Neutral Citation Number: [2019] EWHC 1786 (Admin)

Case No: CO/4663/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 July 2019

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN
on the application of

BERKS, BUCKS AND OXON WILDLIFE TRUST	**Claimant**
- and -	
SECRETARY OF STATE FOR TRANSPORT	**Defendant**
HIGHWAYS ENGLAND	**Interested Party**

- -
- -

Ned Westaway and Merrow Golden (instructed by **Leigh Day**) for the **Claimant**
Andrew Tait QC and Richard Honey (instructed by the **Government Legal Department**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing dates: 19 & 20 June 2019

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Approved Judgment

Mrs Justice Lang:

1. The Claimant challenges the Defendant's decision, dated 12 September 2018, in which he accepted recommendations from Highways England ("HE") on the choice of a preferred corridor for the proposed new Oxford to Cambridge Expressway (hereinafter "the Expressway Scheme").

2. The Claimant is a regional charity which operates under the umbrella of the Royal Society of Wildlife Trusts, recognised for its expertise in protecting the natural environment and natural habitats. Supporting evidence, expressing concern about the impacts of the Expressway Scheme, has been provided by other Wildlife Trusts, the Royal Society for the Protection of Birds, the Council for the Protection of Rural England (Bedfordshire), Plantlife International, Horton-cum-Studley Parish Council and Horton-cum-Studley Expressway Group.

3. The Defendant is the sponsor of the Expressway Scheme, which is being promoted by HE.

4. The Claimant's grounds for judicial review were that, prior to the decision, the Defendant unlawfully failed to carry out:

    i) a Strategic Environmental Assessment ("SEA"), under the Environmental Assessment of Plans and Programmes Regulations 2004 ("SEA Regulations 2004"), and

    ii) a Habitats Regulations Assessment ("HRA") under the Conservation of Habitats and Species Regulations 2017 ("Habitats Regulations 2017").

5. The Defendant's response was that there was no legal requirement to undertake these assessments at this early stage, when no definite decisions on corridor or route had been made. The environmental impacts of the Expressway Scheme, including the choice of corridor and routes within a corridor, will be assessed as part of the forthcoming Development Consent Order process, which will comply with Directive 2011/92/EU ("the EIA Directive") and the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations 2017").

6. Permission to apply for judicial review was refused on the papers by Supperstone J. on 16 January 2019. At an oral renewal hearing on 20 February 2019, Lieven J. granted permission on Grounds 1 and 2 in the Claimant's Statement of Facts and Grounds.

Facts

7. In December 2014, the Department for Transport ("DfT") published a "National Policy Statement for National Networks", which was presented to Parliament pursuant to sections 9(8) and 5(4) of the Planning Act 2008. Its purpose was to set out "the need for, and Government's policies to deliver, development of nationally significant infrastructure projects on the national road and rail networks in England" (paragraph 1.1) to be used as the basis for making decisions on development consent

applications for nationally significant infrastructure projects, pursuant to section 104 of the Planning Act 2008. It did not refer to specific road projects.

8. In the DfT's 2015-2020 Road Investment Strategy ("RIS 1"), published in March 2015, it was announced that there would be a strategic study into a fast high-quality road link to improve the route between Oxford, Milton Keynes and Cambridge.

9. In 2016, the DfT commissioned HE to undertake the strategic study into the Expressway Scheme.

10. HE undertook its work on the Expressway Scheme in accordance with the Project Control Framework ("PCF"), which is a joint DfT and HE approach to managing major projects. Under the PCF, the project sponsor was the DfT which has "overall ownership of the transport problem that is being addressed by the project" and was "accountable for ensuring that the project provides the right solution" (PCF Handbook (April 2016) p.5). The Project Manager was HE which manages the development and delivery of the project (PCF Handbook (April 2016) p.5).

11. Prior to entering the PCF, a project must complete a pre-project phase ("phase 0"), which includes "strategy, shaping and prioritisation". The project delivery elements of the PCF phases which follow thereafter comprise:

    i) An options phase, which identifies the preferred road solution to the transport problem. It is divided into stages:

        a) "1. Option identification";

        b) "2. Option selection", in which the preferred route will be announced.

    ii) A development phase which takes the preferred solution through the necessary statutory processes to obtain consent for its construction. It is divided into stages:

        a) "3. Preliminary design", which includes undertaking an environmental assessment and statement;

        b) "4. Statutory procedures and powers" including the process of obtaining a development consent order from the Defendant, following a planning inquiry;

    iii) "Construction preparation", where the road is built and handed over for operation.

12. As part of the pre-project phase 0, HE's final report was published in November 2016. The key conclusions were that transport connectivity between Oxford, Milton Keynes and Cambridge was poor, which was likely to constrain economic growth. Initial option sifting identified three Expressway corridor options.

13. In paragraph 17 of his witness statement, Mr Andrews, Deputy Director in the DfT, referred to the "sheer scale and complexity of the project (this project is of a magnitude not undertaken in the UK for some 30 to 40 years)". This meant that the cost of developing detailed route options for all the corridors was disproportionate.

Instead, HE and the DfT agreed that a bespoke Stage 1A would be introduced, which would include a report and decision on corridor assessment. As Mr Andrews explained at paragraph 21, a corridor approach is not usually part of the PCF process but it was adopted in this case because of "the extreme geographical extent of the study area, combined with the environmental, social, economic and political importance of the scheme itself".

14. The Corridor Assessment Report ("CAR") was extensive, and it included a detailed assessment of environmental factors in appendix E, as well as other matters. It was accompanied by a stakeholder engagement report and a strategic outline business case. It recommended that Corridors B1 and B3 be selected, and that viable route options within those corridors should be developed, and then put out to public consultation. The CAR recommended that Corridors A, B2, C1, C2 and C3 should be rejected "at that stage" (CAR Executive Summary page 42).

15. HE submitted the CAR to the Defendant and the Minister for Roads, seeking their agreement to HE's recommendations, and a meeting and email exchanges took place.

16. The Defendant accepted the recommendations in the CAR and, on 12 September 2018, the Minister for Roads (Jesse Norman MP) made a Written Statement to Parliament in the following terms:

> "England's road network is a huge national asset and a cornerstone of our present and future economic prosperity. Across the country the government is investing in this network, in order to open up new opportunities, improve productivity and connect people and businesses.
>
> As part of this, after considerable consultation and review, the government is announcing today (12 September 2018) the preferred corridor for the new Oxford-Cambridge Expressway, accepting the recommendations of Highways England.
>
> The expressway, which fills a major gap in the national road network, will work together with the proposed East West Rail link to revolutionise east-west connectivity. In so doing, it will help unlock the commercial development of up to one million new homes.
>
> The expressway is projected to take up to 40 minutes off the journey between the A34 south of Oxford and the M1, so that hundreds of thousands of people will be brought within reach of high quality jobs in centres of rapid growth such as Oxford Science Park. The preferred corridor identified today runs alongside the planned route of East West Rail, so that consumers have a variety of road and rail travel options.
>
> This decision determines the broad area within which the road will be developed: the process of designing a specific route will now get under way, involving extensive further consultation with local people to find the best available options. Members of

> the public will be able to comment on the full set of front-running designs in a public consultation next year, and the road is on schedule to be open to traffic by 2030.
>
> The choice of this corridor means that the government has ruled out construction in the area of the Otmoor nature reserve, underlining its desire to protect the natural environment."

17. The CAR was also published on 12 September 2018, with supporting documentation, and the business case.

Legislative Framework

Directive 2001/42/EC and the SEA Regulations 2004

18. Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive"), provides in recital (4):

> "Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in Member States, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption."

19. The purpose of the SEA Directive is set out in Article 1:

> "The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

20. The SEA Regulations 2004, (which implemented Directive 2001/42/EC into domestic law), do not define the terms "plans" and "programmes" but Regulation 2(1) describes those plans and programmes which come within the scope of the Regulations:

> "… "*plans and programmes*" means plans and programmes, including those co-financed by the European Union, as well as any modifications to them, which–
>
> (a) are subject to preparation or adoption by an authority at national, regional or local level; or

> (b) are prepared by an authority for adoption, through a legislative procedure by Parliament or Government; and, in either case,
>
> (c) are required by legislative, regulatory or administrative provisions; …"

21. Regulation 5 sets out the circumstances in which a SEA will be required:

> "5 (1) Subject to paragraphs (5) and (6) and regulation 7, where–
>
> (a) the first formal preparatory act of a plan or programme is on or after 21st July 2004; and
>
> (b) the plan or programme is of the description set out in either paragraph (2) or paragraph (3),
>
> the responsible authority shall carry out, or secure the carrying out of, an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of that plan or programme and before its adoption or submission to the legislative procedure.
>
> (2) The description is a plan or programme which–
>
> (a) is prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, and
>
> (b) sets the framework for future development consent of projects listed in [Annex I or II to Directive 2011/92/EU of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment].
>
> (3) The description is a plan or programme which, in view of the likely effect on sites, has been determined to require an assessment pursuant to Article 6 or 7 of the Habitats Directive.
>
> …"

22. Once it is established that a SEA is required for a plan or programme, regulation 12(2) requires that an environmental report is produced that identifies, describes and evaluates the likely significant effects on the environment of both:

(a) implementing the plan and programme; and

(b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.

23. The requirement to assess "reasonable alternatives" is broader than the obligation under the EIA Regulations 2017, which only require an environmental statement to include a "description" of the "reasonable alternatives studied by the developer".

Directive 92/43/EEC and the Habitats Regulations 2017

24. Directive 92/43/EEC ("the Habitats Directive") makes provision in article 6 for the conservation of special areas of conservation, which are sites of Community importance designated by Member States.

25. Article 6(3) provides:

> "Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

26. Article 6(4) provides:

> "If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted."

27. The Habitats Directive is implemented by the Habitats Regulations 2017. Regulation 63 provides for appropriate assessment where a plan or project not directly connected with nature conservation management is "likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects)". By Regulation 62(1)(b), such assessment must be made of all plans or projects not covered by Chapters 2 – 9 or by separate legislation. Regulation 64 transposes the derogation in Article 6(4) into domestic law.

Ground 1: Strategic Environmental Assessment

28. The decision under challenge in this claim was the ministerial Written Statement to Parliament, read together with the other documents published on 12 September 2018.

29. The dispute between the parties was whether or not the decision was within the scope of the SEA Directive.

30. The CJEU has adopted a purposive approach in interpreting the SEA Directive, having regard to its fundamental objective in article 1 (see Case C-567/10 *Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale*, at [20] to [32]; and the Opinion of AG Kokott in Case C-105/09 *Terre wallone ASBL v Region wallonne*, at [29] to [35]).

31. Consistently with the purposive approach, the CJEU has interpreted limitations to the scope of the SEA Directive strictly. In Case C-473/14 *Dimos Kropias Attikis v Ipourgos Perivallontos, Energias kai Klimatikis Allagis*, at [50], the CJEU held:

> "Given the objective of Directive 2001/42, which consists in providing for a high level of protection of the environment, [1] 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 … [2] Any exceptions to or limitations of those provisions must, consequently, be interpreted strictly".

32. In Case C-290/15 *D'Oultremont v Région wallonne,* the CJEU said, at [48]:

> "… it is necessary to avoid strategies which may be designed to circumvent the obligations laid down in Directive 2001/42 by splitting measures, thereby reducing the practical effect of the directive."

33. In *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51, at [20] - [21], Lord Reed cited the CJEU authorities in support of adopting a purposive approach to the interpretation of the SEA Directive. Thus, the complementary nature of the objectives of the SEA and EIA Directives should be borne in mind. At [14], Lord Reed quoted the Commission's report on the application of the SEA Directive (COM (2009) 469 final, para 4.1 which explained:

> "The two Directives are to a large extent complementary: the SEA is 'upstream' and identifies the options at an early planning stage, and the EIA is 'downstream' and refers to the projects that are coming through at a later stage…. the boundaries between what constitutes a plan, a programme or a project are not always clear…"

34. In this case, the main issues were as follows:

    i) Was the decision a "plan"?

    ii) If so, did it meet criteria sub-paragraphs (a) and (c) in Regulation 2(1) of the SEA Regulations 2004?

    iii) If so, was it a plan which "sets the framework for future development consent of a projects listed" in the EIA Directive, as required by Regulation 5(2)(b)?

iv) Alternatively, was it a plan which "in view of the likely effect on sites, has been determined to require an assessment pursuant to Articles 6 or 7 of the Habitats Directive", as required by reg 5(3)?

(i) Was the decision a "plan"?

35. The Claimant submitted that the decision was a "plan"; it was not suggested that it was a "programme". The meaning of the term "plan" is not defined in the SEA Directive.

36. The Office of the Deputy Prime Minister issued "A Practical Guide to the Strategic Environmental Assessment Directive" (2005) ("ODPM Guide") which included an indicative (but not definitive) list of the types of plans which could be subject to the SEA Directive. It included:

i) land use plans, such as Structure Plans and Local Plans;

ii) other regional and local authority plans, such as Local Transport Plans, Local Housing Strategies;

iii) environmental protection and management plans, such as National Park Management Plans and National Policy Statements on planning for waste management.

37. The indicative plans listed in the ODPM Guide were plans in the literal sense of the word. The decision in this case is quite different in character to these plans. However, the ODPM Guide has not been updated since 2005 so it does not take account of some important decisions on the interpretation of the SEA Directive and the Commission's Guidance.

38. According to guidance issued by the European Commission, at paragraph 3.4, the term "plan" should be given "a wide scope and broad purpose", adopting the approach of the CJEU towards the EIA Directive. The extent to which an act is likely to have significant environmental effects may be used as one yardstick, and "it may be that the terms *[i.e. plan and programme]* should be taken to cover any formal statement which goes beyond aspiration and sets out an intended course of future action" (paragraph 3.4).

39. Paragraph 3.5 provides:

> "The kind of document which in some Member States is thought of as a **plan** is one which sets out how it is proposed to carry out or implement a scheme or a policy. This could include, for example, land use plans setting out how land is to be developed, or laying down rules or guidance as to the kind of development which might be appropriate or permissible in new areas, or giving criteria which should be taken into account in designing new development…."

40. The Claimant relied heavily upon the Opinion of AG Kokott in the *Terre wallone*, especially because of the example given at [33] of a plan which stipulates that a road is to be built in a certain corridor:

> "32. The application of the EIA Directive revealed that, at the time of the assessment of projects, major effects on the environment are already established on the basis of earlier planning measures. Whilst it is true that those effects can thus be examined during the environmental impact assessment, they cannot be taken fully into account when development consent is given for the project. It is therefore appropriate for such effects on the environment to be examined at the time of preparatory measures and taken into account in that context.
>
> 33. An abstract routing plan, for example, may stipulate that a road is to be built in a certain corridor. The question whether alternatives outside that corridor would have less impact on the environment is therefore possibly not assessed when development consent is subsequently granted for a specific road construction project. For this reason, it should be considered, even as the corridor is being specified, what effects the restriction of the route will have on the environment and whether alternatives should be included."

The Court did not comment on these passages in the AG's Opinion. However, they were cited with approval by Lord Reed in *Walton* at [12] – [13].

41. The Claimant submitted that the decision in this case was of the same nature as AG Kokott's example of an "abstract routing plan". However, in my judgment, the Defendant was correct in his submission that it was fundamentally different, as this decision did not "stipulate that a road is to be built in a certain corridor", nor did it create a "restriction of the route". The decision merely accepted the recommendation of the CAR to take forward to the next stage of development two mutually exclusive preferred corridors, but it did not prevent consideration of routes outside the preferred corridors at a later stage.

42. As Mr Andrews explained in his first witness statement:

> "72. The Decision accepted HE's recommendation to identify preferred corridor areas within which routes could be developed for public consultation, that is where detailed work would be focussed to develop route options. It does not preclude consideration or later development of routing options outside the preferred corridor. The preferred corridor areas included two different areas, one to the west of Oxford (B1) and one to the east of Oxford (B3), rather than a single preferred corridor. The Expressway can only be constructed either to the west or to the east of Oxford, and not in both.
>
> 73. I am aware that the Claimant has argued that the Decision was intended to direct the development of the

Expressway by stipulating a corridor within which the Expressway must be built, and set a locational framework for the Expressway project so that it limits consideration of environmental effects to just this corridor, but this is genuinely not the case. The DfT does not regard itself, either as sponsor of the project or as decision-maker on the project, constrained in this way. No instruction has been given to HE through which the Decision would act as a constraint on what HE can propose. To the contrary, when HE asked for confirmation that it was appropriate to look beyond the preferred corridor area for solutions to environmental, engineering or other issues that emerged, DfT was happy to confirm that they could. I have seen nothing which would lead me to think that the Decision will be a material consideration when the time comes for the Secretary of State to make a decision on the DCO application.

74. The CAR and the Decision identified preferred corridor areas within which work would be focussed in the next stage to develop viable route options to be progressed into public consultation. This means that in practice it is likely that the route of the Expressway which is finally proposed through a Development Consent Order will be within one of the preferred corridor areas, Bl and B3, but there is nothing which requires this to be the case. It is possible that something identified in the future, either as part of one of the check-back exercises or arising for some other reason, will cause us to look for route options outside the preferred corridor areas identified in the Decision. If the preferred corridor area turns out to be worse than was judged in the CAR in a significant respect, including in relation to its environmental effects, then we would review the corridor position. The Decision was a pragmatic way of attempting to narrow down the work with HE had to do to develop route options, but it did not impose any kind of constraint on the project or on the decision-making in relation to the project.

75. The Decision does not mean that the Expressway will, or can only, be constructed within the preferred corridor area. Nor does it mean that the preferred route to be selected in around Autumn 2020 must be situated within the preferred corridor area. The Decision does not confine the later decisions on the preferred route or on development consent. The Decision does not fix a corridor within which the Expressway must be built, nor set any parameters which limit the scheme, nor set any confines for later decisions. The Decision does not mean that alternatives outside the preferred corridor area, and their environmental effects, are ruled out from any further consideration. No instruction has been issued by HE which could have any effect like this and the DfT does not regard

> itself as bound in any way as regards future steps or future decisions by the Decision.
>
> 76. No part of the Expressway project development process will constrain the decision on whether or not to grant development consent nor will it affect the discretion of the Government on whether or not to proceed with all or any part of the project.
>
> 77. The overall study area being used by the Expressway design team for the identification of suitable route options is centred on the preferred corridor areas but extends out across a study area that is appropriate and proportionate for the topic and receptor type being assessed. [A receptor is an asset (natural or engineered), community or feature that may be affected by impacts of the proposal. As an example if vibration is experienced from road traffic, a grade 1 listed building is defined as a receptor. The first task is to identify all the sensitive features (receptors) such that impacts of a proposal can be assessed.] Moreover, the corridor areas are subject to amendment as part of an iterative assessment and corridor refinement process which will likely broaden out the study area in some locations or focus it more tightly in other areas. As a matter of fact, the route option development process is not being confined to the preferred corridor areas identified in the Decision. The preferred corridor area boundaries are being treated by HE in its assessment work as indicative only, with HE effectively reserving the ability to go outside those boundaries when developing route options."

43. Mr Andrews also described, at paragraphs 103 to 110 of his first witness statement, the re-evaluation exercise which would be undertaken, as part of the process of identifying route options to be progressed into public consultation, to review whether corridors outside the preferred corridor area would be better than the preferred corridor area.

44. During the public consultation on route options in 2019, the public will be able to suggest routes outside the preferred corridor area. Similarly, during the consultation processes undertaken for the development consent order, the public will be able to suggest routes outside the preferred corridor area, and such suggestions would be placed before the examining authority which considers the application for a development consent order. The examining authority will also have the benefit of the EIA environmental statement for the Expressway which will report on Corridors A and C as part of the reasonable alternatives considered for the project, including options rejected early on in the project process.

45. In response, the Claimant understandably relied upon the Defendant's statements that some options had been discarded because of the risk of environmental damage, and that corridor selection would provide some "certainty" on within which corridor the road will be built (the Defendant's letter to 'England's Economic Heartland', dated 4 May 2018, and the Government's response to the National Infrastructure

Commission, dated November 2018). However, in my judgment, Mr Andrews' careful analysis of the effect of the decision on the future progress of the project was a more reliable guide to the status of the decision than these statements, which I view as aspirational rather than factually accurate.

46. In *Walton*, at [59], Lord Reed recognised that the question as to what constituted a "plan or programme" and whether it "sets the framework" for future development consent were to "some extent inter-related". This is reflected elsewhere in the authorities. So, in considering whether this decision was a "plan", I have taken into account my findings, set out under question (iii) below, that the decision did not set the criteria by which the decision on development consent would be made and it did not constrain the future decision-making process so as to prevent consideration of the alternatives which the Claimant submitted were less environmentally damaging.

47. Whilst having regard to the broad purposive interpretation in the Commission Guidance, I consider that the decision was a step taken in the course of the preparation of a project, and not a plan.

(ii) If so, did it meet criteria sub-paragraphs (a) and (c) in Regulation 2(1) of the SEA Regulations 2004?

48. It was not in dispute that sub-paragraph (a) was satisfied as the decision was made by a national authority.

49. As to sub-paragraph (c), the Claimant accepted that the decision was not required by legislative or regulatory provisions, but submitted that it was required by administrative provisions because the decision was preceded by a hierarchy of administrative planning, commencing with RIS 1, and was formally regulated by an administrative framework, the PCF.

50. Paragraph 3.16 of the Commission Guidance provides as follows:

> "**Administrative provisions** are formal requirements for ensuring that action is taken which are not normally made using the same procedures as would be needed for new laws and which do not necessarily have the full force of law. Some provisions of 'soft law' might count under this heading. Extent of formalities in its preparation and capacity to be enforced may be used as indications to determine whether a particular provision is an 'administrative provision' in the sense of the Directive. Administrative provisions are by definition not necessarily binding, but for the Directive to apply, plans and programmes prepared or adopted under them must be required by them, as is the case with legislative or regulatory provisions."

51. However, the Commission Guidance needs to be read in the light of the decision of the CJEU in *Inter-Environnement Bruxelles* that the term "required" in Art.2(a) means "regulated" rather than prescribed. The CJEU stated at [31]:

> "plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required'".

52. In *Walton*, at [99], Lord Carnwath observed that:

> "[t]here may be some uncertainty as to what in the definition is meant by "administrative", as opposed to "legislative or regulatory", provisions. However, it seems that some level of formality is needed: the administrative provisions must be such as to identify both the competent authorities and the procedure for preparation and adoption".

53. In my judgment, the Defendant was correct in his submission that in this case there was no procedure, let alone a formal procedure, which required (regulated) the taking of the decision by the Defendant. Preferred corridor selection was not required or regulated by the earlier decisions and documents issued regarding the Expressway Scheme. Moreover, preferred corridor selection was not specified in the PCF at all. This was an *ad hoc* decision, which fell outside any established procedures, made during the course of the project.

(iii) If so, was it a plan which "sets the framework for future development consent of a project listed" in the EIA Directive, as required by Regulation 5(2)(b)?

54. In *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324, Lord Carnwath helpfully reviewed the CJEU authorities at [24] to [28], and concluded as follows:

> "36. Against that background, and unaided by more specific authority, I would have regarded the concept embodied in article 3.2 as reasonably clear. One is looking for something which does not simply define the project, or describe its merits, but which sets the criteria by which it is to be determined by the authority responsible for approving it. The purpose is to ensure that the decision on development consent is not constrained by earlier plans which have not themselves been assessed for likely significant environmental effects. That approach is to my mind strongly supported by the approach of the Advocate General and the court to the facts of *Terre Wallone* case [2010] ECR I-5611 and by the formula enunciated in *Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale* [2012] 2 CMLR 909 and adopted by the Grand Chamber in *Nomarchiaki* case [2013] Env LR 453.
>
> 37. In relation to an ordinary planning proposal, the development plan is an obvious example of such a plan or programme. That is common ground. Even if as in the UK it is not prescriptive, it nonetheless defines the criteria by which the

application is to be determined, and thus sets the framework for the grant of consent. No doubt the application itself will have been accompanied by plans and other supporting material designed to persuade the authority of its merits. In one sense that material might be said to "set the framework" for the authority's consideration, in that the nature of the application limits the scope of the debate. However, no one would for that reason regard the application as a plan or programme falling within the definition.

38. In principle, in my view, the same reasoning should apply to the DNS, albeit on a much larger scale. It is a very elaborate description of the HS2 project, including the thinking behind it and the government's reasons for rejecting alternatives. In one sense, it might be seen as helping to set the framework for the subsequent debate, and it is intended to influence its result. But it does not in any way constrain the decision-making process of the authority responsible, which in this case is Parliament. As Ouseley J said:

> "96. The very concept of a framework, rules, criteria or policy, which guide the outcome of an application for development consent, as a plan which requires SEA even before development project EIA, presupposes that the plan will have an effect on the approach which has to be considered at the development consent stage, and that that effect will be more than merely persuasive by its quality and detail, but guiding and telling because of its stated role in the hierarchy of relevant considerations. That simply is not the case here."

39. With respect to Sullivan LJ, I do not think that position is materially changed by what he called the "dual role" of government. Formally, and in reality, Parliament is autonomous, and not bound by any "criteria" contained in previous government statements.

40. I have noted that the majority and the minority in the Court of Appeal adopted the same test, turning on the likelihood that the plan or programme would "influence" the decision. The majority referred to the possibility of the plan having "a sufficiently potent factual influence" (para 55). Although Mr Mould generally supported the reasoning of the majority, he submitted that "influence" in the ordinary sense was not enough. The influence, he submitted, must be such as to constrain subsequent consideration, and to prevent appropriate account from being taken of all the environmental effects which might otherwise be relevant.

> 41. In my view he was right to make that qualification. A test based on the potency of the influence could have the paradoxical result that the stronger the case made in favour of a proposal, the greater the need for strategic assessment. Setting a framework implies more than mere influence, a word which is not used by the court in any of the judgments to which we have been referred. It appears in annex II of the directive, but only in the different context of one plan "influencing" another. In *Terre Wallone* [2010] ECR I-5611 Advocate General Kokott spoke of influence, but, as already noted, that was by way of contrast with the submissions before her which suggested the need for the plan to be "determinative"."

55. The Claimant submitted that the decision in this case set the framework for future development consent of the Expressway Scheme, and by the selection of preferred corridors, it constrained or limited subsequent consideration of less environmentally damaging alternatives. SEA assessment would be broader in scope than EIA assessment, which would focus on route selection, rather than corridor selection. By the time of the development consent order examination process, the scheme would be at an advanced stage.

56. I accept the Defendant's submission that the decision in this case did not set the framework for the future development consent of any project. It did not set the criteria by which the decision on development consent would be made. Nor did it have such a potent influence that it would constrain the future decision-making process and prevent consideration of the alternatives which the Claimant submitted were less environmentally damaging: see paragraphs 41 to 46 above. The decision merely identified the broad areas where detailed work would be focussed to find potential routes for the Expressway as a step in preparing a specific project. By the time of the development consent procedures, the decision would simply be part of the project's history.

57. Although the Defendant will also be the final decision-maker in the development consent order process, it was not submitted by the Claimant that, by reason of this dual role, he would be strongly influenced, and constrained, by the earlier decision to select preferred corridor routes. I accepted the Defendant's submission that the Defendant would retain complete discretion in the decision-making process as to the choice of route, and that it was by no means a foregone conclusion that development consent would be given for the Expressway Scheme, as economic, political and environmental considerations may well have changed by the time the application for development consent is considered and determined.

(iv) Alternatively, was it a plan which "in view of the likely effect on sites, has been determined to require an assessment pursuant to Articles 6 or 7 of the Habitats Directive", as required by reg 5(3)?

58. The requirement in Regulation 5(3) of the SEA Regulations 2004 is only met where a plan has been "determined to require an assessment" under the Habitats Directive.

59. The Commission Guidance states, at paragraph 3.32, "if a plan has been found to have significant environmental effects under Article 6(3) of Directive 92/43 on a certain site or sites, this finding triggers the application of the SEA Directive under this paragraph".

60. However, no such determination has been made in this case, and so the requirement in Regulation 5(3) has not been met.

61. The Claimant relied upon the Opinion of AG General Kokott in *Terre Wallonne*, at [91], in which she referred to an obligation to carry out an assessment under the SEA Directive typically arising in projects such as "the planning of a corridor for the construction of a road which will affect an area of conservation". However, it must be a question of fact in each case whether an area of conservation will be affected.

62. As to the facts of this case, the Claimant submitted that the decision should have been subject to an appropriate assessment under the Habitats Directive and the Habitats Regulations 2017. I refer to my conclusions rejecting the Claimant's submission on Ground 2.

Conclusion

63. For the reasons I have set out above, the Claimant has not succeeded in showing that the decision in this case comes within the scope of the SEA Directive. Even adopting a purposive construction, the decision under challenge does not meet the specific criteria set out in the SEA Directive and the SEA Regulations 2004.

64. Finally, in the course of the hearing, the Claimant referred to other road projects in which assessments under the SEA Directive had been undertaken, and submitted that it was inconsistent to adopt a different approach in this case. I did not accept this submission, as the facts in the other projects were readily distinguishable from this one.

Ground 2

65. The Claimant submitted that the decision should have been subject to an appropriate assessment under article 6(3) of the Habitats Directive, as it was a "plan" which was likely to have a significant effect on European designated sites. The focus of concern was two Special Areas of Conservation ("SAC") – the Oxford Meadows SAC and the Cothill Fen SAC. They are both located to the west of Oxford, within Corridor B1. No European designated sites were affected by the route of Corridor B3.

66. The CJEU held in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Another v Staatssecretaris Van Landbouw Natuurbeheer en Visserij*, that the term "likely" in the context of article 6(3) means a mere "probability or a risk" that significant effects will occur. Such a risk exists if it cannot be excluded on the basis of objective information that the plan will have significant effects on the site concerned and in cases of doubt, as to the absence of significant effects, a HRA must be carried out (at [43] – [44]). The test is a *"very low one"* (Case C-258/11 *Sweetman v An Bord Pleanála*, Advocate-General Sharpston's Opinion, at [49]).

67. In my judgment, on a proper interpretation, article 6(3) of the Habitats Directive, is not engaged unless there is a "plan" or "project" in existence (see *R (Boggis) v Natural England* [2009] EWCA Civ 1061, [2010] PTSR 725, per Sullivan LJ at [22] – [29]).

68. The term "plan" is not defined in the Habitats Directive. The European Commission guidance, *Managing Natura 2000 Sites* (2000), at paragraph 4.3.2, states that it potentially has a broad meaning, including land use and spatial plans which formed the framework for development consents and sectoral plans, such as transport network plans, waste management plans and water management plans.

69. In deciding whether or not the decision in this case amounted to a plan, it is appropriate to have regard to the same factors as were considered in deciding this question under the SEA Directive, at paragraphs 41 to 47 above. The decision merely accepted the recommendation of the CAR to take forward to the next stage of development two mutually exclusive preferred corridors, but it did not prevent consideration of routes outside the preferred corridors at a later stage. It was a step taken in the course of the preparation of a project, and not a plan.

70. As the decision was not a "plan", article 6(3) of the Habitats Directive was not engaged.

71. In any event, this decision was not likely to have a significant effect on the SACs as it would not result in the execution of work or any intervention in the environment. It was an early preliminary step in the definition of a project yet to take shape. In this regard, it was clearly distinguishable from Case C-6/04 *Commission v UK*, 20.10.05 where a statutory development plan, which gave rise to a statutory presumption when determining planning applications, did have a considerable influence on development decisions, and as a result, on the designated site.

72. In conclusion, the Claimant has failed to establish that article 6(3) of the Habitats Directive was engaged by the decision and so Ground 2 does not succeed.

Final conclusion

73. For the reasons set out above, the claim is dismissed.