



Status:  Positive or Neutral Judicial Treatment

**Dianne Smyth v The Secretary of State for Communities and Local
Government v Ms Elizabeth Archer Arthur, Ms Angela Lucie
Baker-Mercadal, Ms Carol Ann Land**

Case No: C1/2013/3708

Court of Appeal (Civil Division)

5 March 2015

[2015] EWCA Civ 174

2015 WL 869058

Before: Lord Justice Richards Lord Justice Kitchin and Lord Justice Sales

Date: Thursday 5th March 2015

On Appeal from the High Court of Justice Queens Bench Division Administrative Court

Mrs Justice Patterson

CO/8108/2012

Hearing dates: 17 and 18 February 2015

Representation

Mr Gregory Jones QC and Mr David Graham (instructed by Leigh Day Solicitors) for the appellant.

Mr James Maurici QC (instructed by The Treasury Solicitor) for the respondent.

Mr Rhodri Price Lewis QC (instructed by Ashfords LLP) for the interested parties.

Judgment

Lord Justice Sales:

Introduction

1 This is an appeal by the Appellant, Mrs Smyth, against the decision of Patterson J — [2013] EWHC 3844 (Admin) — in which the Judge dismissed an application by Mrs Smyth under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") against a decision dated 20 June 2012 of the Inspector (John Wilde C.Eng M.I.C.E.), on behalf of the Secretary of State, to grant planning permission for a development of 65 residential dwellings on land at Sentry's Farm, Exminster, Devon EX6 8DY ("the development site"). The Inspector granted planning permission in respect of the development site on an appeal by the developer ("Bellway") against a decision of the

65 As to (a), in my judgment it is clear that preventive safeguarding measures which have the effect of eliminating completely or mitigating to some degree possible harmful effects of a plan or project on a protected site (in the sense that they prevent such effects from arising at all or to some degree) may be taken into account under Article 6(3) , and a competent authority is not confined to bringing them into account under Article 6(4) . If preventive safeguarding measures have the effect of preventing harmful effects from arising, or reduce them to a level where they are not significant, then the conservation objectives of Article 6(3) of the Habitats Directive will have been fulfilled to the requisite standard stipulated by the Directive, as interpreted by the Court of Justice, and there would be no further discernible or proportionate justification for preventing the plan or project from proceeding or for imposing the stricter requirements involved in satisfying Article 6(4) before authorising it. As the CJEU has said (see para. 23 of the judgment in *Sweetman*), " article 6 ... must be construed as a coherent whole in light of the conservation objectives pursued by the Directive": this approach points firmly in favour of this interpretation of Article 6(3) .

66 There is sometimes reference in cases and guidance to a distinction between mitigation measures and compensation measures: see e.g. the European Commission's Guidance Document on Article 6(4) of the Habitats Directive (2007/2012) , *referred to in the Opinion of AG Sharpston in Case C-521/12, Briels v Minister van Infrastructuur en Milieu [2014] PTSR 1120* , at paras. 8-10. One needs to be careful here, because although the concept of "compensatory measures" is used in Article 6(4) , no definition is given; and, further, the concept of mitigation is not used in the Habitats Directive itself, and the idea of mitigation is not always a precise one. However, I think that the basic distinction which is relevant for purposes of the application of the Habitats Directive is clear enough. If a preventive safeguarding measure of the kind I have described is under consideration, which eliminates or reduces the harmful effects which a plan or project would have upon the protected site in question so that those harmful effects either never arise or never arise to a significant degree, then it is directly relevant to the question which arises at the Article 6(3) stage and may properly be taken into account at that stage. This view is supported by para. 108 of AG Kokott's Opinion in the Waddenzee case, where, in relation to what may be brought into account as part of an "appropriate assessment" under the second limb of Article 6(3) , she says in terms: "Measures to minimise and avoid harm can also be of relevance." The part of the judgment of the Court which corresponds with this part of her Opinion indicates no dissent from her approach. Rather, the wide language used by the Court to indicate what should be brought into account for the purposes of an "appropriate assessment" under Article 6(3) supports it: an appropriate assessment requires " *all aspects* of the plan or project which *can* , either individually or in combination with other plans or projects, *affect [the objectives of the Directive]* " to be taken into account (emphasis supplied), and preventive safeguarding measures which would prevent harm from occurring meet this description.

67 The approach of AG Kokott, to treat preventive safeguarding measures as relevant at the Article 6(3) stage, is also supported by other authority: see Case C-239/04, *Commission of the European Communities v Portuguese Republic* [2006] ECR I-10183 , para. 35 of the Opinion of AG Kokott; paras. 31-33 and 36-38 in the Opinion of AG Sharpston in *Briels* ; and para. 28 of the judgment in *Briels*, where the ECJ said this: