Case Commentary

River water quality in agricultural areas

R (Sahota) v Herefordshire Council and another [2022] EWCA Civ 1640
Court of Appeal (Civil Division) Singh, Arnold and Lewis LLJ, 13 December 2022

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Introduction

The issue at the heart of this judicial review relates to the maintenance of water quality in agricultural areas and where there is documented stress placed on river systems though nutrient run-off. Often this is caused through manure spreading and/or the use of chemical fertilisers. The case concerned a proposal for relatively small agricultural development, the consequences of which would be additional manure generation and land spread in the River Wye catchment. The river is noted as under pressure from such inputs and a challenge was brought against a decision of the respondent local authority to permit the proposed development.

Facts and decision at first instance

The respondent council had granted planning permission for the construction of a cattle shed and extension to an existing agricultural building. The development site is situated in the Golden Valley, an area that hosts a system of tributaries to the River Wye. The River Wye is designated a Special Area of Conservation (SAC) under the Habitats Regulations,[2] and a Site of Special Scientific Interest (SSSI).[3] The appellant's concern was that additional livestock farming would necessarily create more manure with the spreading of that manure on surrounding fields, which would inevitably run off into local watercourses and ultimately the River Wye. The grant of permission followed the respondent council's planning committee having considered the recommendations of its officers.

Central to those recommendations was the report of an ecology officer (B). The report stated that the additional development fell below a threshold for air pollution emissions related to SSSIs, based on the approach taken by Natural England. It concluded that there was no likely identified significant effect on a relevant SSSI and that there were no further ecology comments of relevance in respect of development on an existing farm. During the High Court proceedings, the respondent filed an additional witness statement from B, dated some months after the permission was granted. The appellant objected (and maintained the objection in the appeal) to the admission of this evidence. In rejecting the judicial review, the judge also rejected the objection to B's witness statement.

Lord Justice Singh then referred to the planning officer's report, which was put before the committee. It made verbatim reference to B's report, noting also that the proposed development was outside of the River Wye SAC and that there were '… no other triggers for a Habitats Regulations Assessment (HRA) Process'.[4] Questions to the planning committee relating to ecological concerns were essentially referential to B's advice.

The Habitats Regulations provide that an appropriate assessment must be undertaken of the implications of a plan or project before work is undertaken or consent granted, if that plan or project is likely to have a significant effect on the designated site.[5] The competent authority is required to consult the appropriate nature conservation body and have regard to its representations.

Issues for appeal

The appeal was based on two grounds: first, that the judge's decisions to admit B's evidence, and to dismiss the claim, were premised on flawed and/or irrational interpretations of the evidence and the arguments presented, and that the decision to admit the evidence was unjust. The second ground was that the judge had erred in holding that, before the grant of planning permission, the respondent council had complied with Regulation 63 of the Habitats Regulations.

Decision

The appeal was dismissed on both grounds, Singh LJ providing the judgment with which his colleagues agreed. On the first ground, relating to the admissibility of B's evidence, circumstances in which '*ex post facto*' evidence may be used were summarised and applied to the case. The court has discretion as to whether it permits evidence that comes into existence after the making of the decision being reviewed. This is so as to elucidate, correct or add to the reasons given at the time. This discretion would not usually permit directly conflicting evidence, the test to apply being whether the evidence was clarificatory, 'confirmation not contradiction'.[6] Even where such evidence is just

1 The first author is a final year LLB student supervised as part of the University's pilot Environmental Law Clinic, which has run in partnership with the Environmental Law Foundation – continuing its work on Reviving UK Waterways; details at: https://elflaw.org/news/reviving-uk-waterways-conference/#:~:text=On%20Tuesday%2022nd%20March,problems%20that%20they%20are%20experiencing.

2 Conservation of Habitats and Species Regulations 2017 (SI 2017 No 1012). The JNCC listing is available at: https://sac.jncc.gov.uk/site/UK0012642.

3 SSSI details are available at: https://www.wyevalleyaonb.org.uk/exploring-wye-valley-aonb/wildlife/river-wildlife/#:~:text=The%20river%20has%20been%20designated,river%20are%20of%20international%20importance.

4 At para 12.

5 Regulation 63.

6 At para 18.

explanatory, the court must determine the legitimacy of admitting it. This meant, according to Singh LJ, that the scope for intervention with the judge's decision on B's evidence was limited. He then went on to state the role of the court in such appeals, which turned on the question of whether the judge exercised their discretion wrongly; and even if so, whether the conclusion reached was one reasonably open to them. Given this, his view was that the judge had not erred, having considered the relevant authorities; the conclusion reached was thus one open to him.

It was argued for the appellant that since it was the planning committee and not B that had made the decision, it was not appropriate to admit B's evidence to clarify the committee's decision. In Singh LJ's view, there was no reason to depart from the established inference that the committee members adopted the decision based on the planning officer's recommendation, which they had.[7] The second submission, that B's evidence went beyond elucidation and was in fact contradicting what had been said to the committee in the officer's report, was also dismissed. Singh LJ noted that it was open to the judge to conclude that B's evidence was about 'showing his workings' as he reached the conclusion he did. It was also noted that part of a planning officer's expert role is to be able to select the information necessary for the planning committee to make a decision, avoiding overburdening with unnecessary detail. To do so, such committees required sufficient, as opposed to excessive, information, since otherwise there was a risk reports may be not read and/or not understood. The fact that planning committees were located in, and democratically accountable to, their local electorates was an important consideration. The nature of decision-making by democratically elected bodies is different from the courts, with the former best placed to weigh competing public and private interests.[8]

Finally, on the first ground, the appellant had argued that the judge's decision to admit B's evidence 'went against the grain' of both judicial review proceedings and planning decision-making. In the case of the former, it was held that the judge had correctly directed himself on the need for caution in admitting such evidence. Further, it did not fall into the class of information which was unavailable to the decision-makers at the time, and thus was not *ex post facto* evidence that would lead to a 'rolling review'. Singh LJ concluded the point noting that, '[what B's] evidence does is not to refer to information which has arisen after the decision under challenge was taken. Rather it refers to material which he had in his mind at the time and which helps to explain how he reached the conclusion which he did and which was then conveyed to the planning committee through the officers' report'.[9] In the case of the latter, there was no identified failing in the procedure adopted that would run contrary to 'the grain' of the planning system.

The second ground was essentially premised on the assertion by the appellant that the planning officer had misled the planning committee by stating that an HRA was not necessary. The River Wye is an SAC, which gave rise to the obligation in the Habitats Regulations that an HRA should be carried out before consent to any project likely to have a significant effect upon it. That HRA did not take place as the respondent council was of the view it was not necessary following the officers' advice. It was submitted for the appellant that the planning committee was incorrectly advised as to the test it should be using – that of the exclusion of scientific doubt as to the project's potential adverse effects in combination with other developments on the River Wye SAC. The reasoning that there was unlikely to be adverse impact because the site was not located within the River Wye SAC was flawed, principally as a result of the interconnected hydrography of the area. In addition, the cumulative effects of adding more manure to the system had not been sufficiently considered by B or the planning officers. Expert evidence suggested that there would be surface run-off of the manure on land, which, although 'outside' of the River Wye SAC, was within its hydrological catchment. Added to this, it was submitted that the Opinion of the *AG in Sweetman v An Bord Pleanála* was relevant in that it identified that where there was a *possibility* of significant effect on a European site, there should be an appropriate assessment.[10]

Lord Justice Singh's examination of the legal principles distilled from the numerous authorities on both planning decisions and habitats considerations, drew him to a different conclusion. He noted that the courts should keep in mind the function of elected planning committees: it was they, rather than the courts, with decision-making powers. As to review, he stated that 'they are entitled to expect good sense and fairness in the court's review of a planning decision, not the hypercritical approach which the court is often urged to adopt'.[11]

On the Habitats Regulations, he drew from Lindblom LJ's guidance in *R (Lee Valley Regional Park Authority) v Epping Forest District Council* and *R (Wyatt) v Fareham BC*.[12]

So far as was relevant to the case at hand, it was restated that the duty imposed by Regulation 63 rests with competent authorities – not the courts. The courts will apply public law principles relevant to the nature of the subject matter and the expertise of the competent authority and would only intervene in cases of irrationality in the performance of the duty. A competent authority can, and should, give appropriate weight to expert bodies, which in cases to do with nature conservation would be Natural England. There was some difficulty is separating the trigger point for an appropriate assessment under the Habitats Regulations and the duties imposed in respect of formal screening for EIA purposes, but it was noted the two are not the same.[13]

7 See paras 21 to 22.
8 See paras 23 to 24.
9 At para 26.
10 (C–258/11) *Sweetman v An Bord Pleanála* EU:C:2013:220 (*emphasis added*).
11 At para 37.
12 *R (Lee Valley Regional Park Authority) v Epping Forest District Council* [2016] EWCA Civ 404; and *R (Wyatt) v Fareham BC* [2022] EWCA (CiV) 983.
13 See paras 39 to 46.

This led to the appellant's final point, that the committee's reasoning was flawed. A demonstrable flaw in the reasoning or methodology could enable a challenge. However, in this case, and on an examination of Natural England's guidance, relied on by B, there was no evidence that there was a flaw. B had considered possible triggers – the only one being air pollution; and had considered the project alone and in combination with other projects. His conclusion was there was no effect on the River Wye SAC. It was accepted that in certain areas outside of the SAC boundaries, HRA would be carried out for planning applications. However, the development at issue in the case at hand did not fall within one of these additional areas and there was no pathway for impact, as the phosphate run-off would be unlikely to reach the river. Interestingly, a contrasting position exists in Wales. Natural Resources Wales' position statement in respect of SAC designated rivers and phosphates would subject 'any' proposed development which 'might' increase the amount of phosphate in a river catchment to an HRA.[14] In terms of the case before him, though, Singh LJ stated that it was not relevant, noting '[i]t is inherent in the scheme of devolution that there may be different laws and policies in England and Wales'.[15] He concluded by observing that the appellant's real complaint was that B's evidence was incorrect. That of itself, and even where there were other views. was insufficient. Thus, it had not been established that there was a demonstrable error in the reasoning, or that the respondent's decision was irrational.

Commentary

The case has thrown up several questions, which it is hoped will be addressed in a Supreme Court appeal, yet to be determined. Undoubtedly, river water quality is under considerable pressure from both abstraction and inputs. Greater appreciation of these pressures will perhaps inevitably draw more attention from affected or interested parties, particularly those in or near protected areas where development may adversely contribute to the problems. In such cases, the potential for disagreement is enhanced, and challenges to decision-making through judicial review more likely. This case follows numerous others in holding that the courts will not be drawn into an assessment of the merits of the decision-making; rather that it has been undertaken in accordance with accepted public law principles. The bar might seem high, but the process recognises the reality of decision-making and the use of expert guidance.

The issue of devolution here leaps out. It was a minor point in the judgment but one of significance in practical terms. The fact that a wholly different approach to river catchment management is adopted in Wales, and one that is seemingly more precautionary in methodology, bears some attention. If the basis of effective river basin management is to ensure that inputs into a catchment are 'managed', the presence of an in effect artificially created jurisdictional boundary with differing imperatives does not *feel* that it is reflecting that managerial purpose. Arguably, the catchment is indivisible. The fact that within just a few hundred metres a wholly different decision may be reached is unfortunate and would appear to work against the principle of legal certainty. What is certain on the evidence of this and other contemporary cases, however, is that the public imagination has been mobilised in respect of water quality.

14 See paras 57 to 58.
15 At para 59.