



22 July 2015

PRESS SUMMARY

R (on the application of Champion) (Appellant) v North Norfolk District Council and another (Respondents) [2015] UKSC 52
On appeal from [2013] EWCA Civ 1657

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Carnwath and Lord Toulson

BACKGROUND TO THE APPEAL

The appeal concerns a proposed development by Crisp Maltings Group Limited (“CMGL”) at a plant in the area of the North Norfolk District Council (“the council”). The development comprised two silos and a lorry park with associated facilities on a site close to the River Wensum. The appellant, Mr Champion, is a member of the Ryburgh Village Action Group, which opposed the development.

The river is a Special Area of Conservation protected by the EU Habitats Directive (97/92/EC), given effect in the UK by the Conservation and Habitats Species Regulations 2010. Regulation 61, implementing article 6(3) of the Directive, requires that before giving consent for a project “likely to have a significant effect on a European site”, the competent authority must make “an appropriate assessment of the implications for that site”. It may agree to the project “only after having ascertained that it will not adversely affect the integrity of the European site.” Also relevant is the Environmental Impact Assessment (“EIA”) Directive, given effect by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. Under the regulations, a competent authority carries out “screening” to decide if a proposal is “likely to have significant effects on the environment”. If so, EIA is required. The EIA process involves an environmental statement and public consultation, which informs the decision whether to grant consent to an EIA development.

CMGL’s planning application of October 2009 included a Flood Risk Assessment (“FRA”) recognising a risk that surface water runoff from the site would pollute the river. There followed investigation of measures meant to prevent this pollution. From October 2009-June 2010 the council consulted with relevant statutory bodies. It issued a screening opinion on 23 April 2010 stating that EIA was not required. Between July 2010 and January 2011, two new FRAs and an ecological assessment were prepared, which led to the statutory bodies withdrawing their objections. The council decided on 20 January 2011 to give delegated powers to its officers to approve the development subject to conditions. This led to local complaints, including from the appellant, who argued that appropriate assessment and EIA were required. The council decided to refer the application back to committee and asked for further comments from the appellant, who did not respond. At the council’s committee meeting of 8 September 2011, planning officers presented a detailed report concluding that appropriate assessment and EIA were not required. The committee resolved to approve the application subject to conditions, including monitoring the river’s water quality. The appellant challenged the consent successfully before the High Court for failure to comply with the EIA and Habitats legislation, but lost in the Court of Appeal.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Carnwath gives a judgment with which Lord Neuberger, Lord Mance, Lord Clarke and Lord Toulson agree.

REASONS FOR THE JUDGMENT

The two issues were the timing of the council's decisions that appropriate assessment or EIA was not required, and the relevance of measures meant to address adverse effects on the river from the site.

On the first issue, there is nothing in the Habitats Directive or regulations to support a separate stage of "screening" in any formal sense. Case-law of the Court of Justice of the European Union describes two stages under article 6(3) of the Directive: the appropriate assessment, and the decision in light of it. It used the word "trigger" to set the threshold for the first stage. The formal procedures in the EIA regulations, including "screening", an environmental statement, and mandatory public consultation, have no counterpart in the habitats legislation. Where it is not obvious, the competent authority will consider whether the "trigger" for appropriate assessment is met, but this is not a "screening" in the EIA sense. All that is required is that, where there is found to be a risk of significant adverse effects to a protected site, there is an appropriate assessment. In this case, the planning authority and the expert consultees were satisfied that the material risk of significant effects on the river had been eliminated. Though the officers expressed this conclusion by saying that no appropriate assessment was required, there is no reason to think that the conclusion would have been different if they had decided from the outset that appropriate assessment was required. The mere failure to exercise the article 6(3) "trigger" at an earlier stage does not in itself undermine the legality of the final decision. [37-42]

On timing of EIA screening, authorities should in principle adopt screening opinions early in the planning process. [43] Though a negative opinion, lawfully arrived at on the information then available, may need to be reviewed in light of subsequent information, this does not mean that a legally defective screening opinion not to require EIA, or a failure to conduct a screening opinion at all, can be cured by carrying out an assessment exercise outside the EIA regulations. In the present case it was accepted that the council's screening exercise in April 2010 was legally defective: the pollution prevention measures had not been fully identified at that point, so the council could not be satisfied then that mitigation measures would prevent a risk of pollutants entering the river. This was an archetypal case for EIA so that the risks and measures to address them could be set out in the environmental statement and subject to consultation and investigation. That defect was not remedied by what followed: it was not enough to say that the potential adverse effects had now been addressed in other ways. [45-47]

On the second issue, the appellant disputed the legality of the council's reliance on mitigation measures, at the stage of granting planning permission, to dispense retrospectively with the requirement for EIA which should have been initiated at the outset. [48] There is nothing to rule out consideration of mitigation measures at the EIA screening stage, but the Directive and the regulations expressly envisage that they will where appropriate be included in the environmental statement. Cases of material doubt should generally be resolved in favour of EIA. [51]. The failure to treat this proposal as EIA development was a procedural irregularity, which was not cured by the final decision. [53]

Despite the legal defect in the procedure leading to the grant of planning permission, the court retains a discretion to refuse relief if the applicant has been able in practice to enjoy the rights conferred by European legislation and there is no substantial prejudice. [54] There is nothing to suggest that the council's decision would have been different had the process taken place within the framework of the EIA regulations. There was only one issue of substance: measures to achieve adequate hydrological separation between the site's activities and the river. It is clear from the final report that the statutory agencies involved formed their own view of the measures' effectiveness, and that the views of the public were taken into account. At the time the appellant was unable to raise specific concerns that had not been dealt with before the final decision, which remains the case. The appeal is dismissed. [59-62]

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Judgments are public documents and are available at: <http://supremecourt.uk/decided-cases/index.shtml>