Rights of the European Union, Article 37

3. EC directive 85/337/EEC (the assessment of the effects of certain public and private projects on the environment) as amended by 97/11/EC and 2003/35/EC

In addition the United Nationals Economic Commission for Europe's Århus Convention is relevant.

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1 The case-law of the ECJ relevant to each parties case is included in the summaries of the arguments of each party: see section 6

VI Summary case for Mr Mellor

1. Mr Mellor contends:

   (i) there is a duty to give reasons for screening decisions which conclude that Environmental Impact Assessment of a project is not required;

   (ii) those reasons must enable an informed reader to understand why the decision was taken and whether it was taken lawfully;

   (iii) the reasons given in the present case by the Secretary of State were not adequate.

2. A decision that Environmental Impact Assessment is not required removes a level of scrutiny and public participation from the decision making process for a project. It excludes the project from measures designed to protect the environment. Whilst such exclusion may be correct in a particular case, it is necessary for the reasons for that decision to be set out and capable of being properly understood.

3. This issue came before the European Court of Justice in *Commission v Italy* C-87/02. Advocate-General Ruiz-Jarabo Colomer said at paragraph 36:

   > "An administrative decision which concludes that the particular features of a project are not such that it is damaging to the environment must be explained by reasons. According to the general rule, which I have already set out, all projects must be made subject to an assessment of their effects prior to authorisation; therefore, if a particular project is excluded from that requirement because it is not harmful, the reasons on which that finding was based must still be disclosed. Environmental protection currently occupies a prominent position among Community policies. Furthermore, the Member States also have a crucial responsibility in that area. Community citizens are entitled to demand fulfilment of that responsibility under Article 37 of the Charter of Fundamental Rights of the European Union, which guarantees a high level of environmental protection and the improvement of the quality of the environment. Accordingly, the main elements of any measure which strays from the general criteria aimed at protecting the environment must be duly specified, since that is an embodiment of the rational exercise of power, as well as being a tool which, if necessary, enables the measure to be reviewed subsequently."

4. He concluded (paragraph 41):

   > "the Italian authorities did indeed fail to carry out the required checks because a conclusion which is not based on reasons amounts to no conclusion at all."

5. The Court recorded the Commission's arguments that reasons must be given for negative screening opinions (*Commission v Italy* C-87/02, para 27, 29, 45). The Court noted that Decree No 25/99 which exempted the project from EIA

'is based on a cursory statement of reasons' (paragraph 46). It then follows the references through the Coordinating Committee minutes to the civil engineer's opinion and says that was not an opinion on the environmental effects of the project. The information therefore indicated that no screening was carried out (paragraph 48). Mr Mellor observes that there was a screening decision but the evidence did not indicate that any lawful consideration had taken place

6. In any event, the Court said (paragraph 49):

> "It must be observed that a decision by which the national competent authority takes the view that a project's characteristics do not require it to be subjected to an assessment of its effects on the environment must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of Directive 85/337."

7. In *Commission v Italy* C-83/03 the Court found a failure to screen 'without having to make a finding on the duty to state reasons' (paragraph 21).

8. Essentially for the reasons given by the Advocate General and by the Court in C-87/02 at paragraph 49, Mr Mellor says that reasons must be given for negative screening opinions.

9. The reasons must enable the public to understand why the decision has been taken and whether it has been taken lawfully.

10. Mere recitation of the test in Article 2(1) and reference to the screening criteria in Annex III of the Directive (Schedule 3 of the EIA Regulations) is insufficient. The present case illustrates the nature of the issues which arise on a screening exercise. It is not possible to determine whether those issues have been considered lawfully and how they were resolved on the basis of the Secretary of State's letter (even if material known to have been before her is taken into account).

11. It follows that the decision of the UK Court of Appeal on the permission application in *R v Secretary of State for the Environment, Transport and the Regions ex p Marson* [1998] Env LR 761 was wrongly decided.

VII Summary case for the Secretary of State

1. It is submitted that there is no duty on the Secretary of State to give reasons for concluding that EIA is not required when making a screening direction pursuant to the 1999 Regulations.

2. Nothing in the EIA Directive, or EC law more generally, imposes a requirement to give reasons for a negative screening direction. The Appellant's case turns on the EIA Directive being held to require the giving of reasons for a decision that EIA is not required. But Article 4 of the EIA Directive makes no reference to a

need to provide reasons in determining whether EIA is required. This is in marked contrast with the:

i. the wording at Article 9 of the EIA Directive relating to decisions to grant or refuse development consent. The wording here expressly requires the competent authority to make reasons for their decision available to the public. Had it been the purpose and intention of the Directive that competent authorities were required to make available to the public reasons why in a specific case, EIA was not required, it is reasonable to assume the wording would have been more explicit, and in line with that used in Article 9.

ii. Article 3(7) of the more recent Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive") which by Article 3(7) expressly requires that reasons be given "for not requiring an environmental assessment". The contrast with Article 4 of the EIA Directive could not be clearer.

3. That there is no duty in EU law to give reasons in the circumstances of this case is supported by the reasoning of the Court of Appeal ***R v SSE, ex p Marson*** [1998] Env LR 761 at p. 769.

4. The case advanced by the Appellant relies principally on the decision of the ECJ in ***Case C-87/02 Commission v Italy*** which it is said supports the proposition that there is an obligation to give reasons for a negative screening direction. However, ***Case C-87/02*** was in essence a case about the failure to consider whether EIA was required at all (i.e. a failure to screen for EIA), rather than the failure to give reasons for a screening direction. Properly understood ***Case C-87/02*** is about the failure to consider whether a development should be subjected to EIA i.e. a failure to screen per se, evidenced by (in part) a failure to give reasons. It does not support the view that even if there was a screening decision, reasons must be given for that decision In this case there was, and it can be shown that there was, screening at two levels by the Council (on two separate occasions) and subsequently by the Secretary of State following the making of detailed representations.

5. If the Secretary of State's primary contention that there is no duty to give reasons for a negative screening direction is upheld the Appellant's case must fail.

6. However, if (contrary to what is submitted above) the Court determines that there is a duty to give reasons in this context it is submitted that in any event the letter dated 4 December 2006 did give reasons albeit in summary form.

7. As the ECJ has recognised in the context of Art. 253 ~~235~~ of the EC Treaty (see ***Case C26/00 Netherlands v Commission***) it is not necessary for reasoning to go into all the relevant facts and points of law, since the question whether the statement of

reasons is adequate must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question: see para. 113.