R (Merricks) v. S/S Trade and Industry and another

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Wall LJ and Sir Peter Gibson
Case No: C1/2006/2247Neutral Citation Number: [2007] EWCA Civ 1034IN THE SUPREME COURT OF JUDICATURECOURT OF APPEAL (CIVIL DIVISION)ON APPEAL FROM QUEEN'S BENCH DIVISIONADMINISTRATIVE COURT(HER HONOUR JUDGE HAMILTON)Royal Courts of JusticeStrand, London, WC2A 2LL

Date: Monday, 30th July 2007

Before:

LORD JUSTICE WALLandSIR PETER GIBSON

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Between:

THE QUEEN ON THE APPLICATION OF MERRICKS
Appellant- and -

THE SECRETARY OF STATE FOR TRADE AND INDUSTRY & ANR

Respondent

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Mr R Gordon QC and Mr D Forsdick (instructed by Messrs Richard Buxton) appeared on behalf of the Appellant.

THE RESPONDENTS DID NOT APPEAR AND WERE NOT REPRESENTED.

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(As Approved by the Court) Sir Peter Gibson:

1. This is a renewed application by Philip Merricks for permission to appeal against a refusal on 16 October 2006 by HHJ Hamilton QC, sitting as a deputy judge of the High Court, of an application by Mr Merricks for judicial review.

2. He sought to challenge (a) the decision of the Secretary of State for Trade and Industry on 18 October 2005 to grant consent under section 36 of the Electricity Act 1989 and deemed planning permission for the construction and operation of a wind turbine

generating station ("the Windfarm") at Little Cheyne Court, Walland Marsh, Kent ("the Site"); and (b) the "appropriate assessment" ("the Assessment") required by regulation 48/1 of the Conservation (Natural Habitats etc) Regulations 1994 ("the Regulations"). Permission to apply for judicial review was refused by Richards LJ, exercising the powers of a High Court judge, on the papers. The application was renewed before Judge Hamilton at a hearing at which Mr Merricks, the Secretary of State and the interested party, Npower Renewables Limited ("NRL"), were all represented by counsel. The Judge in a reserved judgment refused the application. Mr Merricks then applied to this court for permission to appeal. That application also was refused by Dyson LJ. It is that application which is now renewed before us.

3. Although it is an application for permission to appeal, unusually Mr Merricks has been allowed an extended time of an hour in which to present his oral submissions which he has done through Mr Richard Gordon QC, who did not appear below, and Mr David Forsdick, who did. We have been greatly assisted by the fact that Mr Gordon has produced a very detailed speaking note which he has taken us through in the hour or so that he had before us.

4. I can now summarise the background. Mr Merricks owns land in Romney Marshes on which he has established a nature reserve. For the purposes of this case it has been treated as if it is part of a Special Protection Area ("SPA"). On 15 November 2002 NRL applied to the Secretary of State for consent to construct and operate the Windfarm at the Site which immediately adjoins Mr Merricks' land. Objections were submitted by, amongst others, the relevant planning authorities, and the Secretary of State caused a public inquiry to be held. This opened on 12 October 2004 and amongst the objectors who appeared were English Nature ("EN") and the Royal Society for the Protection of Birds ("RSPB") presenting a joint case and Romney Marsh Wind Farm Advisory and Action Group ("the Action Group"). Mr Merricks was part of

the Action Group. It was common ground throughout the inquiry that the provisions of the Habitats Directive 92/43/EEC and the Regulations had to be complied with. By article 6(3) of the Directive any plan or project likely to have a significant effect on an SPA is required to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives and the competent national authority (in the present case the Secretary of State) can agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site. In Waddenzee [2004] case C-127/02 the European Court of Justice made clear that the competent national authority can only consent to a plan or project after having made certain that it would not adversely affect the integrity of the site and that, the Court said, was the case where no reasonable scientific doubt remained as to the absence of adverse effects (see paragraphs 55 to 61 of the judgment).

5. Regulation 48 implemented article 6. It required the making of an appropriate assessment of the implications for the site and consultation with the appropriate nature conservation body (in this case EN). Account was to be taken if the competent authority thought it appropriate of the opinion of the general public, in this case through the public inquiry. The Regulation provided that the plan or project would only be agreed after it was ascertained that it was not affect the integrity of the site. The precautionary principle by common consent applies to decisions relating to such environmental matters.

6. EN and RSPB expressed the view to the inquiry that the scheme failed the integrity test as those bodies continued to harbour doubts which were both scientific and reasonable. The Action Group also submitted that it could not be ascertained that the scheme would not have an adverse effect on the integrity of the site. After a hearing of 21 days the inquiry closed on 14 January 2005.

7. On 13 May 2005 the inspector presented his report. It is full and detailed. He took account of a report commissioned by NRL, which addressed the nature conservation issues raised in respect of the SPA. He concluded that the ecological integrity of the site would not be threatened. He expressed his belief that the scheme would not adversely affect the integrity of the SPA by reducing the level of the population of any of the sensitive bird species present. The Bewick swan is a species of high sensitivity. The Secretary of State then undertook an appropriate assessment taking account of the inspector's report. He concluded in the Assessment that although some very minor effects of negligible magnitude might occur on some of the SPA populations, none would threaten the ecological integrity of the SPA. By his decision letter of 18 October 2005 he accordingly consented to NRL's application.

8. At the very end of the three month period Mr Merricks commenced these judicial review proceedings. He applied on six grounds, grounds 1 and 6 raising points of law one of which is not renewed, grounds 2 to 5 relating to evidential conclusions which are challenged. Richards LJ in rejecting the application went through each ground in turn. On Mr Merricks' oral renewal of the application Judge Hamilton by a reserved judgment found that both the inspector and the Secretary of State could not be faulted on the integrity test. She adopted Richards LJ's comments on the challenges to the evidential conclusions and said that in the absence of a challenge on the grounds of perversity or Wednesbury unreasonableness factual findings were not challengeable by way of judicial review.

9. In applying to this court for permission to appeal, Mr Merricks contended that the approach of the Secretary of State was contrary to that mandated by Waddenzee in that the Secretary of State failed to fill what were called gaps in the evidence or failed to explain why it was not necessary to fill the gaps. Three particular criticisms were identified relating to: (1) night time bird flights; (2)

bird scaring; and (3) evidence as to bird mortality. Dyson LJ in refusing permission dealt in turns with each criticism and also said that the inspector purported to apply the correct test and that the Secretary of State adopted the inspector's approach.

10. Nothing daunted, Mr Gordon in his paragraph 4(14)(a) statement and his oral submissions launched a powerful and wide-ranging attack on the inspector's report and the Assessment and the decision letter of the Secretary of State. Some of the points are taken for the first time in this court. A general criticism which he makes relates to what he has called "underplaying the test". He has submitted that, whilst on a few occasions the inspector and Secretary of State may be read as having formulated the Waddenzee test correctly, at numerous other critical points in their analysis they do not and at other times they allow themselves to take it into account what are called "extraneous matters". That is repeated before us orally this morning, and nine or ten examples are there taken from the inspector's report and two from the Secretary of State.

11. In my view there is no real prospect of Mr Merricks succeeding on an appeal on that general point. On a fair reading of the inspector's report and the documents of the Secretary of State recording decisions by him, it seems to me manifest that the inspector and the Secretary of State had well in mind the correct test and sought to apply it.

12. Before us Mr Gordon has particularly challenged the correctness of one sentence set out by Judge Hamilton at paragraph 21 of her judgment, where she says this:

"In the absence of scientific evidence to support suggestions of adverse effects, the inspector was entitled to conclude that he could be certain that the development would not adversely affect the integrity of the site, and that there was no reasonable scientific

doubt as to the absence of such effects."

He suggests that the judge may have considered that Waddenzee required objectors to put forward a positive scientific case that there would be an adverse impact on the integrity of the site rather than raising scientific doubt as to the absence of such harm. Mr Gordon suggests that a similar misunderstanding of the law was perpetrated by Mr Mellish in a document produced by him recording his advice to the Secretary of State. I do not accept that that ground has a real prospect of success either. It seems to me plain that all that is being said is that, where a reasonable scientific doubt is raised from whatever source, whether from the objectors or in the interested party's own evidence, as to the absence of adverse effects, then that is sufficient to require that refusal of consent be given to the proposal but without such evidence the inspector could conclude that the integrity of the site was not affected. In my judgment that ground of appeal has no real prospect of success.

13. The second point taken by Mr Gordon relates to the evidence that he submits was available to the inspector and the Secretary of State and either existed in the form of evidence put before the inquiry or could have been obtained and should have been obtained before any decision was taken. I turn to the three specific matters to which Mr Gordon drew our attention. The first is night flights. Mr Gordon submitted that requests had been made over a considerable period for data on night flights and that faced with evidence from the scientists for EN and RSPB respectively, Dr Langston and Mr Drewett, it was not enough simply to assert that there were no reasonable scientific doubts.

14. That does not seem to me, with respect, to be a fair summary of the position. The inspector noted in detail what the parties had submitted on the point of adequacy of evidence and in paragraphs 422 to 424 the inspector gave his conclusion. He pointed out that

the only site specific data on birds presented to him had been by NRL, that EN and RSPB had adduced no data of their own and that their lead ecological witness, Dr Langston, had proceeded exclusively by way of literature review and had undertaken no more than a half day site familiarisation visit. The RSPB, the inspector pointed out, had welcomed NRL's wintering birds study for 2002/3 and its consideration of night time surveys. He noted that in 2003 EN had requested night time details but in 2004 it said without requiring further night time work that it wanted one further year's survey before it was happy on the integrity test. No suggestion at that point was raised that further night time surveys were needed. In July 2004 EN brought up again the question of night time surveys. I agree with Dyson LJ that the inspector was entitled to take the view that had that matter any great substance it would have been raised earlier and in a more robust manner by EN when setting out its views and further survey requirements. The inspector was also entitled to take account of the fact that at Out Newton, another wind farm site, EN was satisfied as to the integrity test without any night time surveys. The Secretary of State was equally entitled to adopt the same view, having regard to what the ornithological experts EN and RSPB had said and done, without being in breach of the Waddenzee requirements.

15. Next Mr Gordon criticised the failure by the inspector to obtain data on bird scaring carried out by local farmers. Mr Merricks had complained that NRL's ornithological assessment, which it had conducted after the environmental assessment, made no mention of bird scaring on the site over the three years of the survey. In response NRL produced a statement by Mr McMinn to the effect that bird scaring had been done by farmers but to little effect and that Mr Merricks himself had referred to bird scarers as "dinner gongs", "when they go off the birds know its feeding time." It was not a point taken by EN or by the RSPB. I agree with Richards LJ that it was not necessary for the inspector to deal with it in any greater detail than he did and that he was entitled to conclude that

bird scaring was random and that the robustness of NRL's data on birds at the site had not been materially affected by the practice of bird scaring.

16. Mr Gordon's next point was headed in his paragraph 4(14)(a) statement as "Bird Strike on Pylons", but he referred us to paragraphs in his skeleton entitled "Evidence as to bird mortality", and he has made clear that what he was concerned with evidence relating to birds found dead under electricity wires outside the site. He relied on an extrapolation from some evidence of Bewick swans being found dead under electricity wires to the risk of collision with wind turbine blades. It was said that this raised a scientific doubt as to NRL's basic case of a low number of birds at the site and a low collision rate. In my judgment there is no real prospect of a successful appeal on this point either. It was not referred to by EN in its closing speech. The inspector had a mass of evidence on the numbers of Bewick swans visiting the site. The fact that Bewick swans collided with electricity wires, the evidence of which, the inspector was well aware of, tells one little about the risk of collision with the more visible and noisier wind turbine blades.

17. The risk of collision was also the subject of Mr Gordon's attack on what he called the "sensitivity test". That appears to be an extension of a ground of appeal relating to what is known as the Blyth model. NRL had undertaken a collision modelling exercise using a model developed and recommended by Scottish Natural Heritage ("SNH"). The statement of common ground acknowledged that it was the best tool available provided that suitable data was used to populate it and limitations were recognised in its application and interpretation. NRL relied on studies conducted at Blyth Harbour, even though the bird species there differed from those at the site. In particular no Bewick swans were found at Blyth Harbour. NRL treated Blyth as a worst case scenario for reasons which it fully explained. The inspector noted

that EN and RSPB had originally agreed a collision avoidance rate of 99.62 per cent derived from Blyth but had altered that to 98.5 per cent. The inspector noted the numbers of swan and goose collisions documented at existing wind farms had been very small. That evidence was that precisely one swan, not limited to Bewick swans, had been found to have collided with a wind turbine throughout the world and similarly only four geese were found to have died from such collision.

18. The inspector said that it was another example of a robust worst case approach to collision modelling. He continued (at page 171 paragraph 432):

"Most important is the fact that for NRL to be wrong in its analysis, it would have to have erred by several orders of magnitude for its conclusions to be invalidated. The difference between the Blyth avoidance rate, as originally agreed and an avoidance rate of 95 per cent (which SNH has assumed elsewhere on a precautionary basis where there is an absence of data) represents a tenfold increase in collisions. Even at that rate, or as low as 90 per cent, no material casualties would occur."

19. Mr Gordon before us advances a new argument not taken at any stage in the inquiry by EN or RSPB or the Action Group nor was it taken before the judge. Mr Gordon fastens on some evidence produced by NRL at the inquiry and the environmental statement's adoption of a matrix for testing the sensitivity of species versus the magnitude of risk to them and the assessment of collision mortality as a percentage of overall mortality, which Mr Gordon put at 0.17 per cent. That was taken from the environmental statement which shows the supporting figures used to reach that conclusion. However, I have noted and drawn Mr Gordon's attention to the fact that in the Assessment different figures are given both in relation to the conclusions, in which the 0.17 per cent figure was changed to 0.14 per cent, and also in the supporting figures, which have

been changed. Why the changes were made we do not know.

20. Mr Gordon nevertheless applies the tenfold or twentyfold increase referred to by the inspector to the 0.17 per cent figure, and says that 1.7 per cent or 3.4 per cent amounts to what is stated in the environmental statement to be a low, not negligible, magnitude of medium significance capable of having a significant impact on the bird population. However, it is also said in the environmental statement that such impact requires careful individual assessment. Mr Gordon also criticises the evidence of Dr Percival for NRL in rebuttal of evidence put in by the objectors. Dr Percival was clear that no material casualties would occur. Mr Gordon says that Dr Percival used graphs based on collisions per year. He argues that that is not the factor which is used in the environmental statement to assess significance, namely increase in underlying mortality. He submits that the figure taken by SNH of a collision avoidance rate of 95 per cent, where there is an absence of data, leads to a figure of 0.8 collisions per annum which results in an impact on underlying mortality of more than 1 per cent and is therefore of medium significance with the consequence that it would have a potentially significant impact requiring careful individual assessment.

21. It is unfortunate that these points were not taken before the inspector so that any response from NRL could have been given by Dr Percival. It is unfortunate that the points were not taken in the grounds of appeal or advanced before the judge so that the Secretary of State and NRL could have commented on them. Instead, it would appear that NRL's assertions on the effect of applying the Blyth model went unchallenged. Indeed, NRL itself made a submission that it was important to put collision rates from turbines in the context of overall mortality rates for birds. Yet despite this, the points now taken by Mr Gordon were never raised at any stage until the paragraph 4(14)(a) statement.

22. I am not persuaded that it would be right on the basis of this new argument to hold that there would be a reasonable prospect of success on an appeal. The points could and should have been taken earlier if they had weight. True it is that the Bewick swan population is one which is not large and the species has great importance. Nevertheless, the actual recorded figures of swans of any sort dying through collision with wind turbines are remarkably low. Dr Percival's evidence, which as I say went unrebutted, was that the wind farm had been specifically designed to avoid the important local bird populations and flight routes. He said:

"With the comparatively low densities of birds in (and over flying) the proposed wind farm site, the fact that the development is relatively small (26 turbines) and that the turbines have been located outside any bird concentrations, mean that it is unlikely that bird collisions would be a significant problem at this site. In addition, the risk of collision will be further reduced as the turbines will be widely spaced, and the towers will be tubular and not guyed. All cabling within the development will be under-grounded, so this will not pose any addition collision risk."

23. The figures that were relied on by NRL were applied to the Blyth model; that, as the inspector had pointed out, was inherently a conservative model. It seems to me plain that there was a margin of error that could be tolerated built into NRL's figures. The 95 per cent rate, which SNH had taken in the absence of data to the contrary, was not based on any actual studies but was simply a figure which was adopted for the purposes of a worst-case scenario. The figures which were agreed by EN and RSPB were much more favourable by a magnitude of several hundred per cent.

24. Accordingly, I would not grant permission to appeal in relation to that issue either.

25. Mr Gordon finally pointed out to us that the fact that planning

permission was deemed to be permitted as a result of the Secretary of State's decision produces something of an anomaly. Normally if a planning decision were taken, there would be the ordinary statutory right of appeal. In this case it was necessary for Mr Merricks to go by the judicial review route, with the consequence that the application for permission is before us today. That is of course correct, but nevertheless this court is required to consider whether or not the conditions laid down by the rules are satisfied so as to permit the appeal to go forward. For the reasons which I have endeavoured to give, I am not persuaded that the appeal would have a real prospect of success, nor that there is any other compelling reason why this appeal should be heard.

26. For these reasons, therefore, I must conclude that the application should be refused.

Lord Justice Wall:

27. I agree. Any judgment from me would essentially be a repetition of what my Lord, Sir Peter Gibson, has said. He has covered the ground fully. In fairness to HHJ Hamilton, I add simply that in my judgment neither she nor the inspector nor the Secretary of State has misapplied Waddenzee, and the other grounds argued by Mr Gordon with such skill do not persuade me either that there would be a reasonable prospect of success in any appeal.

28. It is, in my view, high time that this litigation came to an end and the application will accordingly be refused.

Order: Application refused.