Case Name: *Durham County Council & Anor v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 1394 (Admin) (09 June 2023)

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Commentary: This was an unsuccessful judicial review claim by Durham County Council and Hartlepool Borough Council ("the Claimants") in relation to various planning applications made for solar farms and other associated structures by special purpose companies related to Lightsource bp ("Lightsource").

Durham CC granted planning permission in June 2020 to Lightsource for a solar farm with a generating capacity of 49.9 MW ("Hulam"). In 2021, Lightsource made another five applications relating to the construction of another solar farm of generating capacity of 49.9MW ("Sheraton") which was to be connected with Hulam. All the five applications were found valid but refused by the Claimants and all applications were appealed.

The Claimants issued this judicial review claim, upon adjournment of the Inquiry by the Inspector, seeking two declarations:

a) That Hulam and Sheraton should be viewed together as a nationally significant infrastructure project ("NSIP") for which development consent under PA 2008 was required; and
b) That the Secretary of State ("the Defendant") does not have jurisdiction to determine the appeal applications made under the Town and Country Planning Act 1990.

The claim gave rise to the following three issues:

1. Can and should the court determine whether development consent under the PA 2008 would be required for the projects if taken together?
2. Is development consent required?
3. If development consent is required, does the Inspector have jurisdiction to consider the appeals?

Issue 1:
The Defendant contended that the Court did not have the power to determine whether development consent was required for a project under the PA 2008 since this was "a question of mixed fact and law which turns on the exercise of planning judgement". The court considered that the question did not require the court to 'weigh the "planning merits"', and is 'the kind of judgment a court has to make whenever it asks whether a given set of facts falls within a statutory concept'. Therefore, the Court considered that it did have jurisdiction to determine whether development consent was required. In support of this conclusion, Chamberlain J alluded to Sections 160, 161 and 171 of the PA 2008 which allow authorities to seek an injunction via the High Court or a county court if

development, which required development consent under PA 2008, was carried out without such consent.

Further, the Defendant contended that s.55(3)(c) of the PA 2008 specifically allocates the power to take a decision as to whether applications taken together constitute an NSIP to the Secretary of State alone. The Court rejected this argument and concluded that, although s.55(3)(c) requires the Secretary of State to determine whether a project requires development consent where an application is made, it does not allocate such a decision to be made solely by the Secretary of State ([30]).

Issue 2:
As per sections 14 and 15 of PA 2008, development consent would be required for the construction or extension of a "generating station" provided that it was situated in England, it did not generate electricity from wind, it was not an offshore station and its generating capacity exceeded 50MW.

The Claimant argued that Hulam and Sheraton, along with the associated structures, should be viewed as forming one "generating station", with Sheraton seen as an "extension" of Hulam. The Claimants supported this view by asserting that the shared cables and substation of both projects formed part of the meaning of "generating station". Further, the Claimants asserted that, even if the cables and substation did not form part of the "generating station", the addition to the generating capacity of Hulam using Sheraton would amount to an extension of Hulam as a generating station, which would require development consent under PA 2008.

The Court ruled that the cables and substation, which were to be shared by Hulam and Sheraton did not form part of a "generating station" as per the Electricity Act 1989 ("EA 1989"); they were simply apparatus required for transmitting and distributing the electricity generated at both sites. The Court noted that even without the cables and substation, and despite the non-contiguous nature of both sites, the addition of generating capacity could still be deemed as an "extension" for the purposes of s.36(9) of the EA 1989. However, the Court ruled that the current circumstances this proposition did not apply to Sheraton and Hulam for the following six reasons:

a) Hulam and Sheraton were projects which were developed separately at different times;
b) they have separate distribution and connection agreements and are separately metered;
c) both projects could operate independently of each other – both in contractual terms and in terms of physical infrastructure;
d) the supposedly common substation for Hulam and Sheraton was in fact comprised of two substations;

e) in any event, the substation was only transmitting and distributing electricity and not generating it; and
f) the reason for the common cable between the two projects was increased efficiency and not because the generating capacity of the two solar farms were to be interconnected.

Issue 3:
Having given the above conclusions on Issues 1 and 2, Issue 3 did not strictly arise, however, Chamberlain J proceeded to conclude that even if development consent was required and the project was deemed an NSIP, the Inspector still had jurisdiction to determine the appeals. In particular, contrary to commentary in the Planning Encyclopaedia, the Chamberlain J held that planning permission could be granted for a project even if it were an NSIP and similarly that the Inspector had jurisdiction to entertain appeals on that matter.

For the above reasons, the claim for judicial review was dismissed.

Case summary prepared by Chatura Saravanan