[2020] EWHC 2580 (Admin)

Case No: CO/1955/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/10/2020

Before:

THE HON. MR JUSTICE HOLGATE

- -

Between:

London Historic Parks and Gardens Trust	**Claimant**
- and -	
Secretary of State for Housing Communities and Local Government	**Defendant**

- -
- -

John Howell QC and Meyric Lewis (instructed by **Richard Buxton Environmental & Public Law**) for the **Claimant**
Timothy Mould QC and Anjoli Foster (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: 9 and 10 September 2020

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Judgment approved by the court for handing down

Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and released to Bailii.

Mr Justice Holgate :

Introduction

1. In this claim the first issue is whether the United Kingdom has failed to transpose properly into English law the requirements in Article 9a of Directive 2011/92/EU ("the Directive") for independence and objectivity in the discharge by a "competent authority" of its duties regarding environmental impact assessment of its own projects. This affects decision-making by local planning authorities throughout the jurisdiction and, as in the present case, the Secretary of State. If the Court is satisfied that proper transposition has been achieved, the second issue is whether the "handling arrangements" made for the determination of the Secretary of State's planning application for the proposed Holocaust Memorial in the Victoria Tower Gardens, London SW1, complies with regulation 64(2) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 571) ("the 2017 Regulations").

2. On 1 July 2020 I ordered the claim to be dealt with at a rolled-up hearing.

3. The proposed development has attracted much support and much opposition. However, the pros and cons of the proposal are not matters for this Court, as was rightly emphasised at the outset of his submissions by Mr John Howell QC, who appeared on behalf of the Claimant together with Mr Meyric Lewis. The Court is only concerned with the specific legal issues raised by this challenge.

4. This judgment is set out under the following headings:

Factual Background

5. In January 2019, the Secretary of State made an application to Westminster City Council ("WCC") for planning permission for the "installation of the United Kingdom

Holocaust Memorial and Learning Centre including excavation to provide a basement and basement mezzanine for the learning centre (Class D1); erection of a single storey entrance pavilion; re-provision of the Horseferry Playground and refreshments kiosk (Class A1); repositioning of the Spicer Memorial; new hard and soft landscaping and lighting around the site; and all ancillary and associated works".

6. It is common ground that the planning application is for a development which is likely to have significant effects on the environment and as such is required to be the subject of an environmental impact assessment by virtue of the 2017 Regulations. The site is near to the Palace of Westminster and Westminster Abbey UNESCO World Heritage Site. The Palace of Westminster is a Grade I listed building.

7. On 5 November 2019, the then Minister of State for Housing "called-in" the planning application for determination by the Secretary of State instead of by WCC pursuant to the power in s. 77 of the Town and Country Planning Act 1990 ("TCPA 1990"). It is common ground that the decision on the application can only be taken by the Secretary of State, or by a person to whom he delegates that function. The provisions in schedule 6 of TCPA 1990 for determination of matters by Planning Inspectors do not apply (see s. 77(5) and contrast s. 79(7) for the determination of planning appeals). It is to be noted that the Claimant has not brought any challenge to the decision to call in the application.

8. The Defendant has decided that the application will be determined by the current Minister of State for Housing, Mr Christopher Pincher MP.

9. The Claimant is a small charity with a principal object of preserving and enhancing the quality and integrity of London's green open spaces. It has been actively involved in the planning process as an objector to the proposed development and has registered as a party in the forthcoming public inquiry on the planning application.

10. On 11 February 2020 WCC resolved that they would have refused the application if it had remained with them for determination. In that event, the Secretary of State would have been entitled to appeal against that decision nominally to himself. Under this procedure the appeal could then have been determined by another Minister acting on the Defendant's behalf or by a Planning Inspector acting under schedule 6 of TCPA 1990.

11. It appears that the Claimant would be content if the final decision were to be taken by an Inspector (see paragraph 15 of the Claimant's skeleton relying upon paragraphs 32 to 37 of the pre-action protocol letter on behalf of the Thorney Island Society sent on 19 February 2020). However, that option is not available to deal with a called-in application under the present statutory framework.

12. Instead, an Inspector has been appointed to hold a public inquiry into the application which will open on 6 October 2020. It is expected to last a few weeks. After the close of the inquiry the Inspector will prepare a report to the Minister of State on the material placed before him, set out his conclusions, and make a recommendation as to whether or not planning permission should be granted, and if granted subject to what conditions.

13. The Minister will then have to consider that report, aided by the advice he receives from his dedicated team, and reach his own conclusion on whether to accept or reject the Inspector's recommendation. His decision will have to be taken in accordance with the

Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000 No. 1624) ("the 2000 Rules"), which also govern the proceedings before the Inspector. Irrespective of whether the Minister decides to grant or refuse planning permission, he will have to give reasons for his decision and, under the 2017 Regulations, he will have to express his "reasoned conclusion" on "the significant effects of the proposed development on the environment" (regulation 26(2)). The Minister's decision may be open to challenge in the High Court under s. 288 of TCPA 1990, but only on public law grounds.

14. The Planning Inspectorate is held in the highest regard for its independence, expertise and professionalism. Not surprisingly, the Claimant does not suggest that the Inspector's role under the call-in procedure (including any functions he may discharge under the 2017 Regulations on environmental impact assessment) would not meet the requirements of independence and objectivity under Article 9a of the Directive.

15. The Claimant has drawn attention to a manifesto commitment concerning the project and to strong statements of support from the Secretary of State and the Prime Minister. However, Mr Howell QC confirmed that the present claim does not raise any issues of pre-determination or bias, actual or apparent. It is simply concerned with the issues I have identified at the outset, that is whether article 9a has been properly transferred into our national law and, if it has, whether the arrangements proposed for the handling of this application comply with that law. In that context, Mr Howell QC made it plain that the Claimant is not seeking to call into question the good faith of the Minister of State, particularly with regard to compliance with any relevant legal requirements.

The handling arrangements

16. On 10 March 2020 the Inspector held a pre-inquiry meeting to address the procedural arrangements for the forthcoming public inquiry. At that meeting the Inspector read out a note prepared by the Ministry of Housing Communities and Local Government ("MHCLG") summarising the arrangements first put in place in November 2019 so that Ministers or officials who had previously made public pronouncements or have responsibility for the promotion or the delivery of the Memorial are excluded from the decision-making process on the planning application.

17. On 5 May 2020 the Claimant's solicitors wrote to the Government Legal Department ("GLD") asking for a copy of the *actual* arrangements in place for the separation of functions, rather than just a summary. In a letter dated 18 May 2020 GLD refused to provide a copy of the "full document" because that was a purely internal document intended for Ministers, special advisers and officials.

18. In fact, the Defendant has provided in the court bundle a copy of the revised, full version of the handling arrangements dated 17 June 2020, albeit with certain information redacted, principally the names of certain individuals. Mr Tim Mould QC, who together with Ms. Anjoli Foster represented the Defendant, stated that there was no reason in principle why this version of the arrangements, or any further revision of it, could not be published. The text of this document is appended to this judgment.

19. The Claimant has not made any application for an order for the disclosure of the unredacted version. The Claimant has not suggested that these limited redactions have impeded its ability to advance its case that the handling arrangements do not comply

with the requirements of either article 9a of the Directive or regulation 64 of the 2017 Regulations, or impede the Court's ability to determine this second issue in the claim properly and fairly.

Legislative Framework

Directive 2011/92 EU

20. The Directive, adopted on 13 December 2011, codified a number of earlier directives going back to 85/337/EEC. It sought "to achieve one of the objectives of the Union in the sphere of the protection of the environment and the quality of life" (recital 4). Article 3(3) of the Treaty on European Union declares that the Union shall establish an internal market and shall work for the sustainable development of Europe based on (inter alia) "a high level of protection and improvement of the quality of the environment". Recital (7) provides:-

> "Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question."

21. The Directive applies "to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment" (Article 1(1)).

22. Article 1(2) contains a number of key definitions: -

> "(b) 'developer' means the applicant for authorisation for a private project or the public authority which initiates a project;"
>
> "(c) 'competent authority or authorities' means that authority or those authorities which the Member States designate as responsible for performing the duties arising from this Directive;"
>
> "(g) 'environmental impact assessment' means a process consisting of:
>
> (i) the preparation of an environmental impact assessment report by the developer, as referred to in Article 5(1) and (2);
>
> (ii) the carrying out of consultations as referred to in Article 6 and, where relevant, Article 7;
>
> (iii) the examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information

> provided, where necessary, by the developer in accordance with Article 5(3), and any relevant information received through the consultations under Articles 6 and 7;
>
> (iv) the reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination referred to in point (iii) and, where appropriate, its own supplementary examination; and
>
> (v) the integration of the competent authority's reasoned conclusion into any of the decisions referred to in Article 8a."

23. Under Article 6 consultation must be carried out on the developer's environmental impact assessment report and application for development consent with authorities designated by virtue of their specific environmental responsibilities. In this jurisdiction they would include the Environment Agency and Natural England.

24. The decisions in Article 8a refer to determinations by "competent authorities" on whether "development consent" (a decision entitling a developer to proceed with a project – article 1(2)(c)) should or should not be granted.

25. Thus, environmental impact assessment must involve the staged process summarised in Article 1(2)(g) whereby the developer submits an EIA report, consultations are undertaken with designated bodies and the public, and the competent authority assesses the information gathered, including its adequacy, before deciding whether to grant consent and producing its reasoned conclusions on the significant environmental effects of the project.

26. The Directive applied to EIA developments promoted by a competent authority responsible for deciding whether they should be granted development consent, but EU legislation did not tackle that conflict of interest until the amending Directive 2014/52/EU was adopted on 16 August 2014. Recital (25) provided:-

> "The objectivity of the competent authorities should be ensured. Conflicts of interest could be prevented by, inter alia, a functional separation of the competent authority from the developer. In cases where the competent authority is also the developer, Member States should at least implement, within their organisation of administrative competences, an appropriate separation between conflicting functions of those authorities performing the duties arising from Directive 2011/92/EU."

27. Article 1(11) inserted Article 9a into Directive 2011/92/EU as follows: -

> "Member States shall ensure that the competent authority or authorities perform the duties arising from this Directive in an objective manner and do not find themselves in a situation giving rise to a conflict of interest.

> Where the competent authority is also the developer, Member States shall at least implement, within their organisation of administrative competences, an appropriate separation between conflicting functions when performing the duties arising from this Directive."

28. The first limb has a broad application. However, it is common ground that the present case is only concerned with the second limb. This accepts that a competent authority may be responsible for assessing the environmental effects of and granting development consent for its own development projects, but then sets out how the conflict of interest is to be handled.

29. Article 2 imposed an obligation on Member States to transpose the amending Directive: -

> "1. Without prejudice to Article 3, Members States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 16 May 2017.
>
> When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
>
> 2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive."

The Town and Country Planning Environmental Impact Assessment Regulations 2017

30. These Regulations were made pursuant to (inter alia) s. 2(2) of the European Communities Act 1972. They consolidated with amendments the earlier domestic legislation and also implemented Directive 2014/52/EU.

31. Regulation 3 provides: -

> "The relevant planning authority, the Secretary of State or an inspector must not grant planning permission or subsequent consent for EIA development unless an EIA has been carried out in respect of that development."

32. Regulation 4 describes "the environmental assessment process." Regulation 4(1) and (2) provide: -

> "(1) The environmental impact assessment ("EIA") is a process consisting of-
>
> (a) the preparation of an environmental statement;
>
> (b) any consultation, publication and notification required by, or by virtue of, these Regulations or any other enactment in respect of EIA development; and

(c) the steps required under regulation 26.

(2) The EIA must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on the following factors-

(a) population and human health;

(b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;

(c) land, soil, water, air and climate;

(d) material assets, cultural heritage and the landscape;

(e) the interaction between the factors referred to in sub-paragraphs (a) to (d)."

33. Regulation 26(1) deals with the determination of an application for development consent: -

"When determining the application or appeal in relation to which an environmental statement has been submitted, the relevant planning authority, the Secretary of State or an inspector, as the case may be, must –

(a) examine the environmental information;

(b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, their own supplementary examination;

(c) integrate that conclusion into the decision as to whether planning permission or subsequent consent is to be granted; and

(d) if planning permission or subsequent consent is to be granted, consider whether it is appropriate to impose monitoring measures."

34. "Environmental information" is defined in regulation 2(1): -

" 'environmental information' means the environmental statement, including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development"

35. Under the heading "objectivity and bias" regulation 64 provides: -

> "(1) Where an authority or the Secretary of State has a duty under these Regulations, they must perform that duty in an objective manner and so as not to find themselves in a situation giving rise to conflict of interest.
>
> (2) Where an authority, or the Secretary of State, is bringing forward a proposal for development and that authority or the Secretary of State, as appropriate, will also be responsible for determining its own proposal, the relevant authority or the Secretary of State must make appropriate administrative arrangements to ensure that there is a functional separation, when performing any duty under these Regulations, between the persons bringing forward a proposal for development and the persons responsible for determining that proposal."

This is the provision by which the UK has sought to transpose article 9a of the Directive into our national law. The Claimant contends that regulation 64(2) fails to transpose the second limb of article 9a properly. No issue is raised with regard to the transposition of the first limb of that article by regulation 64(1).

A summary of the parties' cases

36. Before proceeding any further, I wish to express my gratitude for Counsel's written and oral submissions and for the care taken by the legal teams to agree and prepare bundles for the hearing which complied with the Court's protocols and enabled the issues to be handled efficiently.

37. I will set out only a summary of the parties' cases, recognising that the submissions covered matters in greater detail.

Issue 1 - the transposition issue

38. Mr Howell QC submitted that regulation 64(2) failed to transpose the second limb of article 9a in a number of respects. He said that it is limited to the determination of applications for development consents and does not cover all the duties of a competent authority under the EIA process. It does not achieve a separation of function with regard to all the personnel involved, for example, those involved in *advising* either the promoters of a project or the decision-maker on the application.

39. Mr Howell QC submits that regulation 64(2) fails to comply with the principle of legal certainty in EU law. The requirements of article 9a have to be guaranteed by the member state through domestic law and with the precision and clarity necessary for persons concerned to know the full extent of any legal rights they have and to be able to have those rights enforced before national courts. He sometimes referred to this as a requirement for sufficiently precise rules. Administrative measures may not be relied upon to achieve any necessary transposition of a directive into domestic law. In this respect Mr Howell criticises regulation 64(2) because it allows individual planning authorities, whether the Secretary of State or a local authority, to determine

administrative arrangements, which may vary from case to case and may be varied administratively from time to time.

40. Mr Howell QC submits that the UK has failed to discharge its responsibility to enact domestic legislation guaranteeing the independence and objectivity of decision-makers by ensuring functional separation within an authority between those promoting a project and those determining the relevant planning application (and discharging the duties of the competent authority). These legal guarantees must provide the decision-maker with the freedom to reach impartial decisions, including freedom from instructions or pressure from those involved in the development project. An administrative entity within a competent authority must have real autonomy, in particular its own administrative and human resources necessary for carrying out its functions under the Directive. Mr Howell says that there has been a failure to enshrine these requirements in domestic legislation, which cannot be overcome by recourse to the *Marleasing* principle of construction (*Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89).

41. However, Mr Howell QC accepts that on his case a proper transposition of the second limb of article 9a could be achieved either by legislation which imposes a dedicated legal structure on a particular authority or by providing for the "separate functioning" of competent authorities by enshrining in legislation the necessary tests or criteria which must be satisfied by any administrative arrangements devised by an individual authority. It is significant that the Claimant accepts this criteria-based approach to transposition.

42. Accordingly, it became plain during the hearing that the major difference between the parties under the first issue is whether the criteria for guaranteeing "an appropriation separation between conflicting functions" were required to be stated explicitly in domestic legislation in order to transpose the second limb of article 9a properly. If the answer to that question is "no", those criteria must still be satisfied in any event when regulation 64(2) comes to be applied. This is a matter which arises under the second issue in this claim, the adequacy of the handling arrangements for the called-in application.

43. It also emerged during argument that there is not a great difference between the parties as to the criteria required to guarantee independence and objectivity in the context of the second limb of article 9a.

44. Mr Mould QC submitted that regulation 64(2) had adequately transposed that provision and that there was no legal requirement for those criteria to be referred to explicitly in domestic legislation. They are just as intrinsic to the functional separation required by the language used in regulation 64(2) as they are to the language used in section 64(1) or indeed article 9a. They are clearly identified in the European jurisprudence and do not need to be expressly mentioned in regulation 64 in order to satisfy the principle of legal certainty.

45. Mr Mould QC submits that any rights conferred by regulation 64(2) are plainly capable of being enforced in national courts. The proper transposition of article 9a has been achieved by the text of regulation 64(2), without having to depend on administrative measures. The "administrative arrangements" in regulation 64(2) simply refer to the

scheme which an individual authority puts in place in order to comply with that provision.

46. At one point Mr Howell QC suggested that the Defendant's analysis on transposition is flawed because it depends upon a judgment being reached by each individual planning authority on the administrative arrangements to be put in place, which judgment could only be challenged on conventional Wednesbury grounds, and so the legal certainty required of any transposition would not be achieved. I should say straight away that there is nothing in this criticism. Whichever party's contentions on transposition are correct, one thing is common to both of them. There comes a point when the legal criteria for functional separation have to be applied to whatever judgment or decision an authority has made about the administrative arrangements to be operated. In other words, legal criteria have to be applied to administrative measures, even under the transposition model which Mr Howell QC would accept as being sufficient. Accordingly, whichever party' analysis is correct, the issue would not be whether a claimant can show that the authority's administrative arrangements are perverse or irrational, or beyond the range of rational choices which could have been made by the authority. Instead, there would be a binary question. Either those arrangements comply with the relevant legal requirements or they do not.

Issue 2 - whether the handling arrangements comply with Regulation 64(2)

47. The Claimant submits that if it fails on the transposition issue, the handling arrangements set up for the called-in planning application do not comply with regulation 64(2) of the 2017 Regulations. First, Mr Howell QC submits that the arrangements do not refer to that provision or indicate that they have been made in order to discharge those legal requirements. Furthermore, he says that there has been a failure to publicise the arrangements.

48. In summary, Mr Howell QC raises the following additional criticisms: -

(i) The document relies upon the "Ministerial Code", paragraph 2.3 of which would treat the Minister of State as being bound by decisions of Cabinet or Ministerial Committee;

(ii) The document allows the Director General to authorise the disclosure of information relating to the Ministry's handling of the planning application to persons outside those approved for that purpose in the document, without ensuring compliance with regulation 64(2);

(iii) The arrangements were made by the Secretary of State, being the authority whose interest in the achievement of the Memorial project conflicts with the independent discharge of the competent authority's duties under the 2017 Regulations;

(iv) The arrangements are subject to change by the Defendant or the Permanent Secretary;

(v) The "propriety walls" separating the decision-maker and his team from the project team provide insufficient "insulation". For example, the arrangements do not exclude discussions about the planning application

between the Minster of State and the Secretary of State or other members of the Government or a person involved in promoting the project;

(vi) The office of the Minister of State is integrated with the Defendant's Ministry, his staff are provided by that Ministry and subject to its supervision;

(vii) Both the Minister of State and his officials are subject to "hierarchical supervision" and therefore subject to pressures from persons involved in promoting the project which may appear to affect their future career prospects.

49. Mr Mould QC accepts that paragraph 2.3 of the Ministerial Code should be excluded. However, he submits that no legal complaint can be made about the fact that the arrangements were made or endorsed by the Secretary of State and the Permanent Secretary, or that they might make changes in future, given that what is done under the arrangements must always satisfy regulation 64(2) and its inherent safeguards. The mere fact that they have drafted or approved arrangements which are compliant in securing "appropriate separation", that being the true question, is nothing to the point. Similarly, he submits that the arrangements should not be read as if they permit non-compliant behaviour such as improper influence or discussions between parties who should remain functionally separate. Mr Mould QC also submits that "independence" for decision-making of this kind does not require the setting up of an entirely separate entity, whether external or internal, and the fact that the Minister and his team form part of the Ministry and have hierarchical superiors is not objectionable.

50. However, Mr Mould QC accepted that if the Court were to conclude that the handling arrangements did not satisfy regulation 64(2) then they should be reconsidered and amended in the light of the judgment.

Remedies

51. On the first issue the Claimant seeks a declaration that regulation 64(2) does not properly transpose the second limb of Article 9a of the Directive. In addition, the Claim Form, the Statement of Facts and Grounds and the skeleton argument suggested that regulation 64(2) should be disapplied by order of the Court because of non-compliance with EU law. But as Mr Howell QC pointed out, that remedy applies to primary, not secondary, legislation (see e.g. *R (National Council for Civil Liberties) v Secretary of State for the Home Department* [2019] QB 481). Instead, he now submits that if the Claimant succeeds on the transposition issue, regulation 64(2) is ultra vires s.2(2) of the European Committees Act 1972 and should therefore be quashed.

52. Mr Mould QC submits that if the Claimant succeeds on the transposition issue then the Court should only grant a declaration.

53. The Claimant does not seek any specific relief in relation to the legality of the handling arrangements. This judgment will deal with the issues raised and the parties may make submissions as to whether any relief is justified. In this context it may be appropriate to have in mind, for example, what was said by Lord Bridge in *R v Secretary of State for Transport ex parte Factortame Limited* [1990] 2 AC 85, 150: -

> "A declaration of right made in proceedings against the Crown is invariably respected and no injunction is required."

Delay

54. Mr Mould QC stated that the Defendant no longer pursues any of the delay issues which were raised in the Summary Grounds of Defence and skeleton. However, I will revert to this subject when I deal with a submission which Mr Howell QC made in his reply, the effect of which would be to challenge the decision to call in the application on 5 November 2019.

Issue 1: whether regulation 64(2) properly transposes the second limb of article 9a

55. I will address this issue under the following headings: -

(i) Whether the UK has complied with Article 2 of Directive 2014/52/EU;

(ii) The principle of legal certainty and transposition;

(iii) The criteria for independence and objectivity;

(iv) Whether those criteria had to be set out expressly in national legislation;

(v) Whether the second limb of Article 9a has been properly transposed into English law.

Whether the UK has complied with Article 2 of Directive 2014/52/EU

56. Article 2(1) required a member state to adopt legal provisions which transpose the requirements of the Directive. It also required those provisions to refer to the Directive or to be accompanied by such a reference upon their official publication. Mr Howell QC suggested at one point that the arrangements which have been put in place for the present case did not comply with Article 2.

57. However, the main issue in this part of the case is whether regulation 64(2) adequately transposed the Directive. If the Court concludes that it did, then there can be no doubt that the Regulations did make adequate reference to the Directive in the accompanying Explanatory Note.

58. Article 2(2) required the UK to communicate the text of the transposing legislation to the European Commission. The Explanatory Note states that that requirement was satisfied.

The principle of legal certainty and transposition

59. Article 288 of TFEU provides *inter alia*: -

> "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

Some of the cases cited refer to the earlier Article 189 of the EEC Treaty which was to the same effect.

60. There is a considerable amount of jurisprudence on the application of this provision, which needs to be read carefully in context and not selectively.

61. It is convenient to begin with *Commission v Germany* Case C-29/84, a decision which is frequently cited in many of the subsequent cases. In paragraph 23 the Court held: -

> "It follows from that provision that the implementation of a directive does not necessarily require legislative action in each member state. In particular the existence of general principles of constitutional or administrative law may render implementation by specific legislation superfluous, provided however that those principles guarantee that the national authorities will in fact apply the directive fully and that, where the directive is intended to create rights for individuals, the legal position arising from those principles is sufficiently precise and clear and the persons concerned are made fully aware of their rights, and where appropriate, afforded the possibility of relying on them before the national courts. That last condition is of particular importance where the directive in question is intended to accord rights to nationals of other Member States because those nationals are not normally aware of such principles."

62. This passage was echoed in another well-known decision, *Commission v France* Case 252/85 at [5]:-

> "…. it must be observed that the transposition of Community legislation into national law does not necessarily require the relevant provisions to be enacted in precisely the same words in a specific express legal provision; a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner ….. . However, a faithful transposition becomes particularly important in this case such as this in which the management of the common heritage is entrusted to the Member States in their respective territories."

63. The principle of legal certainty requires a directive to be transposed by legal measures and principles so that the requirements are rooted in a source of legal authority and binding. Accordingly, those materials must of course be expressed in terms which are sufficiently clear and precise so as to give full effect to the directive and be enforceable.

64. Some of the cases are straightforward, where for example, a member state has failed to take any steps at all to transpose a directive into domestic law within the time limit set. This happened, for example, in *Commission v Greece* Case C-311/95. There the government sought to rely upon a ministerial circular requiring compliance with the rules in a directive on the procedures for the award of public service contracts, to which the Court responded at [7]: -

> "It has consistently been held that mere administrative practices, which by their nature are alterable at will by the administration and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty (see *inter alia* Case C-242/94 *Commission v Spain* [1995] ECR 1-3031, paragraph 6). The Greek Government's argument based on the distribution of the ministerial circular cannot therefore be accepted."

Essentially the same failure to transpose arose in *Commission v Germany* Case-262/95.

65. In other cases, a member state has failed to transpose into national law essential requirements laid down in a directive. *Commission v Netherlands* Case C-339/87 concerned the transposition of Directive 79/409/EEC, the Wild Birds Directive. The issue arose because the language used in the Dutch law on hunting could be applied in a manner incompatible with conditions in the directive. The relevant conditions had not been set out in any domestic legal rules [AG5]. The Netherlands responded to that argument by relying upon the manner in which their permit system was in fact operated so as to comply with those conditions ([AG 42]). Having referred to the case law cited in [61] and [62] above, the Court held at [29]: -

> "The explanation that the requirements as to protection set out in Article 9 of the directive are observed in fact by ministerial practice with regard to the use of hunting permits cannot be accepted, since, as the Court reiterated in the judgment of 23 February 1988 in Case 429/85 Commission v Italy [1988] ECR 843, mere administrative practices, which by their nature may be changed at will by the authorities, cannot be regarded as constituting proper compliance with the obligation of Member States to which a directive is addressed, pursuant to Article 189 of the Treaty."

Here, the national legislation had conferred discretionary powers on the Minister without the explicit legal constraints imposed by the directive upon derogations ([28] and [36]). Those powers were therefore capable of being used in a manner conflicting with the directive.

66. Essentially the same issue arose in *APAS v Préfet of Maine and Loire* Case C-435/92. Article 7 of the Wild Birds Directive allowed the hunting of (inter alia) certain migrating bird species, in derogation from a prohibition on killing birds in Article 5, subject to certain express conditions, in particular limits on the duration of the hunting season. The Court held that the language of the directive did not preclude the *prefet* of each *departement* being given the power to set a closing date for the hunting season in that area to reflect differing regional circumstances. But those discretionary powers would only be compatible with the directive if they were circumscribed by domestic legislation so that they could only be used in accordance with the conditions governing those derogations laid down in the directive ([25] to [27] and [AG27] to [AG28]).

67. Sometimes national law, as far as it goes, may be compatible with a directive, in the sense that there is no express provision which conflicts with the directive. But the problem is that domestic law has not gone far enough to achieve proper or full

transposition; there is a gap which needs to be filled. So, for example, in *Commission v Greece* Case C-236/95 the issue was whether the national provisions adequately provided for suspending a public supply contract alleged not to satisfy procurement rules. Greek law only provided for the suspension of the *award* of a public supply contract by a party entitled to bring a public law claim for annulment, whereas the directive entitled anyone interested in obtaining the contract, or who would be harmed by an alleged infringement of the procurement code, to apply for the suspension of *the procedure* for awarding a contract ([10] to [11]). The Court rejected the government's reliance upon the interpretation by the Council of State of a presidential decree as filling this lacuna in transposition. The differences between that interpretation and the wording of the decree meant that there was not a clear and precise legal framework satisfying the requirement for legal certainty [13-14]. In addition, the domestic law failed to provide a remedy in damages required by the directive for infringements of public procurement rules ([15]).

68. Mr Howell QC placed a good deal of emphasis upon *Commission v Netherlands* Case C-144/99, which concerned a failure to transpose the requirements of Directive 93/13/EEC on the protection of consumers against "unfair terms" in contracts for the supply of goods and services. It was accepted by the Advocate General that the state was entitled to rely upon a pre-existing legislative scheme, so as to dispense with the need for any transposing legislation, subject to a rigorous appraisal and strict interpretation of that material [AG 16-18]. He summarised the case law on legal certainty in [AG 15] as follows: -

> "'[a]though [the third paragraph of Article 189 of the EC Treaty] leaves Member States to choose the ways and means of ensuring that the directive is implemented, that freedom does not affect the obligation imposed on all the Member States to which the directive is addressed, to adopt, in their national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues'. The Court has explained that, to that end, the Member States must define a specific legal framework in the sector concerned which ensures that the national legal system complies with the provisions of the directive in question. That framework must be designed in such a way as to remove all doubt or ambiguity, not only as regards the content of the relevant national legislation and its compliance with the directive, but also as regards the authority of that legislation and its suitability as a basis for regulation of the sector. Thus, for example, for the purposes of transposing a directive correctly into national law, mere administrative practice or ministerial circulars are not sufficient. In contrast with proper legislative measures, these offer no safeguards in terms of consistency, binding authority and publicity."

69. At [AG 25-31] the Advocate General explained why Dutch law failed to go as far as the requirements set by the directive, for example with regard to the cancellation of unfair terms and the application of the *contra proferentem* principle of interpretation. The Court accepted that reasoning at [19-20].

70. Mr Howell QC then relied upon a passage at [21] where the Court rejected an argument by the Dutch government by pointing out that reliance upon the settled case law of a state to interpret national law in a manner deemed to satisfy the requirements of a directive does not comply with the principle of legal certainty. He suggested that the Court had decided that the *Marleasing* principle may not be relied upon for the purposes of transposition at all. I do not believe that the resolution of the current challenge makes it necessary for me to decide this point. But I think it would be helpful to set out more fully and to comment on what in fact was said in the *Netherlands* case on this subject.

71. In fact, the Court relied upon [AG 36] and did not disagree with any part of the Advocate General's analysis on this subject. It is necessary to cite [AG 34-36] as a whole:-

> "34. The principle that national law should be so construed as to comply with Community law is a famous general principle of Community law, application of which the Court has extended to cases where a directive is not transposed into national law within the period prescribed. As the Court recently pointed out, on the subject of the Directive at issue, '[a]s regards the position where a directive has not been transposed, ... it is settled case-law ... that, when applying national law, whether adopted before or after the directive, the national court called upon to interpret that law must do so, as far as possible, in the light of the wording and purpose of the directive so as to achieve the result pursued by the directive and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC)'. 12
>
> 35. However, I repeat, that principle of interpretation does not solve the problem at issue here. It is designed to be of use pending the transposition of a directive into national law — or even after transposition if this is incorrect or incomplete — but it certainly cannot serve as an excuse for failure to transpose or for inadequate transposition. As has been rightly observed, the mere fact that a national court purports, in accordance with the principles laid down by the Court, to interpret national law in the light of Community law 'does not affect the obligation imposed on all the other authorities of that Member State, particularly the legislature, to adopt all the measures necessary, within the scope of their competence, to ensure that the Community rule is implemented and the objectives thereof are attained.
>
> 36. As Advocate General Léger observed — and as is apparent from the case-law cited above — that 'would run counter to the fundamental requirements underlying any transposition: those of legal certainty and adequate publicity. The Court has stated on many occasions that the provisions of a directive must be implemented "with unquestionable binding force ... with the specificity, precision and clarity required ... in order to satisfy the requirement of legal *certainty*" and so that "where the directive is intended to create rights for individuals, the persons

> concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts". National caselaw interpreting provisions of domestic law in a manner regarded as being in conformity with the requirements of a directive is not sufficient to make those provisions into measures transposing the directive in question'. 14 Consistently with that approach, as I have already mentioned, the Court explained in the same case that 'it is particularly important, in order to satisfy the requirement for legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts'."

72. Thus, the Advocate General made it plain that the *Marleasing* principle may be relied upon to overcome "incorrect and incomplete" transposition. He rightly based that statement upon the decision of the Court in *Oceano Grupo Editorial SA* Case C-240/98 to C-244/98 at [30] to [31]. On the other hand the *Marleasing* principle cannot be relied upon to overcome a failure to transpose at all or a transposition which is inadequate because, for example, national legislation conflicts with a directive or omits a provision which a directive has required to be explicitly included in a national legal framework, That was the problem with the government's transposition argument in the *Netherlands* case.

73. From this review of the case law general principles on the transposition of a directive may be summarised. Administrative measures cannot be relied upon to overcome a failure to make any transposition of a directive into domestic law at all. Nor can they be relied upon to overcome a conflict between national law and a directive or a failure to include a requirement of a directive by showing that a system is in practice operated compatibly with the directive. A national legal framework does not need to contain provisions expressed in the same language as a directive, but it must give full effect to, or fully apply, the requirements of that directive in terms which are sufficiently clear and precise, so that any rights created are enforceable in national courts. Where a directive allows the use of discretionary powers any conditions or requirements stipulated by the directive must be transposed into national law. Ultimately, how far national law is required to go depends on a proper understanding of the scope of the requirements laid down by the directive.

The criteria for independence and objectivity

74. The nature and extent of the requirements of independence and objectivity depend upon the wording, context and objectives of the directive in question.

75. Article 6 of Directive 88/301/EEC required member states to ensure that responsibility for drawing up specifications for, and granting type-approval of, telecommunications equipment was entrusted to a "body independent of public or private undertakings offerings goods and/or services in the telecommunications sector." The object was to facilitate entry to and competition in the market for the supply of equipment, whilst maintaining the safety of users and the proper functioning of the telecommunications network. In France the one laboratory authorised by the Minister to deal with type approvals formed part of a directorate within the Ministry, which itself was responsible for (inter alia) operating the public network. In *Decoster* Case C-69/91 the Court held

that the Minister had entrusted the type-approval function to a body, the laboratory, which was not an independent body for the purposes of Article 6 ([10] to [12] and [19] to [21]). The outcome was the same when the laboratory authorised to deal with type approval subsequently became part of France Telecom (*Tranchant* C-91/94 at [8] and [18] to [22]). The outcome of these cases was entirely predictable.

76. However, the second limb of article 9a does not require that an independent body be set up. Instead, it proceeds on the basis that the competent authority is also the developer, and not a body independent from the developer. The directive then requires "an *appropriate* separation between *conflicting functions*" (emphasis added) when the competent authority performs its duties under the EIA Directive.

77. I accept the submission of Mr Mould QC that the most analogous case for the purposes of this provision is *Department of the Environment for Northern Ireland v Seaport* Case C-474/10. This concerned Directive 2001/42/EC for the assessment of the environmental effects of plans and programmes, the Strategic Environmental Assessment ("SEA") Directive. This is a process which typically has to be applied to development plans and is therefore often "upstream" of any application for development consent requiring EIA. The promoter of a plan has to prepare an environmental report on the likely significant effects on the environment of a proposed plan or programme (article 5). Consultations on the plan and environmental report must be carried out with "designated consultation authorities" and the public (article 6). The outcome of the consultations along with the environmental report must be taken into account by the promoter of the plan during its preparation and prior to its adoption. A statement must be published as to how those requirements have been met (articles 8 and 9). Article 6(3) required a Member State to designate authorities to be consulted on a draft plan "which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans or programmes". In England those designated bodies are Historic England, Natural England and the Environment Agency.

78. In Northern Ireland the Department of Environment comprised four executive agencies which were all subject to its control. None had a separate legal identity but each had its own staff and resources. The Planning Service ("PS") was responsible for planning functions including the preparation of development plans. The Environment and Heritage Service ("EHS") was responsible for (inter alia) the regulation of the environment and had expertise in environmental matters. The proceedings concerned two plans promoted by the PS. During their preparation the PS had worked very closely with the EHS in gathering environmental information and taking advice on the content of the plans ([15] to [18]). At the consultation stage the Department sought the views of the EHS ([19] to [20]).

79. The Northern Ireland legislation designated the Department of Environment as the sole consultation body for the purposes of article 6(3), but went on to provide that the Department would not exercise those functions at any time when it was responsible for promoting a plan or programme [12]. Plainly, therefore, the consultation with EHS on the two plans had taken place outside the legislative framework. It was non-statutory.

80. Seaport and others contended before the High Court that the directive had not been transposed properly into national law because a consultation body had not been designated to deal with plans promoted by the Department ([21] to [22]). The High

Court agreed. The Court of Appeal referred to CJEU (inter alia) the issue whether the UK had been required to designate a further consultation body which was separate from the authority preparing the plans ([31]).

81. The SEA Directive did not refer expressly to any obligation on the part of the consultation body to act independently or to any separation of function. However, CJEU, drawing upon the objective in recital (15) that authorities be consulted to improve the transparency of decision-making, decided that this was to ensure that a draft plan and its environmental report and the environmental effects are "objectively considered" ([35]).

82. CJEU recognised that the Department had been designated as the consultation body for the purposes of article 6(3) because of its environmental responsibilities and ability to assess the environmental effects of a plan [38]. However, where that body was also responsible for preparing a plan, the SEA Directive would be deprived of practical effect if "in the administrative structure of the Member State" no other body was empowered to carry out the consultation function ([39]).

83. Nevertheless, the Court accepted that the Directive did not require in these circumstances that another "authority" be created or designated to undertake consultation ([41]) and then continued at [42]: -

> "However, in such a situation, Article 6 does require that, within the authority usually responsible for consultation on environmental matters, a functional separation be organised so that an administrative entity internal to it has real autonomy, meaning, in particular, that it is provided with administrative and human resources of its own and is thus in a position to fulfil the tasks entrusted to authorities to be consulted as provided for in that directive, and, in particular, to give an objective opinion on the plan or programme envisaged by the authority to which it is attached, which it is for the referring court to verify."

84. The second limb of article 9 is very similar in that there is no requirement for a separate authority or body to be created to carry out the duties imposed by the Directive on the competent authority. Instead, there must be an "appropriate separation between conflicting functions" within the "organisation of administrative competences". Article 9a requires that administrative arrangements achieve that separation within the authority. *Seaport* accepted that functional separation within the Department would be satisfied by the internal group responsible for acting as consultee having real autonomy, and its own administrative and human resources (however, no detail was given about those aspects). But it should be noted that, although the context for the decision was whether transposition had been adequate, the requirements laid down by the Court were not secured or guaranteed by any specific legislative provisions, or legal framework. The arrangements were simply administrative in nature.

85. The opinion of the Advocate General in *Commission v Poland* Case C-530/16 contains a valuable discussion of the concepts of independence and objectivity. The case was concerned with Article 21 of Directive 2004/29/EC, the Railway Safety Directive, which required investigations of certain accidents and incidents to be carried out by a permanent investigating body which had to be "independent in its organisation, legal

structure and decision-making" from (inter alia) any infrastructure manager, or railway undertaking or any party where interests could conflict with the tasks entrusted to that body.

86. The Advocate General pointed out that independence is not a uniform notion involving a set of guarantees universally applicable to all independent bodies in the same way. Instead, independence involves a "ladder", or spectrum, of requirements, the exact nature of which depends on the nature of the functions that a body is to undertake in any given situation and the separation required from other parties in order perform that role independently ([AG32]). I agree with Mr Mould QC that European law recognises that there are degrees of independence. I would add that the nature of the independence required must also depend on the particular wording of the directive in question.

87. The Advocate General explained in [AG33]: -

> "The core of independence and the first rung on the ladder is 'decision-making independence': to be allowed to make a decision in the individual case impartially, without taking any instructions beforehand and fearing any repercussions after the decision. Beyond that core, an administrative authority can find itself at many higher rungs of the ladder where there is a need for greater impartiality: from independent legal personality to guarantees against removal of individual members, to own budget and/or full self-administration and other elements. At the very top of the ladder, a highly independent and thus impartial administrative authority will start approaching the guarantees that are required and reserved for the judicial function."

88. He considered that the "outer end" of the spectrum was represented by the jurisprudence on article 28(1) of Directive 95/46/EC on the protection of individuals in relation to the processing and free movement of personal data ([AG48]). This was discussed in, for example, *Commission v Germany* Case C-518/07 and *Commission v Austria* Case C-614/10. Each Member State was required to provide one or more supervisory authorities to be responsible for monitoring the application of the directive and to ensure that they would act "with complete independence in exercising the functions entrusted to them". The Grand Chamber described these authorities as the guardians of the fundamental rights and freedoms (recognised by Article 8 of ECHR) of citizens in relation to the handling of personal data. They have to ensure a fair balance between the right to private life and the free movement of personal data as an essential component of the internal market. The guarantee of the independence of these bodies is intended "to strengthen the protection of individuals and bodies affected by their decisions." Therefore, in order that they may act objectively and impartially "they must remain free from any external influence, including the direct or indirect influence of the State … and not of the influence only of the supervised bodies" (*Germany* at [20] to [25]).

89. Accordingly, it was held that the State scrutiny exercised over the supervisory authorities in both the *Germany* and *Austria* cases was incompatible with the independence they were required to have. For example, in the *Austria* case it was objectionable that the managing member of the supervisory authority was a federal official subject to "an extensive power of supervision" and evaluation by his hierarchical superior which might be perceived as affecting his career prospects. The

Grand Chamber stated that in view of the authority's role as the guardian of the right to privacy, the authority had to "remain above all suspicion of partiality" (*Austria* at [48] to [52] applying *Germany* at [36]).

90. In my judgment, the position of competent authorities acting under the EIA Directive and determining planning applications cannot be equated to the functions of supervisory authorities established in order to satisfy article 28(1) of Directive 95/46/EC. Although a high level of protection is given to the environment, one of the objectives of the EU (Article 3(3) of TEU), competent authorities do not act as guardians of any fundamental rights. Instead, they exercise planning control impartially in the public interest. That involves balancing the evidence and arguments in favour of and against a development proposal, which will include deciding how much weight to give to environmental receptors, effects and protection in the circumstances of a particular case. Planning policy, both at the national and at the local level, is generally an essential component of that decision-making process. It may include policies promoted and adopted by the competent authority itself. The obligation of a competent authority to have regard to such policy, does not conflict or interfere with its independence in relation to the EIA process. That is compatible with article 9a, even if the proposal under consideration is one which the authority has already promoted through a policy in a plan it has adopted.

91. It is in this context that the second limb of article 9a operates. The language used is rather different as compared with "independence" provisions in other directives. Often those provisions require the setting up of a *body* which is required to be independent from other parties with defined conflicting interests (see the *Poland* case at [6]). By contrast the second limb of article 9a accepts that the same body can be both the competent authority and the developer, but the focus is on ensuring an "appropriate separation between conflicting functions" within the "organisation of administrative competences". For these reasons, I do not accept that all of the requirements laid down in the case law on Article 28(1) of Directive 95/46/EC, or in the *Poland case* dealing with article 21 of Directive 2004/19/EC (e.g. [86]-[90]), should be read across to the second limb of Article 9a of the EIA Directive.

92. Instead, in my judgment article 9a is focused on the "normal" approach to independence and objectivity summarised by the Advocate General in the *Poland* case. He said at [AG 31]: -

> "From the general perspective, the Court has already stated that 'in relation to a public body, the term "independence" normally means a status which ensures that the body concerned can act completely freely, without taking any instructions or being put under any pressure'. Thus, independence entails, in essence, that the body in question be insulated from other entities whose action may be driven by other kinds of interests than those pursued by that body. To that effect, the body must enjoy a number of concrete guarantees of independence that protect it against undue interferences that could prevent it from carrying out its tasks and fulfilling its mission."

That "normal" meaning had been laid down by the Grand Chamber in *Germany* Case C-518/07 at [18].

93. At [AG 35] the Advocate General continued: -

> "It is nonetheless clear that the minimum guarantee applicable to any independent administrative authority worthy of that name is decision-making independence: in the sense of being able to adopt impartial decisions in individual cases, free from the interference of any other entities that have potentially conflicting aims or interests. The members of that authority cannot be bound by instructions of any kind in the performance of their duties. At the same time, however, such minimum independence requirements aimed at impartial decision-making in individual cases do not per se prevent the existence of overall structural or organisational links between the concerned entities, provided that there are clear and robust guarantees that there cannot be any interference in individual decision-making."

94. These statements, both in the *Poland* case and elsewhere, contain overlapping principles. But in my judgment, it is plain that the second limb of article 9a does not involve independence at the "higher rungs of the ladder" described in the *Poland* case at [AG 33] (see [87] above), such as separate legal personality, full self-administration and ring-fenced budget. There is no requirement for an additional body to be created to act as competent authority in this situation. Instead, independence requires in the present context that: -

(i) The functions of the competent authority under the EIA Directive be undertaken by an identified internal entity within the authority (including any officials assisting in those functions) with the necessary resources and acting impartially and objectively;

(ii) The prohibition of any person acting or assisting in the discharge of those functions from being involved in promoting or assisting in the promotion of the application for development consent and/or the development;

(iii) The prohibition of any discussion or communication about the Holocaust Memorial project or fund, or the called-in application for planning permission between, on the one hand, the Minister of State determining the application and any official assisting him in the discharge of the competent authority's functions and, on the other, the Secretary of State or any official or other person assisting in the promotion of the project or the called-in planning application or any other member of the government; and

(iv) The prohibition of any person involved in promoting or assisting in the promotion of the application for development consent and/or the development from giving any instructions to, or putting any pressure upon, any person acting or assisting in the discharge of the functions of the competent authority, or from attempting to do so, in relation to those functions.

95. An "entity" under point (i) need not be a formal body or structure. Such an "entity" may be a single person. It suffices that the person or persons comprising the entity or

working for it, together with the purpose of the entity are identifiable. Points (i) and (ii) give effect to the requirement that the administrative entity should have its own resources so that it may act independently in discharging the functions of the competent authority. I have not received any detailed submissions on the implications of the second limb of article 9a for the functioning of local planning authorities and their officers. Accordingly, the formulation in (ii) above may need to be considered further in an appropriate case. For the avoidance of any doubt, point (iii) does not impede the provision of information on an application for development consent through the formal channels appropriate to whichever application process is being followed.

96. Having established the criteria which must be satisfied in order for a member state to ensure the independence of a competent authority required under the second limb of article 9a, the next question is whether EU law required those criteria to be expressly included in the legislative transposition of that provision, that is in the 2017 Regulations. As Mr Mould QC pointed out, the essential issue here is whether regulation 64(2) has gone far enough to transpose the second limb of article 9a of the Directive.

Whether the criteria for independence had to be set out expressly in national legislation

97. The second limb of article 9a requires "an appropriate separation between conflicting functions." It does not go further by mandating that the criteria for defining the appropriate level of independence be enshrined in legislation or a framework of legal rules. By contrast, the Wild Birds Directive and the Habitats Directive contain several examples of express criteria or conditions which are required to be transposed in order to ensure that actions taken by authorities are compliant (see e.g. *Commission v Netherlands Case C-339/87* and *APAS v Préfets de Maine et Loire* Case C-435/92). The same approach has been taken for the transposition of air quality limit values for pollutants (*Commission v Germany* Case C-361/88).

98. The European case law on requirements for independence generally does not address this issue. Instead, many of the decisions are concerned with whether the domestic legal framework actually put in place conflicted or interfered with the independence which an authority was required by a directive to have.

99. In these circumstances, Mr Howell QC placed particular reliance upon one decision, *Commission v Portugal Case* C-2015/14, which concerned compliance with Council Regulation (EEC) No. 95/93 on the allocation of landing and take-off slots at congested airports. The recitals required allocation to be based on neutral, transparent and non-discriminatory rules and the appointment of a co-ordinator with unquestioned neutrality as the sole person responsible for the allocation of slots. They also referred to the Community's policy to facilitate competition between carriers and to encourage entry into the market. Article 4(2)(b) required a member state to ensure "the independence of the co-ordinator" "by separating the co-ordinator functionally from any single interested party" and a system of funding the co-ordinator's activities which would guarantee his independent status.

100. By a legal decree Portugal designated ANA as the national co-ordinator for a number of airports. But ANA was also the managing body for those airports, and in that capacity was held by the court to be an "interested party" giving rise to a conflict of interest ([42] to [44]).

101. Article 5(1) of the decree provided: -

> "In carrying out its functions as national … coordinator in respect of the allocation of slots, ANA … shall ensure that this activity is independent of its activity as an airport manager by means of appropriate separation."

102. The Court identified the issue as being whether the Portuguese decree established to the required legal standard guarantees capable of ensuring the functional separation of the co-ordinator [45]. The Court held that although ANA was responsible for carrying out the functions of both co-ordinator and airport manager, Portuguese law required ANA to guarantee "appropriate separation" of the co-ordinator, at least at a functional level ([46]). Mr Howell QC relies in particular on the passage which then followed at [47]: -

> "It must be held that the guarantees provided for by the Portuguese legislation at issue are not, on account of its vague nature, sufficient to actually ensure the functional separation required by the first sentence of Article 4(2)(b) of Regulation No 95/93. That legislation relies, in essence, solely on the self-limitation of ANA, without, in that regard, imposing on it an appropriate and specific framework."

He submits that it follows from that decision that legal rules defining the necessary independence ought to have been enshrined in domestic law.

103. The *Portugal* case was about a Council regulation which was directly applicable and binding in all Member States (Article 288 of TFEU), rather than a directive. The issue to be decided was whether the legal arrangements in Portugal complied with the regulation, and not whether a directive had been properly transposed. More importantly, the regulation expressly required a member state to be responsible for separating the co-ordinator it appointed functionally from any interested party so as to ensure independence. By contrast, the second limb of article 9a is worded more loosely. It requires member states to implement "within their organisation of administrative competences" an appropriate separation between conflicting functions. This language is compatible with separation of function being ensured by the relevant administrative bodies. This reflects the approach taken in the language of the first limb of article 9a, which simply requires that *competent authorities perform their duties* in an objective manner and *do not find themselves* in a situation giving rise to a conflict of interest.

104. It is also necessary to understand what the court meant by its reference to "vagueness" in the context of article 4(2)(b) of the Regulation. There is little by way of reasoning on the point, albeit that the court was differing from the Advocate General. Paragraphs [46] and [47] of the judgment echo the Commission's case summarised at [26]. Although ANA had been required under domestic law to guarantee the independence of the co-ordinator, the government was not able to state in what ways the co-ordinator, an integral part of ANA, was independent and what guarantees existed in that regard. Furthermore, the judgment at [46] referred to the legal scheme by which another body responsible for monitoring the allocation of slots by ANA could deal with a failure to achieve "functional separation", but only by imposing fines and penalties (see [9] to [11]). It can therefore be seen why the court was not satisfied that arrangements which had not even been described, and which were substantively reliant upon self-limitation

by ANA, did not comply with the requirement for a member state itself to separate the co-ordinator it appointed functionally from interested parties.

105. Accordingly, the *Portugal* case does not address the question whether the transposition of a requirement in a directive for a member state to ensure the independence of a body or, as in this case, separation of functions within an authority, must set out the criteria or characteristics of that independence in domestic legislation where they have not been stipulated in the directive. Furthermore, none of the other cases cited involved any decision on that point. To the contrary, *Seaport*, which was determined in the context of an issue about adequacy of transposition, would suggest that there is no such requirement.

106. Although the first limb of article 9a requires Member States to ensure that competent authorities perform their duties under the Directive objectively and so as to avoid conflicts of interest, it does not mandate any specific criteria or conditions for determining these issues which must also be transposed into domestic legislation. Regulation 64(1) of the 2017 Regulations transposed those requirements by adopting a "copy-out" style of drafting. Mr Howell QC did not contend that that transposition was inadequate. Plainly, individual planning authorities up and down the country are required to make legal (or constitutional) and administrative arrangements, the combination of which complies with regulation 64(1).

107. I do not see how any distinction can be drawn between the first and second limbs of article 9a so that in the latter case Member States are required to define in domestic legal rules the criteria or characteristics which satisfy the requirement for an "appropriate separation between conflicting functions". There is nothing in the language of the Directive or in the jurisprudence which lends any support to the Claimant's contention. Indeed, the second limb is satisfied by member states implementing "appropriate separation" through the way in which they *organise administrative competencies*. The language used in the second limb, which is more flexible than that used in the first limb or any directive considered in the case law cited to this court (including the *Portugal* case), plainly indicates that member states are not required to include criteria for determining functional separation in their transposing law. There is no need for this to be done in order to satisfy the principle of legal certainty.

Whether the second limb of article 9a has been properly transposed into English law

108. In my judgment, the language of regulation 64(2) effectively amounts to a "copy-out" of the second limb of article 9a, although, of course, there is no requirement for precisely the same language to be used (*Commission v France* Case 252/85).

109. I do not accept Mr Howell's submission that regulation 64(2) is limited to the determination of an application for planning permission and fails to address all the duties of a competent authority in the EIA process as set out in article 1(2)(g) of the Directive. There is nothing in this point. First, all of the duties of a competent authority referred to in that article are picked up in regulation 26(1), and correctly linked through its opening words to the determination of the application by the appropriate decision-maker. Second, regulation 64(2) requires functional separation when that authority performs "any duty under these Regulations", and not just the determination of the application for planning permission.

110. I also see no merit in the criticism that regulation 64(2) does not achieve separation of function with regard to all relevant persons, for example officials who advise those who determine an application. It is necessary to give a sensible construction to the regulation. The regulation's requirement for functional separation between those who bring forward a proposal and those responsible for determining an application must include those who advise or assist in either task so that objectivity is not undermined or frustrated.

111. Regulation 64(2) requires "appropriate administrative arrangements" to be made so as to ensure functional separation. This is a perfectly proper transposition of the requirement in article 9a for "appropriate separation" to be implemented within the "organisation of administrative competences".

112. At one point Mr Howell QC criticised the regulation for allowing these arrangements to be made by competent authorities, as opposed to them being imposed through legislation by the member state. However, as we have seen, it is plain from the jurisprudence that domestic legislation may confer powers on bodies or officials to make the required arrangements so long as that power is expressed to be subject to any provisions that the directive requires to be explicitly transposed (see eg. *APAS v Préfets of Maine and Loire* Case C-435/92 at [AG4] and [26] to [27]). Indeed, Mr Howell QC accepted that a criteria-based approach to transposition would be acceptable ([41] and [46]). That is why it became apparent during the course of oral argument that the transposition issue in this case really turns on whether the second limb of article 9a requires any criteria for determining functional separation or objectivity to be included in domestic legislation. For the reasons I have already given, neither the terms of the directive nor the principle of legal certainty requires this.

113. Next Mr Howell submitted that it was inappropriate that regulation 64(2) allows the competent authority to make different arrangements for different proposals or to alter arrangements from time to time. There is no substance in this criticism. Mr Howell accepts that proper transposition would be achieved if appropriate criteria for guaranteeing objectivity are expressly stated in domestic legislation. But that case (i) involves a tacit acceptance that individual authorities will be responsible for devising arrangements which comply with the criteria and (ii) does not preclude those arrangements from being altered from time to time by the authority, so long as any new arrangement complies with the criteria. Regulation 64(2) applies to a wide range of authorities and projects across the country. It is entirely appropriate that the legislation allows for arrangements to be tailor-made in this way by individual authorities for their own circumstances.

114. Likewise, the criticism that regulation 64(2) allows administrative arrangements to be made by the very authority which has the conflicting interest falls away. First, any arrangement made by that authority must satisfy the tests for independence and objectivity. That can be objectively determined by the Court in the event of an issue arising. Second, the criteria-based transposition, which according to the Claimant would be lawful, would operate in the same way. It follows that the decision in *Commission v Poland* Case C-530/16 (and similar cases) does not assist Mr Howell's argument. In *Poland* there was a plain conflict of interest between the Minister and the investigating body and the Court objected to the influence which, under the express terms of the domestic legal framework, the former could bring to bear upon the latter, for example, by amending its statute or constitution. However, the Claimant's case does

involve an acceptance that the internal conflict of interest within an authority to which article 9a applies may be addressed by arrangements made by the authority itself, so long as they comply with adequately transposed national legislation.

Conclusion on Issue 1 - the transposition issue

115. For all these reasons, the Claimant's case on the transposition issue fails. I conclude that the United Kingdom has properly transposed the second limb of article 9a of the Directive into English law by regulation 64(2) of the 2017 Regulations. Regulation 64(2) satisfies the principle of legal certainty for this purpose.

Issue 2: whether the handling arrangements for the application comply with regulation 64(2) of the 2017 Regulations

The Court's jurisdiction

116. Section 284(1) of TCPA 1990 ousts the court's jurisdiction of judicial review in relation to certain matters, which instead can only be challenged by statutory review under s.288 on an application made within the strict time limits there laid down. By s. 284(1)(f) these matters include any action on the part of the Secretary of State mentioned in sub-section (3), which relates *inter alia* to any decision on an application for planning permission referred to the Secretary of State under s.77 (s.284(3)(a)). Equally, matters which fall outside this ouster clause and which therefore do not have to be dealt with under s.288, can be raised in an application for judicial review.

117. In response to a question from the court, Counsel referred to regulation 66 of the 2017 Regulations, which provides as follows:-

> "For the purposes of Part 12 of the Act (validity), the reference in section 288 of the Act (Proceedings for questioning the validity of other orders, decisions and directions) to action of the Secretary of State which is not within the powers of the Act shall be taken to extend to a grant of planning permission or subsequent consent by the Secretary of State in contravention of regulation 3 or 36."

They both submitted that because regulation 64 is not referred to in regulation 66, the Claimant was entitled to raise its allegation of breach of regulation 64(2) in the present claim.

118. With respect, I do not think the position is as straight forward as that. It is, of course, for the court to satisfy itself that it has jurisdiction in a matter.

119. As we have seen, regulation 3 prohibits the grant of planning permission for "EIA development", such as the present project, "unless an EIA has been carried out in respect of that development." Regulation 2(1) provides that "EIA" has the meaning given by regulation 4 (see [32] above). Accordingly, "EIA" comprises (inter alia) the steps required under regulation 26, which must include the examination by the planning authority (here the Minister of State) of the environmental information. So I agree that the focus of regulation 66 is simply on the stage when the final decision is reached and

the decision letter is issued. But how does regulation 66 sit with ss. 284(1) and (3) and s. 288(1) and (4)? It is those provisions which are determinative of jurisdiction.

120. In *Co-operative Retail Services Limited v Secretary of State for the Environment* [1980] 1 WLR 271 the Court of Appeal decided in relation to the parallel provision in s.284(3)(b), dealing with "any decision on an appeal under s.78", that this is confined to a decision made in disposing of the appeal, or dealing with its final outcome, as contrasted with a decision made during the course of an appeal, such as a procedural decision (p. 275 B-C). The same interpretation must apply to what is meant by a decision on a called-in application. Thus, the ouster provision in TCPA 1990 does not prevent the Claimant from contending in the present claim for judicial review that the arrangements being applied during the course of handling the application (prior to its determination) fail to comply with regulation 64(2) of the 2017 Regulations.

121. Of course, these "arrangements" will also apply when the Minister's decision on the application is made. It would therefore be possible to raise an alleged failure to comply with regulation 64(2) at the time of the decision letter, but only through a challenge under s.288. However, if that issue is previously determined by the Court in an application for judicial review, any attempt to re-litigate it might be treated as an abuse of process, unless the arrangements were altered materially in the meantime.

122. For these reasons, I accept that the court has jurisdiction to determine this second issue in the claim. There is a practical advantage in the court being able to consider the issue at this stage. If any legal errors or criticisms are identified, there is an opportunity for the competent authority to address them before the Minister of State receives and considers the report from the independent Inspector.

Discussion

123. I should begin by recording some aspects of the handling of the planning application which do not give rise to any concerns about conflict of interest or independence. In practical terms since the beginning of this year the application has been in the hands of the Planning Inspectorate and the Inspector appointed within that body to conduct the public inquiry. As I have said, the Inspector held a pre-inquiry meeting in March and the inquiry will begin on 6 October. The proceedings have been and remain under the control of the Inspector at least until the close of the inquiry. That role includes the ability to call for further environmental information if he considers that appropriate. The independence of the Inspector is not questioned and there is no conflict of interest between the Secretary of State as promoter of the project and the Inspector. It is not suggested that the Minister of State as the decision-maker on the application has any active role to play during this period. The process is governed by the 2000 Rules as well as the rules of natural justice. Once the inquiry is closed the Inspector's involvement will continue until he prepares and sends his report, with its conclusions and recommendations, to the Minister. No concern in relation to regulation 64(2) or independence arises in relation to this important part of the application process in which the proposal will be examined publicly, supporters and objectors will be able to present their cases and test other evidence as appropriate, and then the issues and information presented will be carefully evaluated by an experienced Inspector in a document which will be published when the decision letter of the Minister is issued.

124. The functions of the competent authority set out in article 1(2)(g) of the Directive and regulation 26 of the 2017 Regulations relate to the decision-making stage, but that does not begin until the Minister's team receives the Inspector's report. This stage of the process is also governed by the 2000 Rules, notably rules 17 and 18. It is possible that after the inquiry closes a participant may seek to rely upon additional material. Ordinarily that would not be seen by the Inspector and would not influence his report. It would be dealt with by the Minister's officials acting in accordance with the rules of natural justice.

125. For the reasons I have already given under the first issue, I do not accept that the preparation or approval of the handling arrangements by the Secretary of State or the Permanent Secretary (or other officials involved in bringing forward the Memorial project) involves a breach of article 9a or regulation 64(2). These provisions accept that the Secretary of State (or other relevant planning authority) will make appropriate arrangements for functional separation in order to address the conflict of interest. There can be no objection to their involvement in the setting up of arrangements which otherwise comply with the requirements of functional separation for the discharge of the EIA duties to which regulation 64(2) relates. The same goes for any changes made to those arrangements from time to time.

126. However, I accept Mr Howell's criticisms that the current version of the handling arrangements fails to refer to regulation 64(2) and that there has also been a failure to publish the document. These requirements derive from the principle of legal certainty. They are matters of substance and not mere formalism. It is important to bring home to those to whom the arrangements apply, whether involved in the promotion of the development or the handling of the application by the competent authority, that the document lays down a regime in order to comply with the Secretary of State's legal obligations under regulation 64(2), and that those obligations are enforceable in the courts. Accordingly, ministers and officials must understand that they have to comply with the arrangements. The document is not to be treated as simply guidance. The document, and any amended version, should also be published so that the public is aware that it sets out the arrangements made by the Secretary of State in order to comply with his legal obligations under regulation 64(2).

127. I agree with Mr Mould QC that the introductory paragraphs of the document are helpful, but in my judgment they do not go far enough. The handling arrangements should be amended so as to set out the requirements in [94] above.

128. I also agree with Counsel on both sides that the document must be amended so as to make it clear that the Minister of State who will determine the application for planning permission is not subject to paragraph 2.3 of the Ministerial Code or "collective Ministerial responsibility" in relation to any matter affecting the discharge of the duties of the Secretary of State as competent authority under the 2017 Regulations for the called-in planning application.

129. Page 3 of the handling arrangements allows the Director General, who acts as the executive team representative for the Minister of State, to authorise disclosure or discussion about information on the planning case work (which I take to refer to the called-in application) with any person not on the list of persons to whom such information can be disclosed (which I take to refer to the Minister of State or the persons identified in the document as forming part of his team for the purposes of regulation

64(2)). This passage needs to be amended so as to make it clear that any authorisation must comply with regulation 64(2) and must require any authorised person discussing or receiving such information to comply with that regulation and the handling arrangements.

130. Page 1 of the handling arrangements refers to information on submissions concerning "the Holocaust Memorial Fund". This should be broadened to cover the Holocaust Memorial project. There should also be inserted a general provision which explicitly prohibits any discussion or communication about the Holocaust Memorial project or fund, or the called-in application for planning permission between, on the one hand, the Minister of State determining the application and any official assisting him in the discharge of the competent authority's functions under the 2017 Regulations and, on the other, the Secretary of State or any official or other persons assisting in the promotion of the project or the called-in planning application. This prohibition should extend to include any discussion or communication with any other member of the government about the project or fund or the application for planning permission.

131. I have already said that the requirements set out in [94] above must be included in the handling arrangements for the called-in application, including the prohibition of direct or indirect pressure. Mr Howell has also raised an issue about the risk of the Minister or an official assisting him in the discharge of the relevant duties being affected by the influence which a "hierarchical superior" may have over that person's future career prospects as a politician or as a civil servant. In so far as this concern relates to the risk of something being said or hinted at, that is adequately covered by the prohibition of "pressure". But Mr Howell's submission went further by raising the risk that the Minister of State or an official assisting in the discharge of his functions might *perceive* that the outcome of the planning application could affect his or her future career prospects. It is said that both the Minister of State and his officials work under "hierarchical superiors" who are able to control or influence these prospects. Having carefully reflected on the submissions of both parties and the jurisprudence, and given the context and wording of article 9a and regulation 64(2), I have reached the firm conclusion that nothing further needs to be added to the handling arrangements to address this point.

132. Once the handling arrangements properly address the issues of "instructions" and "pressure", the Claimant's concern is essentially about a residual risk to do with the *perception* of individuals involved in the decision-making process. I accept Mr Mould's submission that at this stage the court should proceed on the basis that the Minister of State and those assisting him will act in good faith and be true to the arrangements made to satisfy regulation 64(2). There is therefore no need to add, for example, an express requirement that they should not allow their future career prospects to influence their participation in the decision-making process.

133. It is also necessary to understand regulation 64(2) and article 9a of the Directive in the practical context to which they apply. These provisions are quite unlike those considered in, for example, *Commission v Germany* Case C-518/07 or *Commission v Austria* Case C-614/10, where the legislation required an independent body to be created. The relevant provisions in this case do not require an independent body to be set up to determine an application for planning permission made by a local planning authority or by the Secretary of State (see e.g. Seaport). Instead, appropriate "*functional* separation" is required *within* the planning authority, but not an entirely separate legal

organisation or the elimination of any hierarchy above the persons involved in the handling and determination of the planning application.

134. In practice it is very unlikely that a separate team set up within the Ministry or within a local planning authority to deal with a planning application made by the same authority will devote the whole of their time to that application while it remains outstanding. During that period they are likely to be dealing with a range of other issues which have nothing to do with the project but which do involve working with persons who have responsibilities for the planning application or project giving rise to the conflict of interest. Article 9a does not require that these working relationships, which may involve "hierarchical superiors", should cease while that planning application remains to be determined.

135. Furthermore, it is perfectly possible that an HR or conduct issue arising from something which has nothing to do with the authority's planning application or project may need to be dealt with. Ordinarily that would be handled by a hierarchical superior. The second limb of article 9a does not require these practical realities to be ignored or negated. The mere fact that a person or team responsible for discharging the duties of a competent authority under the 2017 Regulations has hierarchical superiors, even if the latter are involved in promoting the authority's development project, does not mean that the authority has failed to achieve appropriate separation under regulation 64(2) of the relevant functions.

136. I do not consider that the fact that the Minister of State and those officials assisting him have hierarchical superiors means that either he or his team lack real autonomy, or administrative and human resources of their own, to satisfy the legal requirements of functional separation under regulation 64(2). Those requirements are properly protected by the criteria which I have set out above, particularly in [94].

137. Mr Howell did not indicate any practical way of overcoming his "hierarchical superiors" objection for the many situations in which regulation 64(2) is applicable. He mentioned that legislation could be enacted so that a called-in planning application made by the Secretary of State could be determined by a Planning Inspector, but that transfer of the responsibility for decision-making to a separate authority is not the type of solution which article 9a requires, as cases such as Seaport demonstrate. In any event, the Claimant's suggestion does not address the hierarchical structures which exist within local planning authorities.

138. As Mr Mould QC pointed out, in order to ensure that decisions falling within the second limb of article 9a are made by persons without "hierarchical superiors" it would be necessary for them to be taken by the person or persons at the top of the hierarchy, for example the head of government. I do not accept that such a high level of functional independence is required by article 9a, which accepts that the same authority may be responsible for both promoting and determining a planning application. In any event, removing the issue of hierarchical superiors by "going to the top" introduces a different problem. It is not practical to treat, for example, a head of government as being insulated from the promotion of the project. He or she still has responsibility for a government project. Furthermore, the Claimant has not explained how the issue it raises could be resolved practically within the hierarchical structures of local planning authorities. In some cases a project may be promoted by the ultimate source of power, the authority itself.

139. However, in my judgment, there is no need to delve further into constitutional issues of this nature, because the second limb of article 9a does not require such a high degree of independence as to invalidate decision-making by a person or persons working within an "authority" with hierarchical superiors. Instead, the setting up of separate teams to deal with the conflicting functions is sufficient. There is no need to prohibit any hierarchical superior to the Minister of State (or to those officials assisting him in dealing with the planning application) from being involved in or supporting the project. But plainly any such person must be prohibited from playing any part in the handling of the planning application or from putting pressure on, or giving instructions to, the decision-making team in relation to their functions under the 2017 Regulations.

Delay

140. Because I have rejected the Claimant's contention relating to "hierarchical superiors" it is unnecessary for me to determine formally a delay issue to which one part of this argument gives rise. In his reply, Mr Howell QC submitted that no arrangements could be put in place to overcome the objection that a Minister of State might be concerned that his or her future career might be affected by the determination of the application. This argument would apply to any Minister of State. Given that the statutory framework does not allow for a called-in application to be determined by a Planning Inspector, this was in effect a challenge to the legality of the decision to call in the application made on 5 November 2019. It does not depend upon the content of the handling arrangements or, indeed, whether there are any arrangements. Instead, the argument is simply based upon the Claimant's interpretation of the requirements of article 9a combined with the decision-making structure imposed by TCPA 1990. A challenge to a decision to call in an application does not fall within s. 288 of TCPA 1990 (see the *Co-operative* case above) and so a claim for judicial review to address that point would not have been ousted by s. 284(1). However, this claim for judicial review was not issued until 28 May 2020, over 6 months after the call-in decision, and it does not challenge that decision.

141. Mr Howell QC submitted that a challenge to the handling arrangements could be brought in any event under s. 288 once the Minister's decision is issued. He also submits that for this reason the court should be willing to grant an extension of time to overcome any delay issue in the present proceedings. I do not accept that analysis. As I have explained, the effective challenge to the decision to call in the application falls outside the matters covered by s. 284(3) and thus s. 288. It would have been a challenge to the handling of the application process and therefore could have been dealt with at an earlier stage by way of judicial review. Indeed, there are sound practical reasons as to why that would have been the only correct course to follow. The effect of Mr Howell's submission is that, in the circumstances of this case, the Defendant was not entitled to exercise the power under s. 77 to call in the application, with the consequence that only WCC could have determined it. A claim of that kind should have been brought without delay as a challenge to the decision made on 5 November 2019 in order to avoid the considerable waste of expenditure, resources and effort involved in the application being considered through a substantial public inquiry and also to avoid delay in the determination of the application. Even if I am wrong about whether this particular part of Mr Howell's argument could be pursued in a challenge under s. 288, the court's powers under that provision are discretionary, and for the same reasons there would be

a powerful argument that it would be an abuse of process for the complaint to be raised under s. 288 when it could and should have been raised much earlier.

142. In recent years there has been an increasing emphasis upon the need for procedural rigour in public law proceedings, for example with regard to the pleading of the decision being challenged and the grounds of challenge (see e.g. *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841 at [67] to [69]). It should be recorded that the claim form does not challenge the decision to call in made on 5 November 2019 and there has been no application to amend the form or to apply for an extension of time. If any such applications had been before me then, on the submissions I have heard, I would have refused them. It is necessary for the court to be clear about this aspect, because my decision to grant permission to apply for judicial review on the challenge which has been brought (see [144] below) cannot be taken as having decided that there is no delay issue as regards the Defendant's decision to call in the application for planning permission. That decision is not challenged in these proceedings.

Conclusion on Issue 2

143. For the reasons set out above, unless the handling arrangements are amended to resolve the legal criticisms I have accepted above, the current version fails to satisfy regulation 64(2) of the 2017 Regulations. If, however, it is amended so as to overcome those errors it will be compliant, at least on the material currently before the court and in the circumstances as they currently exist.

Conclusions

144. I grant permission to apply for judicial review in relation to the challenge pleaded in the claim form because it crosses the threshold for arguability.

145. I have concluded that the Claimant has failed on the transposition issue, because regulation 64(2) of the 2017 Regulations did properly transpose the second limb of article 9a of Directive 2011/92/EU into English law. However, on the second issue I have concluded that the handling arrangements put in place for dealing with the called-in application fail to comply with regulation 64(2) in the respects identified in this judgment and therefore need to be amended so as to resolve those matters.

APPENDIX

"HOLOCAUST MEMORIAL AND LEARNING CENTRE – MHCLG HANDLING NOTE – 3RD ISSUE – 17/06/2020

The planning application for the Holocaust Memorial and Learning Centre (HM), made to Westminster City Council in December 2018, in the name of the Secretary of State was called-in on 5 November 2019 by the then Housing Minister, using powers under Section 77 of the Town and Country Planning Act 1990.

It is vital to ensure that the published propriety guidance is followed (the Ministerial Code, the Civil Service Code, and Guidance on Planning Propriety Issues) and that there is a clear process for handling this application which avoids any potential conflicts of interest or any perception of conflict and/or that the decision-maker has been influenced by irrelevant considerations.

This note updates previously advised handling arrangements made in earlier versions of this note, circulated by email from Simon Gallagher, Director of Planning. It ensures that Ministers or officials who have either previously made public pronouncements or have formal responsibility on the issue of the Memorial are explicitly excluded from the decision-making process. It also ensures that this called-in application can be handled in line with the department's normal processes and that propriety rules are maintained. This process must be followed to ensure that a proper and fair decision under the relevant planning legislation can be taken.

Ministerial level

Christopher Pincher MP (the Housing and Planning Minister) will be responsible for exercising the functions of the Secretary of State under sections 70 and 77 of the Town and Country Planning Act 1990, section 38(6) of the Planning and Compulsory Purchase Act 2004, the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 and any other applicable Ministerial statutory responsibilities arising in respect of the determination of the planning application. He will handle advice / submissions on the substantive decision on the case following the planned Public Inquiry, currently scheduled to begin in October 2020. A pre-inquiry meeting took place on 10 March 2020. Advice and information on planning casework relating to the memorial will not be seen by any other Minister.

No other Minister or their Special Advisors will be able to require any official working on the called-in planning application to disclose to them, or any other person, information relating to the case.

No information or submissions concerning the Holocaust Memorial Fund more generally should be shared with Christopher Pincher MP or his Private Office officials [redacted] supporting him on this called-in planning application.

DG level

Tracey Waltho – has not had involvement in HM issues previously, and will act as Exec team representative as and when needed.

Director level

Paul Hudson, Senior Casework Adviser, and **Simon Gallagher**, Director Planning will both be involved in the planning case and should not be copied into information on the Holocaust Memorial more generally.

Official level

Planning Casework Unit (PCU)

While before the decision to call-in the application there was some engagement between PCU and colleagues in the HM team in terms of understanding processes and timescales, there can now be no communication between the relevant case officers, [redacted] and **Richard Watson** and the HM team.

Similarly, the HM team will not have sight of any submissions or other advice on planning casework matters relating to the HM.

Legal

Legal colleagues have insulated specified lawyers from any involvement with the Holocaust Memorial Fund, such that they are not compromised and are able to work on any PCU advice should this be necessary in due course.

Advisory lawyers who will be advising on any Ministerial decision regarding the called-in planning application are: [redacted] (from Oct 2019 onwards), [redacted] (from Oct 2019 onwards), [redacted] (from Feb 2020 onwards) and **Matthew Stubbs** (from Oct 2019 onwards). Litigation lawyers who will also be advising in the context of ministerial decisions regarding the called- in planning application as and when necessary are: [redacted] (from Oct 2019 onwards), [redacted] (from Feb 2020 onwards), and [redacted] (from April 2020 onwards).

Communications

While not involved in the process of reaching a decision, to deal with ongoing press queries, and comms once decisions are made, Comms colleagues have identified specific individuals [redacted] to deal with issues relating to planning casework decisions on the called-in application. They will be kept separate from any other issues relating to the Holocaust Memorial Fund.

Freedom of Information / EIR Team

[redacted] **and** [redacted] will deal with FOI / EIR requests relating to the called-in planning application.

While it is normal practise (sic) for some responses to FOI/EIR requests to be cleared via Special Advisers or their office, those relating to Holocaust memorial planning casework matters will not be handled in this way. Copies of final responses may be shared with advisers once they have been issued and are effectively in the public domain. Where necessary, FOI/EIR cases will be cleared with the private office officials, [redacted] and [redacted] in Christopher Pincher's office.

Others

Information relating to the planning case work case must not, except with express authority of **Tracey Waltho**, be disclosed or discussed with any person not on the list of persons to whom such information can be disclosed.

PROPOSED HANDLING ROUTE FOR HOLOCAUST MEMORIAL PLANNING CASEWORK*

- Christopher Pincher (also [redacted] and [redacted] in Private Office)
- DG – Tracey Waltho
- Paul Hudson, Senior Caseworker Adviser and Simon Gallagher, Director Planning

Planning Casework Unit

- [redacted], Richard Watson

Legal

- (Matthew Stubbs, [redacted], [redacted], [redacted], [redacted])

Comms plus FOI/EIR

- ([redacted] [redacted] [redacted] [redacted])

GLD

- ([redacted])

Planning Inspectorate

- ([redacted])

***To be kept under regular review and added / amended as necessary**

MINISTERS / OFFICIALS TO HAVE NO ROLE IN PLANNING CASEWORK DECISION-MAKING*

MINISTERIAL / EXEC TEAM

- Secretary of State (applicant) Luke Hall (PQs)
- Simon Clarke (signed letter supporting application)
- Perm Sec (plus office) – meetings with Trust
- Catherine Frances (plus office) – Faith Portfolio
- CFO – Rachel MacLean (plus office)

OFFICIALS

- Holocaust Memorial Team
- Richard Clarke
- Jamie Cowling
- Abigail Dean

– Planning Policy

***To be kept under review on a 2-monthly basis and added / amended as necessary**

Detailed Handling Arrangements for Casework

In order to ensure the separations set out above are maintained, we propose to take the following actions:

- Ensure this note is circulated to everyone working on the planning case work and anyone else who needs to see it and issue a clear instruction email to PCU and other staff involved on handling / propriety etc; the note will be recirculated at quarterly intervals and also when there is a material amendment
- Clearly mark who can and cannot be allowed to see the document in question on all submissions / emails etc – e.g. by clearly marking all relevant mails / submissions as follows; HOLOCAUST MEMORIAL PLANNING CASEWORK TEAM ONLY
- Use only the agreed casework list of people as set out in this note;
- Ensure that material related to the case is not stored on shared file spaces accessible by those outside of the decision-making chain;

- Report to Tracey Waltho on propriety and handling at key stages of the called-in planning application / on request.

- Maintain a list of every person working on the called-in planning case and entitled to receive information relating to the case, including date of assignment to the task and, where appropriate, date of leaving the task – see attached Annex for those who have previously, but no longer, advised on the application.

ANNEX – OTHERS WHO HAVE PREVIOUSLY ADVISED ON / HAD RESPONSIBILITY FOR THE CALLED-IN APPLICATION:

Litigation lawyer

[redacted] (from Oct 2019 – Dec 2019).

Housing Minister

Esther McVey (from Oct 2019 – Feb 2020).

Chief Planner

Steve Quartermain (from Oct 2019 – Mar 2020).

Housing Minister's Private Office

[redacted] (from Oct 2019 to Mar 2020).

Planning Inspectorate

[redacted] (from Oct 2019 to May 2020).

MHCLG Executive Team

Emran Mian (from Oct 2019 to June 2020)."