

Case Name: *Sahota, R (On the Application Of) v Herefordshire Council* [2022] EWCA Civ 1640 (13 December 2022)

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Commentary: This was an appeal from a decision by the High Court to dismiss a claim for judicial review in respect of the grant of planning permission for a cattle shed and extension to an existing agricultural building within the upper Golden Valley in western Herefordshire.

Singh LJ explained that the issues in the appeal were: (1) whether the judge erred in admitting the evidence of the ecology officer at the Respondent authority; and (2) whether the Respondent's planning committee was misled into believing that there was no need for a Habitats Regulations Assessment ("HRA"). The Appellant was concerned that an increase in manure production and the spreading of manure on the surrounding fields in connection with the proposed development would run off into nearby watercourses, in particular the River Wye.

The main issue of interest for the purposes of this summary is issue (2). In this regard, regulation 63 of the Conservation of Habitats and Species Regulations 2017 (the "Habitats Regulations") provides that a competent authority must undertake an appropriate assessment of the implications of a project which is likely, either alone or in combination with other projects, to have a significant effect on a European site prior to giving consent to any such project. The proposed development was located in the vicinity of the River Wye which is a Special Area of Conservation ("SAC") and also a Site of Special Scientific Interest ("SSSI"). An appropriate assessment did not take place because it was considered to be unnecessary by the Respondent, on the advice of its officers.

Singh LJ set out the relevant legal principles in connection with regulation 63. He noted that the duty imposed by regulation 63 rests with competent authorities and not with the courts. In a legal challenge to a competent authority's decision, the role of the court is not to undertake its own assessment, but to review the performance by the authority of its duty under regulation 63. If the competent authority has properly understood its duty under regulation 63, the court will intervene only if there is some *Wednesbury* error in the performance of that duty. A competent authority is entitled, and can be expected, to give significant weight to the advice of an expert national agency with relevant expertise in the sphere of nature conservation, such as Natural England.

In this case, the appellant argued that the threshold for an HRA is a low one and that the test under regulation 63 is whether scientific doubt can be excluded as to the possibility that the proposal could, in combination with other developments, have an adverse effect on the River Wye SAC. It was argued that the officers' report did not properly advise the planning committee of that test, and the report's reasoning that, because the site was not itself within the SAC, there were "therefore no likely significant effects" was

wrong in law. The mere fact that the site was not within the SAC was not determinative of the potential impacts as, it was alleged, the advice seemed to suggest. The Appellant's fundamental complaint was that the officers did not consider the cumulative impact of the increase in manure production at the proposed development site when combined with the manure produced and spread in other parts of the farmholding. There was, therefore, a demonstrable flaw in the reasoning process both in the officers' report to the planning committee and in the evidence of the ecology officer.

Having considered the evidence of the ecology officer, Singh LJ accepted the respondent's submission that there were no relevant effects of the proposed development on the River Wye SAC, whether taken in isolation or in combination with other plans or projects. The conclusion reached by the respondent's ecology officer was based on his own expert experience and on the methodology recommended by the expert body in this field, Natural England. The appellant's case was, essentially, that the advice of the ecology officer was wrong; however, in order to succeed in that argument, he found that the Appellant would have to do more than show that others (including other experts) might take a different view. What had to be shown was that there are public law grounds which would entitle the court to intervene by way of judicial review and, in particular, that there was a demonstrable error in the reasoning process or that the conclusion was irrational. There were no such public law grounds in this case and, accordingly, the appeal was dismissed.

Case summary prepared by Victoria McKeegan