

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

Regina

v.

London Borough of Bromley (Respondents) ex parte Barker (FC)
(Appellant)

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:

Robert McCracken QC
James Pereira
(Instructed by Richard Buxton)

Respondents:

Timothy Straker QC
James Strachan
(Instructed by London Borough of
Bromley)

Intervener

David Elvin QC and James Maurici (instructed by Treasury Solicitor) on behalf of The
First Secretary of State

Hearing date:

6 November 2006

ON

WEDNESDAY 6 DECEMBER 2006

HOUSE OF LORDS

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT
IN THE CAUSE**

**Regina v. London Borough of Bromley (Respondents) *ex parte*
Barker (FC) (Appellant)**

[2006] UKHL 52

LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead. I agree with it, and would make the orders which he proposes for the reasons he gives.

LORD HOPE OF CRAIGHEAD

My Lords,

2. The issue in these proceedings is whether the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988/1199) (“the 1988 Regulations”) fully and properly implemented the terms of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p 40) (“the Directive”). The 1988 Regulations were replaced by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293), which raise exactly the same issue. But the 1999 Regulations apply only to applications lodged on or after 14 March 1999: see regulation 34(2). The application to which these proceedings relate was lodged on 4 April 1997.

3. The issue which lies at the heart of this case may be described as one of classification. The Directive is a fundamental instrument of the

European Union's environmental policy. Article 2(1) provides that member states shall adopt all measures necessary to ensure 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. Article 1(2) provides that "development consent" means "the decision of the competent authority or authorities which entitles the developer to proceed with the project." The way planning decisions are classified in the domestic system must match that definition if the Directive is to be fully implemented.

4. Under the domestic system planning permission may be obtained in various ways. One of these, which applies to buildings, is to seek outline planning permission for the proposed development. This is a procedure by which permission is obtained for the development in principle, leaving matters of detail for approval at a later stage. Article 1(2) of the Town and Country Planning (General Development Procedure) Order 1995 (SI 1995/419) defines the expression "outline planning permission" as "a planning permission for the erection of a building, which is granted subject to a condition requiring the subsequent approval of the local planning authority with respect to one or more reserved matters." The procedures for applications for outline planning permission and for applications for approval of reserved matters are dealt with separately in articles 3 and 4 of the Order. Regulation 4(2) of the 1988 Regulations prohibits a grant of "planning permission" pursuant to an application for development of the kinds listed in Schedule 1 or Schedule 2 to the Regulations unless the competent authority has first taken environmental information into consideration and states that it has done so.

5. The effect of regulation 4(2) of the 1988 Regulations is that, where outline planning permission is being sought, an environmental impact assessment (an "EIA") can only be required at the stage when the application for outline planning permission is being considered by the competent authority. This is because it refers only to decisions to grant planning permission. There is no provision in the 1988 Regulations which enables the competent authority to call for an EIA at the later stage when it is giving consideration to an application for approval of reserved matters in relation to these developments. In many, if not most, cases this will not matter. This is because the environmental effects of the proposed development can usually be assessed sufficiently at the outline stage. But it is possible to conceive of cases where they only become apparent when consideration is being given to the reserved matters or where further consideration is necessary due to a material

change of circumstances. The question is whether, by failing to provide for these situations, the 1988 Regulations failed to implement the Directive.

The facts

6. The appellant lives with her daughter in London on a street called Anerley Hill. The entrance to the site of the former Crystal Palace is on the same street. It provides access to Crystal Palace Park, which she and her child use for pleasure and recreation. On 4 April 1997 London & Regional Properties Ltd ("L & R") submitted an application to the London Borough of Bromley ("the council") under the Town and Country Planning Act 1990 as local planning authority for outline planning permission. They sought permission to develop the Crystal Palace site by providing leisure and recreational facilities there, together with a car park deck, associated ramps and surface car parking. On 26 March 1998 the council granted outline planning permission for the proposed development, reserving certain matters for subsequent approval by the local planning authority before any development was commenced. The development control committee had before it a report which stated that the council's officers had been advised by a firm of planning consultants that the project was unlikely to require a formal process of environmental assessment. This advice was accepted, and L & R were not required to carry out an EIA at that stage.

7. On 25 January 1999 L & R submitted an application for the approval of reserved matters. These included an 18 screen multiplex cinema with 4800 seats and a 950 space car park. When these details were being considered by the committee a number of councillors indicated that they wished a formal EIA to be carried out before the reserved matters were approved. This was said by one councillor to reflect the view of very many. But the committee was advised by the Borough Secretary that an EIA could not as a matter of law be required at the stage of approving the reserved matters. In the light of that advice the application was approved by the council without an EIA on 6 May 1999. A notice of approval was issued on 10 May 1999.

8. The proposal proved to be highly controversial. Many people were opposed to it. A group was formed, called the Crystal Palace Campaign. A petition against the proposal was organised, and it attracted a large number of signatories. When outline planning permission was granted the group applied for judicial review of the

decision, on grounds relating to the architectural style of the proposed building and the car parking arrangements. The application was dismissed by the Court of Appeal in December 1998, and a petition for leave to appeal to the House of Lords was dismissed in June 1999.

9. In the meantime the council had approved L & R's application for approval of reserved matters. On 16 June 1999 the appellant applied for judicial review, seeking an order that the decision to approve be quashed. She also sought a declaration in these terms:

“that the decision was unlawful by reason of the council's

- (i) failure, at all or properly, to consider the requirements imposed on it by the environmental assessment Directive 85/337/EEC (“the EA Directive”);
- (ii) and/or misdirection of itself in law in deciding that it had no power to require an environmental assessment in accordance with the requirements of the Directive (“EA”).”

She also sought a declaration that the outline consent itself was unlawful by reason of the council's failure to consider the need for an environmental assessment at that stage. She was granted permission to apply on paper by Lightman J in July 1999. The effect of these proceedings was that L & R were unable to implement the approval of the reserved matters within the relevant time limit. The planning permission which the council granted on 26 March 1998 lapsed on 10 May 2001. In any event L & R have intimated that they no longer wish to proceed with the development.

The proceedings

10. The project was an “urban development project” within the meaning of class 10(b) of Annex II to the Directive. Article 4(2) of the Directive provides that projects of the classes listed in Annex II shall be made subject to an assessment in accordance with articles 5 to 10 when member states consider that their characteristics so require. Schedule 2 to the 1988 Regulations sets out the classes of project which are listed in Annex II to the Directive. As it was an urban development project, the application to develop the Crystal Palace site was a Schedule 2 application: see item 10(b) in Schedule 2. Regulation 2(1) provides that

a "Schedule 2 application" means an application for planning permission for the carrying out of development of any description mentioned in Schedule 2 which is not exempt development and which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location. Regulation 4(2) provides that a local planning authority or the Secretary of State or an inspector shall not grant planning permission in respect of a Schedule 2 application unless they have first taken into account the information in an environmental statement and state in their decision that they have done so.

11. The effect of the 1988 Regulations is that, when it is faced with an application for planning permission for development of the kinds listed in Schedule 1 and Schedule 2, the local planning authority must determine prior to any grant of planning permission whether the project is likely to have significant effects on the environment. It must refuse permission if it is of the opinion that it does not have sufficient information to come to a decision on this point at that stage. Regulation 5 enables a person who is minded to apply for planning permission to ask the local planning authority to state in writing whether in its opinion the likely effects of the proposed development would be such that an environmental impact assessment EIA would be required. But no provision is made for requiring an EIA to be provided at the stage when approval is being given to reserved matters in cases where it becomes apparent at that stage that such an assessment is necessary.

12. On 3 March 2000 Jackson J set aside the permission for judicial review in so far as it related to the grant of outline planning permission and dismissed the application in respect of the remainder: [2000] Env LR 1. On 8 February 2001 Dyson LJ granted leave to appeal. On 23 November 2001 the Court of Appeal (Brooke and Latham LJJ and Burton J) dismissed the appeal: [2001] EWCA Civ 1766; [2002] Env LR 631. On 9 October 2002 the appellant was given leave to appeal to the House of Lords. In the statement of facts and issues the following agreed issues were set out:

- "(1) Is the approval of reserved matters a part or stage of the development consent for the purpose of the Directive?
- (2) If so, is environmental impact assessment potentially required both at the grant of outline planning permission and later approval of reserved matters?

- (3) Do the EIA Regulations correctly transpose the EIA Directive?
- (4) Is a reference to the European Court of Justice necessary?

On 12 June 2003 the First Secretary of State (now the Secretary of State for Communities and Local Government) sought leave to intervene in the proceedings.

13. On 16 June 2003 the First Secretary of State was granted leave to intervene. Their Lordships then heard argument from counsel for the appellant, the council and the Secretary of State on the question whether a reference to the European Court of Justice was necessary. It was decided that the proceedings should be stayed and that the following questions on which a decision was necessary to enable the House to give judgment should be referred to the court for a preliminary ruling:

“(1) Is identification of ‘the decision of the competent authority or authorities which entitles the developer to proceed with the project’ (article 1(2) of Directive 85/337/EEC (‘the Directive’)) exclusively a matter for the national court applying national law?

(2) Does the Directive require an EIA to be carried out if, following the grant of outline planning permission subject to conditions that reserved matters be approved, without an EIA being carried out, it appears when approval of reserved matters is sought that the project may have significant effects on the environment by virtue inter alia of its nature, size or location (article 2(1) of the Directive)?

(3) In circumstances where:

- (a) national planning law provides for the grant of outline planning permission at an initial stage of the planning process and requires consideration by the competent authority at that stage as to whether an EIA is required for purposes of the Directive; and
- (b) the competent authority then determines that it is unnecessary to carry out an EIA and grants outline planning permission subject to conditions reserving specified matters for later approval; and
- (c) that decision can then be challenged in the national courts;

may national law, consistently with the Directive, preclude a competent authority from requiring that an EIA be carried out at a later stage of the planning process?"

14. On 4 May 2006 the Court of Justice made the following rulings in answer to these questions (Case C-290/03):

“1. Classification of a decision as a ‘development consent’ within the meaning of article 1(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment must be carried out pursuant to national law in a manner consistent with Community law.

2. Articles 2(1) and 4(2) of Directive 85/337 are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of consent comprising more than one stage, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location.”

15. The House is now in a position to address the questions raised by this case. Departing from the order in which they were set out in the statement of facts and issues, I propose to deal first with the question whether, by failing to provide for the situations where an EIA might be required at the reserved matters stage, the 1988 Regulations failed fully and properly to implement the Directive (“the classification issue”). I shall then consider what answer, if any, should be given to the question whether an EIA was required at the reserved matters stage in this case (“the requirement issue”).

The classification issue

16. The Court of Justice said in its first ruling that the classification of a decision as a “development consent” within the meaning of article 1(2) of the Directive must be carried out pursuant to national law in a manner consistent with Community law. In para 40 of its judgment the court said that, while this term is modelled on certain elements of national law, it remains a Community concept which, contrary to the submissions of the council and the United Kingdom Government, falls exclusively within Community law:

“According to settled case-law, the terms used in a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope are normally to be given throughout the Community an autonomous and uniform interpretation which must take into account the context of the provision and the purpose of the legislation in question.”

17. Elaborating on this point, the court ruled, secondly, that articles 2(1) and 4(1) of the Directive are to be interpreted as requiring an EIA to be carried out if, in the case of a grant of consent comprising more than one stage, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its size, nature or location. Further guidance is to be found in the court’s judgments in *Wells v Secretary of State for Transport, Local Government and the Regions* (Case C-201/02) [2004] ECR I-723, in which judgment was given on 7 January 2004, and *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* in which judgment was given immediately before its judgment in the appellant’s case on 4 May 2006.

18. In *Commission v United Kingdom* the Commission put forward two complaints. The first was that there had been an infringement of articles 2(1) and 4(2) of the Directive by Hammersmith and Fulham London Borough Council in relation to a development project at the White City and by the council in relation to the Crystal Palace development project. The second was that the national rules, under which an assessment could be carried out only at the initial outline planning permission stage and not at the reserved matters stage, had incorrectly transposed into domestic law articles 2(1), 4(2), 5(2) and 8 of the Directive as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p 5).

19. It was submitted in that case for the United Kingdom Government, as it was for the council and the Secretary of State in the case which is before your Lordships, that “consent” was given when outline planning permission was granted, not when the reserved matters were approved at the later stage. The court dealt with that submission in the following paragraphs:

“100. As to those submissions, it should be noted that article 1(2) of that Directive defines ‘development consent’ for the purposes of the Directive as the decision of the competent authority or authorities which entitles the developer to proceed with the project.

101. In the present case, it is common ground that, under national law, a developer cannot commence works in implementation of his project until he has obtained reserved matters approval. Until such approval has been granted, the development in question is still not (entirely) authorised.

102. Therefore, the two decisions provided for by the rules at issue in the present case, namely outline planning permission and the decision approving reserved matters, must be considered to constitute, as a whole, a (multi-stage) ‘development consent’ within the meaning of article 1(2) of Directive 85/337, as amended.

103. In those circumstances, it is clear from article 2(1) of Directive 85/337, as amended, that projects likely to have significant effects on the environment, as referred to in article 4 of the Directive read in conjunction with Annexes I and II thereto, must be made subject to an assessment with regard to their effects before (multi-stage) development consent is given (see, to that effect, Case C-201/02 *Wells* [2004] ECR I-723, para 42).”

20. In *Wells* consent had been granted for mining operations at Conygar Quarry without an EIA having first been carried out. It too had proceeded in stages. An old mining permission was registered under the Planning and Compensation Act 1991. But it was stated when the permission was registered that no development could lawfully be carried out unless and until an application had been made for the determination of new planning conditions, which left some matters to be decided by the mineral planning authority. At no time was consideration given to the need for an EIA. In paras 41 and 42 of its decision in that case the court said:

“41. As regards the decision approving matters reserved by the new conditions, the United Kingdom Government observes that the decision likely to affect the environment had already been taken and the approval of details may not extend beyond the parameters set by the initial determination of the scheme of planning conditions.

42. As to those submissions, under article 2(1) of Directive 85/337 projects likely to have significant effects on the environment, as referred to in article 4 of the Directive read in conjunction with Annexes I and II thereto, must be made subject to an assessment with regard to such effects before consent is given.”

21. Mr Elvin QC for the Secretary of State accepted, in the light of the court’s rulings, that he was not in a position to resist a declaration that the 1988 Regulations failed fully and properly to implement the Directive. Mr Straker QC adopted the same position on the council’s behalf. In my opinion they were right to do so. It is clear that the effect of regulation 4(2) of the 1998 Regulations, read together with the definition of “Schedule 2 application” in regulation 2(1), was that any consideration of the need for an EIA was precluded at the reserved matters stage. The Regulations overlooked the fact that the relevant development consent may, as the Court of Justice said in *Commission v United Kingdom*, para 102, be a multi-stage process. That situation is demonstrated by the terms in which outline planning permission was given in this case. In its notification of grant of outline planning permission the council stated that the grant was subject to conditions, which included the following:

“01 (i) Details relating to the siting, design, appearance, access, landscaping shall be submitted to and approved by the local planning authority before any development is commenced.”

The effect of that condition was that the consent which would have entitled L & R to proceed with the project was withheld until the details referred to were approved by the local planning authority. Any grant of planning permission which contains a condition in these terms must be regarded as a multi-stage development consent for the purposes of the Directive.

22. It does not follow however, where planning consent for a development takes this form, that consideration must be given to the need for an EIA at each stage in the multi-consent process. The first recital in the Directive indicates that the competent authority must take account of the effects on the environment of the project in question at the earliest possible stage in all the technical planning and decision-making processes: see also *Wells*, para 51. In the case of a Schedule 2

development the competent authority must decide at the outset whether an EIA is needed because the development is likely to have significant effects on the environment. An application for outline planning permission should be accompanied by sufficient information to enable that question to be answered and an EIA, if needed, to be obtained and considered before outline planning permission is granted. The need for an EIA at the reserved matters stage will depend on the extent to which the environmental effects have been identified at the earlier stage.

23. If sufficient information is given at the outset it ought to be possible for the authority to determine whether the EIA which is obtained at that stage will take account of all the potential environmental effects that are likely to follow as consideration of the application proceeds through the multi-stage process. Conditions designed to ensure that the project remains strictly within the scope of that assessment will minimise the risk that those effects will not be identifiable until the stage when approval is sought for reserved matters. In cases of that kind it will normally be possible for the competent authority to treat the EIA at the outline stage as sufficient for the purposes of granting a multi-stage consent for the development: *R v Rochdale Metropolitan Borough Council, Ex p Milne* (2001) 81 P & CR 365, para 114, per Sullivan J.

24. As the European Court said in para 48 of its judgment, however, the competent authority may be obliged in some circumstances to carry out an EIA even after outline planning permission has been granted. This is because it is not possible to eliminate entirely the possibility that it will not become apparent until a later stage in the multi-stage consent process that the project is likely to have significant effects on the environment. In that event account will have to be taken of all the aspects of the project which have not yet been assessed or which have been identified for the first time as requiring an assessment. This may be because the need for an EIA was overlooked at the outline stage, or it may be because a detailed description of the proposal to the extent necessary to obtain approval of reserved matters has revealed that the development may have significant effects on the environment that were not anticipated earlier. In that event account will have to be taken of all the aspects of the project that are likely to have significant effects on the environment which have not yet been assessed or which have been identified for the first time as requiring an assessment. The flaw in the 1988 Regulations was that they did not provide for an EIA at the reserved matters stage in any circumstances.

25. In my opinion it is plain that the appellant is entitled to a declaration that by precluding any consideration for the need for an EIA at the stage when, following the grant of outline planning permission for the development, consideration is being given to an application for approval of reserved matters the 1988 Regulations failed fully and properly to implement the Directive.

The requirement issue

26. The court approached this issue in two stages. First, in para 46 of the judgment it said that it was the task of the national court to verify whether the outline planning permission and the decision approving reserved matters constituted, as a whole, a “development consent” for the purposes of the Directive. Secondly, recalling what it said in para 52 of its judgment in *Wells*, it said in para 47 of the judgment:

“... where national law provides for a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.”

27. Mr McCracken QC said that, as the planning permission had now lapsed through the effluxion of time, he was no longer seeking an order that the decision to approve the reserved matters should be quashed. But he asked for a declaration that the decision was unlawful, by reason of the council’s misdirection of itself in law in deciding that it had no power at that stage to require an EIA in accordance with the requirements of the Directive.

28. In my opinion the answer to the question whether the outline planning permission and the decision to approve the reserved matters in this case constituted, as a whole, a “development consent” for the purposes of the Directive is now plain. It is conveniently set out in the court’s judgment in *Commission v United Kingdom*, paras 101 - 102. L

& R were told in condition 01 (i) of the outline planning permission that they were not entitled to proceed with any development until details relating to the reserved matters had been submitted to and approved by the local planning authority. That being so, the decisions to grant outline planning permission and to approve the reserved matters must be considered to constitute, as a whole, a multi-stage development consent for the purposes of the Directive.

29. It is no longer possible to challenge the grant of outline planning permission on the ground that an EIA was required at the outline stage, and we lack the information that would be needed for finding as a fact that an EIA was required at the reserved matters stage. These issues have in any event been rendered academic by the lapse of planning permission for the development. But the appellant is entitled to a declaration that the advice that the officials gave to the committee that an EIA could not as a matter of law be required at the stage of approving the reserved matters was wrong. Sullivan J's observation in *R v Rochdale Metropolitan Borough Council, Ex p Tew* [1999] 3 PLR 74, 97 that, if significant adverse impacts on the environment are identified at the reserved matters stage and it is then realised that mitigation measures will be inadequate, the local planning authority is powerless to prevent the development from proceeding must now be regarded as unsound. If it is likely that there will be significant effects on the environment which have not previously been identified, an EIA must be carried out at the reserved matters stage before consent is given for the development.

Conclusion

30. The Court of Appeal rejected the appellant's argument that there was a lacuna in the implementation of the Directive by the 1988 Regulations. In the light of the rulings by the European Court that decision cannot stand. I would allow the appeal and set aside the order made by the Court of Appeal. I would make a declaration that (1) by precluding any consideration for the need for an EIA at the stage when, following the grant of outline planning permission, consideration is being given to an application for approval of reserved matters the 1988 Regulations failed fully and properly to implement the Directive, and (2) that the council misdirected itself in law when it decided that it had no power to require an EIA to be carried out in accordance with the requirements of the Directive at that stage.

Costs

31. Although I would decline to make a declaration that the council's decision to approve the reserved matters was unlawful in this case, these proceedings have resulted in a decision in the appellant's favour on an important issue of principle. In my opinion the success which she has achieved indicates that she should be awarded her costs in the courts below and in this House, including the proceedings in the European Court of Justice. I would order the council to pay her costs in the courts below, except for her costs that are solely attributable to the Secretary of State's application to intervene referred to in the Court of Appeal's order of 23 November 2001 which must be paid by the Secretary of State.

32. There is a difference of view as to who should pay the appellant's costs in this House. Mr Elvin reminded your Lordships that the usual practice is that an intervener pays his own costs and that any additional costs are treated as costs in the appeal. He said that the reason why the Secretary of State intervened was to assist and that he did not thereby become a party to the dispute. He submitted that costs in this House should be borne wholly by the council, as it was its decision that had led to the raising of the issue of principle. Mr Straker pointed out in reply that the council's hands were tied by the 1988 Regulations, for which the Secretary of State was responsible. He said that these costs should be paid by the Secretary of State.

33. There is force in the point that the Secretary of State must accept responsibility for the defect in the 1988 Regulations. There is nevertheless no doubt that the council would have had to pay the whole of the appellant's costs had the Secretary of State not intervened. But the Secretary of State in his written case invited your Lordships to dismiss the appeal and joined forces with the council in arguing against the need for a reference and submitting to the Court of Justice that the classification of a decision as "development consent" depended exclusively on national law. In my opinion the effect of this intervention was that he became a party to the proceedings. I would order that the appellant's costs in this House and in the European Court of Justice be paid as to one half by the council and as to the other half by the Secretary of State.

BARONESS HALE OF RICHMOND

My Lords,

34. For the reasons given in the opinion of my noble and learned friend, Lord Hope of Craighead, with which I agree, I too would allow this appeal and make the declarations proposed.

LORD CARSWELL

My Lords,

35. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Hope of Craighead. I agree with his opinion and for the reasons which he gives I also would allow the appeal and make the declaration which he proposes.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

36. For the reasons given in the opinion of my noble and learned friend, Lord Hope of Craighead, with which I agree, I too would allow this appeal and make the declarations proposed.

