



Neutral Citation Number: [2024] EWHC 2404 (Admin)

Case No: AC-2024-CDF-000001

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Bristol Civil and Family Justice Centre
2 Redcliffe Street
Bristol
BS1 6GR

23 September 2024

Before :

HIS HONOUR JUDGE JARMAN KC

Sitting as a judge of the High Court

Between :

(1) SCOTT LOVELUCK
(2) SENEDH AN STENEGOW A'PENWYDH
- and -
NATURAL ENGLAND

Claimants

Defendant

The First Claimant appeared in person
The Second Claimant did not appear and was not represented
Ms Hollie Higgins (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 22 August 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 23 September 2004 by circulation to the parties or their representatives and by release to the National Archives.

.....

HIS HONOUR JUDGE JARMAN KC

HHJ JARMAN KC:

Introduction

1. The first claimant, Dr Loveluck, appeared before me at an oral hearing to renew his application for permission and extension of time to apply for judicial review of a decision by the Board of the defendant (NE), announced at a public meeting on 28 June 2024, to confirm notification of land known as West Penwith in Cornwall as a Site of Special Scientific Interest (SSSI) under section 28 of the Wildlife and Countryside Act 1981. Both applications were refused by Lane J on consideration of the papers by order dated 11 December 2023. Dr Loveluck made clear at the hearing before me that although he is a member of the Second Claimant he did not represent that organisation, which accordingly did not appear and was not represented before me.
2. In refusing the application for an extension of time Lane J gave as his reasons that Mr Loveluck did not approach the Administrative Court Office until 25 September 2024 and owing to difficulties caused by the amount of documentation which he wished to file, the claim was not filed until 4 October 2023. Accordingly the claim was not filed within the three months deadline set out in CPR 54.5(1)(a) or promptly within the meaning of that rule. Lane J went onto deal with the merits of the seven grounds of challenge and considered that none of them is arguable.
3. In summary, the grounds allege in turn that the confirmation of the Board of the notification is rendered unlawful by maladministration, bias, breaches of the European Convention of Human Rights (ECHR), irrationality, taking into account matters on which there was no evidence, and errors of fact and law. Ms Hollins, for NE, submits that none of the grounds is arguable.
4. The SSSI as confirmed covers a large area of the Lands' End Peninsula, some 3143ha, some of which falls within the West Cornwall AONB. It includes heathland, lowland and valley which was extensively mined for tin, copper and gold. Some 300 people are owners/occupiers of land which is subject to the SSSI. One of these is Dr Loveluck, who has a tenancy of about 8 hectares, although in the past he held four other tenancies. On his holding he raises sheep goats lamas and geese. He also holds academic qualifications to PhD level, including in the field of lichenology, and at one time worked with subcontractors of NE.

The statutory scheme

5. Like its predecessor, English Nature, NE is an expert body. It was established by the Natural Environment and Rural Communities Act 2006 to ensure that the natural environment is conserved enhanced and managed for the benefit of present and future generations. Section 2 provides:

“2 General purpose

(1) [NE]'s general purpose is to ensure that the natural environment is conserved, enhanced and managed for the

benefit of present and future generations, thereby contributing to sustainable development.

(2) [NE]’s general purpose includes—

(a) promoting nature conservation and protecting biodiversity,

(b) conserving and enhancing the landscape,

(c) securing the provision and improvement of facilities for the study, understanding and enjoyment of the natural environment,

(d) promoting access to the countryside and open spaces and encouraging open-air recreation, and

(e) contributing in other ways to social and economic well-being through management of the natural environment.

(3) The purpose in subsection (2)(e) may, in particular, be carried out by working with local communities.”

6. [17] of Schedule 1 of the 2006 Act provides that NE may determine its own procedure (including quorum) and under that power NE have produced standing orders which govern the formal proceedings of the Board.
7. Under section 28 of the 1981 Act, NE is under a statutory duty to make a notification to the local planning authority to affected owners and occupiers and the Secretary of State for the Environment, Food and Rural Affairs, where it is of the opinion that an area of land is of special interest because of its flora, fauna or geological or physiographical features. There is then a period of three months for representations or objections to be made, which NE must consider and within nine months give notice confirming or withdrawing the notification.
8. Upon the initial notification, under section 28E owners and occupiers must not carry out any operation which is likely to damage the SSSI features without the consent of NE. There is a statutory right of appeal to the Secretary of State.
9. Section 28, so far as material, provides:
 - “ 28. Sites of special scientific interest.
 - (1) Where [NE] are of the opinion that any area of land is of special interest by reason of any of its flora, fauna, or geological or physiographical features, it shall be the duty of [NE] to notify that fact—
 - (a) to the local planning authority (if any) in whose area the land is situated;
 - (b) to every owner and occupier of any of that land; and

(c) to the Secretary of State.

...

(2) [NE] shall also publish a notification of the fact mentioned in subsection (1) in at least one local newspaper circulating in the area in which the land is situated.

(3) A notification under subsection (1) shall specify the time (not being less than three months from the date of the giving of the notification) within which, and the manner in which, representations or objections with respect to it may be made; and [NE] shall consider any representation or objection duly made.

(4) A notification under subsection (1)(b) shall also specify—

(a) the flora, fauna, or geological or physiographical features by reason of which the land is of special interest, and

(b) any operations appearing to [NE] to be likely to damage that flora or fauna or those features,

and shall contain a statement of [NE]'s views about the management of the land (including any views [NE] may have about the conservation and enhancement of that flora or fauna or those features).

(5) Where a notification under subsection (1) has been given, [NE] may within the period of nine months beginning with the date on which the notification was served on the Secretary of State either—

(a) give notice to the persons mentioned in subsection (1) withdrawing the notification; or

(b) give notice to those persons confirming the notification (with or without modifications)...

(6) A notification shall cease to have effect—

(a) on the giving of notice of its withdrawal under subsection (5)(a) to any of the persons mentioned in subsection (1); or

(b) if not withdrawn or confirmed by notice under subsection (5) within the period of nine months referred to there, at the end of that period.

...

(7) [NE]'s power under subsection (5)(b) to confirm a notification under subsection (1) with modifications shall not

be exercised so as to add to the operations specified in the notification or extend the area to which it applies.

(8) As from the time when there is served on the owner or occupier of any land which has been notified under subsection (1)(b) a notice under subsection (5)(b) confirming the notification with modifications, the notification shall have effect in its modified form in relation to so much (if any) of that land as remains subject to it.

10. Ms Hollins referred me to *R (Aggregate Industries UK Ltd) v English Nature* [2002] EWHC 908 (Admin), where Forbes J considered whether this process complied with the requirement in Article 6 ECHR, which so far as material gives the right of a fair and public hearing of the determination of civil rights and obligations. At [95] he indicated that as it was officers of English Nature who respond to objections before its council (the predecessor of the Board), there was a want of the necessary objective appearance of impartiality and independence on the part of the council, at the decision-making meeting, for it not to constitute an independent and impartial tribunal for the purposes of Article 6(1). That reasoning in my judgment applies in the present case, as does the lack of any appeal from the decision.
11. At [104] Forbes J identified a number of procedural safeguards in the section 28 process, again which in my judgment apply to NE and the Board. These included the objection process, the public meeting of the council to determine whether to confirm the notification, and that the council is a public authority required to act in accordance with the normal principles of procedural fairness and/or rules of natural justice, failure to comply with which would render a decision to confirm an SSSI liable to be quashed by the courts in judicial proceedings. The safeguards also included the right to appeal under the 1981 Act to the Secretary of State against a refusal of consent or the service of a management notice and the power under sections 28A and 28D to vary the notification or to de-notify the site upon further representations after confirmation.
12. At 105, he made an observation which applies equally to NE:

“...the discharge of its statutory duty under section 28 of the 1981 Act requires English Nature to exercise its expert judgment on technical and scientific matters as well as on policy issues: so far as concerns the factual and technical aspects of that process, English Nature is far better placed and qualified than a court to make the requisite assessments and value judgments: essentially English Nature is required to carry out a scientific assessment of the site in question.”
13. Ms Hollings also referred to *R (Fisher) v English Nature* [2004] EWCA Civ 632, at [95] and [134], in which the Court of Appeal cited Lightman J at first instance when he indicated that where English Nature was of the opinion that the criteria in section 28(1) is made out, which is a matter of judgment, then notification follows. Lightman J at [42] of his decision ([2004] EWHC 1597 Admin) indicated that notification and confirmation do not interfere with peaceful possession of possessions.

The notification process

14. A brief history of the notification can for present purposes begin in 2008 when NE began a series of surveys by experts instructed or employed by NE on the land now subject to the SSSI. In that year vegetation surveys were carried out. In 2012 species surveys of flora and fauna and ornithological surveys including a species of bird known as the Dartford Warbler were carried out. There were also hydrological, landcover and farm surveys and reports. Evidence was obtained from such sources as the Cornish Biodiversity Network and the Botanical Society of Britain and Ireland. All of these were scrutinised by experts employed by the NE and its Chief Scientist Directorate.
15. In 2020 NE held a meeting with owners/occupiers, including Dr Loveluck, at which concerns were raised about the proposal, and in particular the nature and extent of the surveys which had been conducted. In March 2021 NE sent a letter to all known owners/occupiers affected providing details of how the evidence and surveys could be accessed. Later that year there were over 80 face to face meetings and some 45 telephone meetings with owners/occupiers. Dr Loveluck has little or no access to the internet and so hard copies of the evidence was sent to him in 2022.
16. In October 2022 notice of the notification, which ran to some 26 pages and included photographs and maps, was sent by recorded delivery to 292 owners/occupiers, and to a further 14 by March 2023. Notice was also sent to eight statutory bodies and 56 observing bodies. The ownership or occupation of some 50 parcels of land could not be identified through the Land Registry or other sources but notices were affixed to those parcels. A notice was placed in the local newspaper, and the notification documents were available online.
17. The notice in section 1 indicated that the SSSI boundary comprises 59 parcels of land separated by distances of a few metres up to just over a kilometre, which it said supported mosaics of similar vegetation over the same geology and similar soil types. It was considered to be a single, ecologically coherent compound site. Section 4 gave the reasons for the notification and section 5 showed how the boundary was drawn. The reasons given included several important features such as low heathland, fens with habitats referred to as mires and wet woodland, low dry acid grassland, flora including coral-necklace, pale dog-violet, pillwort and Cornish moneywort, lichens associated with non-montane acid rock, invertebrates associated with scrub-heath and moorland, and breeding Dartford warbler.
18. The notice gave four months for written representations. Where notices were served later, the statutory minimum of three months was given. 176 written objections were received. A public meeting was held in January 2023 where concerns were raised, including hydrological aspect of the proposal.

The Board meeting

19. The Board meeting to consider whether or not to confirm the notification was due to take place in Plymouth on one day in May 2023 but was adjourned because of strike action. After receiving representations about the appropriate venue, the hearing was scheduled for one day on 28 June 2023 in St Ives, Cornwall. NE invited affected owners/occupiers and other objectors to speak at the meeting to highlight written

representations and to confirm their intention to speak. Copies of a 200 page report which NE prepared for the Board outlining the case for notification, objections and NE's response to the same was provided in advance to anyone who confirmed they would attend the meeting. By then some objections had been resolved but 169 remained. These, and NE's responses, are set out in great detail in the report. Most speakers were allotted 10 minutes, although Dr Loveluck and others who spoke in a representative capacity were given longer. There was a transcript of the meeting in the hearing bundle before me.

20. The Board first heard group representations. Barristers representing eight affected farmers spoke first to oppose the proposal with the support of the National Farmers Union (NFU) and called hydrogeological evidence. Then a representative of the Country Land and Business Association (CLA) spoke in opposition. Responses and questions followed. The first of the individual objectors, Dr Loveluck and his mother, were then given the chance to speak. As his mother was not present, Dr Loveluck spoke for the allotted 10 minutes and a little beyond. He indicated that some 6,500 pages of documents were before the Board and that he was probably the only person who had read each page. He summarised his qualifications and experience and referred to the evidence in support of the proposal, which he described as shambolic. He dealt with such matters as mistake as to areas, in surveying and modelling, and in hydrology and mineshafts.
21. Later on in the hearing he was given another 30 minutes to speak, on his own behalf and on behalf of two other objectors. In this session he dealt with a number of issues including the loss of documents which he had sent by recorded delivery to the local NE office, powers of entry, that he and others had not initially received the notification, breach of standing orders, missing maps surveys and tables, changes in habitat, surveying deficiencies, mining and hydrology, and wildfires which had destroyed some of the flora and fauna. Again he went a little over his allotted time. Apart from these slots Dr Loveluck made observations throughout the hearing including when experts on behalf of NE were giving evidence or speaking.
22. Thereafter the Board heard from speakers in support of the proposal. At the end of those and further questions, the chair indicated that the Board was moving towards a decision. He said that case was complicated and broad ranging and there were some issues which had been raised upon which he would like to take legal advice so that the Board would move into closed session. After a short break the hearing resumed and the chair indicated that the time had come to record the Board's decision on "where the weight of the of the scientific evidence lies." The vote was then taken in the hearing. Seven members voted in favour of confirming the notification with some modifications which reduce the area of the land notified, two members abstained and one member voted against. Several members of the Board, including one who voted against the proposal, and the chair and a member of the executive team, each then spoke briefly and each emphasised the importance of working with farming and other local communities to ensure the success of the SSSI but also to support farmers and such communities.

The grounds of challenge

23. Against that background I turn to consider the grounds in more detail, as highlighted by Dr Loveluck in his written and oral submissions and responded to by Ms Higgins

in her written and oral submissions. I will deal with the substantive grounds before the timing issue, because the extent if any to which the grounds have merit may inform whether any necessary extension of time should be granted.

24. Ground 1 alleges maladministration. Dr Loveluck alleges that NE lost written objections, imposed arbitrary deadlines for submissions, failed to engage with objectors and dealt wrongly with applications made for consents to carry out various operations within the SSSI.
25. In my judgment none of the aspects of this ground is arguable. Dr Loveluck in the current proceedings filed many hundreds of pages of documents spanning some 12 volumes. The renewal application was listed for one day and took almost all of that time, with Dr Loveluck taking the substantial majority of that time in his oral submissions. However, it was not shown that any loss of documentation was material or prejudicial to his case. NE received no requests in relation to lost maps. Far from inappropriate deadlines or lack of engagement, the opposite is shown to be the case. Some objections were resolved by the hearing. Those that were not were the subject of a very detailed report to the Board. It is clear from the transcript of the hearing that the handling of oral representations was proportionate and appropriate. The matter of operational consents, which gives rights of appeal, is a separate matter.
26. Ground 2 is that the Board in confirming the notification, did so with actual or apparent bias. It is alleged that one member, Dr Dicks had received funding in respect of a NE project and continues to promote the same, and that another, the chair, Mr Juniper is a member of organisations with a direct interest in the designation of SSSIs. The fact that the Board held parts of the hearing in private with NE staff is also relied on. In his oral submissions before me, Dr Loveluck maintained that he heard members of the Board when retiring to take legal advice using the word “fixed” in the context of discussing voting.
27. There is nothing in this ground either in my judgment. The chair was appointed by a House of Commons Committee upon his agreement to cease to be a leading member of pro-conservation bodies on the understanding that he could continue to be a member. The register of interests of Board members was made available. As already indicated, expertise is a necessary ingredient in the process. The Board represents a spectrum of such expertise, including members of the NFU and CLA. The Board was entitled to retire in private to take legal advice and to take refreshment and comfort breaks. The reference to “fixed” was not contained in Dr Loveluck’s statement, but in any event is too vague a reference to found such a serious allegation, if that is what it is, that the Board fixed the voting.
28. Ground 3 is that the process leading to the decision was unfair and in breach of various articles of the ECHR: 6; 8; 13; 14, and 1 of the First Protocol (A1P1). Some objectors were not given the opportunity to speak and others were given insufficient time in breach of Article 6, the right to a fair trial. The SSSI gives extensive rights to NE over homes and farms in breach of Article 8, the right to respect for private and family life. There is no effective remedy in breach of Article 13, as judicial review cannot consider the merits. Article 14 which prohibits discrimination is said to be breached as there is interference with the rights of the Cornish as a national minority. A1P1 is breached because the peaceful enjoyment of possessions is interfered with.

29. I have already found that the hearing was fair. The process and the availability of judicial review has been found to be ECHR compliant (*Aggregates*). In respect of the interference with homes and possessions are concerned, notification and confirmation does not amount to such interference (*Fisher*). As already indicated, this is subject to the operational consents regime with a right of appeal. There is no evidence that Cornish owners/occupiers are more adversely affected than others. In my judgment, none of the aspects of this ground is arguable.
30. Grounds 4 and 5 involve allegations that the Board acted irrationally in relying on old surveys and/or in inadequate tests and sampling. Some of those entitled to object were not given proper notice. Terms of office of some Board members had expired. Other breaches of standing orders are relied upon.
31. In my judgment, on the basis of the facts set above, proper notice was given. It is not in dispute that some surveys were old and some surveys were desktop surveys, but other surveys were carried out more recently. It was acknowledged by the chair at the hearing that more surveys might have been carried out. It was a matter of scientific expertise of NE and, as the chair indicated, for the Board with its expertise, to weigh up the evidence that was before it. Dr Loveluck with his expertise, disagreed at the hearing before the Board and before me with many parts of NE's evidence, but that does not render the Board's evaluation of the evidence irrational. That is a high threshold to meet, especially where the decision maker has its own expertise, and is not met in this case. In terms of the standing orders, 10 of the 12 Board members were present at its hearing and were therefore quorate. An update as to extension of terms of office of some members as from 1 June 2023 was not uploaded on the government website until August, but it is clear that at the time of the decision all Board members who took part were properly appointed. I have already dealt with bias, the register of interests, the opportunity to make oral representations and to present cases, and the weighing up of evidence. These grounds are not arguable.
32. Ground 6 is that NE took into account matters on which there was no evidence, such as climate change and biodiversity decline, included areas where there was no evidence of the need for protection and was pronounced a compound site without rational justification. It is also said that the Board wrongly relied upon potential extra funding for farmers, and that NE misused its power of entry onto land under section 51 of the 1981 Act for surveying purposes.
33. The statutory purpose of NE is nature conservation and the Board was entitled to use its expertise in such matters as climate change. The potential for additional funding was dealt with at the hearing before the Board as part of the policy context in which notification had taken place, as is apparent from the transcript. It was not a reason for the notification. NE included land within the SSSI on evidence that it supported features on other parts of the SSSI. This was in accordance with guidelines of the Joint Nature Conservation Committee (JMCC), which is a statutory body established by section 31 of the 2006 Act, and whose statutory purpose includes advising NE on the exercise of its functions (section 35). None of this ground is arguable. It was a matter for the expertise of NE and the Board whether the site should be regarded as a compound site.
34. Ground 7 is that the Board in confirming the notification made a number of errors of fact and law, such as the depth of peat deposit, because of misleading evidence of NE

officers.

35. Dr Loveluck took many detailed points under this head. In my judgment none of them amount to anything more than disagreement with the scientific evidence which the Board with its expertise was entitled to accept. Under this ground, points raised under previous grounds such as lack of opportunity to speak at the Board meetings are repeated and I have dealt with those. It was also said that at that meeting represented objectors were treated more favourably than unrepresented ones. As indicated, the former were given more time to speak, but that is because they represented more than one objector, as was Dr Loveluck in the slot given to him when he represented two other objectors. The transcript of the hearing shows that the hearing was fair and proportionate. Nothing in this ground is arguable.
36. Accordingly none of the grounds is arguable and that is sufficient to refuse permission. Were it necessary to do so, I would conclude that the claim was not made promptly or in time for the reasons given by Lane J and would decline to extend time.
37. I would be grateful if the parties could agree a draft order and file the same within 14 days of hand down of this judgment, together with written submissions on any consequential matters which cannot be agreed. This is not an opportunity to take issue with this judgment. The way to do that is to apply to the Court of Appeal under CPR 52.8 within seven days of this judgment being handed down. Any such matters which cannot be agreed will be determined on the basis of the written submissions.