

Case No: C1/2011/2222

Neutral Citation Number: [2012] EWCA Civ 869
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HON. MR. JUSTICE LLOYD JONES
[2011] EWHC 2010 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2012

Before :

LORD JUSTICE PILL
LORD JUSTICE TOULSON
and
LORD JUSTICE SULLIVAN

Between :

The Queen on the application of Loader **Appellant**
- and -
Secretary of State for Communities and Local Government **Respondent**
& Ors

Mr James Pereira (instructed by **Richard Buxton Environmental & Public Law solicitors**)
for the **Appellant**
Mr James Maurici (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing date : 23 May 2012

Judgment

Lord Justice Pill :

1. This is an appeal against a judgment of Lloyd Jones J dated 28 July 2011 whereby he refused an application by Ms Anne-Marie Loader (“the appellant”) to quash a decision of the Secretary of State for Communities and Local Government (“the Secretary of State”). On 7 July 2009, the Secretary of State gave a screening direction by which he stated that a development proposed by Churchill Retirement Living Ltd (the Second Interested Party) was not likely to have “significant effects on the environment” for the purposes of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (“the 1999 Regulations”). It followed that the proposed development was not an Environmental Impact Assessment (“EIA”) development and did not require the procedure under the 1999 Regulations to be followed before a planning permission could be granted.
2. Permission to appeal was granted, on a renewed oral application, by Richards LJ who stated that “there is a compelling reason for an appeal to be heard in relation to it.” “The issue is one of sufficient importance to merit an authoritative and fully reasoned ruling by this court”.

The facts

3. The screening direction related to the proposed redevelopment of a site at Gulliver's Bowls Club, Knole Road, Bexhill-on-Sea to form 41 sheltered apartments for the elderly, car parking, landscape and access and a new outdoor bowls green, indoor rink, club facilities and car parking. The appellant’s standing to make the application for judicial review has not been challenged.
4. Planning permission was first sought in August 2006 and was refused by Rother District Council (“the Council”) on 12 October 2006. An appeal to the Secretary of State was allowed but the grant of permission was quashed by consent on 10 June 2008 for agreed failure to follow the procedure under the 1999 Regulations. On remittal to the Secretary of State, the screening direction now challenged was made. It determined that:

“The development proposed, namely re-development of the site to form 41 sheltered apartments for the elderly, car parking, landscape and access and new outdoor bowls green, indoor rink, club facilities and car parking, falls within the description at paragraph 10(b) 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 effect on the environment by virtue of facts such as its nature, size or location. Accordingly, in exercise of the powers conferred on her by reg.s 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 RR/2006/2226/P is not EIA development.”

5. Reasons for the decision, which was made by the Planning Inspectorate (“the Inspectorate”) on behalf of the Secretary of State, were provided on 4 August 2009. (No attempt has been made to distinguish the role of the Inspectorate from that of the Secretary of State.) The reasons were:

“The appeal is for a re-development to form 41 sheltered apartments for the elderly, car parking, landscape and access and new outdoor bowls green, indoor rink, club facilities and car parking. The development falls under the description at paragraph 10(b) of schedule 2 to the 1999 Regulations – Urban development projects. This includes the construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas.

The site is not within an approved Green Belt or AONB, nor is it in or adjacent to or likely to affect an SSSI, and no protected species are affected, however as the site area is 0.7 hectares the development exceeds the applicable thresholds and criteria guidance given in column 2 of the table in that schedule of being over 0.5ha, and so requires EIA screening.

The guidance given in the indicative criteria/thresholds in schedule 3 to the 1999 Regulations, is that in addition to the physical scale of such developments, particular consideration should be given to the potential increase in traffic, emissions, and noise. EIA is unlikely to be required for the development of land unless the new development is on a significantly greater scale than the previous use, or the types of impact are of a markedly different nature or there is a high level of contamination.

Developments proposed for sites which have not previously been intensively developed are more likely to require EIA if;

The site of the scheme is more than 5 hectares; or

They would provide a total of more than 10,000m² of new commercial floor space; or

The development would have significant urbanising effects in a previously non-urbanised area. (e.g. a new development of more than 1,000 dwellings).

The current use of the site is as a bowls club and so the land has already been developed, and use as a bowling club already established.

The site is 0.7 hectares and well under the guidance given of EIA being required for land which has not previously been intensively developed (over 5ha). The residential part of the development is for 41 apartments. This again is below the

guidelines given (a new development of more than 1,000 dwellings). The land is not in a sensitive area, nor does it affect a European site as given within the meaning of reg. 10 of the Conservation (Natural Habitats etc.) Regulations. So any impacts would be of a local nature only.

In conclusion this re-development would not have significant effects on the environment considering the size, nature and location of the development.”

6. Following further representations both by the appellant and by the second interested party, the Secretary of State, by letter of 24 September 2009, confirmed the decision. On receipt of a pre-action protocol letter from the appellant’s solicitors, the Secretary of State provided a copy of a screening checklist dated 12 September 2009 completed on behalf of the Secretary of State. It was said that the check list was in the format approved by the EU Commission.

The Environmental Impact Assessment framework

7. For the appellant, Mr Pereira referred to the EU Environmental Impact Assessment Directive (85/337/EEC) as amended (“the Directive”), transposed into domestic law by the 1999 Regulations. Both the Directive and the 1999 Regulations have now been replaced but the changes are not said by either party to be material for present purposes. It was submitted that the Secretary of State had misdirected himself in law as to the meaning of “significant effects on the environment” in article 2(1) of the Directive and in regulation 2.

8. The purpose of the procedure is described in one of the recitals to the Directive:

“Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; whereas this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question.”

9. A screening direction is defined in Regulation 2(1) of the 1999 Regulations as “a direction made by the Secretary of State as to whether development is EIA development”. (Regulation 2 provides that the decision of the Secretary of State as to whether development is EIA development is a “Screening Direction”; the written statement of the opinion of the relevant planning authority, normally the local planning authority, is known as a “Screening Opinion”).

10. Under the heading “Environment”, article 191(2) of the Treaty on the Functioning of the European Union provides:

“Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the

precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”

11. Article 2.1 of the Directive provides:

“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. Those projects are defined in Article 4.”

12. Article 4 provides:

“1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination;

or

(b) thresholds or criteria set by the Member State

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.”

13. Annex I includes a range of projects entirely different in nature and scale from the present proposal. Annex II also sets out a range of projects which includes, under the heading “Infrastructure Projects”, at paragraph 10:

“Urban development projects, including the construction of shopping centres and car parks.”

It is accepted that the present planning proposal comes within that definition.

14. The selection criteria referred to in article 4.3, as set out in Annex III, are “Characteristics of projects”, “location of projects” and “characteristics of the potential impact”. Under the third heading, the most relevant for present purposes, it is stated:

“The potential significant effects of projects must be considered in relation to criteria set out in points 1 and 2 above, and having regard in particular to:

- the extent of the impact (geographical area and size of the affected population);
- the transfrontier nature of the impact;
- the magnitude and complexity of the impact;
- the probability of the impact;
- the duration, frequency and reversibility of the impact.”

15. Reference was also made to Directive 2011/92/EU of 13 December 2011 which is a Codification Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment. It does not apply in the present case because it had not taken effect but reference was made to the reaffirmation of the precautionary principle in recital 2. Recital 11 provides:

“When setting such thresholds or criteria or examining projects on a case-by-case basis, for the purpose of determining which projects should be subject to assessment on the basis of their significant environmental effects, Member States should take account of the relevant selection criteria set out in this Directive. In accordance with the subsidiarity principle, the Member States are in the best position to apply those criteria in specific instances.”

16. The 1999 Regulations reflect the contents of the Directive. Regulation 2 defines “EIA development” as development which is either:

“(a) Schedule 1 development; or

(b) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location.”

Schedules 1 and 2 in substance reproduce Annexes I and II of the Directive. The development proposed in this case is schedule 2 development as an urban development project, as stated in the Inspectorate’s reasons for decision.

17. Circular 02/99 Environmental Impact Assessment gives guidance on the application of the Directive and Regulations. It provides:

“33. . . . In the light of these [the selection criteria], the Secretary of State's view is that, in general, EIA will be needed for Schedule 2 developments in three main types of case:

- a. for major developments which are of more than local importance (paragraph 35);
- b. for developments which are proposed for particularly environmentally sensitive or vulnerable locations (paragraphs 36-40); and
- c. for developments with unusually complex and potentially hazardous environmental effects (paragraphs 41-42).

34. The number of cases of such development will be a very small proportion of the total number of Schedule 2 developments. It is emphasised that the basic test of the need for EIA in a particular case is the likelihood of significant effects on the environment. It should not be assumed, for example, that conformity with a development plan rules out the need for EIA. Nor is the amount of opposition or controversy to which a development gives rise relevant to this determination, unless the substance of opponents' arguments reveals that there are likely to be significant effects on the environment.”

18. Annex A to the Circular provides, in relation to urban development projects:

“A18. In addition to the physical scale of such developments, particular consideration should be given to the potential increase in traffic, emissions and noise. EIA is unlikely to be required for the redevelopment of land unless the new development is on a significantly greater scale than the previous use, or the types of impact are of a markedly different nature or there is a high level of contamination (paragraph 41).

A19. Development proposed for sites which have not previously been intensively developed are more likely to require EIA if:

- the site area of the scheme is more than 5 hectares; or
- it would provide a total of more than 10,000 m² of new commercial floorspace; or
- the development would have significant urbanising effects in a previously non-urbanised area (e.g. a new development of more than 1,000 dwellings).”

The Circular does recognise that “the more environmentally sensitive the location, the lower will be the threshold at which significant effects will be likely”. The

information to be included in an Environmental Statement is described in articles 5 to 10 of the Directive and schedule 4 of the Regulations.

19. In June 2001, the Commission issued Guidance on EIA Screening. That provides, at B4.1, checklists:

“To help EIA participants apply [Annex III] criteria in case-by-case screening, two checklists have been prepared to support and help the process of deciding whether or not a project is likely to have significant effects on the environment.”

In making its screening decision, the Inspectorate used the relevant checklist. In relation to the checklists, the Guidance provides, at B3.4.1:

“These are intended to be of assistance where there is no Member State guidance or where the need for EIA is still not clear. They are designed to help answer the question “Is this project likely to have significant effects on the environment?”

It is important to emphasise that use of these tools is not intended to require special studies. The tools are intended to be used quickly by people with the qualifications and experience typically found in competent authorities, and using the information which is readily available about the project and its environment.”

20. I do not propose to list the questions in the checklist. They are appropriate to the judgment to be exercised and are prefaced by these instructions:

“The Screening Checklist provides a list of questions to help identify where there is the potential for interactions between a project and its environment. This checklist is designed to help decide whether those interactions - effects - are likely to be significant.

Those responsible for making screening decisions often find difficulties in defining what is “significant”. A useful simple check is to ask whether the effect is one that ought to be considered and to have an influence on the development consent decision. At the early stage of Screening there is likely to be little information on which to base this decision but the following list of questions may be helpful.”

Submissions and discussion

21. On behalf of the appellant, Mr Pereira submitted that a significant environmental effect, as defined in the Directive, is one that has a real prospect of influencing the outcome of the application for development consent. The expression must be given an autonomous meaning which has regard to its context and the purpose of the Directive. Underlying the procedure is the purpose of achieving a high level of environmental protection through the precautionary and preventative principles.

22. The procedure provided by the 1999 Regulations contemplates the adoption by the relevant planning authority of a screening opinion at an early stage of the application process (regulations 5 and 7). Because the screening decision is normally (though not in this case) taken at an early stage of the application process, it will often be based on limited information. The uncertainties at that stage are such that a broad construction must be given to the expression “significant effects”. The requirement for environmental assessment is not confined to applications which are likely to have major environmental effects.
23. The test is consistent, it was submitted, with the approach advised in the Commission’s Guidance on EIA Screening which provides a Screening Checklist and states (paragraph 20 above) that when considering what is “significant”, “a useful simple check is to ask whether the effect is one that ought to be considered and to have an influence on the development consent decision”. Trivial environmental impacts would not do so. The application of the precautionary principle means that unless the decision-maker can exclude on the basis of objective evidence any real possibility of the effects being significant, an EIA is required. In a case such as the present, the real possibility of impacts being found at a later stage having significant effects could not be ruled out at the screening stage. Unacceptably adverse effects have already been identified in the council’s reasons for refusing planning permission.
24. Mr Pereira accepted that the test he proposed was at odds with language used in the domestic authorities but submitted that the courts had wrongfully failed to consider the effect of the precautionary principle. Reliance was placed on the decision of the Grand Chamber in *Waddenzee* (Case C-127/02) [2004] ECR I-7405, a decision under the Habitats Directive (92/43/EEC) of 21 May 1992. The court stated, at paragraph 44:

“In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, inter alia Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, paragraphs 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.”

25. The correct test, submitted Mr Maurici on behalf of the Secretary of State, is that specified in regulation 2: Is the development likely to have significant effects on the environment?

26. He accepted that the expression “is likely to have” in the Directive and Regulations means no more than that there is a serious possibility of it happening. In *R (Bateman) v South Cambridgeshire DC* [2011] EWCA Civ 157, Moore-Bick LJ, with whom Jackson LJ agreed, stated, at paragraph 17:

“In my view something more than a bare possibility is probably required, though any serious possibility would suffice.”

27. In *R (Morge) v Hampshire County Council* [2010] EWCA Civ 608, Ward LJ, with whom Hughes LJ and Patten LJ agreed, stated, at paragraph 80, that:

“‘likely’ connotes real risk and not probability.”

28. The test and approach to be applied were stated in *Jones v Mansfield* [2004] Env LR 21. At paragraph 17, Dyson LJ stated:

“Whether a proposed development is likely to have significant effects on the environment involves an exercise of judgment or opinion.”

29. At paragraph 38, Dyson LJ stated:

“But the question whether a project is likely to have significant effect on the environment is one of degree which calls for the exercise of judgment. Thus, remedial measures contemplated by conditions and/or undertakings can be taken into account to a certain extent (see *Gillespie*). The effect on the environment must be “significant”. Significance in this context is not a hard-edged concept: as I have said, the assessment of what is significant involves the exercise of judgment.”

Carnwath LJ stated, at paragraph 61:

“Furthermore, the word ‘significant’ does not lay down a precise legal test. It requires the exercise of judgment, on technical or other planning grounds, and consistency in the exercise of that judgment in different cases. That is a function for which the courts are ill-equipped but which is well-suited to the familiar role of planning authorities, under the guidance of the Secretary of State.”

30. As Laws LJ, with whom Tomlinson LJ and Kitchin LJ agreed, stated in *R (Bowen-West) v Secretary of State* [2010] EWCA Civ 321, at paragraph 33:

“. . . we are dealing with what is quintessentially a matter of judgment.”

Laws LJ rejected a submission, based on the judgment of Judge Thornton QC in *R (BugLife) v Medway Council and Ors* [2011] EWHC Admin 746 that a proportionate standard should be applied. Laws LJ stated, at paragraph 40:

“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.”

31. There is ample authority that the conventional *Wednesbury* approach applies to the court’s adjudication of issues such as these (*Jones*, paragraphs 14, 15, 17 and 60 and *Bowen-West*, paragraph 39). Mr Pereira accepted that, provided the correct test is applied, the court should approach a challenge to the decision on *Wednesbury* principles.
32. Mr Maurici submitted that the appellant’s reliance on the single sentence in the Commission Guidance, set out at paragraph 20 above, is misplaced. In *Bateman* the test said to emerge from that sentence was rejected, in obiter observations, by Moore-Bick LJ, with whom Jackson LJ agreed. He stated, at paragraph 19:

“For my own part, I do not think that one should attempt to place too rigid an interpretation on the word "significant" in this context, but the main difficulty I have with this part of Mr. Drabble's argument is that, if his submission[s] are both correct, an EIA would be required in virtually all cases in which a development might possibly have some effect on the environment, which does not seem to me to be what the directive intended. However, for reasons which will become apparent it is not necessary to reach a final decision on either of these questions in the present case. I would therefore prefer not to place a gloss of my own on the words used in the Regulations and leave it to planning authorities to decide on a case by case basis whether the development under consideration is likely to have a significant effect on the environment, as that expression is to be understood in the light of the developing case law of the European Court.”

33. Counsel submitted that the test advocated by the appellant was not appropriate to the implementation of the purpose of the Directive and the Regulations. Assessment of the impact of an environmental consideration on a particular planning decision poses a different question from assessing whether the same consideration is likely to have significant effects on the environment. Almost any planning application contested on environmental grounds would require an EIA, an approach inconsistent with the purpose of the legislation as expressed in the annexes and schedules and with the guidance in the Circular. The elaboration involved in the case of an EIA application involves, for example, wide consultation, as spelt out in paragraphs 97 to 99 of Circular 02/99, and a much longer time limit for the determination of applications (paragraph 107). Such elaboration could not sensibly be appropriate in every case

where an environmental objection which might influence the decision on planning consent is raised.

34. Mr Maurici relied on the judgment of the ECJ in *Commission v United Kingdom* [2007] Env LR 1. The case involved the large-scale White City Development Project which included about 58,000 square metres of retail and leisure development, a major new road junction and 4,500 car parking spaces. It had been decided that an EIA was not required. The Court found against the Government on the basis that it had been decided that an environmental assessment was required only at the initial stage of granting permission for that major development and not at the later reserved matters stage. However, the Court also held, at paragraph 89, that article 4(2) of the Directive gave the competent authority a degree of freedom in appraising whether or not a particular project must be made subject to an assessment.
35. At paragraph 91, the Court considered evidential requirements where a screening decision was challenged. In order to demonstrate that the national authority exceeded the limits of their discretion, “the Commission must furnish at least some evidence of the effects that the project is likely to have on the environment.” The Court added, at paragraph 92:

“In the present case, it is clear that the Commission did not satisfy the burden of proof placed upon it. It cannot merely rely on presumptions that large-scale projects are automatically likely to have significant effects on the environment without establishing, on the basis of at least some specific evidence, that the competent authorities made a manifest error of assessment.”
36. Mr Pereira fairly made the point that there is no such lack of evidence in the present case. It is provided by the council’s reasons for refusal and evidence in support. The test of ‘manifest error of assessment’ expressed in that paragraph does, however, confirm the ‘degree of freedom’ provided by paragraph 89. The limits of “that discretion are to be found in the obligation, set out in article 2(1) of the directive, that all projects which are likely to have significant effects on the environment are to be subject to an assessment.”
37. In relation to *Waddenzee*, Mr Maurici drew attention to the different wording of the Habitats Directive as compared with the Directive. In article 6, the Habitats Directive is concerned with a project “likely to have a significant effect” on the management of a particular protected site and its effect on the “integrity of the site concerned”. That site-specific test is different from the general test in the Directive. Moreover, *Waddenzee* does not detract from the principle that assessment is a matter for the relevant national authorities.
38. In *R (Hart DC) v Secretary of State* [2008] 2 P & CR 16, Sullivan J considered the effect of the Habitats Directive. He stated, at paragraph 72:

“The underlying principle to be derived both from the *Waddenzee* judgment and the domestic authorities referred to above (*Gillespie* and *Catt*) [cited below] is that, as with the EIA Directive, the provisions in the Habitats Directive are intended

to be an aid to effective environmental decision making, not a legal obstacle course.”

39. The Commission Guidance underlines the role of guidance provided by Member States and describes the “useful tools” presented by way of checklists as “designed to help answer the question ‘Is this project likely to have significant effects on the environment?’”.
40. Mr Maurici accepted that screening decisions will usually be made at an early stage of the planning process. However, if a council came to the belief during the course of making the decision that the proposed development might have significant effects on the environment, it would be open to the council to require an environmental statement at that stage (*R (Mageean) v Secretary of State* [2012] Env LR 3, per Sullivan LJ).
41. In *Gillespie v First Secretary of State* [2003] Env LR 30, cited in *Jones* and in *Hart DC*, the question was whether proposed mitigation measures could be taken into account when assessing the effects of a development on the environment. It was held, at paragraphs 36 and 37, that the decision maker must “examine the actual characteristics of the particular project” and consider whether the uncertainties present are such that their favourable implementation can or cannot be assumed when the screening opinion is formed.
42. In *Jones*, Dyson LJ, having referred to *Gillespie*, stated, at paragraph 39:

“ . . . the uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effect. It is possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further surveys are to be undertaken. Everything depends on the circumstances of the individual case.”

(See also *R (Catt v Brighton and Hove CC* [2007] EWCA Civ 298) paragraphs 33 to 37. “An assessment, which almost invariably involves an element of prediction, is required as to the effect of the particular proposal on the environment and a planning judgment made” (paragraph 34).)

Conclusions

43. What emerges is that the test to be applied is:

“Is this project likely to have significant effects on the environment?”

That is clear from European and national authority, including the Commission Guidance at B3.4.1. The criteria to be applied are set out in the Regulations and judgment is to be exercised by planning authorities focusing on the circumstances of the particular case. The Commission Guidance recognises the value of national guidance and planning authorities have a degree of freedom in appraising whether or

not a particular project must be made subject to an assessment. Only if there is a manifest error of assessment will the ECJ intervene (*Commission v UK*).

The decision maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental impact, at the date of the decision. Depending on the information available, the decision maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot be taken. Subject to that, proposals for ameliorative or remedial measures may be taken into account by the decision maker.

44. The criteria in the annexes to the Regulations justify the approach to the question proposed in Circular 02/99, paragraphs 33, 34 and annex A (cited at paragraphs 17 and 18 above). It is stated, at paragraph 34, that the number of cases of schedule 2 development which are EIA developments will be “a very small proportion of the total number of schedule 2 developments”.
45. I do not consider that the reference in the Commission Guidance to a “useful simple check” (paragraph 20 above) can lead to a conclusion that the test proposed by the appellant is appropriate. Whether the perceived environmental effect has an influence on the development consent decision is a relevant consideration but cannot in itself answer the question to be posed. The sentence in the Guidance relied on also requires the decision maker to ask “whether the effect is one that ought to be considered”, an affirmation of the need to answer the question “is this project likely to have significant effects on the environment” posed at B3.4.1 of the Guidance. The purpose of the checklist is stated to be to help decide whether the effects are likely to be significant. Establishing that the environmental effect will influence a particular development consent decision may well be a necessary requirement for a decision that development is EIA development but it is not determinative of whether the effects are likely to be significant and “ought to be considered”.
46. The proposed test does not accord with the overall purpose and tenor of the procedure initiated by the Directive. A formal and substantial procedure is contemplated, potentially involving considerable time and resources. It is contemplated for a limited range of schedule 2 projects, those which are likely to have significant effects on the environment. To require it to be followed in all cases where the effect would influence the development consent decision would devalue the entire concept. It is not contemplated, for example, that if the Secretary of State took the view that a proposed house extension might affect the amenity of a neighbour on environmental grounds, and do so decisively, it would for that reason necessarily be EIA development. I agree with the approach of Moore-Bick LJ in *Bateman* and with the judge.
47. Applying that approach to the present facts, I have no doubt that the Inspectorate was entitled to conclude that the proposed redevelopment would not have significant effects on the environment. A checklist was completed and no complaint is made about its contents. Judgment was exercised and reasons given for the decision, cited at paragraph 5 above, which justify the conclusion reached. It may be added that the application for planning permission in this case did not involve the uncertainties which have presented difficulties of analysis in some of the cases considered. Moreover, judgment was exercised, not at the early stage of the procedure when such

decisions are often made, but after full consideration of the planning issues by the local planning authority and also by an Inspector appointed by the Secretary of State. Full information as to the nature of the proposal and its likely effects was available.

48. I would dismiss this appeal.

Lord Justice Toulson :

49. I agree.

Lord Justice Sullivan :

50. I also agree.