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Court of Appeal (Civil Division) upholds Divisional Courts ruling and finds secretary of state's decision to make statutory instruments to change the GPDO 2015 a lawful act.

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The Courts are normally cautious when making decisions which may affect amendments to primary legislation and so it is preferable in their view for Parliament to make such amendments by statutory legislation instead. This thesis was tested in R v (on the application of Rights: Community Action) v Secretary of State for Housing Communities and Local Government [2021] EWCA civ 1954. National authorities will be pleased to hear that although the Court takes a similar approach in attitude, the outcome was favourable for the secretary of state. This is a case where judicial interpretation and wording of legislation illustrates a fine balance between the determination of what could have been an ultra vires decision if the impact weighted more heavily on the primary legislation (Town and Country Planning Act (General Permitted Development) (England) Order 2015 (GPDO Order 2015).

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, as ruled by the Court, is that the secretary of state did not act unlawfully.

Neither the Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020 nor the Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020 or the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 set the "framework for future development consent" within the meaning of SEA Directive and the SEA regulations. Subsequently it was conceded that the secretary of state had not acted unlawfully in making those statutory instruments.

Key Issue deliberated on by Court of Appeal

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.

Court of Appeal Analysis and reasoning for decision

The Court of Appeal tackles three important points on which the applicant challenged the secretary of state's decision making. The applicant argued that the secretary of state fell short and erred in their duties to: 1. carry out an environmental impact assessment; 2. have regard to the public sector equality duty under the Equality Act 2010; and 3. failed to deliver adequate consultations. These three points are discussed in turn below.

Environmental impact assessment - A legal measure such as the 1987 Order, which simply defined whether certain changes of use constituted development for the purposes of development control, could not be described as setting a framework for the grant of future development consents within the meaning of art.3 of the Directive and there was therefore no requirement for it to be subject to an environmental impact assessment. SI 755 and SI 756 also did not set the framework for future development consents. They were the measure by which planning permission for defined developments was granted (Keenan v Woking BC [2017] EWCA Civ 438, [2018] P.T.S.R. 697, [2017] 6 WLUK 323 applied). As a condition of that planning permission, they provided for certain matters to be approved by the planning authority before the particular development could begin, but they did not set out a significant body of criteria or rules for determining how the authority should exercise the powers of control given to it. They did not have the effect of repealing or modifying a pre-existing plan or programme which had been the subject of an environmental assessment, such as a development plan. Nor did the grant of a permitted development right, whether or not subject to prior approval, fall within the scope of the Directive and the 2004 Regulations as involving a derogation from development plan policies (see paras 89, 95-96, 98-99, 108 of judgment).

Public sector equality duty - The duty was to have regard to specified matters, not a duty to achieve a specific result. The duty was one of substance not form, and the real issue was whether the relevant public authority had, in substance, had regard to the relevant matters, taking into account the nature of the decision and the public authority's reasoning. It was helpful to identify the specific functions that a defendant was exercising. The question of what regard was due would be influenced by a number of factors, including the nature of the decision being taken, the stage of the decision-making process reached, and the particular characteristics of the function being exercised. In the instant case, the consultation paper issued at the start of the process had stated that the proposal had to be assessed by reference to the public sector equality duty, that equality impact assessments were to be prepared for each of the proposed SIs, and that the secretary of state's attention had specifically been drawn to the duty. In those circumstances, there was no basis on which it could be said that the secretary of state had failed to have due regard to the specific matters in s.149 of the 2010 Act (paras 113-118).

Consultation - It was not arguable that the secretary of state had failed conscientiously to consider the consultation responses or to have regard to reports that they had commissioned. The secretary of state had represented that there would be a further consultation in relation to SI 756 which had given rise to a legitimate expectation of consultation, but they had established good and proportionate reasons for departing from that promise: to stimulate regeneration at a time of great economic difficulty arising out of the COVID-19 pandemic (paras 129-130, 133, 137-138).

Conclusion

The secretary of state acted well within their powers, as the statutory instruments did not modify any existing plan or alter the policies in any plan, or remove any part of a plan, or bear upon any plan-making process.

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