2 October 2020

PRESS SUMMARY

London Historic Parks and Gardens Trust v Secretary of State for Housing, Communities and Local Government) [2020] EWHC 2580 (Admin)

Planning Court, High Court of Justice: Mr Justice Holgate

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the court is the only authoritative document. It is published at www.judiciary.uk/judgments. References to paragraphs in the judgment appear in square brackets.

The two issues before the Court [1] to [3]

This case is concerned with two legal issues arising from the handling of the planning application for the National Holocaust Memorial and Learning Centre.

The first is whether the UK has failed to ensure that English law transposes, or gives effect to, article 9a of the EU Directive (2011/92/EU) on environmental impact assessment ("EIA"). The law allows a local planning authority or the Secretary of State to decide whether planning permission should be granted for a development project promoted by themselves. But the directive requires the role of promoting such a project to be kept separate from decision-making on the planning application and the assessment of environmental effects. Regulation 64(2) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 571) was passed in order to comply with the Directive. Regulation 64(2) states:-

> "Where an authority, or the Secretary of State, is bringing forward a proposal for development and that authority or the Secretary of State, as appropriate, will also be responsible for determining its own proposal, the relevant authority or the Secretary of State must make appropriate administrative arrangements to ensure that there is a functional separation, when performing any duty under these Regulations, between the persons bringing forward a proposal for development and the persons responsible for determining that proposal."

If English law does properly give effect to the Directive through regulation 64(2), the second issue is whether the arrangements put in place by the MHCLG for the handling of the planning application within the Ministry ("the handling arrangements") comply with that regulation.

The High Court is only concerned with those legal issues. It is not the role of the Court to deal with the merits of the development proposed.

Factual Background [5] to [18]

In January 2019 the Secretary of State applied to Westminster City Council ("WCC") for planning permission for the Memorial, which would be constructed in the Victoria Tower Gardens, London SW1 near the Palace of Westminster and Westminster Abbey UNESCO World Heritage site.

On 5 November 2019 the then Minister of State "called-in" the planning application so that it would be determined by the Secretary of State instead of WCC under powers given by planning legislation. On February 2020 WCC decided that they would have refused the application if they had been deciding the matter.

An independent planning inspector held a pre-inquiry meeting on 10 March 2020, he will also hold the public inquiry beginning on 6 October. After it closes, he will prepare a report with a recommendation as to whether planning permission should be granted or refused. The report will be sent to the Minister of State for Housing, Mr Christopher Pincher MP, who will be responsible for determining the planning application.

The object of the handling arrangements is to separate the Minister and his team of officials handling the planning application from the Secretary of State, officials and other persons involved in promoting the Memorial project. A copy of the current version is appended to the end of the judgment.

The Claimant

The Claimant, London Historic Parks and Gardens Trust, is a small charity primarily devoted to preserving and enhancing London's green open spaces. It has been actively involved in the planning process as an objector to this proposal. But the Claimant does not challenge the decision to call-in the application last November, nor does it put forward any allegations of pre-determination or bias.

The legal arguments

The judgment reviews the legislation ([20] to [35]) and gives a summary of the arguments of each party ([36] to [54]).

Conclusions on the first issue – giving full effect to the EU Directive

The greater part of the judgment is concerned with whether regulation 64(2) properly complied with the requirement to give effect to the EU Directive in English law ([55] to [115]). The judgment covers the requirements for transposing an EU Directive into national law and the criteria for independence in decision-making by a planning authority dealing with EIA cases ([55 *to* 96]).

The Court concludes that EU law does not require any separate body to be created to decide a planning application made by a planning authority. Instead, it requires arrangements to be made by that authority for the decision-making and EIA assessment to be carried out by a team which must act impartially and without any involvement from the promoters of the authority's project.

That team must not be given any instructions by, or subjected to any pressure from, those supporting or bringing forward the authority's proposed development ([94]).

The EU Directive does not require national legislation to contain any more specific requirements than those set out in the Directive itself ([106] to [107]). Regulation 64(2) gives proper effect to Article 9a of the Directive. The requirements of independence inherent in both European and English legislation are well-understood and enforceable by the courts. The Claimant's challenge on the first issue is unsuccessful ([108] to [115]).

Conclusions on the second issue – the adequacy of the handling arrangements

On the second issue, it is important first to record that no challenge has been made to the independence of the Planning Inspector who will hold the public inquiry, and make a recommendation to the Minister as to whether the application for planning permission should be granted or refused ([123]).

The handling arrangements for the called-in application were intended by MHCLG to satisfy the requirements of regulation 64(2) of the 2017 Regulations. However, some alterations are needed to ensure that the arrangements fully comply with that regulation ([124] to [143]).

For example, the requirements identified in the Court's judgment should be expressly set out in the arrangements. It should also be made clear that collective Ministerial responsibility does not apply to the decision to be taken on the planning application. No communications about the Memorial project or the application are permissible between the Minister of State (and his team) and any other Minister including the Secretary of State (and any member of his team involved in promoting the project). The communications which are permissible with the "application team" are those which would take place through the usual formal channels for the handling of any application.

The arrangements must refer to regulation 64(2) of the 2017 Regulations so that all involved do understand that the arrangements have been put in place so that they comply with the legal requirements for the making of an independent decision on the application. So long as the appropriate arrangements are made, the mere fact that the Minister of State and his team have superiors or work with those persons on other matters having nothing to do with the Memorial project is not objectionable as a matter of law. The 2017 Regulations have to be understood in the context of the practical realities which affect decision-making by planning authorities up and down the country.

Overall conclusion

The Claimant's challenge has failed on the first issue. But she has been partially successful on the second issue so that the handling arrangements will need to be amended. The legal position has been set out in the judgment of the Court and its order.