Neutral Citation Number: [2021] EWCA Civ 1954

Case No: C1/2021/0207

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(DIVISIONAL COURT)
LORD JUSTICE LEWIS AND MR JUSTICE HOLGATE
[2020] EWHC 3073 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2021

Before:

SIR KEITH LINDBLOM
(SENIOR PRESIDENT OF TRIBUNALS)
LORD JUSTICE COULSON
and
LORD JUSTICE BIRSS

- -

Between:

The Queen (on the application of Rights: Community: Action)	**Applicant**
– and –	
The Secretary of State for Housing, Communities and Local Government	**Respondent**

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Mr Paul Brown Q.C. and **Mr Alex Shattock** (instructed by **Leigh Day**) for the **Applicant**
Mr Rupert Warren Q.C. and **Ms Anjoli Foster** (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing date: 5 October 2021

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Approved Judgment

"Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down was deemed not before 2pm on Monday 20 December 2021"

The Senior President of Tribunals

Introduction

1. Was it lawful for the Secretary of State for Housing, Communities and Local Government, the respondent here, to reform the planning legislation in England by making statutory instruments to adjust "permitted development" rights and to remove certain changes of use from the scope of development control, without undertaking a strategic environmental assessment under Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive") and the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA regulations")? That is the basic question in this case. The answer to it, in my view, is that the Secretary of State did not act unlawfully.

2. The applicant, Rights: Community: Action, seeks permission to appeal against the order of the Divisional Court (Lewis L.J. and Holgate J.) dated 17 November 2020, dismissing its claim for judicial review of three statutory instruments made by the Secretary of State on 20 July 2020. The statutory instruments are the Town and Country Planning (General Permitted Development) (England) (Amendment) (No.2) Order 2020 ("S.I. 2020/755"), the Town and Country Planning (General Permitted Development) (England) (Amendment) (No.3) Order 2020 ("S.I. 2020/756") and the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 ("S.I. 2020/757"). Rights: Community: Action is a campaigning organisation; it seeks to influence the Government's approach to climate change and other environmental issues.

3. S.I. 2020/755 and S.I. 2020/756 came into force on 31 August 2020. They amended the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO"): S.I. 2020/755 by permitting development involving the construction of one or two additional storeys above a single dwelling-house, or above a detached or terraced building used for commercial purposes; S.I. 2020/756 by permitting the demolition of blocks of flats and certain commercial buildings, and rebuilding for residential use. S.I. 2020/757 came into force on 1 September 2020. It amended the Town and Country Planning (Use Classes) Order 1987 ("the Use Classes Order") by introducing a new commercial, business and service use class, with the effect that changes of use within that class were removed from development control.

4. There were three grounds in the claim, all of which the Divisional Court rejected. Only the first is maintained in this court. It contends that each of these statutory instruments should have been the subject of an environmental assessment or screened for such an assessment under the SEA Directive and the SEA regulations, which was not done.

5. On 21 May 2021, Stuart-Smith L.J. adjourned the application for permission to appeal to be heard by a three-judge constitution, with the appeal itself to follow immediately if permission were granted.

The main issue in the appeal

6. The sole ground of appeal raises this issue: whether "[the] Divisional Court erred in concluding that the three statutory instruments were not required to be subject to Strategic Environmental Assessment because they did not set the framework for future development consent of projects, or modify an existing framework for future development consent of projects", and therefore did not fall within article 3(4) of the SEA Directive. That is the main issue for us to decide.

The SEA Directive and the SEA regulations

7. Article 1 of the SEA Directive states that "[the] objective of this Directive is to provide for a high level of protection of the environment … by ensuring that … an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment".

8. "Plans and programmes" are defined in article 2(a):

> "'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:
>
> – which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and
>
> – which are required by legislative, regulatory or administrative provisions …".

9. The scope of the SEA Directive is described in article 3, which states:

> "1. An environmental assessment, in accordance with articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.
>
> 2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,
>
> (a) which are prepared for … town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to [the EIA Directive] …
>
> …
>
> 4. Member states shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects."

10. "Development consent" is not defined. Draft article 2(c) of the Commission's original proposal for the SEA Directive stated that "'development consent' means the decision of the competent authority which entitles the developer to proceed with a project", but that definition was not in the end included.

11. The SEA Directive was transposed into domestic law by the SEA regulations. Regulation 5(4)(b) requires an environmental assessment to be carried out for a plan or programme where it "sets the framework for future development consent of projects". The definition of "plans and programmes" in regulation 2(1) is substantially the same as in article 2(a) of the SEA Directive. Regulations 8 and 9 require a plan or programme falling within the scope of the SEA regulations to be subject to a screening decision determining whether it is "likely to have significant environmental effects", and, if it is determined that that is so, preclude its adoption until an environmental assessment has been carried out and the environmental report for it taken into account.

12. The relevant European Union and domestic jurisprudence has yielded several principles relating to the concept of "plans or programmes … which set the framework for future development consent of projects". Most recently, in *Compagnie d'entreprises CFE SA v Région de Bruxelles-Capitale* (Case C-43/18) [2020] Env. L.R. 11 the Court of Justice of the European Union ("the CJEU") observed (in paragraph 36 of its judgment) that, "given the objective of the SEA Directive, which is to provide for so high a level of protection of the environment, the provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly ([*Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale* (Case C-671/16) EU:C:2018:403] ["*IEB 2*"] and *Thybaut v Région Wallonne* (Case C-160/17) [2019] Env L.R. 8] and the case law cited)". It went on to emphasise some other principles that are also well established (in paragraphs 61 to 64 of its judgment):

> "61. … [The] court has held that the notion of "plans and programmes" relates to any measure which establishes, by defining rules and procedures, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment … .
>
> 62. In the present case, it is apparent … that the decree of 14 April 2016 designates a Natura 2000 site, and, in order to achieve the conservation and protection objectives it defines, provides for preventive measures and lays down general and specific prohibitions. To that end, it reflects choices and forms part of a hierarchy of measures intended to protect the environment, in particular the management plans to be adopted in the future.
>
> 63. … [The] referring court notes that the designation of a site has legal effects on the adoption of plans and on the consideration of applications for permits affecting the site, both procedurally and in terms of the criteria according to which decisions are made. That court therefore takes the view that such a designation contributes to setting the framework for activities that are, in principle, to be accepted, encouraged or prohibited, and thus is not unconnected with the concept of "plan or programme".

> 64. It is apparent from the judgments in [*IEB 2*] at [55] … and *Thybaut* at [55] … that the concept of "significant body of criteria and detailed rules" must be construed qualitatively."

It went on to say (in paragraph 67) that "in so far as such a measure would not satisfy the conditions referred to in [61]-[64] of this judgment, it would not constitute a plan or programme requiring an environmental assessment within the meaning of art.3(2) and (4) of the SEA Directive". And it added (in paragraph 71) that "the court has repeatedly held that the concept of "plans and programmes" not only includes their preparation, but also their modification, this being intended to ensure that provisions which are likely to have significant environmental effects are subject to an environmental assessment [*Associazione "Verdi Ambiente e Societa – APS Onlus (VAS)" v Presidente del Consiglio dei Ministri* (Case C-305/18) [2019] Env. L.R. 33] at [52]".

13. In *Thybaut* the measure challenged was a decree of the Walloon Government defining for the village of Orp-Jauche in Walloon Brabant an "urban land consolidation area". Projects of development in such an area benefited from a simplified process for development consent, derogating from the planning rules in force, and a simplified process for expropriation, in which the public interest was presumed. The municipality was no longer responsible for development consent. That responsibility now lay with the Walloon Government. A request for an "urban land consolidation area" had to be accompanied by an "urban development plan" for the demolition and construction of buildings, the construction of roads and the creation of open space, which would be the subject of a subsequent, separate development consent. All future projects within the "urban land consolidation area" would benefit from the simplified processes even if they were not linked to the initial "urban development plan". As Advocate General Kokott said in her opinion, "[enabling] a derogation from existing requirements is similar to repealing those requirements as, by establishing an urban land consolidation area, projects that have significant effects on the environment and that previously conflicted with the requirements contained in existing plans may, in principle, be implemented in that area". Those requirements might be "restrictions on building size or land use that must no longer be observed" (paragraph 29).

14. In its judgment, the CJEU reminded itself that "the notion of 'plans and programmes' relates to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment" (paragraph 54). It concluded (in paragraphs 56 to 58):

> "56. … [Although] a consolidation area … does not in itself lay down any positive requirements, it does, however, allow for derogation from existing requirements for plans. [The referring court] has made it clear that determining the boundaries of the consolidation area in the contested order amounts to accepting the principle of a future urban development plan, which will be able to be carried out by means of derogations from the planning requirements in force being granted more easily. … [Under] Article 127(3) of the Walloon Code and the requirements laid down by it, planning permissions given for the geographical area within a consolidation area may depart from the sectoral plan, a municipal development plan and local planning rules.
>
> 57. In that regard, in so far as a sectoral plan, a municipal development plan and local planning rules are themselves plans and programmes

> within the meaning of the SEA Directive, a consolidation area, such as that at issue in the main proceedings, given that it amends the framework laid down by those plans, must also be characterised as such and be subject to the same rules of law.
>
> 58. It follows that, although such an instrument does not, and cannot, lay down positive requirements, the possibility which it lays down of allowing a derogation from the planning rules in force to be obtained more easily amends the legal process and consequently brings the consolidation area at issue in the main proceedings within the scope of Article 2(a) and Article 3(2)(a) of the SEA Directive."

15. The CJEU ruled that those provisions "must be interpreted as meaning that an order adopting an urban land consolidation area, the sole purpose of which is to determine a geographical area within which an urban development plan may be carried out … , in respect of which it will be permissible to derogate from certain planning requirements, comes, because of that possibility of derogation, within the concept of 'plans and programmes' likely to have significant effects on the environment within the meaning of [the SEA Directive], thereby necessitating an environmental assessment".

16. The domestic courts have considered several cases where particular measures have been held to fall outside the scope of the SEA Directive. Among them are *R. (on the application of Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 W.L.R. 324, and *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51 – both decisions of the Supreme Court.

17. In *Buckinghamshire County Council*, the Supreme Court held that a command paper in which the Government announced its intention to proceed with HS2, and set out the steps by which the project would be realised, was not a plan or programme within article 3(2) of the SEA Directive (see the judgment of Lord Carnwath, at paragraphs 34 to 42). Lord Sumption emphasised (in paragraph 120) that "an environmental assessment is still not required unless the plan or programme in question "[sets] the framework for future development consent" within article 3(2)(a)". He also said (in paragraph 125) that "governments may in some cases be able to avoid the need for an environmental assessment by promoting specific legislation authorising development". He explained why (ibid.):

> "125 … [That] is not because the SEA Directive has no application to projects authorised in that way. It is because (i) the SEA Directive does not require member states to have plans or programmes which set the framework for future development consent, but only regulates the consequences if they do; (ii) where development consent is granted by specific legislation there are usually no plans or programmes which set the framework for that consent; and (iii) legislative grants of development consent are exempt from the EIA Directive by virtue of article 1(4), subject to conditions which replicate some of the benefits of a requirement for environmental impact assessment …".

He added, obiter (in paragraph 126):

> "126 … I think it clear that the [HS2] Bill, if passed, will not set the framework for future development consent. Clause 19 deems planning permission to be granted and authorises the development. An Act in

> these terms would not be part of the process by which the development consent is granted. It would be the ultimate decision. It would itself be the development consent."

18. In *R. (on the application of Friends of the Earth Ltd.) v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 518 (Admin); [2019] PTSR 1540, Dove J. held that the National Planning Policy Framework ("NPPF") was not a plan or programme within article 3 of the SEA Directive. It was a framework for determining applications for future development consent but not a measure required or regulated by legislative, regulatory or administrative provisions. It therefore did not require an environmental assessment (paragraphs 46 to 52 of the judgment).

19. At first instance in *R. (on the application of HS2 Action Alliance Ltd.) v Secretary of State for Transport* [2014] EWHC 2759 (Admin); [2014] PTSR 1334, the court held that safeguarding directions made by the Secretary of State for HS2 were not within the concept of "plans or programmes" in the SEA Directive. They imposed a duty on local authorities not to grant planning permission for developments other than HS2 within the safeguarded area without first consulting the Secretary of State. The essence of the conclusion that they were not a plan or programme setting the "framework for future development consent of projects" was that they had "none of the characteristics of a plan or programme as a coherent set of policies and principles for the development or use of land in any particular area". They were not, either in form or in substance, "a framework of policy" (paragraph 53). The High Court's reasoning was approved by the Court of Appeal ([2014] EWCA Civ 1578; [2015] PTSR 1025, at paragraphs 15 to 20).

20. Quite different circumstances arose in *Cala Homes (South) Ltd. v Secretary of State for Communities and Local Government* [2010] EWHC 2866 (Admin). There, it was held in the High Court that the Secretary of State's decision to revoke the regional strategy for the South East Region was the modification of a plan or programme, and thus a decision within the scope of the SEA Directive. Sales J. (as he then was) acknowledged that the development plan, of which the regional strategy was a part, clearly fell within the scope of the SEA Directive because it was "the principal … instrument to be applied to determine … the outcome of applications for planning permission". It might also "play a decisive role for the outcome of any particular planning application …". The revocation of a regional strategy was a modification of a plan or programme, and therefore also within the scope of the SEA Directive (paragraph 61).

The statutory scheme for "development" and "planning permission"

21. Section 57(1) of the Town and Country Planning Act 1990 ("the 1990 Act") provides that "planning permission is required for the carrying out of any development of land". Section 55(1) defines "development" as "the carrying out building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land". Section 55(2) provides that certain operations or uses of land shall not be taken to involve development of that land, and are therefore excluded from the requirement to obtain planning permission. Paragraph (f) excludes from the definition of "development" changes of use involving "in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or the other land, for any other purpose of the same class". The Use Classes Order was made under the predecessor to that provision.

22. Section 58(1) provides that planning permission may be granted by a development order, a local development order, a neighbourhood order, or by the local planning authority on an application made to it. Section 59 contains provisions for development orders, such as the GPDO. Under section 59(2)(a), "[a] development order may … itself grant planning permission for development specified in the order or for development of any class specified …". Section 60(1) provides that "[planning] permission granted by a development order may be granted either unconditionally or subject to such conditions or limitations as may be specified in the order". The effect of section 60(1A) and (2A) is that where a development order grants planning permission, "the order may require the approval of the local planning authority … to be obtained" for specified matters.

23. When an application for planning permission is made to a local planning authority, the authority is required by section 70(2) of the 1990 Act to "have regard to the provisions of the development plan so far as is material"; and by section 38(6) of the Planning and Compulsory Purchase Act 2004, to make the determination "in accordance with the development plan unless material considerations indicate otherwise". As the Divisional Court pointed out (at paragraph 32), this duty does not apply to an application for prior approval under the GPDO, which is not an application for planning permission, but "development plan policies may still be taken into account in so far as they are relevant to decisions under the controls which that order allows a planning authority to exercise".

The Use Classes Order

24. Article 3(1) of the Use Classes Order states that "… where a building or other land is used for a purpose of any class specified in the Schedule, the use of that building or that other land for any other purpose of the same class shall not be taken to involve development of the land". Before its amendment by S.I. 2020/757, the Schedule identified these use classes: Class A1 – Shops, Class A2 – Financial and professional services, Class A3 – Restaurants and cafes, Class A4 – Drinking establishments, Class A5 – Hot food takeaways, Class B1 – Business use, Class B2 – General industrial use, Class B8 – Storage or distribution, Class C1 – Hotels, Class C2 – Residential institutions, Class C2A – Secure residential institutions, Class C3 – Dwelling houses, Class C4 – Houses in multiple occupation, Class D1 – Non-residential institutions, and Class D2 – Assembly and leisure. Article 3(6) listed a number of "sui generis" uses.

"Permitted development" rights under the GPDO

25. Article 3(1) of the GPDO, "Permitted development", provides that "… planning permission is hereby granted for the classes of development described as permitted development in Schedule 2". Under article 3(2), "[any] permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in Schedule 2". Some of the "permitted development" rights do not apply to "article 2(3) land", which includes land within a "conservation area". Under article 3(10), development that is required to be the subject of environmental impact assessment under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 is not permitted by the GPDO.

26. "Permitted development" rights are defined in Parts 1 to 20 of Schedule 2, each containing one class or more of development. The general pattern is that the "permitted development" is

described; then any exclusions from the right are defined; then, under article 3(2), conditions are imposed on the permission granted by article 3(1); and then, for some classes of development, interpretation provisions are added. Some "permitted development" rights, but not all, are subject to either prior approval of certain matters being obtained from the local planning authority, or the authority's determination of whether prior approval is required, before the development may be begun.

27. The Court of Appeal has acknowledged that "permitted development" rights under the GPDO are grants of planning permission. In *Keenan v Woking Borough Council* [2017] EWCA Civ 438; [2018] PTSR 697, it recognised that the grant of planning permission came about through article 3(1) and the description of the "permitted development" right in Class A of Parts 6 and 7, subject to the exclusions in paragraph A.1 – not through article 3(2) and the conditions imposed by paragraph A.2. Development falling outside that right is to be regarded as development without planning permission. As the court accepted, "[crucially,] the grant of planning permission itself came about not through the procedure to be followed under article 3(2) and the specific provisions for "conditions" in either class, but through the operation of article 3(1) and the provisions for "permitted development" in that class" (paragraph 33).

28. In *R. (on the application of Orange Personal Communications Services Ltd.) v Islington London Borough Council* [2006] EWCA Civ 157; [2006] J.P.L. 1309, the issue was whether a developer had a right to develop from the date of the issue of a prior approval notice, so that the right to develop was unaffected by the subsequent decision to designate the development site as a conservation area. The court held that the developer did have such a right. As Laws L.J. put it (at paragraph 28), "[in] a prior approval case planning permission accrues or crystallises upon the developer's receipt of a favourable response from the planning authority to his application". This understanding of the significance of prior approval was applied in *Murrell v Secretary of State for Communities and Local Government* [2010] EWCA Civ 1367; [2012] 1 P. & C.R. 6, where it was held that a developer had a right to develop after the period of 28 days for determining an application for prior approval had elapsed (see the judgment of Richards L.J. at paragraphs 40 to 43).

29. At first instance, in *Winters v Secretary of State for Communities and Local Government* [2017] EWHC 357 (Admin); [2017] PTSR 568, it was held that a developer cannot apply for prior approval for a development he has already begun in breach of a requirement for such approval to be obtained or an application made for a determination whether it is required, but must apply for planning permission (paragraphs 20 to 30).

S.I. 2020/755

30. By the Town and Country Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020 ("S.I. 2020/632"), with effect from 1 August 2020, a new Part 20 was inserted into the GPDO, creating in Class A a "permitted development" right for the construction of new dwelling houses on top of detached blocks of flats. No legal challenge has been made to that statutory instrument.

31. S.I. 2020/755 introduced additional "permitted development" rights, of two kinds. First, article 3 inserted a new Class AA into Part 1 of Schedule 2 to the GPDO, which concerns development within the curtilage of a dwelling house. The development in Class AA is the "enlargement of a dwelling house by construction of additional storeys".

32. Paragraph AA.1, "Development not permitted", lists exclusions. For example, the highest part of the roof of the extended building must not exceed a height of 18 metres. And the "permitted development" right does not apply if one or more storeys have already been added to the original building, as defined in article 2(1).

33. Paragraph AA.2, "Conditions", provides in sub-paragraph (3):

> "(3) The conditions in this sub-paragraph are as follows –
> (a) before beginning the development, the developer must apply to the local planning authority for prior approval as to –
> (i) impact on the amenity of any adjoining premises including overlooking, privacy and the loss of light;
> (ii) the external appearance of the dwelling house, including the design and architectural features of – (aa) the principal elevation of the dwelling house, and (bb) any side elevation of the dwelling house that fronts a highway;
> (iii) air traffic and defence asset impacts of the development; and
> (iv) whether, as a result of the siting of the dwelling house, the development will impact on a protected view identified in the Directions Relating to Protected Vistas … issued by the Secretary of State …
> … ".

34. Paragraph AA.3, "Procedure for applications for prior approval", gives local authorities the power to refuse such applications on various grounds, and sets out certain specific consultation duties. Sub-paragraph AA.3(3) states that "[the] local planning authority may refuse an application where, in its opinion – (a) the proposed development does not comply with, or (b) the developer has provided insufficient information to enable the authority to establish whether the proposed development complies with, any conditions, limitations or restrictions specified in paragraphs AA.1 and AA.2". Sub-paragraph AA.3(8) states that "[where] the application relates to prior approval as to the impact on protected views, the local planning authority must consult Historic England, the Mayor of London and any local planning authorities identified in the Directions Relating to Protected Vistas … issued by the Secretary of State". Sub-paragraph AA.3(11) provides that the local planning authority "may require the developer to submit such information as the authority may reasonably require in order to determine the application, which may include … (a) statements setting out how impacts or risks are to be mitigated, having regard to the [NPPF] …". Sub-paragraph AA.3(12) states:

> "(12) The local planning authority must, when determining an application –
>
> (a) take into account relevant representations made to them …; and
>
> (b) have regard to the [NPPF] … so far as relevant to the subject matter of the prior approval, as if the application were a planning application."

Sub-paragraph AA.3(13) provides that development must not begin before the authority gives a written notice of prior approval. Sub-paragraph AA.3(15) provides that the

authority "may grant prior approval unconditionally or subject to conditions reasonably related to the subject matter of the prior approval".

35. Secondly, article 4 of S.I. 2020/755 amended Part 20 of Schedule 2 to the GPDO by the insertion of four additional classes of "permitted development" rights – Class AA, Class AB, Class AC and Class AD. The development in Class AA is the construction of up to two additional storeys of dwelling houses above detached buildings used for certain retail and commercial purposes. The development in Class AB is the construction of an additional storey on a single storey building, or two additional storeys above a terraced building used for the same purposes as in Class AA. The development in Class AC is the construction of additional storeys above terraced buildings in use as single dwellings. The development in Class AD is the construction of additional storeys above detached single dwellings. There are limits on the height of the development in each class.

36. Those four classes of "permitted development" were made subject to several exclusions similar to those applying to Class A of Part 20, and to certain conditions. Among the conditions is a requirement that prior approval be obtained before development may be begun. The controls exercisable by a local planning authority when determining an application for prior approval under these four classes are substantially the same as for Class A. For Class AA and Class AB, the authority may also refuse a proposal, or impose conditions on any approval granted, for the impacts of noise on occupiers of the new dwelling houses and the impacts of the new residential use on the carrying on of any trade, business or other use of land in the area.

S.I. 2020/756

37. Further amendments to the GPDO were made by S.I. 2020/756. By article 4, a new Class ZA, "Demolition of buildings and construction of new dwelling houses in their place", was inserted at the beginning of Part 20. The new "permitted development" right was for the demolition of blocks of flats, single detached buildings with use rights within Class B1, and their replacement by a either a purpose-built block of flats or a detached dwelling house. The structure of Class ZA is similar to that of the other five classes in Part 20. Prior approval must be obtained before the development is begun. The matters for which prior approval is required are similar to those governing approval for "permitted development" in Class AA and Class AB in Part 20. The local planning authority may control the impact of the development on heritage and archaeology, the method of demolition, the design and external appearance of the new building, and landscaping.

S.I. 2020/757

38. S.I. 2020/757 amended the Use Classes Order in England. The previous schedule was renamed "Schedule 1". The previous Class A, Class B1 and Class D were revoked. A second schedule was added, Schedule 2, which includes a new use class, Class E, "Commercial, business and service" use, amalgamating much of the previous Class A1, Class A2 and Class A3, the previous Class B1 and elements of the previous Class D1 and Class D2. Other uses in the previous Class D1 and Class D2 Use now form the new Class F1, "Learning and non-residential institutions", and Class F2, "Local community" use. And certain uses in the

previous Class A4, Class A5 and Class D2 were added to the list of "sui generis" uses in article 3(6).

The judgment of the Divisional Court

39. The Divisional Court's conclusions on S.I. 2020/757 were succinct (in paragraph 89 of its judgment):

> "89. We can deal with SI 2020/757 shortly. We agree with [Mr Rupert Warren Q.C., for the Secretary of State,] that a legal measure such as the UCO 1987, which simply defines whether certain changes of use constitute development for the purposes of development control, cannot be described as setting a framework for the grant of future development consents. By definition, it does no such thing. We note that the CJEU took the same approach in *Compagnie d'entreprises* … (Advocate General, points 90-92 and judgment, paras 63-66)."

40. Coming to S.I. 2020/755 and S.I. 2020/756, the court referred to the relevant decisions of the CJEU concerning article 3(4) of the SEA Directive. Article 3(4), it said, "refers to any measure that establishes, by defining rules and procedures for scrutiny applicable to the relevant sector, a significant body of criteria and detailed rules for the grant and implementation of consents for the development of land", and "concerns measures which deal with future development consents, and which do so by setting out a significant body of criteria for determining how such future development consents will be determined" (paragraph 90). It had to be read in the light of the "underlying objective" in article 1, and the provisions defining the scope of the SEA Directive interpreted "broadly" (paragraph 91). But not every domestic measure involving a plan or programme likely to have significant environmental effects was required to be the subject of environmental assessment under the SEA Directive (paragraph 92). A "purposive and broad approach" to European Union legislation for the protection of the environment and the assessment of environmental effects "must not disregard the clearly expressed wording of that legislation". Effect must be given to the expression "sets the framework for future development consent of projects", which "delimits the scope of the [SEA] Directive" (paragraph 94).

41. The Divisional Court concluded (in paragraphs 95 and 96):

> "95. In the case of SI 2020/755 and SI 2020/756, the statutory instruments themselves granted planning permission for the carrying out of development falling within the scope of PD rights as defined in the Order itself. That follows from the wording of section 59(2) of the TCPA which provides that a development order may "itself grant planning permission for the development specified in the order" and article 3(1) of the GPDO which provides that "planning permission is … granted for the classes of development described". That is confirmed by the decision of the Court of Appeal in *Keenan* … , para 33. Accordingly, the provisions of the two statutory instruments (and indeed the GPDO generally) do not set the framework for the grant of development consents. They are the measure by which planning permission for defined developments is granted. It is a condition of certain planning permissions granted by the two statutory instruments

> that specified matters must be the subject of prior approval before the development may be begun. But these provisions do not set out a significant body of criteria or rules by which the application for prior approval of those matters is to be determined. Rather, they delimit the scope of the powers which the planning authority may exercise at that stage. The provisions do not themselves set criteria or rules for determining, or constraining, how those discretionary powers are to be exercised within those limits.
>
> 96. We consider that the provisions of the two statutory instruments at issue do not set a framework for future development consents. They grant planning permission for certain defined development. As a condition of that planning permission, they provide for certain matters to be approved by the planning authority before the particular development may be begun, but they do not set out a significant body of criteria or rules for determining how the authority should exercise the powers of control given to it. Whether the development consent is seen as the planning permission granted by the GPDO 2015, or a combination of that planning permission and the prior approval of specified matters before the development may begin, the two statutory instruments do not set the framework for future development consents."

42. The court did not find helpful here the references in *Murrell* to "permissions accruing or crystallising" after the period for determining whether prior approval is required. In that case, as was confirmed in *Keenan*, the Court of Appeal had not sought to qualify the provisions making it clear that planning permission was granted by article 3(1) of the GPDO itself (paragraph 97).

43. This was not case of a pre-existing plan or programme, such as a development plan, being repealed or modified (cf. *Inter-Environnement Bruxelles ASBL v Region de Bruxelles-Capitale* (Case C-567/10) [2012] Env. L.R. 30, and *Cala Homes (South) Ltd.*). The "content of such plans remains unaffected by this legislation" (paragraph 98).

44. Contrasting the three statutory instruments with the measure considered by the CJEU in *Thybaut*, the Divisional Court did not accept that the grant of a "permitted development" right, whether or not subject to prior approval, comes within the SEA Directive "because it is said to involve a derogation from development plan policies". In *Thybaut* the designation of an urban land consolidation area qualified for environmental assessment because – though it did not itself lay down any positive requirements – it "paved the way for a future urban development plan", which could allow for departures or derogations from existing development plans and planning rules (article 127(3) of the Walloon Code). So it satisfied the essential requirement that the measure "must set a framework for future development consents or must modify such a framework" (paragraph 99). The fact that S.I. 2020/755 and S.I. 2020/756 make it unnecessary to apply to a local planning authority for planning permission, "with the consequence that an authority which might otherwise have had to deal with that application, does not convert them into a framework for future development consents" (paragraph 100). None of the CJEU decisions had concerned "a measure which itself granted some form of development consent, as do SI 2020/755 and SI 2020/756" (paragraph 101).

45. The Divisional Court concluded that none of the three statutory instruments under challenge was a plan or programme setting the "framework for future development consent" within article 3(4) of the SEA Directive (paragraphs 103 and 108).

Was environmental assessment under the SEA Directive and the SEA regulations required?

46. It was common ground before us, as in the court below, that there are four requirements to be satisfied if a plan or programme is to come within the SEA Directive: first, it must be subject to preparation or adoption by an authority at national, regional or local level, or be prepared by an authority for adoption, through a legislative process by Parliament or the Government; second, it must be required by legislative, regulatory or administrative provisions; third, it must set the "framework for future development consent of projects"; and fourth, it must be likely to have significant environmental effects. There is no dispute that the first and second requirements are both met here. And no argument was pursued before us on the fourth requirement. The contest has been over the third. For Rights: Community: Action, Mr Paul Brown Q.C. argued that the Divisional Court should have found that each of the three statutory instruments under challenge is a plan or programme setting the "framework for future development consent of projects", or, alternatively, modifying existing plans or programmes.

47. Mr Brown submitted, first, that the Divisional Court adopted too narrow an understanding of the concept of a "framework" for future development consent. This concept, he argued, embraces not only the rules governing whether development consent ought to be granted but also those defining or affecting the matters for which such consent is required. Otherwise, the regime for strategic environmental assessment could be subverted by taking certain types of proposal outside the range of development or of development for which a formal grant of planning permission by a local planning authority is required – as these statutory instruments have done. Lesser changes, leaving in place the existing control of such proposals but refining how it works, would then be subject to the regime, while the removal of all control, with far greater environmental effects, would not. Mr Brown relied here on the judgment of the CJEU in *Thybaut* (in particular, at paragraph 58).

48. Secondly, he contended, the Divisional Court misunderstood the concept of "development consent", which is not "coterminous" or "synonymous" with a grant of planning permission. Under European Union law it extends both to the grant and to the implementation of projects (see the judgment of the CJEU in *APS Onlus*, at paragraph 50). It includes the process and criteria for determining whether a project can go ahead or not. In the case of the two statutory instruments changing the scope of "permitted development" rights under the GPDO, it is not limited to the principle of development being authorised under the development order; it also includes the local planning authority's prior approval decision, a prerequisite to development proceeding – akin to the approval of reserved matters on an outline planning permission. Only when prior approval has been granted does planning permission for it "crystallise" (see *Orange Personal Communications* and *Murrell*). Until then the permission is "inchoate". Mr Brown relied here on the decision of the House of Lords in *R. (on the application of Barker) v Bromley London Borough Council* [2006] UKHL 52, [2007] 1 A.C. 470 (in particular, paragraphs 21, 22 and 28 in the speech of Lord Hope), and the judgment of the CJEU in *R. (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions* (Case C-201/02) [2004] 1 C.M.L.R. 31 (at paragraphs 51 and 52). He submitted that the detailed provisions for prior approval, which specify the matters that local planning

authorities must take into account, including the NPPF, form a "framework for future development consent of projects".

49. Mr Brown's third submission, in the alternative, was that the Divisional Court was wrong to hold that these statutory instruments do not modify the interpretation and application of development plans. Even if they are not themselves plans or programmes within the scope of the SEA Directive, they affect the relevance and operation of policies for residential and business development in existing plans, which are plainly within that scope. They have lifted a large portion of development control from local planning authorities. In substance, the "framework" that existed before has gone. Taking decision-making away from authorities in this way has disapplied plan policies for various kinds of development, altering the landscape for "future development consent". By replacing the policies of the development plan with those in the NPPF, S.I. 2020/755 and S.I. 2020/756 have amended the framework for development consent.

50. And fourthly, Mr Brown submitted, the Divisional Court had failed to interpret the scope of the SEA Directive and the SEA regulations broadly, in the light of their overarching purpose – to provide a high level of protection of the environment (see the judgment of the CJEU in *Terre Wallone ASBL v Region Wallone* (Case C-321/18) [2020] 1 C.M.L.R. 1, at paragraph 24). The reform of the planning system by these statutory instruments will have significant impacts on the environment, which have not been subjected to an environmental assessment under the SEA Directive and the SEA regulations, and are not within the scope of the EIA Directive. If this were lawful, it would be possible to make far-reaching changes of that kind without either regime being engaged.

51. Skilfully as these arguments were presented by Mr Brown, I am unable to accept them. In my view, as Mr Warren submitted for the Secretary of State, they do not truly reflect the legislation for strategic environmental assessment and the relevant case law. I think the Divisional Court's essential reasoning is correct, and its conclusions sound.

52. A basic point needs to be made at the outset. As a court, it is not for us to visit any of the political, social or economic judgments that have motivated the reform of the planning system by these three statutory instruments. We must not be drawn into that territory. Our task is only to consider the legal questions before us.

53. Mr Brown's first two submissions run into each other, and can be taken together. Neither of them, in my view, is cogent.

54. I do not think the Divisional Court misdirected itself on the concept of a "framework for future development consent". Its understanding of this concept was faithful to the words in the legislation and consistent with the case law.

55. One must start with the language of the legislation, in particular article 3(4) of the SEA Directive. It is well established that a broad and purposive approach to interpreting European Union legislation for the assessment of environmental effects must always respect the words that are used (see the judgment of the CJEU in *Brussels Hoofstedwlijk Gewest v Vlaams Gewest (The Brussels Airport Co. NV intervening)* (Case C-275/09) [2011] Env. L.R. 26, at paragraph 29, and the judgment of Lord Neuberger of Abbotsbury and Lord Mance in *Buckinghamshire County Council*, at paragraphs 170 and 171). One should assume that article 3(4) was drafted with care. The expression "sets the framework for future development consent of projects", which defines the scope of the SEA Directive, is precise. It must be

properly understood when the provision is applied (see Lord Carnwath's judgment in *Walton v Scottish Ministers*, at paragraphs 65 to 69).

56. There is no indication in the relevant decisions of the CJEU, or of the domestic courts, that statutory measures of this kind can properly be regarded as a plan or programme setting a "framework for future development consent of projects" – typically, a new development plan, or the amendment of an extant plan, which has itself been the subject of environmental assessment.

57. Acknowledging that statutory measures such as these do not come within article 3(4) is not to undermine the regime for strategic environmental assessment. It is to recognise that the regime is not unbounded. The limits are drawn by the provisions of the SEA Directive and the SEA regulations. The statutory instruments we are dealing with here sit beyond them. The fact that measures of a different kind will fall within them, perhaps with less significant implications for the environment, does not mean that the legislation for strategic environmental assessment must be read more liberally than its drafting allows, even if the consequences for the planning system are extensive.

58. The concept of such a plan or programme is not further defined or refined in the SEA Directive itself. But as the Divisional Court acknowledged, it has been amply considered in the relevant case law of the CJEU and in this jurisdiction too. The relevant legal principles are mature.

59. What emerges from both the European Union and domestic authorities, as the Divisional Court recognised, is that a qualifying plan or programme must be a measure whose effect is to establish, "by defining rules and procedures for scrutiny applicable to the relevant sector, a significant body of criteria and detailed rules for the grant and implementation of consents for the development of land", and "which [deals] with future development consents, and … [does] so by setting out a significant body of criteria for determining how such future development consents will be determined". A defining characteristic is that the measure in question establishes a coherent framework comprising such "criteria" or "rules", which are then to be applied by decision-makers when considering individual projects of development in a process for the granting or refusal of consent. It is clear from the case law that the process for the granting of development consent contemplated in this concept of a plan or programme is a process lying in the future, for which the plan or programme provides a framework of "criteria" or "rules" to assist the making of that decision. Such a plan or programme is not itself a consent for an individual project. It looks to, and generates criteria for granting, such consents – explicitly, the "future development consent of projects". It is a measure whose preparation and promulgation are separate from the granting of development consent itself, which is a distinct and different process. This was stressed by Lord Sumption in *Buckinghamshire County Council* (in paragraphs 125 and 126 of his judgment).

60. Having in mind those principles and their emphasis in the cases, I do not think any of these three statutory instruments is a plan or programme within article 3(4) of the SEA Directive. They are not, either in character or in content, measures of that kind.

61. As amended by S.I. 2020/757, the Use Classes Order is not a plan or programme that sets a framework comprising criteria for determining whether future development consent should be granted for a project. Nor is S.I. 2020/757 itself. The Use Classes Order is a statutory measure whose effect, in England, is to amend the definition of those changes of use that are development. What it does is to identify classes of use, and thus, in effect, dictate that certain changes of use are not development and do not require planning permission. S.I. 2020/757

changed these arrangements by altering the provisions identifying the various uses. As the Divisional Court concluded, the alterations it made had nothing to do with the creation of a "framework for future development consent of projects".

62. A similar conclusion applies to the "permitted development" rights in the GPDO, again both in its previous form and as amended. S.I. 2020/755 and S.I. 2020/756 are statutory measures whose effect, in England, is to expand the categories of "permitted development". But they do not affect the established style and structure of the provisions by which the GPDO has itself granted planning permission, or of the provisions for prior approval. As before, the provisions of the GPDO for each class of "permitted development", though necessarily formulated in generic terms, are not, and do not contain, a "framework for future development consent". On the contrary, they are in themselves, and operate as, individual grants of planning permission, either with or without a requirement, under a condition attached to that planning permission, for prior approval to be obtained before implementation takes place (see *Keenan,* at paragraphs 32 and following). And they do not apply to development that is required to be the subject of environmental impact assessment under the EIA Directive, which is expressly excluded by article 3(10) of the GPDO.

63. A statutory process by which development consent is actually granted for a project of development is not to be equated to a "framework for future development consent of projects". The GPDO does not set a framework comprising criteria for determining whether such "future development consent" should be granted. The process of granting "development consent" is inherent in the GPDO itself. The GPDO contains the planning permission for each of the "permitted development" rights it provides. It puts in place the restrictions imposed on that planning permission by way of exceptions, limitations and conditions. It sets the "Procedure for applications for prior approval" where that applies, describing the local planning authority's function in granting such approval before the planning permission is implemented. That "procedure" delimits the discretionary powers exercisable by an authority in dealing with an application for prior approval made under the relevant condition. It establishes the parameters of what the authority must do, the consultation it must carry out and matters to which it must have regard, including the NPPF. But the provisions for each class of "permitted development", including those relating to prior approval, embody, for a development within that class, the process of granting "development consent" for that project. Prior approval is not a free-standing "development consent". It is one element of the "development consent" for the project. The grant of planning permission and the prior approval together compose that "development consent". Nothing else is needed in the future to complete it.

64. The requirements set out for each class, including those specifying the matters for which prior approval must be sought under the relevant condition, which tell authorities what they must take into account and stipulate that regard is had to the NPPF, do not articulate a framework establishing criteria or rules for the grant and implementation of a "future development consent" in the sense of article 3 of the SEA Directive – to influence, steer or guide any such process. They belong to, and are inextricably part of, an extant grant of planning permission by the GPDO, as a "permitted development" right. The prior approval condition is attached to and regulates a planning permission already granted by the GPDO itself. The prior approval procedure, including the requirement to have regard to the NPPF, is embedded, by condition, within that "development consent".

65. It follows from this that even if the specific reference to the NPPF, and to other things relevant to the prior approval procedure, could be said to represent or import "criteria" or "rules", those "criteria" or "rules" would not in any event be within a "framework for future

development consent of projects". Properly understood, they would only be "criteria" or "rules" integral to and prescribed by the planning permission itself, under a condition attached to it, for a proposal with the benefit of a "permitted development" right. They would not be "criteria" or "rules" established by a "framework for future development consent". They would be "criteria" or "rules" established by, and for, that planning permission, and that "development consent".

66. When asked which of the cases considered by the CJEU most closely resembled this, Mr Brown pointed to *Thybaut*. But I do not think that case is a parallel. Its circumstances, as the Divisional Court recognised, were materially different. Unlike the statutory instruments here, the measure in question was not legislation whose effect, at a national level, was to remove the need for development consent for certain changes of use. Nor did it actually grant development consent. By designating an "urban land consolidation area", the decree intervened in the development plan itself as it applied to that site, with automatic results under the Walloon Code. Though it did not itself state any requirements for development within the consolidation area, it facilitated – or, as the Divisional Court put it, "paved the way for" – the adoption of an "urban development plan", which would allow future departures or derogations from existing development plans and planning rules when proposals came forward for development consent. It thus served to establish a "framework for future development consent of projects" in that location. In contrast to these statutory instruments, therefore, it was a plan or programme under article 3 of the SEA Directive.

67. In argument before us, the complaint that the Divisional Court misunderstood the concept of "development consent" became, I think, the centrepiece of Mr Brown's submissions on the amendments to the GPDO. In my opinion, however, the criticism is not justified.

68. The Divisional Court did not, in my view, misdirect itself by applying too narrow a construction to the expression "future development consent of projects" in the context of strategic environmental assessment. It did not assume that the concept of "development consent" under the SEA Directive is necessarily "synonymous" or "coterminous" with a planning permission granted by the GPDO, as amended by those two statutory instruments. There is nothing in the Divisional Court's judgment to suggest it did that. Nor is there anything to suggest it was unfamiliar with the well-known concept of a "multi-stage development consent" in the context of environmental impact assessment, which is how Lord Hope in *Barker* (at paragraphs 21 and 28) referred to decisions to grant outline planning permission and later to approve reserved matters (see also the judgment of the CJEU in *Wells*, at paragraphs 51 and 52). It obviously knew that the GPDO itself has granted the relevant planning permission and fixed the procedure for perfecting that permission. It knew that the prior approval exercise, where it applies, cannot be detached from the process in which a lawfully implementable planning permission is issued by the GPDO, under section 59(2) of the 1990 Act and article 3(1) (see *Keenan*, at paragraph 33). And it recognised the place of prior approval within that process, under a condition attached to the grant of planning permission itself – a necessary component, therefore, of the same development consent issued under the GPDO, rather than a separate and subsequent development consent. It knew that the developer's ability to implement the planning permission remains latent until such approval is granted.

69. But as the Divisional Court also clearly understood, no matter whether it is appropriate to regard the relevant "development consent" as a "multi-stage development consent" analogous to *Barker* and *Wells*, this whole exercise under the GPDO is fundamentally different from the concept of a "framework for future development consent of projects" in the SEA Directive and the SEA regulations; I need not repeat the reasons why. And I therefore agree with the

Divisional Court's conclusion in the final sentence of paragraph 96 of its judgment: "[whether] the development consent is seen as the planning permission granted by the GPDO … , or a combination of that planning permission and the prior approval of specified matters before the development may begin, the two statutory instruments do not set the framework for future development consents". That conclusion is not only intrinsically sound. It also sits well with the jurisprudence in *Barker* and *Wells*. And in my view it captures the crucial point.

70. Like the Divisional Court, I do not see how any support for Mr Brown's argument can be drawn from the cases in which the prior approval procedure has been discussed – in this court and below. The decisions in those cases give due prominence to the status of a planning permission granted by the GPDO. They explain how the procedure for prior approval is meant to work, and the consequences of it being ignored or misapplied. They do not cast any doubt on the Divisional Court's analysis here. If anything, they reinforce it.

71. I think Mr Brown's third submission also lacks force. To say that these statutory instruments have had the effect of modifying existing development plans, which have themselves been the subject of strategic environmental assessment, is mistaken. They do not modify any existing plan. They do not alter the policies in any plan, or remove any part of a plan, or bear upon any plan-making process. The redefinition of changes of use constituting "development" does not amount to a modification to any plan; nor does it promote, enable or allow any such modification. Neither does the grant of new "permitted development" rights in the GPDO, whether or not subject to prior approval.

72. Reforming the Use Classes Order to take certain changes of use outside the definition of "development" and granting fresh "permitted development" rights under the GPDO will of course, for some proposals, have the consequence that there will not be a need to apply for a grant of planning permission and that local planning authorities will not be under a statutory obligation to have regard to the development plan and make a determination in accordance with the plan unless material considerations indicate otherwise. Some proposals, therefore, will no longer be the subject of applications for planning permission within the ambit of some policies in some development plans. Under the amended GPDO, some grants of planning permission by "permitted development" rights will be subject to a specific requirement for the local planning authority to have regard to the NPPF at the prior approval stage, but not the development plan. None of this, however, as the Divisional Court held, converts these statutory instruments either into "plans or programmes" in their own right or into "modifications" of existing "plans or programmes", and brings them within article 3(4) of the SEA Directive. Measures of this kind do not modify any "framework" that has already been set for the "future development consent of projects".

73. As Mr Warren submitted, the circumstances here are not comparable to those of *Cala Homes (South) Ltd*. In that case the court held that the action of abolishing regional spatial strategies and thus removing a complete tier of the development plan, through a measure whose purpose was to bring this about, was a modification of the plan itself (see the judgment of Sales J., as he then was, at paragraphs 61 to 63). That is not what was done by these three statutory instruments.

74. Finally, I see nothing in Mr Brown's fourth submission. It cannot be suggested that the Divisional Court viewed the scope of the SEA Directive and the SEA regulations too narrowly, given the purpose of the legislation. As it made clear, it was aware that it must read the relevant provisions broadly, giving effect to the underlying objective in article 1 of the SEA Directive to "provide for a high level of protection of the environment …". But it was also aware of the need to avoid a reading of the legislation that would rob the words used in

article 3 of their intended meaning. This too it made clear. In my view, as one sees in its reasoning, its understanding of the relevant provisions was accurate.

75. I therefore agree with the Divisional Court's conclusion that none of these three statutory instruments was a plan or programme under the SEA Directive, and that the Secretary of State did not err in law in making them without undertaking an environmental assessment or carrying out a screening procedure.

Conclusion

76. For the reasons I have given, whilst I would grant permission to appeal, I would dismiss the appeal itself.

Lord Justice Coulson

77. I agree.

Lord Justice Birss

78. I also agree.