Case No: C1/2011/2986

Neutral Citation Number: [2012] EWCA Civ 321
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(HIS HONOUR JUDGE STEWART QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 18 January 2012

Before:
LORD JUSTICE LAWS
LORD JUSTICE TOMLINSON
and
LORD JUSTICE KITCHIN

- -

Between:
BOWEN-WEST

Appellant

- and -

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**1st Respondent**
NORTHAMPTONSHIRE COUNTY COUNCIL	**2nd Respondent**
AUGEAN PLC	**3rd Respondent**

- -

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Mr Richard Drabble QC and **Ms Zoe Leventhal** (instructed by Richard Buxton Environment and Public Law) appeared on behalf of the **Appellant**.
Mr Rupert Warren (instructed by the Treasury Solicitor) appeared on behalf of the **First Respondent**
The Second Respondent did not appear and was not represented.
Mr Robert McCracken QC and **Ms Annabel Graham Paul** (instructed by Dickinson Dees) appeared on behalf of the **Third Respondent**.

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Judgment

Lord Justice Laws:

1. This is an appeal with permission granted by Carnwath LJ against the judgment of His Honour Judge Stephen Stewart QC (sitting as a deputy High Court judge) by which on 3 November 2011 he dismissed the appellant's application brought under section 288 of the Town and Country Planning Act 199) for an order to quash a decision of the Secretary of State set out in a decision letter dated 24 May 2011. By that decision, the Secretary of State granted to the third respondents, Augean plc, a permission to dispose of low level radioactive waste ("LLW") in addition to hazardous waste ("HW") which was already permitted, at a hazardous waste landfill site known as the East Northamptonshire Resource Management Facility.

2. The grant of permission enures until expiry of the existing permission on 31 August 2013. The appeal requires the court to revisit obligations arising under the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the Regulations"), which transpose the requirements of Council Directive 85/337/EEC (the Directive").

3. The appellant is a local resident, a member of a group called King's Cliffe WasteWatchers, which participated in the inquiry which was to inform the Secretary of State's decision to grant planning permission. Consent for the disposal of HW at the site had been granted in 2006. That consent allowed for the annual deposit of 249,000 metric tons of such waste, together with the emerged materials.

4. On 21 July 2009 the third respondents applied for permission to fill certain parts of the site, referred to as Phases 4B, 5A and 5B with LLW. The application was refused by the local waste authority (the second respondent), but granted by the Secretary of State on 24 May 2011 after a public inquiry conducted in October and November 2010 by an inspector appointed by the Secretary of State.

5. The principal issue in this appeal has its genesis in the fact that, before the refusal of planning permission by the second respondents, the third respondents had decided that they would seek permission to extend the period for completion of the proposed works to 2016 and that in 2011 they would also seek a major extension of the landfill site to accommodate one million cubic metres of waste by 2026 with a maximum permitted input rate of 249,999 cubic metres per annum.

6. According to the Inspector's report (paragraph 7.73, to which I will return), it had not been decided by the time of the inquiry whether only HW was to be disposed of in this extended facility or LLW was to be included. But the prospective application for permission for this larger scheme would clearly allow for the disposal of LLW (see paragraph 9.10 of the witness statement of Dr Gene Wilson prepared on behalf of the third respondents for the enquiry).

7. There is no contest but that the third respondents' application of 21 July 2009 was for Environmental Impact Assessment (EIA) development, so that an Environmental Statement was required under the regulations. An Environmental Statement was accordingly prepared, but it addressed the environmental effects of the current proposal in isolation. The central question we have to decide is whether the Secretary of State deciding on appeal whether to allow the July 2009 application was bound to treat the intended further proposals as involving or constituting "indirect, secondary or cumulative effects" of the existing proposal within the meaning of paragraph 4 of Part I of Schedule 4 to the Regulations. An Environmental Statement has to include (see paragraph 2.1(a) of the Regulations):

> "...such of the information referred to in Part I of Schedule 4 as is reasonably required to assess the environmental effects of the development."

8. Paragraph 4 of Part I of Schedule 4 stipulates:

> ".description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from:
>
> (a)the existence of the development..."

9. Mr Drabble QC for the appellant also seeks to put an alternative case, namely that the "project" which the Inspector and Secretary of State had to consider was in fact the larger scheme not yet applied for by the third respondents; and for that reason the larger scheme's effects had to be considered. This argument is raised in a supplementary skeleton and I will return to it.
10. The appellant's principal case, in briefest outline, is that the current development for which planning permission was granted by the Secretary of State in May last year is "demonstrably but Phase 1 of a much larger scheme and will lead to a 'foot in the door' for major further planning permissions on the same site for the same use" (see paragraph 1 of the appellant's principal skeleton). That being so, the appellant says that the deputy judge ought to have concluded that the Secretary of State had erred in failing to treat the intended further proposals as involving "indirect secondary or cumulative effects" and ought, accordingly, to have held that those effects should have been assessed within the EIA process.

11. There is a further ground of appeal. The appellant says that the deputy judge was also in error in applying the conventional Wednesbury standard of review (Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 QB 223) as a test of the legality of the Secretary of State's view as to the proper scope of the required EIA. It is submitted that the law of the European Union requires a more intensive judicial scrutiny.

12. I should first say a little about the consideration given to the case by the Inspector and the Secretary of State. The second respondent authority was alive to the intended further proposals when they considered the July 2009 application. They had been informed of them in June 2010. On 27 July 2010, they approved "initial reasons for refusal" of the application, which included this:

> "(a) The application is for piecemeal development of a project that should be the subject of a comprehensive application.
>
> (b) The Environmental Statement submitted with the application assessed the application proposal in isolation, whereas it is in reality part only of a more substantial development: the application cannot be determined without assessment of the cumulative effects of the totality of the project."

It will be apparent from this that the second respondents are, so to speak, in the same camp as the applicant.

13. The third respondents and second respondents both made representations as to the adequacy of the Environmental Statement to the planning inspectorate. The inspectorate issued a response on 1 October 2010 as follows:

> "In the run-up to the inquiry it has emerged that the appellant also desires both to achieve an extension to the ENRMF site, and to achieve an extension to the life of the currently permitted site. Neither of these intentions forms part of the current appeal proposal. Northamptonshire County Council (NCC) and the appellant dispute the extent to which these intentions have previously been made evident to the Council and to the public...
>
> In the Planning Inspectorate's view, the matters raised in relation to a future planning application for extension of the currently permitted site are not in themselves sufficient to support or to justify a requirement for further environmental information to be submitted under Regulation 19 of the [Regulations]."

14. The issue of the appropriate scope of the EIA in the case was, however, revisited by the Inspector and the Secretary of State. In discussing the second

respondent's reasons for refusing planning permission in his report, the Inspector said this:

> "7.73. NCC was able to deal with the application that led to this appeal on the basis of the information that it had including the Environment Statement (ES). Augean advises that it only decided in May 2010, after the preparation of the ES, that it will seek to extend the use for hazardous waste until 2026 and, even now (at the time of the inquiry), states that it has not yet decided whether that application will include LLW. The current appeal is not part of a piecemeal proposal or an integral element of a comprehensive scheme; consequently, there would be no cumulative impacts of concern deriving from any future application that might include LLW. This appeal is for a stand-alone proposal which can be and is being considered on its own merits and, no doubt by reason of the precedent arguments outlined above, the appeal decision to be made could be a factor in any decision by Augean about a future application. It is not unusual for applications to be made to alter or extend the life of a temporary permission; at present, there are no details of any future proposals. I see no reason why the current appeal should not be dealt with on its own merits...
>
> 7.74. As to the ES, I find nothing to support NCC's claim that a permission in this case would frustrate the aims of the Environmental Impact Regulations and the Directive. As the current proposal is not part of a comprehensive scheme from which there would be a cumulative impact, I find nothing to support the claim that an assessment of cumulative impact would be deferred to be examined by an ES at the stage of the second application."

15. In the decision letter, the Secretary of State said this:

> "In reaching this position the Secretary of State has taken into account the Environmental Statement (ES) which was submitted under the Town and Country Planning (Environmental Impact Assessment)(England and Wales) Regulations 1999 and the Inspector's comments at IR1.17 and IR7.72-7.75. Like the Inspector, the Secretary of State sees no reason why the current appeal should not be dealt with on its own merits (IR7.73) and that there is

> nothing to support the Council's claim that permission in this case would frustrate the aims of the Environmental Impact Regulations and the Environmental Impact Assessment Directive, or the claim that an assessment of cumulative impact would be deferred to be examined by an ES at the stage of the second application (IR7.74). In conclusion, the Secretary of State is content that the Environmental Statement complies with the above regulations and that sufficient information has been provided for him to assess the environmental impact of the appeal."

16. It is also material to note that both the Inspector and the Secretary of State accepted that grant of permission in respect of the July 2009 application would have some precedent effect as regards future disposal of MLW at the site. The Inspector said this:

> "7.69. Would a permission for this appeal create a precedent? To a significant degree, yes, if the new application is for or includes the landfilling of LLW. In general terms, the greater the similarity between proposals, the greater the potential precedent. I acknowledge that any new application would involve a change of circumstances from those pertaining now, in part from the passage of time or perhaps from proposals to construct new cells and develop the restoration proposals and landforms...
>
> 7.70. However, any new application would be on the same site now being considered or on an adjacent site and many other circumstances would remain the same or be little changed. And, as the new application is expected to be submitted in 2011, possibly shortly after the decision on this appeal, there will have been limited time for change with regard to matters such as policy or the development of competing facilities, which would affect the consideration of the proximity principle, BAT, need and so on. In the same way that appeal decisions elsewhere have been quoted here on the 'perception of harm' issue, I have no doubt that any conclusions that the SOS reaches on this appeal that are favourable to the appellant on actual harm, perception of harm, need, transport, highway safety, localism, economic effects and the like would be quoted by the appellant where relevant in support of a new application for the landfilling of LLW...

> 7.71. If this appeal is allowed, the chances of permission for a future proposal for the landfilling of LLW at or adjacent to the cells to be filled in this case would be enhanced. “

17. The Secretary of State for his part said this:

> “30. The Secretary of State agrees with the Inspector's reasoning and conclusions regarding localism at IR7.67, and regarding whether permission for this appeal would create a precedent at IR7.69-7.70. He accepts that, in allowing this appeal, the chances of permission for a future proposal for a future landfilling of LLW at or adjacent to the cells to be filled in this case would be enhanced (IR7.71). However each application needs to be considered on its merits and having regard to the material circumstances at the time."

18. Now I may turn to the argument. First, some observations by way of introduction.

19. The appellant did not originally suggest that the third respondent was in some way obliged to give effect to their overall aspirations for the site by making a single application for planning permission for the whole scheme for three million cubic metres up to 2026. She accepted that the Secretary of State was entitled to treat the July 2009 application as a "stand alone" proposal in the sense that it represented a proper application for planning permission for a distinct project. But she asserted that, as regards the EIA obligations in the Regulations, the fact that the proposal was plainly a much larger scheme required the Environmental Statement to cover the effects of the latter.

20. In this regard, she relied on authority of the Court of Justice of the European Union as showing that the EIA Directive has a wide scope and a broad purpose: Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland [1996] ECR I/0430, p31, Commission v Spain [2004] ECR I-8253, Ecologistas en Accion-CODA v Ayuntamiento de Madrid). [2009] PTSR 458. The appellant also prayed in aid what is common ground, namely, as the deputy judge put it at paragraph 32(i) of his judgment:

> "The Directive requires that account be taken of the effects on the environment of the development in question at the earliest possible stage in the decision-making process.”

See, for example, Barker v London Borough of Bromley [2006] UKHL 52 per Lord Hope at paragraph 22 to which reference was made yesterday.

21. In the supplementary skeleton argument, as I have indicated, the appellant now suggests, and Mr Drabble has submitted, that the "project" which fell to be assessed under the Directive obligations was the whole scheme up to 2026. It is elementary that an EIA must cover the whole of a project for which authorisation is sought.
22. I will deal with this argument first, albeit quite briefly. In my judgment, the true thrust of this case is the appellant's original submission as to indirect secondary or cumulative effects.

23. The term "project" appears in the Directive where it is defined by Article 1(2) as including "the execution of construction works or of other installation of schemes". I do not accept that the relevant project here was the whole prospective scheme up to 2026. My reasons for so concluding are relevant also to the question whether, assuming the project to consist only in the July 2009 proposal, its context as part of the intended larger scheme meant that the latter had to be considered by a way of an assessment of the July 2009 proposal's "indirect secondary or cumulative effects". I should note that the argument as to the scope of the project was put by the second respondents at the inquiry and rejected both by the Inspector and the Secretary of State.

24. My reasons for concluding as I do are briefly as follows. First, I see no reason to disagree with the Inspector's conclusion (IR 7.73) that the July 2009 proposal was "a stand alone proposal which can be and is being considered on its own merits" or the Secretary of State's likely conclusion at paragraph 4 of the decision letter. This is so notwithstanding the fact (see paragraph 4 of the appellant's principal skeleton) that the third respondent's intention has been to achieve a continuing facility for waste disposal effective, without interruption, until 2026.

25. Secondly, the judge was clearly right in my view to hold at paragraph 40 that:

> "In the present case, the permitted developments can go ahead irrespective of the future proposals. That was the finding of the Inspector, who said that this was a "stand-alone proposal". It is not in truth one integrated development such as the Carlisle Airport development in Brown; [That is Brown v Carlisle City Council [2010] EWCA Civ 523] or the Madrid ring road project in the Ecologistas case; or the Mediterranean Corridor rail project in Commission v Spain..."

Thirdly, the Inspector stated (again IR at 7.73) that "at present, there are no details of any future proposals". This was challenged before the deputy judge: see paragraph 58 of the judgment. Clearly there was a degree of information about the overall intended scheme given in Dr Wilson's evidence to the enquiry. But, in my judgment, the Inspector was perfectly entitled to state that there was a want of detail.

26. All these considerations in my judgment point to the conclusion, which I regard as inescapable, that the "project" in this case is only the proposal contained in the July 2009 application. And I would so conclude whether the issue is one of law or one of judgment for the Secretary of State and in the latter case whatever the appropriate standard of review.

27. I turn then to what I regard as the main question: whether the Secretary of State should have concluded that the largest scheme involved indirect, secondary or cumulative effects of the July 2009 proposal?

28. First and foremost, this is, in my judgment, an issue of fact. Whether it is such or not has been at the centre of the argument to which we listened yesterday and today. But it is clear, as I see the matter, that it is indeed a matter of fact or of judgment: clear from the judgment of Sullivan LJ with whom Jacob LJ and Sir Mark Waller agreed in the case of Brown v Carlisle County Council: see paragraph 21. Sullivan LJ said in terms:

> The answer to the question -- what are the cumulative effects of a particular development -- will be a question of fact in each case."

It is clear also from the words of the regulation itself: "such information as it reasonably required" and "a description of the likely significant effects". These formulations import, as it seems to me, the application of a measured judgment to the evidence. This is not contradicted by the learning, of which Mr Drabble reminded us yesterday, which shows that the term "likely" in the regulation means “possible”: see R(Bateman) v South Cambs DC & Ors [2011] EWCA Civ 157.

29. Whether or not the appellant is right to submit that European Union law requires a more intrusive judicial scrutiny of the Secretary of State's assessment of the matter than is given by the conventional Wednesbury approach (Ground 2) -- and I will return to that -- it must surely be the case that the views of the Inspector and the Secretary of State as the primary judges of fact are entitled to very considerable weight.

30. More deeply perhaps, Mr Drabble submitted on this part of the case that the question whether the effects of the larger scheme are cumulative effects of the smaller is itself one of law. This, with respect to Mr Drabble, is in my judgment a mistake. It entails a suggested rule to the effect, broadly, that in any case where it is intended to continue or supplant a limited scheme with a larger one, the effects of the latter are to be treated as the cumulative effects of the former. There is in my judgment nothing in the Regulations nor indeed the Directive to suggest that the European legislature or domestic legislature implementing the Directive contemplated an approach that could be categorised by so rigid a rule. It seems to me that the texts are all consistent with the proposition that what are and what are not indirect, secondary or cumulative effects is a matter of degree and judgment.

31. Relying on R(Goodman) v LB Lewisham [2003] Env.LR 644, paragraph 8, Mr Drabble submitted yesterday that the Secretary of State has to get the legal meaning of "cumulative effects" right. If this is anything more than a statement of the obvious proposition that the meaning of a text is for the court to ascertain, then it is to restate the supposed rule: which, in my judgment, is no rule.

32. I should next point up the fact that some of the principal authorities relied on by the appellant as demonstrating the breadth of the EIA provisions are not about the scope of the EIA to be undertaken in a case where, as here, an Environmental Statement admittedly falls to be made. Rather, they address the question whether an EIA is required at all. They are "screening" rather than "scoping" positions. This is so of Kraaijeveld, Commission v Spain, Ecologistas and also Swale Borough Council ex parte RSPB [1991] 1 PLR 6, to which reference was made in the written argument. It is in this type of case, screening cases, that the courts have been concerned, energetically concerned, to put a stop to the device of using piecemeal applications as a means of excluding larger developments from the discipline of EIA. That approach cannot simply be read across to a case which is not about screening at all, but rather about the appropriate scope of an EIA.

33. At the heart of this case, it seems to me, is the proposition that the issues arising here are not comparable with those that arose in these screening decisions. In a case such as the present as I have indicated, we are dealing with what is quintessentially a matter of judgment, just as Sullivan J (as he then was) held was the case in relation to whether a park and ride scheme was an integral part of a larger scheme: see R(Davies) v SSCLG [2008] EWHC (Admin) 2223. A like question as regards the relation between a specific proposal for a freight distribution centre and the overall proposed development of Carlisle Airport arose in Brown's case to which I have already referred. There, there was an inextricable link between the two by virtue of the effect of an agreement made under section 106 of the Town and Country Planning Act 1990. The deputy judge in our case cited Sullivan LJ's judgment in Brown extensively. For present purposes, it is enough, with respect, to set out the holding from the headnote in the Environmental Law Reports as follows. This is to be found at page 47 of the appeal bundle:

> "It was difficult to see how the commitment in the s.106 agreement to bring forward the "airport works" could, on the one hand have been adequate to ensure that the "development as a whole" could be regarded as policy compliant for the purposes of the Development Plan, but on the other hand, insufficient to make the airport works part of the cumulative effects of the development for the purposes of the EIA Regulations. Whilst submissions had been made that the airport works were 'inchoate', and so were not required to be assessed at that stage, the difficulty was that they had been sufficiently detailed for assessment of the

> economic and other advantages which would result. The grant of planning permission had been unlawful as there had been a failure to comply with reg.3(2) of the 1999 Regulations."

I agree with the observations of the deputy judge distinguishing Brown. At paragraphs 39 and 40 of his judgment (to which I have already referred) he said this:

> "39. There is no doubt that the Brown decision (whilst clearly a scoping case) is distinguishable on its facts, since (paragraph 21) the s.106 Agreement ensured that the Freight Distribution Centre could not lawfully be developed in isolation; it could only be developed if its cumulative effects included the carrying out of the airport works. In other words, the airport works were integral to the permitted development; hence the question (paragraph 25), which had not been addressed, and to which there was only one rational response.
> 40. In the present case, the permitted developments can go ahead irrespective of the future proposals. That was the finding of the Inspector, who said that this was a "stand-alone proposal". It is not in truth one integrated development such as the Carlisle Airport development in Brown..."

Then the deputy judge referred to Ecologistas and Commission v Spain.

34. I should next say a word about the effect of the grant of the present planning permission as a precedent, a "foot in the door": an expression used by Sullivan LJ in Brown: see paragraph 39 of the judgment in that case. It is said it was a foot in the door for the larger intended scheme. As I have shown, the Inspector and the Secretary of State accepted that there would be some precedent effect.

35. The grant of planning permission may, in my judgment, be said to concede the principle of disposing of LLW on this site or adjacent to it, but only to the extent or on the scale allowed by the permission. If the larger application proceeds, the issue of disposal of LLW of the magnitude thereby contemplated will be open and undecided. It will certainly not be foreclosed nor in my judgment prejudiced by the current permission. It seems to me that the Secretary of State was entitled to conclude at paragraph 4 of the decision letter (which I have read) that:

> "There is nothing to support the Council's claim that permission in this case would frustrate the aims of the Environmental Impact Regulations and the Directive."

It is noteworthy that if the larger scheme is in due course applied for, it will as a whole (including that part of it which is in effect the present scheme) be the subject of an EIA; and thereby it seems to me the purpose of the Directive will be fulfilled. In Commission v Spain, the court said this (paragraph 47):

> "...the Directive's fundamental objective is that, before consent is granted, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location should be made subject to a mandatory assessment with regard to their effects."

That is precisely what will happen if the larger scheme is in due course applied for. The third respondent's case to the inquiry moreover included this passage accepted by the Inspector:

> "2.5 The appeal proposal is not piecemeal development or a development which can only properly be considered as part of a larger whole, as alleged in NCC's additional reasons for refusal (a) and (b)... both of which have been rejected in the PINS ruling. It is not inevitably part of a more substantial development. If permitted, the development will be implemented regardless of the outcome of any further planning application. There is no cumulative or in-combination situation that would arise between the two proposals, even if any implementation of a subsequent permission occurred prior to the expiry in 2013 of the one now sought, which seems unlikely. In any event, the subsequent application would require assessment on the full effects of the extension to the landfill area and the extension of time for the already permitted area so that any cumulative effects would be considered then. At present, it is not possible to carry out that exercise."

36. Given all these considerations and for these reasons, I for my part would acquit the Secretary of State of any Wednesbury error in judging that the EIA here need not encompass the third respondent's wider prospective scheme. I do not accept that the Inspector and the Secretary of State made, as is suggested, an impermissible leap from the view that this was a stand-alone project to the conclusion that, therefore, no EIA of the larger scheme was necessary. Account was taken of the relationship between the scheme in hand and the larger scheme; of the relevance of precedent; of the want of detail of the future scheme; of the fact that the current scheme could properly be dealt with on its own merits.

37. If one looks for a meaning of the term "indirect, secondary or cumulative effects", it is perhaps worth emphasising that the grant of a further planning

permission -- here for the larger scheme -- surely cannot of itself be such an effect. The putative "cumulative effects" on Mr Drabble's argument can only be what are the direct effects of the larger scheme itself or perhaps some effect factually arising from the current and larger scheme together. But all such effects would be examined if the larger scheme is gone into.

38. Thus I would not merely acquit the Secretary of State of a Wednesbury error. I consider, so far as the facts of the matter appear to me, that his conclusion was correct.

39. I turn to Ground 2. It is in the circumstances (if my Lords agree with my conclusions on the first ground) strictly unnecessary to embark upon the debate about the appropriate intensity of review. I will deal with it shortly. R(Goodman) v LB Lewisham [2003] EWCA Civ 140, paragraph 9; Jones v Mansfield DC [2004] ELR 391, paragraphs 14 to 15 and R(Blewett) v Derbyshire CC [2003] EWHC Admin 2775, paragraphs 32 and 33, all indicate, as it seems to me, that the conventional Wednesbury approach applies to the court's adjudication of issues such as arise here, if I am right in holding that such issues are a matter of fact and judgment.

40. In R(BugLife) v Medway Council and Ors [2011] EWHC Admin 746, His Honour Judge Thornton QC opined that the courts might visit the question whether European Union law required them to apply a proportionate standard. For my part, I do not see that there is any true question of proportionality arising in the present case. We are not concerned with the exercise of a discretion and therefore we are not concerned with assessing whether a response to a particular aim is or is not proportionate. We are concerned with a fact-finding exercise. There is nothing, as it seems to me, in the jurisprudence of the Court of Justice to show that the conventional English law approach is inapt. Paragraph 48 of Ecologistas perhaps suggests, though I accept it does not state, the contrary. Paragraph 39 of Abraham & Ors, C-2/07, which is a screening not a scoping decision, does not in my judgment assist the appellants. Mr Drabble has relied in a supplementary skeleton argument on other authority of the Court of Justice. However Commission v Germany C-431/92 and Commission v Spain are infringement cases in which the Court of Justice must inevitably make all judgments of fact and law. Kraaijeveld in the circumstances takes the matter no further.

41. I am inclined to accept Mr McCracken's submission for the third respondents that the Court of Justice is of course concerned to see that the law is properly applied in the Member States, but in the present context that is achieved by the Wednesbury standards.

42. In the circumstances, I see no reason, even assuming if it were open to us to do so, to seek to move the law from where it presently stands in this area. This, in any case, would not be the case in which to do so.

43. Lastly at the beginning of his reply this morning Mr Drabble handed in a draft question which he submitted this court should ask the Court of Justice in the event that we are inclined to dismiss the appeal. The draft is quite complex,

containing a series of sub-questions. The possibility of a reference was raised in the appellant's skeleton argument before the High Court. It was in the form at that stage of a single straightforward question. No submissions were made about a reference in this court before Mr Drabble rose to reply. I have to say that I deprecate the invitation to refer being made at so late a stage and in a complex form.

44. The essence of the draft question asks: what is the correct approach to the appreciation of the facts and evidence in a case like the present for the purpose of making good the EIA policy of the Directive? I will not set out the whole text of Mr Drabble's draft, which is of course before us.

45. In my judgment, and for the reasons I have given, the merits issues in this case are for the factual judgment of the Secretary of State whose conclusions upon them, again for the reasons I have given, are not impeachable on any legal ground. In those circumstances, I do not consider that there is any legal issue as regards which this court should seek the assistance of the Court of Justice by way of a reference.

46. As necessary, I would conclude that the proposition that the issues here are matters of fact before the primary decision-maker is sufficiently clear to absolve us of any duty that we might otherwise have owed to make a reference. I would therefore decline to make one.

47. In all these circumstances and for all these reasons, for my part I would dismiss this appeal.

Lord Justice Tomlinson:

48. I agree.

Lord Justice Kitchin:

49. I also agree.

Order: Appeal dismissed