19 January 2011

PRESS SUMMARY

Morge (FC) (Appellant) v Hampshire County Council (Respondent)
On appeal from the Court of Appeal (Civil Division) [2010] EWCA Civ 608

JUSTICES: Lord Walker, Lady Hale, Lord Brown, Lord Mance, Lord Kerr

BACKGROUND TO THE APPEALS

This appeal concerns, first, the meaning of the obligation imposed on the United Kingdom by the Habitats Directive, a European legislative instrument, to prohibit "*deliberate disturbance*" of certain species of bats. It concerns, secondly, the scope of the obligation in domestic legislation on planning authorities to have regard to the requirements of the Habitats Directive.

Hampshire County Council, the Respondent in the appeal, granted planning permission on 29 July 2009 for a proposed three mile stretch of roadway to provide a rapid bus service between Fareham and Gosport in South-East Hampshire. The Appellant, Mrs Morge, lives close by and objects to the scheme. The scheme, its supporters argue, will create a new and efficient form of public transport to the benefit of many residents, workers and visitors to the area. Environmental objections have arisen, however, on grounds that the proposed path of the busway runs along the path of an old railway line, which has become an ecological corridor for various flora and fauna.

The planning application was submitted on 31 March 2009 and objected to by Natural England, the Government's adviser on nature conservation, in part because of their concerns about the impact of the development on bats. The Council responded by submitting an Updated Bat Survey (UBS), largely as a result of which Natural England in a letter of 17 July 2009 withdrew their objections. At a meeting of the Council's Planning Committee on 29 July 2009 planning permission was granted by a majority of six to five with two abstentions.

The UBS recorded that no bat roosts were found on the site. The removal of trees and vegetation, however, would result in a loss of good quality bat foraging habitats. This would have a moderate adverse impact at local level on foraging bats for nine years, the impact thereafter reducing to slight adverse / neutral. In addition the busway would sever a bat flight path, increasing their risk of collision with buses.

Mrs Morge challenged the permission on environmental grounds, including its impact on several species of European protected bats. The challenge failed before the High Court and Court of Appeal, but the Supreme Court granted the Appellant limited permission to appeal on two issues of general importance. The first is the level of disturbance required to engage the prohibition in article 12(1)(b) of the Habitats Directive on "*deliberate disturbance*" of the bat species in question. The second is the scope of the obligation in regulation 3(4) of Conservation (Natural Habitats etc.) Regulations 1994 on local authorities to have regard to the requirements of the Habitats Directive in deciding whether to grant planning permission, and whether the Council in this case complied with the obligation.

JUDGMENT

The Supreme Court by a majority of 4 - 1 dismisses the appeal. Lord Brown gives the lead judgment for the majority, setting out the correct approaches to article 12(1)(b) of the Habitats Directive and regulation 3(4) of the 1994 Regulations, and finding that the Council complied with the obligation in regulation 3(4). Lord Kerr agrees with majority on the article 12(1)(b) issue but dissents on the regulation 3(4) issue.

REASONS FOR THE JUDGMENT

On the first issue, the Court held that certain broad considerations must govern the correct approach to article 12(1)(b) of the Habitats Directive. First, it is an article affording protection specifically to species and not to habitats. Secondly, the prohibition relates to the protection of "*species*" and not "*specimens of these species*" as in other articles. Thirdly, an assessment is needed of the nature and extent of the negative impact of the activity upon the species and a judgment as to whether that is sufficient to constitute "*disturbance*" of the species. Fourthly, it is implicit in the article that activity during the period of breeding, rearing, hibernation and migration is more likely to have a sufficient negative impact on the species to constitute "*disturbance*": **[19]**.

The European Commission's guidance document is of assistance. It provides illustrations at either end of the spectrum within which the question arises as to whether any given activity constitutes disturbance, and explains that every case has to be judged on its own merits. Two further considerations are also of relevance. First, account should be given to the rarity and conservation status of the species in question and the impact of the disturbance on the local population of the species. Secondly, disturbance includes in particular that which is likely to impair an animal's ability to survive, breed, rear its young, hibernate or migrate, and that which is likely to affect the local distribution or abundance of the species: **[20] – [23]**.

On the second issue, the majority held that the correct approach to regulation 3(4) is that planning permission should ordinarily be granted save only in cases where the Planning Committee conclude that the proposed development would both be likely to offend article 12(1) and be unlikely to be licensed pursuant to the powers to derogate from the requirements of article 12(1). Where Natural England express themselves satisfied that a proposed development will be compliant with article 12(1), the planning authority are entitled to presume that that is so. In the present case the Planning Committee had sufficient regard to the requirements of the Directive so as to satisfy regulation 3(4): the Committee knew that Natural England's objection had been withdrawn and that necessary measures had been planned to compensate for the loss of foraging: **[30]**.

Lord Kerr, dissenting on this second issue, observed that Natural England had expressed no explicit opinion on the question of whether there would be violation of article 12(1). Even if it could be presumed that Natural England's view was of no violation, that did not affect the clear indication in the letter of 17 July 2009 that the matter was still one which required the Committee's attention. If Natural England had unambiguously expressed a view of no violation and the Committee had been informed of this, it may well have been unnecessary for the Committee to go behind that view. But absent such a statement, they were bound to make the judgment for themselves, something which they did not do. Lord Kerr would have quashed the planning permission on this basis: **[75]-[84]**.

References in square brackets are to paragraph numbers in the judgment.