House of Lords

Berkeley *v* Secretary of State for the Environment and another

2000 June 6, 7; July 6

Lord Bingham of Cornhill, Lord Hoffmann, Lord Hope of Craighead, Lord Hutton and Lord Millett

Town Planning — Development — Environmental assessment — Urban development project — Proposed stadium redevelopment encroaching on river bank — Secretary of State holding public inquiry where documents available setting out environmental issues — Failure by Secretary of State to consider whether environmental assessment procedure necessary — Whether subsequent grant of planning permission ultra vires — Whether objectives of environmental assessment met — Court's discretion — Town and Country Planning Act 1990 (c 8), s 288(5)(b) — Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988 No 1199), reg 4(2) — Council Directive (85/337/EEC), art 2(1)

A local planning authority received an application by a football club for planning permission and listed building consent to rebuild part of its stadium on the bank of the River Thames. The proposal involved the creation of a riverside walkway which would encroach slightly into the river and involve the re-modelling of a retaining wall with effect on the river's habitat. The application was advertised and a large number of representations were received. The local authority officers' report to the planning sub-committee, having set out those representations, which included detailed information as to the effect of the project on the river from the National Rivers Authority and from an ecology group, recommended that the application be granted. The application was thereafter called in by the Secretary of State and a public inquiry held, where the officers' report and other relevant material was made available for inspection by those members of the public who attended. The Secretary of State, having received the inquiry inspector's report, granted permission for the project to proceed subject to a number of conditions including the construction of a wetland shelf. The applicant, who had objected to the project and attended the inquiry, made an application under section 288(5)(b) of the Town and Country Planning Act 1990[1] for the High Court to exercise its discretion to quash the permission on the ground that the Secretary of State had failed to act in accordance with regulation 4(2) of the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988[2] which, in implementation of the requirement in article 2(1) of Council Directive (85/337/EEC)[3] that member states adopt measures to ensure that projects likely to have significant effects on the environment were made subject to an assessment of those effects, provided that planning permission was not to be granted in respect of applications falling within Schedule 1 or Schedule 2 to the Regulations, which included applications for urban development projects likely to have significant effects on the environment, unless account had been taken of information provided by the developer by way of an environmental statement prepared in accordance with

[1] Town and Country Planning Act 1990, s 288(5): "On any application under this section the High Court . . . (b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action."

[2] Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, reg 4(2): "The local planning authority or the Secretary of State or an inspector shall not grant planning permission pursuant to [a Schedule 1 or Schedule 2 application] . . . unless they have first taken the environmental information [the environmental statement prepared by the applicant under Schedule 3 and any representations made in respect of it] into consideration . . ."

[3] Council Directive (85/337/EEC), art 2(1): see post, p 609F–G.

Schedule 3 and any representations made in response to that statement. The judge declined to quash the decision and dismissed the motion. The Court of Appeal, dismissing the applicant's appeal, held that although the Secretary of State should have considered whether the proposed development was an urban development project within Schedule 2 and so was in breach of regulation 4(2), since on the facts of the case an environmental assessment would have made no difference to the quality of the decision or the result, the court would exercise its discretion under section 288(5)(b) of the 1990 Act to decline to quash the decision.

On the applicant's appeal—

Held, allowing the appeal, that regulation 4(2) of the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, on its plain meaning and in accordance with the purpose of Council Directive (85/337/EEC), required the Secretary of State, when in receipt of a planning application, to give consideration as to whether the proposed development fell within the ambit of Schedule 1 or Schedule 2 to the Regulations so as to require the assessment necessary under the Directive for projects likely to have significant effects on the environment; that since the Directive required not only that decisions as to such projects were made on the basis of full information but that the information be obtained by means of a particular procedure, namely an environmental impact assessment, as provided for by the Regulations and including the requirement for a statement as described in Schedule 3, it was not open to the court to dispense retrospectively with that requirement on the ground that the outcome would have been the same; that, save possibly where the flawed procedure had in fact amounted to a substantial compliance with the Directive, the court ought not to exercise its discretion under section 288(5)(b) of the 1990 Act to uphold a planning permission granted contrary to the provisions of the Directive, since to do so would be inconsistent with the court's obligations under European law to enforce Community rights; and that, accordingly, since in any event the making available at the public inquiry of a disparate collection of documents produced by parties other than the developer had not amounted to substantial compliance with the terms of the Directive, the Secretary of State's ultra vires decision to proceed without consideration of the need for an environmental assessment under the Regulations could not be upheld and the grant of planning permission would be quashed (post, pp 607D–E, 608C–G, 614A–B, G–H, 615D, 616C–F, 617E–F, H–618D).

Commission of the European Communities v Federal Republic of Germany (Case C-431/92) [1995] ECR I-2189, ECJ distinguished.

Decision of the Court of Appeal [1998] 3 PLR 39 reversed.

The following cases are referred to in the opinion of Lord Hoffmann:

Bolton Metropolitan Borough Council v Secretary of State for the Environment (1990) 61 P & CR 343, CA

Commission of the European Communities v Federal Republic of Germany (Case C-431/92) [1995] ECR I-2189, ECJ

Kraaijeveld BV, Aannemersbedrijf P K v Gedeputeerde Staten van Zuid-Holland (Case C-72/95) [1996] ECR I-5403, ECJ

Marleasing SA v La Comercial Internaciónal de Alimentación SA (Case C-106/89) [1990] ECR I-4135, ECJ

R v North Yorkshire County Council, Ex p Brown [2000] 1 AC 397; [1999] 2 WLR 452; [1999] 1 All ER 969, HL(E)

World Wildlife Fund (WWF) v Autonome Provinz Bozen (Case C-435/97) [2000] 1 CMLR 149, ECJ

The following additional cases were cited in argument:

Ashbridge Investments Ltd v Minister of Housing and Local Government [1965] 1 WLR 1320; [1965] 3 All ER 371, CA

Bund Naturschutz in Bayern eV v Freistaat Bayern (Case C-396/92) [1994] ECR I-3717, ECJ
CIA Security International SA v Signalson SA (Case C-194/94) [1996] ECR I-2201; [1996] All ER(EC) 557, ECJ
Commission of the European Communities v Italian Republic (Case C-58/90) [1991] ECR 4193, ECJ
Fratelli Costanzo SpA v Comune di Milano (Case C-103/88) [1989] ECR 1839, ECJ
R v Medicines Control Agency, Ex p Smith & Nephew Pharmaceuticals Ltd (Case C-201/94) [1996] ECR I-5819, ECJ
R v Rochdale Metropolitan Borough Council, Ex p Tew [1999] 3 PLR 74
van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten (Joined Cases C-430/93 and C-431/93) [1995] ECR I-4705, ECJ

APPEAL from the Court of Appeal

This was an appeal, by leave of the House of Lords (Lord Browne-Wilkinson, Lord Hope of Craighead and Lord Hutton), by the applicant, Lady Berkeley, from the order of the Court of Appeal (Nourse, Pill and Thorpe LJJ) upholding the decision of Tucker J on 26 March 1997 to dismiss her originating motion, brought pursuant to section 288 of the Town and Country Planning Act 1990, seeking to quash the decision letter of the Secretary of State for the Environment dated 16 August 1996 which had granted planning permission and listed building consent to Fulham Football Club for the redevelopment of its stadium at Stevenage Road, London SW6.

The facts are stated in the opinion of Lord Hoffmann.

Robert McCracken and *Gregory Jones* for the applicant. Member states are required by Council Directive of 27 June 1985 (85/337/EEC) to take the measures necessary to determine whether urban development projects are likely to have significant effects on the environment and, if so, to ensure that they are subject to the formal procedure of environmental assessment before granting development consent. *Environmental Assessment: A Guide to the Procedures* (HMSO 1989) explains the importance of the procedure. The provisions of the Directive are directly enforceable by individuals: *World Wildlife Fund (WWF) v Autonome Provinz Bozen* (Case C-435/97) [2000] 1 CMLR 149, 177–178, paras 69–71. In so far as the Directive is not adequately transposed into legislation it must be enforced by the courts of the member states: see *Commission of the European Communities v Federal Republic of Germany* (Case C-431/92) [1995] ECR I-2189 and *Kraaijeveld BV, Aannemersbedrijf PK v Gedeputeerde Staten van Zuid-Holland* (Case C-72/95) [1996] ECR I-5403. Where there is transposing legislation it must be construed, so far as possible, so as to achieve the purpose of the Directive: *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135.

The Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988/1199) were intended to transpose the Directive by integrating them into the existing procedures for assessing planning applications. Regulation 4(2) prohibits the planning authority from granting planning permission to a qualifying project without taking into account the "environmental information" as defined in regulation 2 and including a developer's environmental statement, prepared in accordance with Schedule 3, and the public's response to it. There must be public

participation in the decision-making process: *R v Rochdale Metropolitan Borough Council, Ex p Tew* [1993] 3 PLR 74. The Directive and the Regulations require the adoption of a particular decision-making procedure. [Reference was made to *Bund Naturschutz in Bayern eV v Freistaat Bayern* (Case C-396/92) [1994] ECR I-3717, 3743.]

The discretion under section 288(5)(b) of the Town and Country Planning Act 1990 is limited as a matter of domestic law (see *Bolton Metropolitan Borough Council v Secretary of State for the Environment* (1990) 61 P & CR 343) and cannot be exercised where there is a breach of a state obligation and infringement of a correlative right of an individual deriving from the EC Treaty. The duty to rescind provisions which are contrary to EC law applies to development consents granted in breach of the obligations derived from the Directive: see *Kraaijeveld* (Case C-72/95) [1996] ECR I-5403, 5453, para 62. Administrative decisions must be annulled notwithstanding any prejudice to the interests of those who before the annulment had acquired legal rights or other benefits: see *Fratelli Costanzo SpA v Comune di Milano* (Case C-103/88) [1989] ECR 1839 and *R v Medicines Control Agency, Ex p Smith & Nephew Pharmaceuticals Ltd* (Case C-201/94) [1996] ECR I-5819.

A failure to quash would be contrary to the principles of effectiveness and certainty of European Community Law. Domestic courts cannot be permitted to derogate from the domestic legislation transposing a Directive by asserting that other procedures achieved the same objective: see *Commission of the European Communities v Italian Republic* (Case C-58/90) [1991] ECR 4193, 4202, para 12 and *CIA Security International SA v Signalson SA and Securitel SPRL* (Case C-194/94) [1996] ECR I-2201, 2246–2247, para 48. In any event, the Court of Appeal was wrong to assume that the decision-making process adopted complied with the required procedures so as to amount to substantial compliance with the Directive.

David Elvin QC and *James Maurici* for the Secretary of State. Although the Secretary of State did not consider regulation 4(2) of the 1988 Regulations, the Court should exercise its discretion not to quash on the basis that because of the information available to him there was in substance compliance with the objects of the Directive and the Regulations: see *Commission of the European Communities v Federal Republic of Germany* (Case C-431/92) [1995] ECR I-2189, 2225–2226, paras 41–45.

Under section 288(5)(b) of the 1990 Act the court has a discretion not to quash a decision made in breach of a procedural requirement: see *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1326. That discretion ought not to be restricted because it is exercised in respect of a breach of a provision derived from EC law. The Directive has been fully transposed into English law. Where a procedure has been set up by the national legislation, the application of that procedure to the specific circumstances of each case is a matter for the national courts: see *World Wildlife Fund (WWF) v Autonome Provinz Bozen* (Case C-435/97) [2000] 1 CMLR 149, 171–173, paras 32–33, 42–43. In any event, the exercise of the discretion not to quash the decision on the ground of there having been substantial compliance with the Directive meets the requirements of EC law. It complies with the need for member states to

secure the efficacy of EC law and to ensure that individuals can exercise their EC law rights: see *van Schijndel v Stichting Pensionfonds voor Fysiotherapeuten* (Joined Cases C-430/93 and C-431/93) [1995] ECR I-4705, 4715–4716, paras 27–29.

The purpose of the Regulations and the Directive is to ensure that relevant environmental information is provided so that fully informed decision can be made having regard to the likely environmental effects. Consultation with the public can take place by means of a public inquiry: see article 6(3) of the Directive. All information which would have been contained in an environmental statement was before the Inquiry (which lasted eight days) and the pre-inquiry procedures (including the application process before the local authority), the application consultation process and the inquiry hearing itself afforded ample opportunities for interested parties to be consulted and present relevant environmental information to the Inspector and the Secretary of State. It cannot be said that the manner in which the material was presented caused any significant difficulties to the public. There is no reason to believe that the absence of an environmental impact assessment could have made a difference in the case of a widely-publicised and well-known development of famous site.

McCracken replied.

The club did not appear and were not represented.

Their Lordships took time for consideration.

6 July. LORD BINGHAM OF CORNHILL

My Lords, I have had the benefit of reading in draft the opinion of my noble and learned friend, Lord Hoffmann, with which I am in full agreement. I gratefully adopt his summary of the facts and his citation of the relevant materials.

The issue in these proceedings is whether the Secretary of State's grant of planning permission for development of the Fulham Football Club site at Craven Cottage should be quashed. There is much common ground between the parties' approach to that issue.

It is agreed that Council Directive (85/337/EEC) confers a Community law right exercisable by persons such as the applicant. It is accepted that the Directive was correctly transposed into domestic law by the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988. It is common ground that the Secretary of State did not consider whether the proposed development was an urban development project which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location so as to fall within Schedule 2 to the Regulations, that he should have considered that question (whatever his conclusion might have been if he had) and that he was in breach of regulation 4(2) in granting planning permission without considering it. There was also, I think, a breach of regulation 10(1) in failing to consider it, and such consideration was required by article 4(2) of the Directive. It is common ground that the Secretary of State's failure to consider the question cannot in law be justified or excused on the ground that the outcome (namely the grant of planning permission on the terms of the actual grant) would have been the same even if he had considered it. The parties agree that the Secretary of State's failure can in law be excused, if at all, only on the

ground that there was, on the special and perhaps unusual facts of this particular case, substantial compliance with the requirements of the Directive and the Regulations. It is not, however, suggested that if the Secretary of State had considered the question and had formed the opinion that the proposed development was an urban development project which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location he could, otherwise than by giving an exemption direction under regulation 3(a), have lawfully waived the procedure laid down in the Regulations for assessing the environmental impact of the development on the ground that there had been or would be substantial compliance with the requirements of the Directive and the Regulations. It would, I think, be strange if the Secretary of State could lawfully achieve by inadvertence a result which he could not lawfully achieve if acting deliberately.

By virtue of regulation 25 of the Regulations the grant of planning permission in contravention of regulation 4 is to be treated for purposes of section 288 of the Town and Country Planning Act 1990 as action which is not within the powers of the Act. Even in a purely domestic context, the discretion of the court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow. In the Community context, unless a violation is so negligible as to be truly de minimis and the prescribed procedure has in all essentials been followed, the discretion (if any exists) is narrower still: the duty laid on member states by article 10 of the EC Treaty, the obligation of national courts to ensure that Community rights are fully and effectively enforced, the strict conditions attached by article 2(3) of the Directive to exercise of the power to exempt and the absence of any power in the Secretary of State to waive compliance (otherwise than by way of exemption) with the requirements of the Regulations in the case of any urban development project which in his opinion would be likely to have significant effects on the environment by virtue of the factors mentioned, all point towards an order to quash as the proper response to a contravention such as admittedly occurred in this case. For reasons given in more detail by Lord Hoffmann, I do not in any event agree that there was substantial compliance with the requirements of the Directive and the Regulations in this case. It is quite true that consideration was given, over many years, to various schemes for developing this site and that the scheme for which permission was given was the subject of detailed, careful and informed consideration and wide consultation. But the corner-stone of the regime established by the Regulations is provision by the developer of an environmental statement as described in Schedule 3 to the Regulations, setting out (among other things) the data necessary to identify and assess the main effects which the development was likely to have on the environment. The developer provided no document which, in my view, met that requirement.

Differing with respect from the Court of Appeal, I conclude that this appeal should be allowed and the planning permission quashed.

LORD HOFFMANN My Lords, the Fulham Football Club's ground is sited on the Middlesex bank of the Thames between Hammersmith Bridge and Putney Bridge. The question in this appeal is whether a grant of planning permission by the Secretary of State for a redevelopment of the site

A should be quashed because he failed to consider whether there should have been an environmental impact assessment.

1. Environmental impact assessments

(a) European law

The environmental impact assessment ("EIA") is a procedure which was
B introduced to implement Council Directive (85/337/EEC) of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. The Directive recites that:

> "the best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects [and] affirm[s] the need to take effects on the
C environment into account at the earliest possible stage in all technical planning and decision-making processes . . ."

It goes on to recite that it therefore provides "for the implementation of procedures to evaluate such effects". The general principle is said to be that:

> "Whereas development consent for public and private projects which
D are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; whereas this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question . . ."

E The recitals deal with the contents of the assessment in the following terms:

> "Whereas, for projects which are subject to assessment, a certain minimal amount of information must be supplied, concerning the project and its effects;
>
> "Whereas the effects of a project on the environment must be assessed
F in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life."

The primary obligation imposed upon member states by the Directive is contained in article 2(1). It is to "adopt all measures necessary to ensure
G that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their effects". By article 2(2) the EIA procedure may be integrated into the existing planning procedures of the member states.

Article 4 distinguishes between projects listed in Annex I, such as oil
H refineries, power stations and motorways, which are conclusively presumed to require an EIA and the wide variety of projects listed in Annex II, which may or may not require an EIA, depending upon whether the member state considers that they are likely to have significant effects on the environment. In the case of a project falling within Annex II, the member state must therefore *consider* whether or not it requires an EIA. But such consideration

need not be entirely on a case by case basis. Article 4 permits member states to specify certain projects as being subject to an assessment or establish criteria or thresholds for determining the question.

Article 5 deals with the contents of the EIA. By paragraph 1, member states must adopt the necessary measures to ensure that "the developer supplies in an appropriate form the information specified in Annex III" so far as it is considered relevant and the developer can reasonably be required to compile it. Annex III specifies that there should be a description of the project and the aspects of the environment likely to be significantly affected, under a number of heads including fauna, flora, water, landscape and the interrelationship between such factors. There must be a description of the measures envisaged to prevent, reduce or offset any significant adverse effects on the environment. And, finally, the developer must supply a summary of the information in non-technical language.

By article 6(1) member states must take the measures necessary to ensure that authorities likely to be concerned by the project by reason of their environmental responsibilities are given an opportunity to express an opinion. Article 6(2) requires member states to ensure that the application for development consent and the information gathered pursuant to article 5 is made available to the public and the public must be given the opportunity to express an opinion before the project is initiated. By article 6(3) the detailed arrangements for such information and consultation is left to the member states.

(b) Domestic law

The United Kingdom implemented the Directive by the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 ("the Regulations"), made under section 2(2) of the European Communities Act 1972. The categories of development listed in Annexes I and II of the Directive are reproduced in Schedules 1 and 2 to the Regulations. A "Schedule 2 application" is defined as an application for planning permission for a development specified in Schedule 2 "which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location". A Schedule 2 application must be accompanied by an "environmental statement" in accordance with Schedule 3, which reproduces the contents of Annex III of the Directive. By regulation 12B of the Town and Country Planning General Development Order 1988 (SI 1988 No 1813) a notice of the application, containing a statement as to where copies of the environmental statement can be obtained, must be displayed at the site and published in a local newspaper.

The question of whether an application is or is not a Schedule 2 application may be determined pursuant to regulation 2(2) by a direction or statement of the Secretary of State. In the absence of such a direction the question is left to be determined in the first instance by the opinion of the local planning authority. But regulation 10 provides that if an application without an environmental statement is referred to the Secretary of State for decision and it appears to him to be a Schedule 2 application, he must notify the applicant that an environmental statement is required.

A 2. *The planning applications*

The redevelopment of the Fulham Football Club ground has been under consideration for a long time. The clubhouse and the grandstand and its turnstiles date from the beginning of the last century. They are in fact listed as being of special architectural or historic interest. But their facilities are out of date. The club wants to build a new stadium which incorporates and
B improves the listed buildings and to finance the project by building a block of flats on its boundary overlooking the river. Public inquiries into applications for similar developments were held in 1990 and 1992 and in each case the application was refused. In 1993 there was another public inquiry into the unitary development plan put forward by the local planning authority (Hammersmith and Fulham London Borough Council) which
C contained policies relating specifically to the site. The plan was adopted in 1994.

In 1994 the club applied for planning permission and listed building consent for a development which, after some revision, became the scheme which is the subject matter of the present appeal. An environmental statement did not accompany the applications and the local planning authority was not asked to express an opinion on whether one was required.
D But the application was advertised as an ordinary application and representations were received from a large number of local residents.

One of the features of the scheme was the construction of a walkway along the river bank beneath the proposed flats. The Middlesex bank along that part of Fulham Reach has a sloping concrete retaining wall faced with blocks at its base. The proposal was to replace this with a vertical wall
E supporting the walkway. The local planning authority asked the advice of an organisation called the London Ecology Unit on this aspect of the scheme. The unit advised that the embankment would for some of its length encroach slightly onto the riverbed and that the loss of the sloping wall would be damaging to the habitats of plants, invertebrates, fish and birds in the river. It therefore recommended that the application be refused.

The local planning authority also consulted with a large number of other
F organisations, including the National Rivers Authority, which was at that time the statutory body responsible for conservation issues concerning the Thames. The authority was at first opposed to the scheme for reasons similar to those of the London Ecology Unit. Eventually, however, it agreed to withdraw its opposition on condition that the club built a wetland shelf planted with reeds along the intertidal foreshore. The London Ecology Unit
G did not think that this would be an adequate safeguard or compensation. It remained strongly against the proposal.

The planning department of the local planning authority prepared a report for the planning applications and transport sub-committee which was presented on 7 June 1995. It is a lengthy and impressive document, summarising the views of all the parties who had made representations or
H been consulted. It listed as "background papers" the representations themselves, including the letters from the National Rivers Authority and the London Ecology Unit. It weighed up the advantages and disadvantages of the scheme. On the question of the river ecology, it said that "the slight encroachment into the river is compensated for by an improved habitat for nature conservation". Subject to the various conditions specified, it

recommended that planning permission and listed building consent be granted.

3. The public inquiry

On 9 August 1995 the Secretary of State decided to call in the applications for his own determination after a public inquiry "in order to assess the proposed housing density impact on car parking in the area and the impact of the proposed development on the River Thames". He did not, however, require the applicant to produce an environmental statement pursuant to regulation 10 of the Regulations.

Pursuant to rule 6 of the Town and Country Planning (Inquiries Procedure) Rules 1992 (SI 1992 No 2038) the planning authority produced a statement of its case supporting the application in September 1995. It referred for detailed reasons to the officers' report to the planning sub-committee of 7 June 1995. The club's statement of case, produced a month later, contained numerous cross-references to that of the planning authority.

The inquiry was held in Fulham Town Hall for eight days commencing on 27 February 1996. Leading counsel represented the club and the planning authority. The club called witnesses to deal with, among other things, the effect of the development on the river ecology. A local residents' association were also represented by counsel and she called an ecological and environmental consultant to give evidence in opposition. The proofs of evidence of proposed witnesses were made available at a "library table" at the inquiry. A number of local and other people appeared in person.

4. The decision

The inspector delivered his report in May 1996 recommending that subject to a number of conditions, such as the construction of the wetland shelf, planning permission should be granted. By a letter dated 15 August 1996 the Secretary of State accepted the recommendation and granted permission.

5. The application to quash

The applicant Dido Berkeley lives in a house near the site. She has taken a course on ecology and was concerned about the effect of the development on the diversity of species in the Thames. She was one of the people who wrote to the Secretary of State urging him to call in the application and the terms of her letter indicate that she had seen the officers' report to the planning sub-committee. Before the inquiry she spoke to a number of people whom she thought might have relevant information. The responsible officer at the local planning authority was helpful and directed her to the letters on file from the National Rivers Authority and the London Ecology Unit. She appeared in person at the inquiry and submitted a written statement.

Regulation 4(2) of the Regulations provides that the Secretary of State shall not grant planning permission pursuant to a Schedule 2 application unless the information obtained by an EIA has been taken into consideration. Regulation 25 provides that the grant of planning permission in contravention of regulation 4 shall, for the purposes of section 288 of the Town and Country Planning Act 1990, be taken to be outside the powers of

the Act. Section 288 provides that a person aggrieved by an order to which the section applies (including a grant of planning permission) who wishes to question its validity on the ground that it is not within the powers of the Act may apply to the High Court. By subsection 5(b) the High Court, if so satisfied, may quash the permission.

On 25 September 1995, after the grant of planning permission by the Secretary of State, Lady Berkeley issued an application under section 288 of the 1990 Act to quash the grant of planning permission on the ground, among others, that it was ultra vires because no EIA had been undertaken. It came before Tucker J, who dismissed it. The Court of Appeal (Nourse, Pill and Thorpe LJJ) [1998] 3 PLR 39 upheld his decision. Lady Berkeley appeals against that decision to your Lordships' House.

6. The issues

During the course of the hearings before the judge, the Court of Appeal and your Lordships, the issues have been progressively narrowed, so that there is now a good deal of common ground between the parties. Before the judge, Lady Berkeley contended that the grant of permission was invalid for a number of other reasons. These have not been pursued. The club (but not the Secretary of State) argued before the judge that upon the true construction of the Regulations, no EIA was required. The judge accepted this submission. The Court of Appeal held that the judge was wrong to make such a finding. Before your Lordships, Mr Elvin, who appeared as counsel for the Secretary of State, accepted that the Court of Appeal was right and that the failure of both the planning authority and the Secretary of State to consider whether an EIA should be required made the grant of planning permission unlawful.

The judge said that, in the alternative, even if an EIA should have been required, he would as a matter of discretion refuse to quash the permission. The reason was that in his opinion the absence of the EIA "had no effect on the outcome of the inquiry and could not possibly have done so". It was on this ground that the Court of Appeal upheld his decision. Pill LJ said, at p 53, that he was unpersuaded that an EIA "could have had any effect on the course of events or was prejudicial to objectors or the quality of the decision". Thorpe LJ said, at p 54, that the existence of the discretion "necessarily entails some review of the probable outcome had the proper procedures been observed" and that the procedures actually adopted, though flawed, were "thorough and effective to enable the inspector to make a comprehensive judgment on all the environmental issues affecting the Thames".

Before your Lordships, Mr Elvin has not attempted to support this reasoning. He accepts that the fact that a court is satisfied that an EIA would have made no difference to the outcome is not a sufficient reason for deciding, as a matter of discretion, not to quash the decision. The argument which he submitted to your Lordships was a different one, namely that there had on the facts been substantial compliance with the requirements of the Directive. So the narrow issue argued before your Lordships was whether the objectives of the Directive as transposed into domestic law by the Regulations had been substantially satisfied.

Although it was a matter of concession that the grant of planning permission was ultra vires and that it could not be validated by a court as a

matter of discretion merely on the ground that the outcome would have been the same, these points are of such importance that I think I should say briefly why I think that Mr Elvin was right to concede them.

7. Why was the planning permission ultra vires?

The primary obligation under the Directive, under article 2(1), is for a member state to require an EIA before consent is given in every case in which the project is likely to have significant effects on the environment. But the decision as to whether an Annex II project is likely to have such effects is left to the member state. It depends, as article 4(2) says, on whether the member states "consider" that the characteristics of the project so require. This must mean that in Annex II cases the member states are under an obligation to consider whether or not an EIA is required. If this were not so, a member state could in practice restrict the scope of the Directive to Annex I cases simply by failing to consider whether in any other case an EIA was required or not.

Article 10 (ex article 5) of the EC Treaty requires member states to "take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty. . . ." In *World Wildlife Fund (WWF) v Autonome Provinz Bozen* (Case C-435/97) [2000] 1 CMLR 149, 178, para 70 the European Court of Justice said that it followed that it was for the authorities of member states to

> "take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment."

The Court of Justice said, at paragraph 71, that the Directive confers directly enforceable rights upon citizens of the member state and in a case in which the discretion conferred by the provisions of the Directive had been exceeded (as by omitting altogether to consider whether an EIA should be required), individuals may rely upon the Directive before a court of a member state to obtain from the national authorities "the setting aside of the national . . . measures incompatible with those provisions."

The Regulations do not expressly impose upon either the local planning authority or the Secretary of State a general obligation to consider whether an application is a Schedule 2 application or not. Regulation 5 requires the planning authority to express an opinion only if so requested by the applicant and regulation 10 requires the Secretary of State to notify the applicant that an environmental statement is required if it "appears" to him that the application is a Schedule 1 or Schedule 2 application, without imposing an express obligation to consider the matter. The prohibition upon the grant of planning permissions without an EIA in regulation 4(2) applies expressly only to "any Schedule 1 or Schedule 2 application". But, since the question of whether an application is a Schedule 2 application is primarily entrusted by regulation 2(2) to the Secretary of State, it is not difficult, in order to make regulation 4(2) effective, to imply into that regulation an obligation upon the Secretary of State to consider the matter. So to construe the regulation would be in accordance with the obligation of a member state under the principle in *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135, 4159, para 8, to

A interpret domestic law "as far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter".

If no reasonable Secretary of State could have considered that the club's application was a Schedule 2 application, the judge would of course have been entitled to rule that no EIA could have been required. But Mr Elvin B does not so contend. It is arguable that the development was an "urban development project" within paragraph 10(b) of Schedule 2 and the conflicting evidence on the potential effect on the river is enough in itself to show that it was arguably likely to have significant effects on the environment. In those circumstances, individuals affected by the development had a directly enforceable right to have the need for an EIA considered before the grant of planning permission by the Secretary of C State and not afterwards by a judge.

8. Does it matter that an EIA would not have affected the decision?

I said in *R v North Yorkshire County Council, Ex p Brown* [2000] 1 AC 397, 404 that the purpose of the Directive was "to ensure that planning decisions which may affect the environment are made on the basis of full D information". This was a concise statement, adequate in its context, but which needs for present purposes to be filled out. The Directive requires not merely that the planning authority should have the necessary information, but that it should have been obtained by means of a particular procedure, namely that of an EIA. And an essential element in this procedure is that what the Regulations call the "environmental statement" by the developer E should have been "made available to the public" and that the public should have been "given the opportunity to express an opinion" in accordance with article 6(2) of the Directive. As Advocate General Elmer said in *Commission of the European Communities v Federal Republic of Germany* (Case C-431/92) [1995] ECR I-2189, 2208–2209, para 35:

> "It must be emphasised that the provisions of the Directive are F essentially of a procedural nature. By the inclusion of information on the environment in the consent procedure it is ensured that the environmental impact of the project shall be included in the public debate and that the decision as to whether consent is to be given shall be adopted on an appropriate basis."

The directly enforceable right of the citizen which is accorded by the G Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues. In a later case (*Aannemersbedrijf P K Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland* (Case C-72/95) [1996] ECR I-5403, 5427, para 70), Advocate H General Elmer made this point again:

> "Where a member state's implementation of the Directive is such that projects which are likely to have significant effects on the environment are not made the subject of an environmental impact assessment, the citizen is prevented from exercising his right to be heard."

Perhaps the best statement of this aspect of an EIA is to be found in the UK government publication "*Environmental Assessment: A Guide to the Procedures*" (HMSO, 1989), p 4:

> "The general public's interest in a major project is often expressed as concern about the possibility of unknown or unforeseen effects. By providing a full analysis of the project's effects, an environmental statement can help to allay fears created by lack of information. At the same time it can help to inform the public on the substantive issues which the local planning authority will have to consider in reaching a decision. It is a requirement of the Regulations that the environmental statement must include a description of the project and its likely effects together with a summary in non-technical language. One of the aims of a good environmental statement should be to enable readers to understand for themselves how its conclusions have been reached, and to form their own judgments on the significance of the environmental issues raised by the project."

A court is therefore not entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same or that the local planning authority or Secretary of State had all the information necessary to enable them to reach a proper decision on the environmental issues.

Although section 288(5)(b), in providing that the court "may" quash an ultra vires planning decision, clearly confers a discretion upon the court, I doubt whether, consistently with its obligations under European law, the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the Directive. To do so would seem to conflict with the duty of the court under article 10 (ex article 5) of the EC Treaty to ensure fulfilment of the United Kingdom's obligations under the Treaty. In classifying a failure to conduct a requisite EIA for the purposes of section 288 as not merely non-compliance with a relevant requirement but as rendering the grant of permission ultra vires, the legislature was intending to confine any discretion within the narrowest possible bounds. It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be ultra vires: see Glidewell LJ in *Bolton Metropolitan Borough Council v Secretary of State for the Environment* (1990) 61 P & CR 343, 353 Mr Elvin was in my opinion right to concede that nothing less than substantial compliance with the Directive could enable the planning permission in this case to be upheld.

9. Substantial compliance

The case upon which Mr Elvin relied for the submission that substantial compliance would do was *Commission of the European Communities v Federal Republic of Germany* (Case C-431/92) [1995] ECR I-2189. In that case the Federal Republic had failed to transpose the Directive into its domestic law by the stipulated date and had given consent to the construction of a power station without an EIA. It had however followed the procedures required by its own Bundesimmissionsschutzgesetz or Federal Pollution Protection Law. In enforcement proceedings under article 169 of the EC Treaty, the Commission conceded that, in complying with domestic

A procedures, the developer had in fact supplied all the information required by article 5(2) and Annex III of the Directive. It also conceded that the information had been made available to the public and that the public had been given an opportunity to express an opinion in accordance with article 6. Advocate General Elmer considered and rejected the other points on which the Commission continued to maintain that there had been a failure to
B comply. He said, at p 2207, para 33, that "the procedure followed in this specific case complied with all the requirements of the Directive".

Commission v Germany (Case C-431/92) in my opinion establishes that an EIA by any other name will do as well. But it must in substance be an EIA. Can this be said of the procedure followed in the present case?

Mr Elvin says that the equivalent of the applicant's environmental statement can be found in its statement of case under the Inquiry Procedure
C Rules, read (by virtue of cross-referencing) with the planning authority's statement of case, which in turn incorporated the comprehensive officers' report to the planning sub-committee, which in turn incorporated the background papers such as the letters from the National Rivers Authority and the London Ecology Unit and was supplemented by the proofs of evidence made available at the inquiry. Members of the public had access to
D all these documents and the right to express their opinions upon them at the inquiry.

My Lords, I do not accept that this paper chase can be treated as the equivalent of an environmental statement. In the first place, I do not think it complies with the terms of the Directive. The point about the environmental statement contemplated by the Directive is that it constitutes a single and accessible compilation, produced by the applicant at the very
E start of the application process, of the relevant environmental information and the summary in non-technical language. It is true that article 6.3 gives member states a discretion as to the places where the information can be consulted, the way in which the public may be informed and the manner in which the public is to be consulted. But I do not think it allows member states to treat a disparate collection of documents produced by parties other
F than the developer and traceable only by a person with a good deal of energy and persistence as satisfying the requirement to make available to the public the Annex III information which should have been provided by the developer.

Secondly, the Regulations represent the way in which the United Kingdom has chosen to implement the Directive. This is not a case like *Commission v Germany* (Case C-431/92) [1995] ECR I-2189, in which the
G Directive had not been implemented and the court had to consider whether its terms had nevertheless been satisfied. In the present case the Directive had been transposed into domestic legislation and there was a failure to comply with the terms of that legislation. In my view, a court should not ordinarily be willing to validate such an act on the ground that a different form of transposing legislation (e g by allowing an environmental statement
H to take the composite form put forward in this case) might possibly have also satisfied the terms of the Directive. I would accept that if there was a failure to observe some procedural step which was clearly superfluous to the requirements of the Directive, it would be possible to exercise the discretion not to quash the permission without any infringement of our obligations under European law. But that is not the case here. The Secretary of State did

not comply with his basic obligation to consider whether the UK machinery for implementation of the Directive should be put in motion.

10. Conclusion

My Lords, I would allow the appeal and quash the planning permission and listed building consent granted by the Secretary of State.

LORD HOPE OF CRAIGHEAD My Lords, I have had the advantage of reading in draft the speeches of my noble friends, Lord Bingham of Cornhill and Lord Hoffmann. I agree with them, and for the reasons which they have given I, too, would allow the appeal.

LORD HUTTON My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Hoffmann. I agree with them, and for the reasons they give I, too, would allow the appeal.

LORD MILLETT My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Hoffmann. I agree with them, and for the reasons they give I, too, would allow the appeal.

Appeal allowed with costs.

Solicitors: Richard Buxton, Cambridge; Treasury Solicitor.

CTB