

**Association of the Councils of State and Supreme Administrative
Jurisdictions of the European Union i.n.p.a.**

Response of Lord Justice Carnwath (United Kingdom)

Colloquium 2006: Case and Questionnaire

Your State is planning a new motorway. The projected traffic routing

- runs through the territories of several municipalities,
- passes by a residential area,
- continues across farmland,
- runs through a birds sanctuary in the sense of the EU-“Birds Directive”
(Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds - Official Journal L 103, 25/04/1979 P. 0001 - 0018)
- and ends in a nature protection area which is home to a significant number of endangered species and - moreover - is eligible for designation as a special area of conservation in the sense of the EU-“Habitats Directive”.
(Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora - Official Journal L 206, 22/07/1992 P. 0007 - 0050)

Moreover, there is an increased risk that the emissions of the projected motorway will exceed the limit values of the EU-“Ambient Air Directive”.

(Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air - Official Journal L 163, 29/06/1999 P. 0041 - 0060)

When the planning decision is made public the following plaintiffs decide to take legal action:

- 1) An inhabitant of the residential area who is afraid of unbearable traffic noise and air pollution.
- 2) One of the municipalities which has divergent project plans for its territory.
- 3) The national environment agency which is of the opinion that the motorway will seriously affect the environment.
- 4) A farmer who will lose parts of his farmland.
- 5) A national association for the protection of the environment which is of the opinion that the motorway constitutes a serious threat to the environment in general and to the species listed by the “Habitats Directive” in particular.
- 6) An association for the protection of the environment of your neighbouring state which is afraid of transboundary pollution.

Questionnaire:

1) Administrative consent procedure:

Please give a short outline (no specific details) of the administrative consent procedure applying to project planning in your national legal order (procedural steps, time-limits, competent authorities, involvement of lobby groups and technical experts).

A motorway would be authorized under Part II of the Highways Act 1980. The competent authority would be the Secretary of State for Transport. Schedule I to the Act sets out the procedure, which involves publication of a draft Order, advertisement of the draft in local newspapers and the service of notices on affected parties, a period of at least six weeks for parties to make objections, and a local inquiry to consider objections. The inquiry would hear evidence from lobby groups and technical experts. The timing of submissions to the inquiry would be determined by the person appointed to run the inquiry.

2) Public involvement:

a) Is there any public involvement and/or hearing of individually affected parties during the administrative consent procedure?

Yes. Affected parties have the opportunity to object to the draft, and make written or oral representations at an inquiry.

b) If yes, at which stage(s) of the procedure and in which form ?

See (a).

c) Do affected parties lose their right to challenge the planning decision before the courts if they do not make use of this form of public involvement ?

No. See by analogy R (on the application of Edwards) v Environment Agency, 2 April 2004, Keith J, para 16.

3) Judicial process:

Please give a short outline (no specific details) of the judicial process applying to project planning decisions (pre-trial proceedings, time-limits, competent courts, appeal, interlocutory injunctions).

Proceedings to challenge the Order authorizing the motorway on legal grounds must be brought in the High Court, and commenced within 6 weeks of the publication of notice of the decision. Suspension of the Order is not automatic, but the court has power to make an interim order having that effect. There can be appeal from the High Court to the Court of Appeal with leave. In rare cases, where there is a point of law of general importance, there may be a further appeal (with leave) to the House of Lords.

4) Standing:

a) Do all of the above-listed plaintiffs have standing before your national courts ?

Any person with a "sufficient interest" has standing to bring an application for judicial review of the Order. The courts treat plaintiffs listed under points (1) to (5) above as having sufficient interest. There is nothing in the Procedure Rules to prevent a court from deciding that a plaintiff under point (6) (i.e. foreign NGOs) has a sufficient interest, and so has standing.

b) If not, which are the reasons for their exclusion ?

N/A

5) Scope of claims:

Are the above-listed plaintiffs only allowed to claim infringements of their individual rights (e.g. illegal expropriation of farmland, pollution of their private property) or may they claim infringements of public interests (e.g. adverse effects on the environment) or the unlawfulness of the planning decision in general (e.g. because of procedural deficiencies) as well ?

These plaintiffs could raise any ground of unlawfulness in the decision making process. The breach need not relate directly to the circumstances which give the particular plaintiff a sufficient interest. So, what might be called infringements of the public interest, such as harm to a site contrary to the requirements of the Habitats Directive, could be invoked by any of these plaintiffs.

6) Scope of judicial review:

Do your courts review the lawfulness of a planning decision in every procedural and substantive respect or is the scope of judicial review restricted (e.g. to procedural aspects or clear and serious infringements of national or Community law) ?

The courts would review any procedural unlawfulness or other illegality. The courts would not review the merits of the decision to make the Order, except to (1) correct an error of fact; (2) set aside any decision which was disproportionate; or (3) set aside any decision which was irrational.

7) EU environmental law:

Which decision will your court take, if

a) the environmental impact assessment prescribed by Community law has not or not duly been carried out in connection with the project in question ?

The EIA Directive 85/337/EEC (as amended by Directive 97/11/EC) has been transposed into English law in relation to the construction of motorways by sections 105A-C of the Highways Act 1980. This requires the Secretary of State to carry out EIA in accordance with the requirements of the Directive before deciding whether to proceed with the construction of a motorway. The Administrative Court has power to set aside that decision if it is made without having properly carried out an EIA (see e.g. Berkeley v Secretary of State for Environment, Transport and the Regions (No.1) , [2001] Env LR 16 by analogy).

- b) the project adversely affects a natural habitat which is eligible for designation as a special area of conservation in the sense of the EU-“Habitats Directive” but has not yet been transmitted to the Commission ?

The Habitats Directive has been transposed into English law by the Conservation (Natural Habitats etc.) Regulations 1994, SI 1994/2716. Regulation 7 required the Secretary of State to select sites eligible for designation and transmit the list of proposed sites to the Commission by June 5th 1995. However, should a site be found subsequently which is eligible for designation but had not been transmitted, the Secretary of State would transmit it immediately to the Commission. Failure to do so would be a breach of the Secretary of State’s obligations under the Regulations (either regulation 7, or regulation 7 combined with regulation 3). On transmission it would be treated as a European site (regulation 10(1)(e)) and protected in the same way as sites designated as special areas of conservation.

- c) the project adversely affects a natural habitat which has been transmitted to the Commission as being eligible for designation as a special area of conservation but which has not yet been placed on a Commission list ?

(Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora - Official Journal L 206, 22/07/1992 P. 0007 - 0050)

To authorise the construction of a motorway which, contrary to the requirements of the Directive, adversely affected a natural habitat which had been transmitted to the Commission, would be a breach of the Secretary of State’s obligations under regulation 69 of the 1994 Habitats Regulations, and the Order could be quashed by the Administrative Court.

- d) the project adversely affects a birds sanctuary in the sense of the EU-“Birds Directive” ?

(Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds - Official Journal L 103 , 25/04/1979 P. 0001 - 0018)

As under (c): sites designated under articles 4(1) or (2) of Directive 79/409/EEC are protected in the same way as special areas of conservation under the Habitats Directive (regulation 10(1)(d) of the Habitats Regulations 1994).

- e) the project is likely to exceed the limit values of the EU-“Ambient Air Directive” (esp. those for PM10/ particulate matter) ?

(Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air - Official Journal L 163, 29/06/1999 P. 0041 - 0060)

The requirements of the Directive are given effect in English law by the Air Quality Limit Values Regulations 2003 (SI 2003/2121). Regulation 4(1) requires the Secretary of State to take the measures necessary to ensure that limit values are met throughout England. If the making of an Order was inconsistent with that obligation, the Administrative Court would have power to set it aside on the ground of illegality.

8) Consequences of procedural and substantive deficiencies of the planning decision:

- a) Are there - in your national legal order - any procedural and/or substantive deficiencies which regularly render a planning decision completely void?

An Order is valid unless and until set aside by the courts. The normal consequence of the court finding a serious legal or procedural defect is that the Order is treated as void ab initio.

- b) For which kinds of rulings does your national legal order provide in this case (e.g. cassation of the planning decision or declaratory ruling establishing its nullity) ?

Under Part 54 of the Civil Procedure Rules the Administrative Court would have power to grant a "quashing order" (r 54.1(d)), a "mandatory order" (r 54.1(b)) or a "prohibiting order" (r 54.1(c)). The grant of any of these remedies is in the discretion of the Court. The usual remedy on a successful application for judicial review would be a quashing order setting aside the Order authorizing the motorway.

- c) For which kinds of rulings does your national legal order provide if the planning decision has only minor deficiencies/ is not completely void (e.g. modification of the planning decision by imposing additional requirements such as noise barriers, speed limits or reforestation) ?

The remedies are those set out under (b). The Court has no power to substitute its own decision for that of the Secretary of State, but could decide not to grant a remedy if the deficiencies were minor, or to indicate in its judgment quashing the Order what procedural or substantive amendments would be necessary for the Order to be remade lawfully.

- d) Which rulings are likely to be given in the cases of the above-listed plaintiffs ?

The same forms of order are available, regardless of the identity of the plaintiff.

9) Remedy of deficiencies

May procedural or substantive deficiencies of the planning decision be remedied during the judicial process ? If yes, on which conditions ?

There is no formal procedure for this, and it would be unusual. Depending on the grounds of the Court's decision the Secretary of State could however make a further Order replacing any Order which was quashed.

Please send your national report (in English or French) **until 30 November 2005** to the following address:

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