

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
Mr Justice Lightman

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th November 2003

Before:

LORD JUSTICE SIMON BROWN
LORD JUSTICE JUDGE
and
LORD JUSTICE JONATHAN PARKER

Between:

STEVEN EVANS	<u>Appellant</u>
- and -	
(1) FIRST SECRETARY OF STATE AND OTHERS	
(2) THE LONDON METROPOLITAN UNIVERSITY	<u>Respondents</u>
(3) THE LONDON BOROUGH OF ISLINGTON	

Martin Edwards Esq
(instructed by **Alan Edwards & Co**) for the Appellant
Peter Village Esq, QC & James Strachan Esq
(instructed by **Lawfords**) for the Second Respondent

Hearing dates: 23rd October 2003

JUDGMENT

Lord Justice Simon Brown:

1. This is the claimant's appeal by permission of Pill LJ against the order of Lightman J made on 6 March 2003 entering summary judgment for the second defendant, the London Metropolitan University ("the University"), under CPR Part 24. The appellant's claim was by way of statutory application under s288 of the Town & Country Planning Act 1990 ("the Act") seeking to challenge a decision ("the Decision") of an Inspector ("the Inspector") appointed by the first defendant, the First Secretary of State ("the Secretary of State") given by a decision letter dated 8 November 2002 following a six day public inquiry. The Inspector by the Decision allowed the University's appeal against a decision of the third defendant, the London Borough of Islington ("the Council"), as local planning authority and himself granted planning permission for demolition of existing buildings and construction of additional student residential accommodation ("the Development") at Tufnell Park Halls of Residence, Huddleston Road, N7. The statutory challenge is made on the ground that the Inspector acted unlawfully in failing to consider or require an environmental impact assessment ("EIA") of the Development within the meaning of the Town & Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the Regulations").
2. By his judgment Lightman J accepted the University's argument that the challenge is misconceived and bound to fail and that there is no other compelling reason why it should be disposed of at a trial rather than under Part 24.
3. By this appeal the appellant disputes that his challenge is bound to fail and further disputes that a s288 application can properly be the subject of summary judgment under Part 24.
4. With that brief introduction let me next set out the relatively few relevant facts which for the most part I gratefully take from Lightman J's judgment below.
5. The Development involves the proposed demolition of some existing buildings and the construction of an additional hall of residence alongside an existing one to provide urgently required further accommodation for 552 students attending the University. On 29 May 2001, the University applied to the Council, as local planning authority, for planning permission for the Development. By a decision notice dated 24 July 2001 the Council refused that application. The University appealed under section 78 of the Act to the Secretary of State against that refusal. The Secretary of State appointed an Inspector to determine that appeal. Following the filing of the appeal, in exercise of his powers under regulation 9(1) the Secretary of State considered whether the Development was "EIA development" within the meaning of the Regulations and made a screening direction ("the Direction").
6. By letter dated 5 March 2002, the Planning Inspectorate wrote to the Council informing it of the Direction which so far as material provided:

“The development proposed, namely demolition of some existing buildings and construction of additional student residential accommodation, falls within the description at paragraph 10b of Schedule 2 to the 1999 Regulations, and exceeds the threshold in column 2 of the table in that schedule, but in [the] opinion of the Secretary of State, having taken into account the criteria in Schedule 3 to the 1999 Regulations, would not be likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

Accordingly, in exercise of the powers conferred on him by regulations 9(1) and 6(4) of the 1999 Regulations, the Secretary of State hereby directs that the development for which planning permission is sought by application reference number P011089 is not EIA development.”

7. Following the Direction, the Inspector appointed by the Secretary of State to determine the University’s appeal held a public inquiry which sat for six days on 4 and 5 July, 30 September and 1, 2 and 18 October 2002. Both the University and the Council were represented by planning counsel and called a number of expert witnesses to deal with the issues raised by the appeal. In addition, the Inspector heard evidence and representations from a number of local residents and interested persons, including the appellant. Neither during the course of the public inquiry, nor before or after it, did the appellant (or any other person) seek to suggest that the Development should be the subject of an EIA under the Regulations or that the Inspector should give consideration to this issue.
8. By his decision letter of 8 November 2002, the Inspector rejected objections of the appellant and the Council and granted planning permission for the Development. In the course of his letter the Inspector stated:

“Taking account of all these matters, especially the design, size, scale and external appearance of the proposed building, I conclude that although it would have a significant effect on the character and appearance of the surrounding area, this would not be an adverse impact. I further conclude the proposed development would not therefore conflict with the purposes of the relevant parts of Policies H12, H19, Ed 9, D1, D3, D4 and D5.” (paragraph 39)

That conclusion was effectively repeated later in the letter as follows:

“I have concluded that, although the proposed building would be both large and visible and it would have a significant effect on the character and appearance of its immediate surroundings by reason of its design, size, scale and external appearance, I do not believe this would be an adverse impact.” (paragraph 70)

9. Save for the challenge advanced by this appellant there has been no challenge to the Inspector's decision pursuant to section 288 of the Act. Likewise there has been no challenge to the Secretary of State's Direction.
10. I come next to the Regulations which again were helpfully set out in the judgment below substantially as follows:
11. Article 2(1) of Directive 85/337/EEC states:

“Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.”
12. The Regulations gave effect to the Directive. The core obligation imposed on Member States by the Directive is given effect by regulation 3(2) which, with regulation 3(1), provides:

“Prohibition on granting planning permission without consideration of environment information

 - (1) This regulation applies
 - (a) to every EIA application received by the authority with whom it is lodged on or after the commencement of these Regulations; and ...
 - (2) The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so.”
13. In a word, the prohibition contained in regulation 3(2) applies to every EIA application lodged after the commencement of the Regulations. Accordingly planning permission cannot be granted pursuant to an “EIA application” (the application to which the regulation applies) unless the required EIA assessment has been carried out. The term “EIA application” is defined in regulation 2 as an application for planning permission for “EIA development”, and “EIA development” is defined (so far as material) as development which is either “a Schedule 1 application or is a Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location”. The term “Schedule 2 development” is likewise defined. It is sufficient to say that it is common ground that the Development is a Schedule 2 development.

14. Regulation 4, which makes general provisions relating to screening, so far as material provides:

“(3) A direction of the Secretary of State shall determine for the purpose of these Regulations whether development is or is not EIA development.

...

(5) Where a local planning authority or the Secretary of State has to decide under these Regulations whether Schedule 2 development is EIA development the authority or Secretary of State shall take into account in making that decision such of the selection criteria set out in Schedule 3 as are relevant to the development.

...

(7) The Secretary of State may make a screening direction irrespective of whether he has received a request to do so.”

The term “screening direction” is defined in regulation 2 as “a direction made by the Secretary of State as to whether development is EIA development”.

15. Regulation 6(4) provides that the Secretary of State on the request of a person minded to carry out development shall make a screening direction. Regulation 9(1) provides that on consideration of an appeal against a refusal to grant planning permission, if it appears to the Secretary of State that (a) the relevant application is a Schedule 1 or Schedule 2 application, (b) the development in question has not been the subject of a screening opinion or screening direction, and (c) the relevant application is not accompanied by an “environmental statement” (all three of which conditions were satisfied in this case), the Secretary of State shall make a screening direction under regulation 6(4) as though the request required under that regulation had been made. It was pursuant to regulation 9(1) that the Secretary of State made the Direction.

16. Regulation 9(2) provides:

“Where an inspector is dealing with an appeal and a question arises as to whether the relevant application is an EIA application and it appears to the inspector that it may be such an application, the inspector shall refer that question to the Secretary of State and shall not determine the appeal, except by refusing planning permission, before he receives a screening direction.”

17. Against that factual and legislative background I turn now to consider the appellant’s argument on the substantive challenge. At its heart lies the proposition that the

Secretary of State's Direction is inconsistent with the conclusions reached by the Inspector at the end of his six day inquiry. The Secretary of State's opinion was that the Development "would not be likely to have significant effects on the environment by virtue of factors such as its nature, size or location" (see paragraph 6 above). The Inspector's conclusion, however, was that "taking account of all ... matters, especially the design, size, scale and external appearance of the proposed building, ... it would have a significant effect on the character and appearance of the surrounding area" or, as he put it later in the decision letter, "the proposed building would be both large and visible and it would have a significant effect on the character and appearance of its immediate surroundings by reason of its design, size, scale and external appearance" (see paragraph 8 above). (The fact that the Inspector also concluded that "this would not be an adverse impact" is, as Mr Edwards rightly observed, nothing to the point: a Schedule 2 development which is "likely to have significant effects on the environment by virtues of factors such as its nature, size or location" is an EIA development irrespective of whether those effects are thought to be adverse or beneficial.) The respective views, submits Mr Edwards, are irreconcilable. That is the necessary first part of his argument and, Mr Edwards concedes, unless it succeeds, the challenge as a whole must fail.

18. The second part of the argument is that, assuming the first part succeeds, ie assuming the Inspector's view to be, contrary to the Direction, that the Development ought properly to be characterised as an EIA development, then the Inspector cannot lawfully grant planning permission on the appeal. Rather he must invite the Secretary of State to reconsider his direction.
19. In my judgment the argument falls at the first hurdle. The judgments being made respectively by the Secretary of State in deciding what screening direction to give and by the Inspector in deciding the planning appeal are quite different. The Inspector was not making or purporting to make an assessment of the development for the purposes of the Regulations and, in particular, was not having regard to the selection criteria set out in Schedule 3 to the Regulations. His concern was rather with the planning merits of the application which necessarily had regard to the impact of the development on particular aspects of the character and appearance of the area. The Inspector did not find that the Development would have significant effects on the environment within the meaning of the Regulations. Indeed, he never had to address that question. The Secretary of State by contrast *did* have to; he was required, moreover, by regulation 4(5) to take into account "such of the selection criteria set out in Schedule 3 as are relevant to the development" (see paragraph 14 above). Superficially, I acknowledge, the Secretary of State's Direction and the Inspector's conclusions as expressed in the decision letter appear to sit uneasily together. On closer analysis, however, they are perfectly compatible.
20. When I said in the previous paragraph that the Inspector was not making an assessment of the Development for the purposes of the Regulations, I was expressing the effect of regulation 4(3), a provision central to the arguments advanced on this appeal which for convenience I now repeat:

- “(3) A direction of the Secretary of State shall determine for the purpose of these Regulations whether development is or is not EIA development.”

The Secretary of State’s Direction is decisive, unless and until he himself cancels or varies it, of whether the Development is or is not EIA development. The Inspector was in these circumstances inhibited neither by regulation 3(2) nor by regulation 9(2): not regulation 3(2) because that concerns only “an application to which this regulation [regulation 3] applies” and regulation 3 applies only to EIA applications (defined by regulation 2 as applications for EIA development) which the Secretary of State’s Direction has determined “for the purpose of these Regulations” the Development is not; not regulation 9(2) because no question could arise on the appeal to the Inspector as to whether the application was an EIA application because, again, the Secretary of State’s Direction had already determined it was not.

21. Although, however, as stated, the appellant’s argument on the present appeal fails *in limine* it is, I think, useful nevertheless to consider just what, if anything, the Inspector should do if, in the course of the appeal, he finds himself seriously doubting the correctness of the Secretary of State’s screening direction. As already indicated, such doubts cannot operate to trigger the inhibitions which, but for a direction, would arise under regulations 3(2) and 9(2). Mr Edwards submissions to the contrary were quite simply unarguable. But it is common ground that a direction can be cancelled or varied and, indeed, paragraph 66 of the Department’s Circular No 2/99: Environmental Impact Assessment expressly states that: “It is possible for the Secretary of State to cancel or vary an earlier direction if he has grounds for doing so”.
22. Lightman J below was clearly right, therefore, to observe in paragraph 18 of his judgment:
- “That [the cancellation or variation of an earlier direction if he has grounds for doing so] is an option open to the Secretary of State at any time before the grant of planning permission and an option which he is duty bound to have in mind and of which it is open to an Inspector to remind him.”
23. In what circumstances, however, *should* an Inspector invite the Secretary of State to reconsider his screening direction with a view to his deciding that the application is after all one for EIA development so that all the necessary procedures with regard to environmental assessment must now be undertaken?
24. Clearly the Inspector ought not to invite such reconsideration merely because, on essentially the same facts, he finds himself in disagreement with the Secretary of State. He must recognise that there is often room for two views in making judgments of this nature and that the Regulations accord the final responsibility to the Secretary of State. If, however, the Inspector were to discover during the course of the appeal process that the Secretary of State had proceeded under some important misapprehension as to the nature of the proposed development or the assumptions

underlying it, or if other material facts came to light which appeared to invalidate the basis of the Secretary of State's direction, then he might well think it appropriate to invite reconsideration of the matter. This, however, would be expected to happen only very exceptionally and only if the Inspector thought that there was at the very least a realistic prospect of the Secretary of State now coming to a different conclusion. It should be recognised, moreover, that the Inspector is under no express duty to refer the matter back to the Secretary of State and, indeed, has no express power to do so. The Regulations are silent on the point. In any given case, therefore, his decision on whether or not to refer the matter back to the Secretary of State would fall to be judged solely by the touchstone of rationality. If, as here, no one even asked him to consider referring the matter back, it is difficult to see how his omission to do so could be adjudged irrational. In any event, nothing came to light at the inquiry before the Inspector here such as to invalidate the basis of the Secretary of State's Direction.

25. For these reasons - which are essentially no different from those to be found in the admirable judgment below - the appellant's s288 application here was always doomed to fail. Nor was there any other compelling reason why the case should be disposed of at a trial. On the contrary, as Lightman J pointed out:

“... there is a compelling reason for a determination at this stage of the litigation so that the Development can be allowed to proceed at the earliest available date and the urgent need for accommodation intended to be provided by the Development can be satisfied as soon as possible.”

26. Why, then, should summary judgment not be given under CPR Part 24?
27. Mr Edwards does not submit that on the true construction of the Rules Part 24 does not apply to applications under s288 of the Act. Indeed, it plainly does - see Part 24.3(1). What he seeks to argue is rather that the use of Part 24 “is, in effect, introducing a permission stage into a s288 challenge” (I quote his skeleton argument). The argument is in my judgment plainly hopeless. Indeed, were it correct it would apply no less to all other proceedings (including ordinary civil claims) which are brought without the need for preliminary permission. Such other arguments as Mr Edwards adduced on this issue were even less respectable.
28. I can state my conclusion thus. If ever there were a case for exercising the Part 24 power to bring a speedy end to a misconceived (if not positively mischievous) application this was it.
29. We dismissed this appeal at the conclusion of the short oral hearing on 23 October 2003. These are my reasons for having done so.

Lord Justice Judge:

30. I agree.

Lord Justice Jonathan Parker:

31. I also agree.