Michaelmas Term
[2012] UKSC 44
On appeal from: [2012] CSIH 19

JUDGMENT

Walton (Appellant) *v* The Scottish Ministers (Respondent) (Scotland)

before

Lord Hope, Deputy President
Lord Kerr
Lord Dyson
Lord Reed
Lord Carnwath

JUDGMENT GIVEN ON

17 October 2012

Heard on 9 and 10 July 2012

Appellant
Aidan O'Neill QC
Chris Pirie
(Instructed by Patrick Campbell and Company Solicitors)

Respondent
James Mure QC
Lorna Drummond QC
(Instructed by Scottish Government Legal Directorate Litigation Division)

LORD REED

1. In this application under paragraph 2 of Schedule 2 to the Roads (Scotland) Act 1984 ("the 1984 Act"), Mr Walton challenges the validity of schemes and orders made by the Scottish Ministers under that Act to allow the construction of a new road network in the vicinity of Aberdeen. The basis on which the schemes and orders are challenged, as ultimately argued before this court, is that the Ministers have failed to comply with the requirements of the Strategic Environmental Assessment Directive (Directive 2001/42/EC, OJ 2001 L197/30) ("the SEA Directive"), or in any event with common law requirements of fairness. In the light of observations made by the Extra Division of the Inner House of the Court of Session (*Walton v Scottish Ministers* [2012] CSIH 19), it will also be necessary to consider questions relating to remedies. These include the question whether, even if a failure to comply with the directive were established in the present case, Mr Walton should in any event be denied a remedy; and whether he is entitled to bring the application, or would have the necessary standing to seek an alternative remedy.

2. It will be necessary to examine in detail the facts bearing upon these legal issues. It may however be helpful at the outset to explain the relevant provisions of the 1984 Act and of the directive.

The Roads (Scotland) Act 1984

3. The 1984 Act distinguishes between two different types of roads authority with different functions: a distinction which is apparent, in particular, from the definition of "roads authority" in section 151(1). On the one hand there are local roads authorities, which are responsible for roads and proposed roads in their area other than roads for which the Secretary of State or the Ministers are the roads authority. The local authority for a given area are also the local roads authority for that area. They have the power to construct new roads, other than special roads (defined by section 151 as roads provided or to be provided under section 7), in accordance with section 20.

4. On the other hand there are the Secretary of State and the Ministers. The Secretary of State is the roads authority as respects functions relating to the matters reserved by the relevant provisions of the Scotland Act 1998 and exercisable in relation to trunk roads, special roads or other roads constructed or to be constructed under section 19 of the 1984 Act. The Ministers are the roads authority as respects any other functions exercisable in relation to any such roads, as the

result of the transfer of functions from the Secretary of State effected by section 53 of the Scotland Act. As roads authority, the Ministers have functions under sections 5 and 7 of the 1984 Act which are relevant to the present case.

5. Section 5(2) provides:

> "The Secretary of State shall keep under review the national system of routes for through traffic in Scotland, and if he is satisfied, after taking into consideration the requirements of local and national planning, including the requirements of agriculture and industry, that it is expedient for the purpose of extending, improving or reorganising that system either—
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> (a) that any existing road, or any road proposed to be constructed by him, should become a trunk road, or
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> (b) that any trunk road should cease to be a trunk road,
>
> he may by order direct that the road shall become, or as the case may be shall cease to be, a trunk road as from such date as may be specified in that regard in the order."

6. Section 7 provides:

> "(3) A roads authority may be authorised by means of a scheme under this section to provide, along a route prescribed by the scheme, a special road for the use of traffic of any class so prescribed."

7. It is also relevant to note a number of other provisions of the 1984 Act. Section 20A requires the Ministers to carry out an environmental assessment where they have under consideration the construction of a new road for which they are the roads authority, and they consider that the project falls within the scope of the Environmental Assessment Directive (Directive 85/337/EEC, OJ 1985, L 175/40) ("the EIA Directive"). They must, in particular, prepare an environmental statement and publish notice of it. The notice must state that any person wishing to make any representations about the project and the environmental statement may do so, and that the Ministers will take any such representation into account before deciding whether to proceed with the project (section 20A(5A). Section 139 permits the Ministers to hold an inquiry in connection with any matters as to which they are authorised to act under the Act.

8. The procedures for making orders under section 5 are set out in Part I of Schedule 1 to the Act. They include the publication of the proposed order, an opportunity for any person to object to the making of the order (paragraph 1), and the holding of an inquiry in the event that an objection is received from any person appearing to the Ministers to be affected or from any of a specified group of persons, such as the relevant local authority (paragraph 5). The Ministers are required to take into account the report of the person who held the inquiry. Where an environmental statement has been published, they must also take into consideration any opinion on that statement or the project expressed by any person in writing (paragraph 7). Analogous procedures are prescribed by Part II of Schedule 1 in relation to the making of schemes under section 7.

9. Schedule 2 to the 1984 Act is relevant to the issues in this appeal relating to remedies. Paragraphs 2 to 4 provide:

> "2. If any person aggrieved by the scheme or order desires to question the validity thereof, or of any provision contained therein, on the grounds that it is not within the powers of this Act or that any requirement of this Act or of any regulations made thereunder has not been complied with in relation to the scheme or order, he may, within six weeks of–
>
> (a) the date on which the notice required by paragraph 1 above is first published; or
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> (b) in a case where a notice under paragraph 1A above is required, the date on which that notice is first published,
>
> make an application as regards that validity to the Court of Session.
>
> 3. On any such application the Court—
>
> (a) may by interim order suspend the operation of the scheme or order or of any provision contained in it, either generally or in so far as it affects any property of the applicant, until the final determination of the proceedings; and
>
> (b) if satisfied that the scheme or order or any provision contained in it is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by failure to comply

> with any such requirement as aforesaid, may quash the scheme or order or any provision contained in it, either generally or in so far as it affects the property of the applicant.
>
> 4. Subject to paragraph 3 above, a scheme or order to which this Schedule applies shall not, either before or after it has been made or confirmed, be questioned in any legal proceedings whatever, and shall become operative on the date on which the notice required by paragraph 1 above is first published or on such later date, if any, as may be specified in the scheme or order."

The SEA Directive

10. The SEA Directive forms part of a body of EU legislation designed to provide a high level of protection for the environment, in accordance with article 191 of the Treaty on the Functioning of the European Union and article 37 of the Charter of Fundamental Rights of the European Union. It is complementary, in particular, to the EIA Directive. Both directives impose a requirement to carry out an environmental assessment, but they are different in scope.

11. The EIA Directive was adopted in 1985 and required to be implemented by July 1988. It has been amended significantly by further directives, including the Public Participation Directive (Directive 2003/35/EC, OJ 2003 L156/17) ("the PPD Directive"), which gave effect to the public participation requirements of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The EIA Directive is concerned with the assessment of the effects of "projects" on the environment. The SEA Directive, which was adopted 16 years later, is concerned with the environmental assessment of "plans and programmes". Taken together, the directives ensure that the competent authorities take significant environmental effects into account both when preparing and adopting plans or programmes, and when deciding whether to give consent for individual projects.

12. The background to the SEA Directive, and the problem which it was designed to address, were explained by Advocate General Kokott in her opinion in *Terre Wallone ASBL v Région Wallone and Inter-Environnement Wallonie ASBL v Région Wallone* ((Joined Cases C-105/09 and C-110/09) [2010] I-ECR 5611, points 31-32:

> "The specific objective pursued by the assessment of plans and programmes is evident from the legislative background: the SEA

Directive complements the EIA Directive, which is more than ten years older and concerns the consideration of effects on the environment when development consent is granted for projects.

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 (Proposal for a Council directive on the assessment of the effects of certain plans and programmes on the environment, COM(96) 511 final, p 6). 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."

13. The Advocate General provided an example (point 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."

14. The relationship between the two forms of assessment was also described by the Commission in its first report on the application of the SEA Directive under article 12(3) (COM(2009) 469 final, para 4.1):

"The two Directives are to a large extent complementary: the SEA is 'up-stream' and identifies the best options at an early planning stage, and the EIA is 'down-stream' and refers to the projects that are coming through at a later stage. In theory, an overlap of the two processes is unlikely to occur. However, different areas of potential overlaps in the application of the two Directives have been identified.

In particular, the boundaries between what constitutes a plan, a programme or a project are not always clear, and there may be some

> doubts as to whether the 'subject' of the assessment meets the criteria of either or both of the Directives."

In relation to that passage, it should be noted that a project need not necessarily be a "downstream" development of an option identified at an earlier "upstream" planning stage.

15. The scope of the SEA Directive is defined by article 3. Paragraphs (1) and (2) provide:

> "1. An environmental assessment, in accordance with articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.
>
> 2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,
>
> (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to [the EIA Directive] …"

16. The obligation to carry out an SEA arises under article 3(1) in relation to plans and programmes referred to in article 3(2) to (4). Those provisions are concerned with plans and programmes "which set the framework for future development consent of projects". In relation to article 3(2)(a), the projects listed in Annex I to the EIA Directive include the construction of motorways, express roads and other roads with four or more lanes (Annex I, point 7), and therefore include the road with which these proceedings are concerned.

17. When member states require to determine whether plans or programmes are likely to have significant environmental effects, they are directed by article 3(5) to apply the criteria set out in Annex II, the first of which is "the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources". It is implicit in that criterion that a framework can be set without the location, nature or size of projects being determined. As Advocate General Kokott explained in *Terre Wallone* (points 64-65):

> "Plans and programmes may, however, influence the development consent of individual projects in very different ways and, in so doing, prevent appropriate account from being taken of environmental effects. Consequently, the SEA Directive is based on a very broad concept of 'framework'.
>
> This becomes particularly clear in a criterion taken into account by the member states when they appraise the likely significance of the environmental effects of plans or programmes in accordance with article 3(5): they are to take account of the *degree* to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources (first indent of point 1 of Annex II). The term 'framework' must therefore be construed flexibly. It does not require any conclusive determinations, but also covers forms of influence that leave room for some discretion."

18. Article 2 of the directive is headed "Definitions", and provides:

> "For the purposes of this Directive:
>
> (a) 'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:
>
> - which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and
>
> - which are required by legislative, regulatory or administrative provisions."

19. Although article 2(a) is headed "Definitions", it does not in fact define the terms "plan" or "programme", but qualifies them. For the purposes of the directive, "plans and programmes" means plans and programmes which fulfil the requirements set out in the two indents: that is to say, they must be "subject to preparation and/or adoption by an authority at national, regional or local level or … prepared by an authority for adoption, through a legislative procedure by Parliament or Government", and they must also be "required by legislative, regulatory or administrative provisions".

20. The terms “plan” and “programme” are not further defined. It is however clear from the case law of the Court of Justice that they are not to be narrowly construed. As the court stated in *Inter-Environnement Bruxelles ASBL, Pétitions-Patrimoine ASBL and Atelier de Recherche et d'Action Urbaines ASBL v Région de Bruxelles-Capitale* (Case C-567/10) [2012] CMLR 909, para 37, “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”. The interpretation of the directive, in this respect as in others, has been based primarily upon its objective rather than upon its literal wording.

21. Adopting therefore a purposive approach, the complementary nature of the objectives of the SEA and EIA Directives has to be borne in mind. As Advocate General Kokott said in *Terre Wallone* (points 29- 30):

> “According to Article 1, the objective of the SEA 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 by ensuring that an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.
>
> The interpretation of the pair of terms ‘plans’ and ‘projects’ should consequently ensure that measures likely to have significant effects on the environment undergo an environmental assessment.”

It is also necessary to bear in mind that the directive is intended to be applied in member states with widely differing arrangements for the organisation of developments affecting the environment. Its provisions, including terms such as “plan” and “programme”, have therefore to be interpreted and applied in a manner which will secure the objective of the directive throughout the EU.

22. In relation to the stipulation in the second indent that plans and programmes must be required by legislative, regulatory or administrative provisions, it appears from the judgment of the Court of Justice in *Inter-Environnement Bruxelles* that that requirement is not to be understood as excluding from the scope of the directive plans or programmes whose adoption is not compulsory. The court noted at para 29 that such an interpretation would exclude from the scope of the directive the plans and programmes concerning the development of land which were adopted in a number of member states. Accordingly, as the court stated at para 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'".

23. The concept of "modification" was also considered in *Inter-Environnement Bruxelles*, where one of the issues was whether the repeal of a plan or programme fell within that concept. In holding that in principle it did, the court noted that such a measure necessarily entailed a change in the legal reference framework - that is to say, the framework for development consent of projects - and might therefore be likely to have significant effects on the environment (paras 38-40).

24. A passage in the Commission's guidance document, *Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment* (2003) (para 3.9) is also helpful:

> "It is important to distinguish between modifications to plans and programmes, and modifications to individual projects, envisaged under the plan or programme. In the second case, (where individual projects are modified after the adoption of the plan or programme), it is not [the SEA Directive] but other appropriate legislation which would apply. An example could be a plan for road and rail development, including a long list of projects, adopted after SEA. If, in implementing the plan or programme, a modification were proposed to one of its constituent projects and the modification was likely to have significant environmental effects, an environmental assessment should be made in accordance with the appropriate legal provisions (for example, the Habitats Directive, and/or EIA Directive)."

25. In terms of paragraph 1 of article 4 of the directive, the environmental assessment referred to in article 3 "shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure." Paragraph 3 is designed to avoid the duplication of assessments, and provides:

> "Where plans and programmes form part of a hierarchy, member states shall, with a view to avoiding duplication of the assessment, take into account the fact that the assessment will be carried out, in accordance with this directive, at different levels of the hierarchy. For the purpose of, inter alia, avoiding duplication of assessment, member states shall apply article 5(2) and (3)."

26. Article 5 requires the preparation of an environmental report. Article 6 requires that the draft plan or programme and the environmental report must be the subject of public consultation. For this purpose, member states have to identify the public, "including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned" (article 5(4)). Article 8 requires that "the environmental report prepared pursuant to article 5 [and] the opinions expressed pursuant to article 6 … shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure."

27. Article 11 concerns the relationship between the directive and other EU legislation, and provides in particular:

> "1. An environmental assessment carried out under this directive shall be without prejudice to any requirements under [the EIA Directive] and to any other Community law requirements.
>
> 2. For plans and programmes for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this directive and other Community legislation, member states may provide for coordinated or joint procedures fulfilling the requirements of the relevant Community legislation in order, inter alia, to avoid duplication of assessment."

28. As the Court of Justice explained in *Genovaitė Valčiukienė and Others v Pakruojo rajono savivaldybė and Others* (Case C-295/10) [2012] Env LR 283, paras 57-60, it follows from article 11(1) that an assessment under the EIA Directive (an "EIA") cannot dispense with the obligation to carry out an SEA where required by the SEA Directive, and is additional to any such assessment. At the same time, the court has inferred from article 11(2) that, where an EIA has been carried out under a co-ordinated or joint procedure, it may meet all the requirements of the SEA Directive; and, in that eventuality, there is no obligation to carry out a further assessment under the latter directive (*Valčiukienė*, paras 62-63). If on the other hand the two assessments differ in their scope or content, then a second assessment is appropriate.

29. In terms of paragraph 1 of article 13, member states were required to transpose the directive before 21 July 2004. In relation to transitional arrangements, paragraph 3 provides:

> "3. The obligation referred to in Article 4(1) shall apply to the plans and programmes of which the first formal preparatory act is subsequent to the date referred to in paragraph 1. Plans and programmes of which the first formal preparatory act is before that date and which are adopted or submitted to the legislative procedure more than 24 months thereafter, shall be made subject to the obligation referred to in Article 4(1) unless Member States decide on a case by case basis that this is not feasible and inform the public of their decision."

The implication is that article 4(1) does not apply to plans and programmes which were adopted or submitted to legislative procedure prior to 21 July 2004.

30. The directive has been transposed into domestic law. It is however common ground that the appellant is entitled to rely upon the terms of the directive itself. I need not therefore refer to the domestic law in detail.

The factual background

31. Proposals for a "western peripheral route" around Aberdeen (referred to in the documents before the court as the "WPR" or "AWPR"), linking the A90 trunk road to the north and south of the city to the A96 to the west, have been in existence since the 1950s. In 1996 Grampian Regional Council, which was the local roads authority at the time, decided on a "corridor" for the part of the route between the A96 and the A90 to the south of the city. That corridor crossed the river Dee at Murtle of Camphill and joined the A90 at Charleston, just to the south of Aberdeen. Following the reorganisation of local government, the successor local roads authorities, Aberdeen City Council and Aberdeenshire Council, endorsed the choice of the Murtle corridor.

32. All local authorities were invited to prepare local transport strategies and submit them to the Ministers for approval during 2000. The two councils prepared such strategies, working in collaboration, and adopted them in December 2000. Each document set out a number of objectives and a package of projects designed to realise them. One of the projects discussed was the WPR.

33. On 1 November 2001 a non-statutory regional transport partnership known as the North East Scotland Transport Partnership (NESTRANS) was established with support from the Ministers. Its remit was to develop a regional transport strategy for the north east of Scotland in accordance with guidance (the Scottish Transport Appraisal Guidance or "STAG") which had been issued earlier that year.

The partnership was between Aberdeen City Council, Aberdeenshire Council, Scottish Enterprise (a public body established under the Enterprise and New Towns (Scotland) Act 1990), and Aberdeen and Grampian Chamber of Commerce.

34. The regional transport strategy developed for the period to 2011 was described in NESTRANS' report, *Delivering a Modern Transport System for North East Scotland*, published in March 2003. It appears from the report that the strategy, described as the Modern Transport System or MTS, comprised the local transport strategies adopted by the two local authorities in 2000, which NESTRANS had subsequently assessed in accordance with the Ministers' requirements.

35. Numerous schemes were described and costed in the report. They included the WPR, which was shown as a road around the periphery of Aberdeen (p 15). Its purpose was defined as follows (p 14):

> "The key roles of the WPR are to enable through-traffic to by-pass Aberdeen, which in turn allows for prioritisation for buses, cycles and pedestrians within the urban area. It also improves peripheral movements around the City, improving access to Park & Ride sites and relieving heavily-used, unsuitable rural routes. It will improve accessibility to existing and planned employment locations and open up possibilities for future land release. Finally, it will transform accessibility of freight and business service movements to and from the north and west of Aberdeen."

The report proceeded on the basis that the design and construction of the WPR would be undertaken by the local roads authorities, subject to the continued provision by the Ministers of the necessary funding.

36. On 19 March 2003 the Minister for Transport announced that the WPR would be promoted by the Ministers as a trunk road.

37. In December 2004, in the face of a campaign against the routing of the WPR along part of the Murtle corridor ("the Camphill issue"), the Minister for Transport instructed that work on that corridor should be reviewed and that four other options, previously discarded, should be re-examined. One of those options, described as the Peterculter/Stonehaven route, crossed the Dee near Peterculter and then ran in a southerly direction to join the A90 at Stonehaven. Another option, described as the Milltimber Brae route, crossed the Dee between Murtle of Camphill and Peterculter, and then ran eastwards to join the eastern section of the

Murtle corridor. Public consultation on the five options was undertaken in the spring of 2005.

38. Prior to taking a final decision, the Minister for Transport commissioned a report comparing the Murtle and Milltimber Brae options with a hybrid option which combined the Milltimber Brae route with an A90 relief road to Stonehaven. On 17 November 2005 the Minister was advised that the hybrid option offered many attractions, particularly as a means of anticipating a future need to increase the capacity of the A90 between Stonehaven and Aberdeen, at significant cost.

39. On 1 December 2005 the Minister announced that the route would combine the Milltimber Brae option with part of the Peterculter/Stonehaven option: in other words, the hybrid option. The route differed from the options which had been considered in the earlier consultation exercise, in that it broadly comprised the whole of one option and part of another – that is to say, the whole of the Milltimber Brae option, and the part of the Peterculter/Stonehaven option to the south of the Dee. The length of new road, and the environmental and other costs, would therefore be greater than for any of the options considered individually.

40. The thinking behind the Minister's decision was explained in a minute which he sent to the First Minister on 18 November 2005. One factor was the Camphill issue. The other, he explained, was that it was necessary to provide a new trunk road connecting Stonehaven to the WPR as previously envisaged - the Fastlink, as it became known - in order to relieve growing congestion on the A90 between Stonehaven and Aberdeen and anticipate the need to increase the capacity of that road.

41. The Minister's thinking was also explained in a report prepared by Transport Scotland (an executive agency of the Ministers) in November 2006 ("Aberdeen Western Peripheral Route Project Development 2005-2006 – Consolidation Assessment Report"), which was made available to the public. It stated that the scheme inherited from the local authorities did not reflect completely the strategic objectives of the trunk road network. The inclusion of the Fastlink improved the overall efficiency of the scheme, allowing long distance strategic traffic to get round the city more quickly and reducing traffic using the busiest stretch of the A90 between Stonehaven and Aberdeen. Maintaining the existing A90 south of Aberdeen and keeping traffic moving was, it was said, becoming increasingly difficult.

42. Work was then undertaken to identify the preferred line within the corridor which the Minister had announced. On 2 May 2006 the preferred line was announced. Further work was then carried out to assess the preferred route. The

WPR was subsequently reflected in a number of transport strategies and development plans.

43. On 14 December 2006 draft special road schemes, under section 7 of the 1984 Act, and draft trunk road and other orders, under section 5 and other provisions, were published together with an EIA prepared under section 20A of the 1984 Act. In relation to the reasons for choosing the Fastlink, the EIA referred to the November 2006 report by Transport Scotland. During September and October 2007 new draft schemes and orders were published, some of which were in substantially the same terms as before and others of which were additional to those previously published. The EIA was also withdrawn and replaced by a new EIA reflecting additional work. All objections to the 2006 draft schemes and orders were carried forward and treated as objections to the 2007 versions. A further draft order was subsequently published in May 2008.

44. About 10,000 objections were made. They included a letter of objection dated 5 February 2007, written by Mr Walton as chairman of Road Sense, a local organisation opposed to the WPR. Amongst other matters raised, it was contended that there was no demonstrable need for the Fastlink and that there had been no public consultation on the route. Mr Walton also submitted a personal letter of objection, which appears to have been in similar terms. A subsequent email reiterated some of Mr Walton's earlier objections. A further email containing objections by Road Sense was also submitted by Mr Walton.

45. Transport Scotland responded to Mr Walton's letter of objection, addressing each of the points which he had made. In relation to the need for the Fastlink, it observed that keeping traffic moving on the A90 between Stonehaven and Aberdeen was becoming increasingly difficult, as was demonstrated by the disruption and delays caused by recent roadworks. Online widening would be disruptive to traffic and would require extensive and complex traffic management arrangements and significant land and property purchases. Mr Walton's attention was also drawn to the November 2006 report. In relation to consultation on the route, it was observed that the Fastlink corridor followed one of the routes which had been the subject of consultation in 2005, and that the procedure consequent upon the publication of the draft schemes and orders would include further consultation on the route.

46. On 12 October 2007 the Minister announced that a public local inquiry would be held under section 139 of the 1984 Act to consider objections to the scheme. The scope of the inquiry was later extended to include draft compulsory purchase orders made in connection with the scheme.

47. On 17 April 2008 the Ministers announced that they had appointed reporters to conduct the inquiry. The announcement made clear the limited scope of the inquiry:

> "Scottish Ministers, having taken a policy decision to construct a special road to the west of Aberdeen (known as the Aberdeen Western Peripheral Route) including a new carriageway to Stonehaven (known as Fastlink), have appointed [the reporters] to hold a public local inquiry and to report with respect to objections to the associated schemes and orders…
>
> Having accepted the need in principle for the road, Scottish Ministers do not wish to be advised on the justification for the principle of the special road scheme in economic, policy or strategy terms. Scottish Ministers consider that strategies and policies referring to the special road scheme are only relevant to the inquiry insofar as these set the context for the Aberdeen Western Peripheral Route.
>
> Scottish Ministers have directed that they only wish to be advised on the technical aspects of the route choice including the environmental statement published in connection with the special road scheme and any opinions expressed thereon. Given the assessment approach taken in the environmental statement, Scottish Ministers wish to be advised on the technical and environmental issues associated with the special road scheme together with its individual components."

48. The limited scope of the inquiry was reflected in the approach adopted by the reporters. Following a pre-enquiry meeting, they issued a note dated 22 May 2008 stating that they did not intend to permit the presentation of evidence or questioning on the need for the scheme. They added that the inquiry was into the scheme proposed by the Ministers and could not turn itself into an inquiry into a series of assumed alternative proposals.

49. The inquiry proceeded between 9 September 2008 and 18 February 2009. Road Sense was represented by counsel. A written statement explained that Road Sense had been formed in January 2006 to oppose the proposed WPR and to promote the full and proper evaluation of alternatives. It consisted of private individuals drawn mainly from the settlements situated along and close to the chosen route. It had held public meetings with attendances ranging from 300 to 1,200 people. One of the contentions advanced in the written statement was that the Ministers had failed to comply with the requirements of the SEA Directive.

Road Sense presented evidence to the inquiry, including oral evidence given by Mr Walton. In their closing submissions, counsel for Road Sense confined themselves to matters falling within the remit of the reporters, but also submitted that the terms of that remit had prevented the inquiry from carrying out a proper assessment of the proposals.

50. The report submitted by the reporters, dated 30 June 2009, reflected their remit. They observed in the preamble to the report that a large number of objectors had questioned the need for the scheme in general, or for parts of it, notably the Fastlink. Given their remit, they had not included these matters in the report.

51. On 21 December 2009 the Ministers issued their decision to make the schemes and orders as had been proposed, subject to detailed modifications. Before doing so, they were obliged to take into account all representations made timeously about the project and the EIA, in accordance with section 20A(5A) of the 1984 Act and the corresponding provisions of paragraphs 7 and 13 of Schedule 1. That obligation extended to representations which fell outside the remit of the inquiry, such as Mr Walton's representations questioning the need for the Fastlink. The decision letter stated that the Ministers had considered all the objections which were made and not withdrawn, and all of the evidence presented to the inquiry.

52. The schemes and orders were made on 14 January 2010 and laid before the Scottish Parliament the following day. They were approved by resolution of the Parliament on 3 March 2010. The present application was then made by Road Sense, and by Mr Walton as an individual. In the event, the application so far as presented by Road Sense was abandoned after the Ministers questioned whether the bringing of the application had been duly authorised. The application then proceeded solely at the instance of Mr Walton.

53. Before the Lord Ordinary, the schemes and orders were challenged on a wide variety of grounds, including procedural unfairness in respect of the limited scope of the inquiry, and a failure to comply with requirements of EU and domestic law relating to the protection of the Dee Special Area of Conservation and of several protected species. It was also contended that there had been a failure to comply with the EIA Directive as amended by the PPD Directive. Although the SEA Directive was touched upon, it does not appear to have been argued at that stage that there had been a failure to comply with its requirements. The Lord Ordinary rejected the appellant's submissions (*Walton v Scottish Ministers* [2011] CSOH 131; 2011 SCLR 686).

54. Before the Inner House, it was again argued that there had been a failure to comply with the EIA Directive, with the common law requirements of a fair

procedure, and with the EU and domestic law protecting habitats and species. In addition it was argued that there had been a failure to comply with the SEA Directive in respect of the Fastlink component of the scheme. Their Lordships of the Extra Division rejected these submissions and adopted the reasoning of the Lord Ordinary. The Extra Division also raised the question whether Mr Walton was in any event a "person aggrieved" by the schemes and orders within the meaning of paragraph 2 of Schedule 2 to the 1984 Act: a question which had not been raised by the Ministers. Their Lordships considered that he had failed to demonstrate that he was such a person. They also accepted the Ministers' submission that he had failed to demonstrate that his interests had been "substantially prejudiced", within the meaning of paragraph 3 of Schedule 2, by any failure to comply with any requirement of the Act. On that basis, they concluded that, even if Mr Walton's challenge to the validity of the schemes and orders had been well founded, the court would not have quashed them (*Walton v Scottish Ministers* [2012] CSIH 19).

55. There are three schemes and eleven orders in issue. Each of the schemes is a special roads scheme made under sections 7 and 10(1) of the 1984 Act, in terms of which the Ministers are authorised to provide a special road which will become a trunk road on the date when the scheme comes into force. Each of the schemes relates to a different section of the route. Of the eleven orders, three are trunk road orders made under section 5(2) of the Act, in terms of which specified lengths of road which the Ministers propose to construct will become trunk roads on the dates when the orders come into force. Each of these orders again relates to a different section of the route. The remaining orders authorise measures which are ancillary to the schemes and the trunk road orders, such as the construction of side roads, the stopping up of existing lengths of road, and the detrunking of existing lengths of road.

56. Against this background, Mr Walton's primary contention is that the Fastlink element of the scheme was adopted without the public consultation required by the SEA Directive. He therefore seeks the quashing of the schemes and orders only in so far as they concern the Fastlink. The Ministers maintain that there has been no breach of the directive; that, if there has been, the court should in any event decline to quash the schemes and orders; but that, if the schemes or orders are to be quashed to any extent, they must then fall in their entirety, as the scheme and orders are so integrated with one another that they must stand or fall as a whole.

Issues arising in relation to the SEA Directive

57. The argument advanced on behalf of Mr Walton proceeds in a number of steps. The first proposition is that the regional transport strategy adopted by

NESTRANS – the MTS – was a plan or programme within the meaning of article 2(a) of the SEA Directive. The second proposition is that the decision to construct the Fastlink, announced by the Minister on 1 December 2005 and subsequently implemented by the orders under challenge, was a modification to that plan or programme: the MTS was modified by the addition of a new objective, namely the relief of congestion on the A90 between Stonehaven and Aberdeen. If so, that decision was therefore itself a plan or programme within the meaning of article 2(a) and, since that plan or programme was adopted after 21 July 2004, it was subject to the requirements of the directive. The final proposition is that there was a failure to comply with those requirements: the announcement was not preceded by any consultation on the question whether there should be a Fastlink or not, and that question was not addressed in the subsequent procedures as required by the SEA Directive. Mr Walton's written case also founded upon the Public Access to Environmental Information Directive (Directive 2003/4/EC, OJ 2003 L41/26) and the PPD Directive. In the event however those contentions were not pursued.

58. The Ministers on the other hand contend in the first place that the MTS was not a plan or programme within the meaning of article 2 of the directive, since (a) the directive does not apply to plans and programmes of which the first formal preparatory act was prior to 21 July 2004 (by virtue of article 13(3)), and (b) the MTS was not prepared for adoption through a legislative procedure or required by legislative, regulatory or administrative provisions. In that respect, reliance was placed upon the fact that NESTRANS was a non-statutory partnership: it was accepted that if the MTS had been prepared by a statutory body, at a time when the SEA Directive was in force, an SEA would have been required. Secondly, they contend that in any event the decision to construct the Fastlink was not a modification of any such plan or programme but rather an aspect of the implementation of an element of the MTS at project level. Thirdly, they contend that the requirements of the directive were in any event fulfilled: the need in principle for the WPR was consulted upon at the plan or programme level as an element of the MTS, and public consultation took place after 2005 upon the Fastlink, as part of the WPR project, in accordance with the EIA Directive.

Discussion

59. In the present case, the WPR was subject to an EIA; and there is no longer any complaint that that assessment failed to meet the requirements of the EIA Directive. The question whether there also required to be an SEA depends upon whether the decision to construct the Fastlink as part of the WPR was a modification of a "plan" or "programme" as defined in article 2(a) of the SEA Directive, and was therefore itself such a plan or programme; and, if so, whether it set the framework for future development consent of a project listed in article 3(2)(a) (there being no dispute that the WPR is such a project). The reasoning of the Court of Justice and the Advocate General in such recent cases as *Terre*

Wallone ASBL v Région Wallone and Inter-Environnement Wallonie ASBL v Région Wallone ((Joined Cases C-105/09 and C-110/09) [2010] I-ECR 5611 and *Inter-Environnement Bruxelles ASBL, Pétitions-Patrimoine ASBL and Atelier de Recherche et d'Action Urbaines ASBL v Région de Bruxelles-Capitale* (Case C-567/10) [2012] CMLR 909 suggests that these questions are to some extent inter-related.

60. In determining whether the Fastlink decision was a modification of a "plan" or "programme" as defined in article 2(a), the first question is whether, as Mr Walton contends, the MTS (or the local transport strategies which it comprised) was a plan or programme within the meaning of that provision.

61. It might be argued with some force that none of these documents has been shown to have been "required by legislative, regulatory or administrative measures" as stipulated by the second indent of article 2(a), even according the term "required" the width of meaning given to it in *Inter-Environnement Bruxelles* at para 31. It might also be argued that NESTRANS, at least, was not an "authority" within the meaning of the first indent, since it was established voluntarily and did not exercise any statutory functions. On the other hand, it might be argued that the documents "set the framework for future development consent of projects", as explained by Advocate General Kokott in her opinion in *Terre Wallone* at points 64-65, and were therefore likely to have significant effects on the environment. In those circumstances, it might be argued that a purposive interpretation of the directive would bring the documents within its scope.

62. For reasons which I shall explain, it does not appear to me to be necessary to reach a concluded view on these questions. It is sufficient to say that it appears to me to be arguable that the MTS, or the local transport strategies which formed its constituent parts, formed a plan or programme within the meaning of the directive. The question whether the decision to construct the Fastlink constituted a modification to a plan or programme can be considered on the hypothesis that the MTS (or its constituent documents) comprised such a plan or programme.

63. I should add that I am unable to accept the Ministers' contention that the MTS was not a plan or programme because its first formal preparatory act was prior to 21 July 2004. Article 13(3) defines the temporal scope of application of the directive: not what constitutes a plan or programme. It is based on the premise that there were plans and programmes of which the first formal preparatory act was before 21 July 2004: see the second sentence. The fact that article 4(1) does not apply to a plan or programme of which the first formal preparatory act was before that date, by virtue of article 13(3), does not therefore deprive such a plan or programme of its character as a plan or programme.

64. Proceeding on the hypothesis that the MTS (or its constituent documents) constituted a plan or programme, the next issue which requires to be considered is whether the Fastlink constituted a modification to that plan or programme within the meaning of article 2(a). In my view it did not.

65. As I have explained, the MTS proposed that the local roads authorities should construct a WPR which would, on completion, become part of the trunk road network. In March 2003 the Ministers took over responsibility for designing and constructing the WPR, as the authority responsible for trunk roads. In doing so, the Ministers assumed responsibility for a specific development. In the terminology of the EIA and SEA Directives, that development could aptly be described as a "project", defined in article 1 of the EIA Directive as meaning, in the first place, "the execution of construction works or of other installation or schemes". It could not readily be regarded as a plan or programme subject to the SEA Directive (assuming that to have been temporally applicable): the Ministers did not assume responsibility for the preparation of a document setting the framework for future development consent of projects.

66. The subsequent decision to enlarge the project, so as to provide a trunk road connection between Stonehaven and the WPR as previously envisaged, was taken by the Ministers primarily in order to relieve congestion on the A90 and anticipate the need to increase the capacity of that road. In taking that decision, the Ministers modified a project: they did not modify the legal or administrative framework which had been set for future development consent of projects. It is therefore not the SEA Directive which would apply, but other EU legislation such as the EIA Directive, as the Commission explained in its guidance document, *Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment* (2003), para 3.9.

67. My conclusion that the decision to construct the Fastlink was not a modification of the MTS therefore reflects, in the first place, the fact that the decision was taken by the Ministers in the course of executing a specific project and related solely to that project. They did not take the decision in the exercise of any power to modify the MTS or otherwise set a legal or administrative framework for future development consent of projects.

68. Furthermore, there were no national legislative or regulatory provisions, such as the Court of Justice envisaged in *Inter-Environnement Bruxelles ASBL, Pétitions-Patrimoine ASBL and Atelier de Recherche et d'Action Urbaines ASBL v Région de Bruxelles-Capitale* (Case C-567/10) [2012] 2 CMLR 909, para 31, requiring the development in the Ministers' thinking about the project to be implemented by means of the formal adoption of a plan or programme, or the modification of such a document. Under domestic law, the Ministers' decision was

implemented in accordance with the procedures laid down for specific road projects in the 1984 Act.

69. In addition, the conclusion that the decision to construct the Fastlink does not fall within the scope of the SEA Directive appears to me to be consistent with a purposive interpretation of that directive. In *Inter-Environnement Bruxelles*, the Court of Justice concluded that the repeal of a plan or programme should in principle be regarded as a modification, within the meaning of the directive, because it changed the framework for future development consent of projects and might therefore be likely to have significant effects on the environment. As I have explained, the decision to construct the Fastlink did not alter the framework for future development consent of projects, but altered a specific project which continued to require development consent. The effects of the Fastlink on the environment were capable of being fully assessed in accordance with other applicable EU legislation, including the EIA Directive.

70. Given my conclusion that the decision to construct the Fastlink was not a modification of a plan or programme within the meaning of the SEA Directive, it is unnecessary to reach a concluded decision as to whether the MTS was in fact such a plan or programme.

71. Neither party requested the court to make a preliminary reference to the Court of Justice. The question whether the decision to construct the Fastlink was a "modification" appears to me to turn upon the application to the facts of this case of principles established in the recent case law of the Court of Justice. In these circumstances, a reference does not appear to me to be necessary.

Common law fairness

72. Mr Walton also contended in his written case that common law principles of fairness in any event required that the remit of the public local inquiry should include the economic, policy or strategic justification for the Fastlink. That was said to follow from the decision in *Bushell v Secretary of State for the Environment* [1981] AC 75. That case was however concerned with the procedure which had to be followed at an inquiry in order for it fairly to fulfil its remit: as Lord Diplock observed (p 95), what is a fair procedure to be adopted at a particular inquiry will depend upon the nature of its subject matter. The complaint in the present case concerns the prior question of the subject matter of the inquiry.

73. The 1984 Act lays down detailed provisions governing the consideration of representations and the holding of inquiries. The Ministers are bound to take

timeously submitted representations into account, whether or not there has been an inquiry: section 20A(5A), and paragraphs 7 and 13 of Schedule 1. They have the power to hold an inquiry under section 139, and are under a duty to hold an inquiry if an objection is made to an order or scheme by any person on whom a copy of the relevant notice is required to be served, or any other person appearing to them to be affected: paragraphs 5 and 11 of Schedule 1. Mr Walton was not a person on whom a copy of the notice required to be served. Nothing before the court indicates that he was regarded as a person affected. It has not been suggested that the Ministers were statutorily obliged to hold an inquiry into his objections. It has not been suggested that he had any legitimate expectation that the remit of the inquiry would encompass the economic, policy or strategic justification for the Fastlink. In those circumstances, there is no material before the court which suggests, let alone establishes, that the Ministers were bound as a matter of fairness to include those matters within the remit of the inquiry.

Remedies

74. In the opinion of the Extra Division, delivered by Lord Clarke, a number of observations were made about matters relating to remedies. First, it had been argued on behalf of the Ministers that, even if Mr Walton's contentions were accepted, the court should exercise its discretion under paragraph 3 of Schedule 2 to the 1984 Act to decline to grant him a remedy. The court accepted that submission, stating (para 40) that it would have been quite inappropriate that the project should be stopped from proceeding "by an individual in the position of this reclaimer". In that regard, the court observed that it was not contended that the schemes and orders would substantially prejudice his interests or affect his property (para 39).

75. Secondly, the court questioned whether Mr Walton was "a person aggrieved" within the meaning of paragraph 2 of Schedule 2. Their Lordships noted that Mr Walton did not claim that *his* interests would be substantially prejudiced (the court's emphasis) or that his property would be affected. Although his house was close to the route of the WPR, it was at some distance from the Fastlink. The court cited *Ealing Corporation v Jones* [1959] 1 QB 384, 392 where Donovan J said that the word "grievance" connoted some legal grievance. The court also cited the judgment of Lockhart J in *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 128 ALR 238, 251-252, a decision of the Federal Court of Australia, where it was said that, in order to be a person aggrieved, the applicant's interest must be above that of an ordinary member of the public. The court observed that, although Mr Walton had opposed the project from its inception, he was no different in that respect from someone who lived many hundreds of miles from the proposed route but had on occasions to travel to Aberdeen (para 37).

76. The court added that, even if the test were the same as that of standing to bring an application for judicial review, as explained in *AXA General Insurance Ltd and others v HM Advocate and others* [2011] UKSC 46; [2012] 1 AC 868; 2011 SLT 1061, it would find it difficult to consider that Mr Walton possessed sufficient interest to clothe him with rights under paragraph 2 (para 38).

Discretion

77. Before this court, the Ministers accepted that, if there had been a substantial failure to accord Mr Walton proper participation as required under EU law, then the court should not withhold a remedy, at least if it were satisfied that he was "a person aggrieved" in respect of the particular breach found. It would be inappropriate in these circumstances to embark upon an elaborate discussion. It is sufficient to say that I would wish to reserve my opinion as to the correctness of the approach adopted by the Extra Division. In my opinion the matter requires fuller consideration.

78. That consideration might involve a number of inter-related issues. One is whether a failure to comply with the SEA Directive falls within the scope of paragraph 2 of Schedule 2 to the 1984 Act at all; and, if so, whether it falls under the first or the second of the grounds upon which a scheme or order can be challenged, as specified in that paragraph. They are "that it is not within the powers of this Act or that any requirements of this Act or of any regulations made thereunder have not been complied with in relation to the scheme or order". It is only in relation to the second ground that it is necessary under paragraph 3 to demonstrate "substantial prejudice".

79. There is no requirement in the 1984 Act, or in any regulations made under that Act, that an SEA should be carried out: the provisions in the Act which are concerned with environmental assessment appear to have been designed to comply with the EIA Directive, presumably on the basis that the construction of a road is a project (the term employed in section 20A and in paragraphs 7 and 13 of Schedule 1), rather than a plan or programme. In domestic law, the obligation to carry out an SEA arises under the Environmental Assessment (Scotland) Act 2005 ("the 2005 Act"), section 12 of which prohibits the adoption of a qualifying plan or programme, or its submission to a legislative procedure for the purposes of its adoption, unless the requirements of the Act have been met. The adoption of a plan or programme in breach of the requirements of the 2005 Act could in principle be challenged by means of an application for judicial review. In relation to a local roads authority, there would not appear to be any scope for basing an application under paragraph 2 of Schedule 2 to the 1984 Act upon a failure to comply with the SEA Directive.

80. The position is however less straightforward so far as the Ministers are concerned. The Scotland Act transferred the functions of the Secretary of State under the 1984 Act to the Ministers only so far as they were exercisable within devolved competence: see section 53(1). It is outside devolved competence to make any provision by subordinate legislation which is incompatible with EU law, or to exercise a function in a way which is incompatible with EU law: section 54(2) and (3), read with section 29(2)(d). More generally, the Ministers have no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with EU law: section 57(2). These provisions are intended to disable the Ministers from acting in such a way as to place the United Kingdom in breach of its obligations under EU law. The Act also contains provisions relating to remedies. Section 102, for example, enables the court to make an order removing or limiting any retrospective effect of its decision, or suspending the effect of the decision to allow the defect to be corrected.

81. In an appropriate case, the court would have to consider the relationship between the provisions of the Scotland Act and paragraphs 2 to 4 of Schedule 2 to the 1984 Act. It would be necessary to consider, in particular, whether a scheme or order made by the Ministers in breach of EU law would be beyond the powers which they possess as a roads authority, by virtue of the transfer of functions effected by the Scotland Act, and would therefore be "not within the powers of [the 1984] Act". If so, it would also be necessary to consider the possible interaction between the remedial provisions of the two Acts. In addition, it would be necessary to consider how the discretion conferred by paragraph 3 of Schedule 2 to the 1984 Act should be exercised in that context. In relation to the latter aspect, the EU law principle of effectiveness, discussed by Lord Carnwath, would also be relevant.

Standing

82. Before this court, as in the lower courts, the Ministers did not dispute Mr Walton's entitlement to bring the present application. Nevertheless, this court cannot avoid the need to consider the Extra Division's observations on the issue, as their obiter nature is unlikely to detract from their potential influence, both in relation to statutory applications and in relation to applications for judicial review.

A person aggrieved?

83. I shall consider first the requirement that an application under paragraph 2 of Schedule 2 to the 1984 Act must be brought by "a person aggrieved". In *Attorney-General of the Gambia v N'Jie* [1961] AC 617, 634 Lord Denning, delivering the judgment of the Judicial Committee of the Privy Council, said that

the definition by James LJ of the phrase as connoting a person with a legal grievance (*Ex parte Sidebotham; In re Sidebotham* (1880) 14 Ch D 458, 465), which had been echoed by Donovan J in *Ealing Corporation v Jones*, was not to be regarded as exhaustive. He went on to say this:

> "The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him: but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

84. As Lord Fraser of Tullybelton made clear in *Arsenal Football Club Ltd v Ende* [1979] AC 1, 32, the meaning to be attributed to the phrase will vary according to the context in which it is found. It is therefore necessary, as Lord President Rodger observed in *Lardner v Renfrew District Council* 1997 SC 104, 108, to have regard to the particular legislation involved, and the nature of the grounds on which the appellant claims to be aggrieved.

85. Decisions both north and south of the border have indicated that a wider interpretation than that adopted in *Ex parte Sidebotham* is appropriate, in particular, in the context of statutory appeals under the Town and Country Planning Acts: a context which, like the present, is concerned with the granting of consent for proposed developments, and involves analogous procedures. Scottish examples include *North East Fife District Council v Secretary of State for Scotland* 1992 SLT 373, *Cumming v Secretary of State for Scotland* 1992 SC 464, *Mackenzie's Trs v Highland Regional Council* 1994 SC 693 and *Lardner v Renfrew District Council*. Mention should also be made of the valuable review of the English authorities by Woolf LJ in *Cook v Southend-on-Sea Borough Council* [1990] 2 QB 1.

86. It is apparent from these authorities that persons will ordinarily be regarded as aggrieved if they made objections or representations as part of the procedure which preceded the decision challenged, and their complaint is that the decision was not properly made. In *North East Fife District Council v Secretary of State for Scotland*, for example, Lord President Hope said of the appellants (at 375-376):

> "But in my opinion the fact that all three appellants were present at, and made representations at the public inquiry is sufficient for them to be persons 'aggrieved' … they were entitled to expect that the Secretary of State, in considering their representations, would act within the powers conferred upon him by the statute and … they are

> entitled to appeal against his decision on the ground that he has not done so."

The same approach has been adopted in England and Wales: see for example *Turner v Secretary of State for the Environment* (1973) 28 P&CR 123, endorsed by the Court of Appeal in *Times Investment Ltd v Secretary of State for the Environment* (1990) 61 P&CR 98. Many other decisions to the same effect are noted in Woolf, Jowell and Le Sueur, *De Smith's Judicial Review* (6th edition, 2007), para 2-060, and in Wade and Forsyth, *Administrative Law* (10th edition, 2009), p 630.

87. The authorities also demonstrate that there are circumstances in which a person who has not participated in the process may nonetheless be "aggrieved": where for example an inadequate description of the development in the application and advertisement could have misled him so that he did not object or take part in the inquiry, as in *Cumming v Secretary of State for Scotland* and the analogous English case of *Wilson v Secretary of State for the Environment* [1973] 1 WLR 1083. Ordinarily, however, it will be relevant to consider whether the applicant stated his objection at the appropriate stage of the statutory procedure, since that procedure is designed to allow objections to be made and a decision then to be reached within a reasonable time, as intended by Parliament.

88. In the present case, Mr Walton made representations to the Ministers in accordance with the procedures laid down in the 1984 Act. He took part in the local inquiry held under the Act. He is entitled as a participant in the procedure to be concerned that, as he contends, the Ministers have failed to consult the public as required by law and have failed to follow a fair procedure. He is not a mere busybody interfering in things which do not concern him. He resides in the vicinity of the western leg of the WPR. Although that is some distance from the Fastlink, the traffic on that part of the WPR is estimated to be greater with the Fastlink than without it. He is an active member of local organisations concerned with the environment, and is the chairman of the local organisation formed specifically to oppose the WPR on environmental grounds. He has demonstrated a genuine concern about what he contends is an illegality in the grant of consent for a development which is bound to have a significant impact on the natural environment. In these circumstances, he is indubitably a person aggrieved within the meaning of the legislation.

Standing to invoke the supervisory jurisdiction

89. In view of the Extra Division's observation that Mr Walton would lack standing, even if the test were the same as would apply to an application to the

supervisory jurisdiction under the common law, it may be helpful to consider that matter briefly.

90. In *AXA General Insurance Ltd and others v HM Advocate and others* [2011] UKSC 46; [2012] 1 AC 868; 2011 SLT 1061, this court clarified the approach which should be adopted to the question of standing to bring an application to the supervisory jurisdiction. In doing so, it intended to put an end to an unduly restrictive approach which had too often obstructed the proper administration of justice: an approach which presupposed that the only function of the court's supervisory jurisdiction was to redress individual grievances, and ignored its constitutional function of maintaining the rule of law.

91. As was said by Lord Hope and myself at paras 62 and 170 respectively, an applicant has to have sufficient interest: that is to say, an interest which is sufficient to justify his bringing the application before the court. In further explanation of that concept, Lord Hope said (para 63):

> "I would not like to risk a definition of what constitutes standing in the public law context. But I would hold that the words 'directly affected' which appear in rule 58.8(2) capture the essence of what is to be looked for. One must, of course, distinguish between the mere busybody, to whom Lord Fraser of Tullybelton referred in *R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 646, and the interest of the person affected by or having a reasonable concern in the matter to which the application related. The inclusion of the word 'directly' provides the necessary qualification to the word 'affected' to enable the court to draw that distinction. A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent."

92. As is clear from that passage, a distinction must be drawn between the mere busybody and the person affected by or having a reasonable concern in the matter to which the application relates. The words "directly affected", upon which the Extra Division focused, were intended to enable the court to draw that distinction. A busybody is someone who interferes in something with which he has no legitimate concern. The circumstances which justify the conclusion that a person is affected by the matter to which an application relates, or has a reasonable concern in it, or is on the other hand interfering in a matter with which he has no legitimate concern, will plainly differ from one case to another, depending upon the particular context and the grounds of the application. As Lord Hope made plain in the final sentence, there are circumstances in which a personal interest need not be shown.

93. I also sought to emphasise that what constitutes sufficient interest has to be considered in the context of the issues raised. I stated (para 170):

> "A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law … What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context."

94. In many contexts it will be necessary for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it.

95. At the same time, the interest of the particular applicant is not merely a threshold issue, which ceases to be material once the requirement of standing has been satisfied: it may also bear upon the court's exercise of its discretion as to the remedy, if any, which it should grant in the event that the challenge is well-founded. In that regard, I respectfully agree with the observations made by Lord Carnwath at para 103.

96. So far as the present case is concerned, I have listed the various factors which support Mr Walton's entitlement to bring the present application as a "person aggrieved". *Mutatis mutandis*, those factors would also have given him standing to bring an application for judicial review if, for example, he had sought to challenge the Ministers' decision to restrict the remit of the inquiry so that some

of his objections were, as he contended, unlawfully excluded from its scope. Such a challenge would however have failed on its merits.

Conclusion

97. For the reasons I have explained, the appeal should in my opinion be dismissed.

LORD CARNWATH

Substance

98. I agree that the appeal should be dismissed for the reasons given by Lord Reed. These are, in short, that the adoption of Fastlink did not involve the modification of a plan or programme within the meaning of the SEA Directive; and that the procedure as a whole did not breach any common law principle of fairness.

99. On the first point, like Lord Reed, I am content to proceed on the assumption that the MTS, as approved by NESTRANS in March 2003, was itself such a "plan or programme". However, I should register my serious doubts on the point, even accepting the flexible approach required by the European authorities. I note from that the passage from *Inter-Environnement Bruxelles* quoted by Lord Reed (para 22) refers to regulation of plans and programmes by provisions "which determine the competent authorities for adopting them and the procedure for preparing them..." There 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. Given the relatively informal character of the NESTRANS exercise, it is not clear to me what "administrative provisions" could be relied on as fulfilling that criterion.

100. On the issue of common law fairness, and the merits more generally, our conclusion has persuasive support from the decision of the Aarhus Compliance Committee on a complaint made by Road Sense in May 2009 (that is, after the conclusion of the inquiry, but before the final decision). The Committee is responsible for enforcement of the Aarhus Convention, to which the UK is a party (more fully, the UNECE Convention on Access to Information, Public Participation, in Decision-Making, and Access to Justice in Environmental

Matters). Although the Convention is not part of domestic law as such (except where incorporated through European directives), and is no longer directly relied on in this appeal, the decisions of the Committee deserve respect on issues relating to standards of public participation.

101. The Committee, by a decision adopted on 25 February 2011, rejected all the allegations of breach of the Convention. In particular they rejected a complaint about the limited scope of the public inquiry. The Committee were satisfied that the public had had "a number of opportunities during the ongoing participation process over the years to make submissions that the AWPR not be built, and to have those submissions taken into account" (para 82). Although they noted "with some concern" that the route finally selected and the dual carriageway character of the Fastlink were not subject to the informal consultation process, they found that these aspects had been subject to adequate public participation through the statutory authorisation process (para 85). In relation to the argument that the addition of the Fastlink involved a new strategic objective of providing relief for the A90 without the consultation required by article 7 of the Convention, they held that the document which adopted this objective was not itself a "plan" (subject to article 7 of the Convention), but rather "a document relating to a specific activity". It seems therefore that this case has not disclosed any defects in domestic procedures judged by European standards.

Remedies

102. Two issues have been argued before us in relation to the procedure: (i) discretion (ii) standing. On the latter issue, I have nothing to add to Lord Reed's discussion of the expression "person aggrieved", which confirms, as I understand it, that Scottish practice on these matters is, or should be, in line with that south of the border. I also agree with his comments, and those of Lord Hope, on the issue of standing in judicial review more generally, although that issue does not arise directly for decision in this case.

103. I will however add a few words of my own on the issue of discretion, which in practice may be closely linked with that of standing, and may be important in maintaining the overall balance of public interest in appropriate cases (see, for example, *R v Monopolies and Mergers Commission, ex p Argyll Group plc* [1986] 1 WLR 763, 774-775). In this respect, I see discretion to some extent as a necessary counterbalance to the widening of rules of standing. The courts may properly accept as "aggrieved", or as having a "sufficient interest" those who, though not themselves directly affected, are legitimately concerned about damage to wider public interests, such as the protection of the environment. However, if it does so, it is important that those interests should be seen not in isolation, but

rather in the context of the many other interests, public and private, which are in play in relation to a major scheme such as the AWPR.

104. Mr Mure QC for the Ministers drew a distinction between breaches respectively of domestic and of European law. He accepted that if there had been a substantial failure to accord Mr Walton proper participation as required under European law, then subject to the issue of standing the court should not withhold a remedy. Further, he submitted, since the schemes and orders were drawn in a form which does not enable Fastlink to be dealt with separately, the court would have no alternative under this statutory scheme but to quash them all, with the effect that the statutory procedures for the whole project would have to be started all over again.

105. On the other hand, he submitted, if the only breach established were one of fairness under domestic law, then the court would have wider discretion to refuse relief. It could draw a balance between the "very attenuated" nature of Mr Walton's own interest, and the great public interest in allowing this important scheme to proceed without delay. In this connection, he cited the long delay since the 2003 MTS, when the scheme was already said to be "overdue"; the strong support for the scheme from large sections of the public, and from national and local elected bodies; the lack of any legal challenge from other non-governmental or environmental organisations; the £115m of public money already spent on preparatory work and property acquisition; the uncertainty and blight which would be caused by quashing the orders; and the burden, on those who have participated in the consultations and inquiries over many years, of having to go through the same processes anew.

106. On the other side Mr O'Neill QC submitted that, if a significant breach were found in the requirements for public consultation under either European or domestic law, there would be no grounds to refuse him an effective remedy. As he might have said: "fiat justitia, ruat caelum". He submitted, however, that, notwithstanding the limited nature of the remedies provided for in terms by the statute, it would not be necessary to quash the scheme and orders as whole. The court had inherent powers to fashion a proportionate remedy, directed simply to remedying whatever defect was found in relation to the procedures relating to the Fastlink.

107. In considering these submissions, I propose to consider first the statutory application procedure as it operates under domestic law, before turning to its application to alleged breaches of the European environmental assessment directives. In the latter context, I note what Lord Reed has said about the implications of the Scotland Act. We have not heard argument on that aspect, and nothing I say is intended to pre-empt discussion of such issues in future cases.

Statutory challenge – domestic law

108. The procedure under which the present proceedings were brought is contained in Schedule 2 of the 1984 Act, the relevant provisions of which have been set out by Lord Reed (para 9). There are six distinctive features:

i) The statutory procedure may be brought only by "a person aggrieved" by the scheme or order.

ii) It must be brought within six weeks from the publication of the statutory notice of the making of scheme or order; there is no power to extend that time-limit.

iii) It is an exclusive procedure. The validity of a scheme or order may not be challenged by any other procedural route before or after it is made.

iv) There are two possible grounds for challenge: (a) not within the powers of the Act (b) failure to comply with any requirement of the Act or regulations made under it. Under (b), the applicant must also show substantial prejudice to his interests caused by the failure.

v) If the grounds are established the court "may" make an order; it is on its face a discretionary jurisdiction.

vi) The only remedies available to the court in terms of the Act are (a) an interim order suspending operation of the scheme or order pending final determination by the court, (b) a final order quashing the scheme or order either generally or "in so far as it affects the property of the applicant".

109. Provisions of this kind are found in many statutes relating to planning, highways and other similar public functions, but the detail varies. The scope of the two statutory grounds, and the relationship between them, have been considered in a number of judgments, not all mutually consistent. A useful review of the authorities over some forty years can be found in *Wade & Forsyth, Administrative Law* 10th ed pp 626-629. From that, it can be seen that in some early Scottish cases a narrow view was taken of the second procedural ground. It was held for example that a breach of the inquiries procedure rules was not covered, because they had been made under the Tribunals and Inquiries Act 1958, rather than the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 under which the order had been made (see *Hamilton v Roxburgh County Council* 1971 SLT 2). It is open to

question whether this strict view would be upheld today, but the particular problem has been addressed in some later statutes, which include breach of the inquiries procedure rules as a separate and specific head of procedural challenge (see e.g. Acquisition of Land Act 1981 section 23(3)(b)); Town and Country Planning (Scotland) Act 1997 section 239(9)).

110. On the other hand, the requirement for "substantial prejudice" under the second ground has been interpreted flexibly. Thus, although prejudice to the applicant's own interests provides the test, it has been accepted that he may be prejudiced by a failure to give appropriate notice which might have attracted other potential objectors to his cause (see *Wilson v Secretary of State for the Environment* [1973] 1 WLR 1083). There has also been some debate about which ground is appropriate for a breach of common law principles of natural justice or fairness: whether substantive, procedural or both (see eg *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 1 WLR 1255). On the other hand, in *George v Secretary of State for the Environment* (1979) 77 LGR 689, Lord Denning MR suggested that the issue was academic, since an actionable breach of natural justice necessarily implies a finding of substantial prejudice to the applicant's interests.

111. In the modern law, in my view, it would be wrong to construe such provisions too rigidly, or without regard to the parallel development of principles of judicial review. In *De Smith's Judicial Review* (6th Ed paragraphs 17-025ff) the two statutory grounds are helpfully related to Lord Diplock's now well-established categorisation of the grounds for judicial review in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (the "GCHQ case"). It is suggested that ground (a) is equivalent to "the grounds of judicial review known as illegality and unreasonableness"; while ground (b) is "close to the ground of judicial review of procedural propriety", treated by Lord Diplock as including "both the common law rules of natural justice and the breach of statutorily required procedures". The authors add:

> "Normally in applications to quash, for the claimant to succeed in quashing the decision he must have been 'substantially prejudiced' by the failure to comply with the statute's procedural conditions. Under both substantive and procedural grounds of review the courts possess a residual discretion not to quash a decision where there has been no prejudice or detriment to the claimant and to refuse relief in exceptional circumstances."

112. I find this a useful general guide, which gives appropriate, but not unduly legalistic, effect to the distinction drawn by the legislature between substantive and procedural grounds. The applicant will be refused a remedy, where he complains

only of a procedural failure (whether under statutory rules or common law principles), if that failure has caused him personally no substantial prejudice. Where, however, a substantive defect is established, going either to the scope of the statutory powers under which the project was promoted, or to its legality or rationality in the sense explained by Lord Diplock, the court's discretion to refuse a remedy will be much more limited. These general principles must of course be read in the context of the statutory framework applicable in a particular case.

113. The application of these principles in the present case is to my mind straightforward under domestic law. It is not suggested that the making of the schemes and orders authorising the AWPR was not within the powers conferred by the 1984 Act. Nor is it alleged that they were vitiated by illegality or irrationality. There is no allegation of any breach of the procedural requirements laid down by or under the Act itself. Even if there had been some technical breach of those rules, or of analogous common law principles, Mr Walton would not have been entitled to a remedy, because he has not shown, or even alleged, that his own interests have been significantly prejudiced.

114. In relation to the Fastlink, his legitimate interest extended to the right to be consulted, to make his views known on any aspect of the scheme, and to have those views considered. He did not have a legal right to have those views examined at a public inquiry, but an inquiry was held and he was heard. He had no right to dictate the result. Furthermore, the balance of the factors listed by Mr Mure QC point overwhelmingly to the exercise of discretion in favour of allowing the scheme to proceed.

Statutory Challenge - Environmental Assessment

115. Breach of the rules relating to environmental assessment, derived from European directives, cannot be considered in a purely domestic context. A more careful analysis is required having regard to the principles applying to remedies under European law. In view of Mr Mure's partial concession, the argument before us has been relatively limited. However, I will take this opportunity to dispel what seem to me misconceptions as to the effect of some of the authorities, in the hope of clearing the way to fuller argument in another case.

116. Mr O'Neill submitted that, because a breach of the SEA Directive would involve a breach of European law, the principle of "effectiveness" (see now article 19(1) of the Treaty on the Functioning of the European Union) requires nothing less than the nullifying of any action based on it. This submission (and Mr Mure's partial concession) was derived principally from the speeches of the House of Lords in *Berkeley v Secretary of State for the Environment (No. 1)* [2001] 2 AC

603, relating to the EIA directive, and also on more recent CJEU authorities, *R (Wells) v Secretary of State for Transport, Local Government and the Regions* (C-201/02) [2004] ECR I-723, and (in respect of the SEA directive) *Inter-Environnement Wallonie ASBL v Région Wallonie* (Case C-41/11) [2012] 2 CMLR 623. I will consider those authorities below, but before doing so it is necessary to look in a little more detail at the relevant Scottish legislation.

EIA and SEA in Scottish law

117. Lord Reed has outlined the relevant provisions of the European Directives. For present purposes it is necessary to look in more detail at the implementation respectively of the EIA and SEA Directives in Scottish law.

EIA

118. The Environmental Impact Assessment (Scotland) Regulations 1999 (SSI 1999/1) (replacing regulations made in 1988) gave effect to the 1985 EIA directive, as amended in 1997, in relation in particular to town and country planning and roads. "Environmental information" was defined to include both the environmental impact statement, required by the regulations, and also any representations made in response (regulation 2).

119. Different approaches were adopted in respect of decisions relating to planning and roads. For the former, regulation 3 prohibited the grant of planning permission on an application covered by the regulations, unless the environmental information had been taken into consideration. For the purposes of any statutory challenge to the Court of Session, references to action "not within the powers of the Act" were to be "taken to extend to a grant of planning permission by the Scottish Ministers in contravention of regulation 3" (regulation 43). As will be seen the corresponding English provision was relied on by Lord Hoffmann in *Berkeley* as indicating that breach of the EIA regulations was to be treated as "not merely non-compliance with a relevant requirement but as rendering the grant of permission ultra vires".

120. Roads were dealt with separately by Part III of the regulations. By dint of powers under the European Communities Act 1972, new sections were inserted into the Roads (Scotland) Act 1984, providing (inter alia) for environmental assessment of certain road construction projects (section 20A), and for consideration by Ministers of the environmental information and representations made in response (schedule 1). In contrast with the planning provisions, it was not

provided that non-compliance should be treated as taking the action outside the powers of the Act for the purpose of a statutory challenge.

SEA

121. As explained by Lord Reed, strategic environmental assessment was introduced into European law by Directive 2001/42/EC. Implementation into national law was required by 21 July 2004. In Scotland this was effected initially by the Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004 (SSI 2004/258), which came into effect on 20 July 2004. (It is not therefore true, as was alleged at one time by the appellant, that there was a failure to implement the Directive by the due date.) From 20 February 2006 the regulations were replaced by the Environmental Assessment (Scotland) Act 2005.

122. Unlike the EIA regulations, neither the SEA regulations nor the 2005 Act contained any specific provision making the SEA requirements part of the procedural requirements for a subsequent road project, nor otherwise stating the effects of non-compliance on the validity of such a project. Thus, it appears, breach of the SEA Directive or of the domestic provisions was not made a statutory ground for challenging a subsequent scheme or order under the 1984 Act. One infers that such provision was thought unnecessary, because of the availability of judicial review as an effective remedy to challenge a plan or programme adopted in breach of the SEA directive at the appropriate time. There was no reason for such a breach to be treated also as a breach of the 1984 Act, so as to give rise to a statutory challenge under that Act to the approval of a consequent project, perhaps many years later.

123. Against that background I turn to consider the authorities.

Berkeley

124. In *Berkeley* it was held that a planning permission for the development of a site owned by Fulham Football Club close to the River Thames was unlawful as it had been adopted in breach of the EIA Directive. Relief should not be refused merely because the relevant information was before the Secretary of State in other forms, and compliance with the regulations would have made no difference to the result.

125. On the scope of the court's discretion, Lord Bingham said (at p.608):

"Even in a purely domestic context, the discretion of the court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow. In the Community context, unless a violation is so negligible as to be truly de minimis and the prescribed procedure has in all essentials been followed, the discretion (if any exists) is narrower still: the duty laid on member states by article 10 of the EC Treaty, the obligation of national courts to ensure that Community rights are fully and effectively enforced, the strict conditions attached by article 2(3) of the Directive to exercise of the power to exempt and the absence of any power in the Secretary of State to waive compliance (otherwise than by way of exemption) with the requirements of the Regulations in the case of any urban development project which in his opinion would be likely to have significant effects on the environment by virtue of the factors mentioned, all point towards an order to quash as the proper response to a contravention such as admittedly occurred in this case."

126. Similarly, Lord Hoffmann said (at p.616):

"A court is therefore not entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same or that the local planning authority or Secretary of State had all the information necessary to enable them to reach a proper decision on the environmental issues. Although section 288(5)(b) [of the Town and Country Planning Act 1990], in providing that the court 'may' quash an ultra vires planning decision, clearly confers a discretion upon the court, I doubt whether, consistently with its obligations under European law, the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the Directive. To do so would seem to conflict with the duty of the court under article 10 (ex article 5) of the EC Treaty to ensure fulfilment of the United Kingdom's obligations under the Treaty. In classifying a failure to conduct a requisite EIA for the purposes of section 288 as not merely non-compliance with a relevant requirement but as rendering the grant of permission ultra vires, the legislature was intending to confine any discretion within the narrowest possible bounds. It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be ultra vires: see Glidewell LJ in *Bolton Metropolitan Borough Council v Secretary of State for the Environment* (1990) 61 P & CR 343, 353. [Counsel for the Respondent] was in my opinion right to concede that nothing less than substantial compliance with the Directive could enable the planning permission in this case to be upheld."

127. Although of course these statements carry great persuasive weight, care is needed in applying them in other statutory contexts and other factual circumstances. Not only did they rest in part on concessions by counsel for the Secretary of State, but the circumstances were very unusual in that, by the time the case reached the House of Lords, the developer had abandoned the project, and the decision had lost any practical significance.

128. In *Bown v Secretary of State for Transport, Local Government and the Regions* [2003] EWCA Civ 1170; [2004] Env LR 509, 526 I said (with the agreement of Lord Phillips MR and Waller LJ):

> "The speeches [in *Berkeley*] need to be read in context. Lord Bingham emphasised the very narrow basis on which the case was argued in the House (p 607F-608A). The developer was not represented in the House, and there was no reference to any evidence of actual prejudice to his or any other interests. Care is needed in applying the principles there decided to other circumstances, such as cases where as here there is clear evidence of a pressing public need for the scheme which is under attack." (para 47)

129. That passage was noted with approval by the House of Lords in *R (Edwards) v Environment Agency* [2008] UKHL 22; [2009] 1 All ER 57, paras 63-65. Having referred to the background and reasoning of the decision in *Berkeley*, including the provision by which the grant of permission was to be treated as not within the powers of the planning Act, Lord Hoffmann added:

> "But I agree with the observation of Carnwath LJ in *Bown v Secretary of State for Transport, Local Government and the Regions* [2004] Env LR 509, 526, that the speeches in *Berkeley* need to be read in context. Both the nature of the flaw in the decision and the ground for exercise of the discretion have to be considered. In *Berkeley*, the flaw was the complete absence of an EIA and the sole ground for the exercise of the discretion was that the result was bound to have been the same."

130. In *Edwards*, by contrast with *Berkeley*, there had been no breach of European law, and the only breach of domestic law was the failure to disclose information about the predicted effect of certain emissions. Since then, however, the actual emissions from the plant had been monitored, and taken into account, and it would be "pointless to quash the permit simply to enable the public to be consulted on out-of-date data" (para 65). Lord Hoffmann added:

> "To this pointlessness must be added the waste of time and resources, both for the company and the Agency, of going through another process of application, consultation and decision."

The courts below had accordingly been right to exercise their discretion against quashing the permit.

131. In the present case, both the statutory context and the factual circumstances are again distinguishable from those applicable in *Berkeley*. The factual differences are dramatic. In *Berkeley* there was no countervailing prejudice to public or private interests to weigh against the breach of the directive on which Lady Berkeley relied. The countervailing case advanced by the Secretary of State was one of pure principle. Here by contrast the potential prejudice to public and private interests from quashing the order is very great. It would be extraordinary if, in relation to a provision which is in terms discretionary, the court were precluded by principles of domestic or European law from weighing that prejudice in the balance.

132. The statutory context, as I have explained it above, is also significantly different from that applicable in *Berkeley*. First, under the 1984 Act, even in respect of EIA, a breach of the regulations does not, as under the planning Acts, render the subsequent decision outside the powers of the Act. It is a breach of the requirements laid down by section 20A, and as such is within the second ground of challenge, but is thus also subject to the need to show "substantial prejudice". Secondly, and more importantly for the purposes of this case, there is nothing to assimilate the requirements of the SEA Directive to the requirements of the 1984 Act, breach of which alone may give rise to a challenge under that procedure. No doubt the adoption of a plan or programme in breach of the SEA Directive would be subject to challenge by judicial review at the appropriate time. But the legislature has not thought it necessary to provide for a separate right of challenge on those grounds in relation to the approval of a subsequent project made under the 1984 Act.

133. Accordingly, subject to any overriding principles emerging from the European authorities (see below), it seems to me that, even if (contrary to what appears to be the effect of the statute) breach of the SEA Directive were a ground of challenge under the 1984 Act procedure, the court would retain a discretion to refuse relief on similar grounds to those available under domestic law.

European authorities

134. As I have said, the two European cases on which Mr O'Neill relies are *R (Wells) v Secretary of State for Transport, Local Government and the Regions* (C-201/02) [2004] ECR I-723, and *Inter-Environnement Wallonie ASBL v Région Wallonie* (Case C-41/11) [2012] 2 CMLR 623.

135. In *Wells*, it was held that EIA was required as part of the procedure for determining the registration conditions for an old mining consent. In relation to the remedy for breach of that requirement, and in response to a submission of the UK Government that revocation or modification of the consent was not necessary, the court said (para 64-69):

> "As to that submission, it is clear from settled case-law that under the principle of cooperation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law... Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned...
>
> Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment... Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.
>
> The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.
>
> *The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness)....*

> So far as the main proceedings are concerned, if the working of Conygar Quarry should have been subject to an assessment of its environmental effects in accordance with the requirements of Directive 85/337, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment.
>
> In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered..." (emphasis added)

The passage which I have emphasised, which was repeated in the court's answer to the specific question, contains as I read it an authoritative statement of the two applicable principles of "equivalence" and "effectiveness". On the facts of that case there can have been little doubt as to the practical effect of the project on Mrs Wells' environment, her home being on the road separating the two halves of the quarry (para 21-22). However, it is of interest that the court envisaged the payment of compensation, if possible under national law, as a possible alternative to revoking the consents. It is not entirely clear why that should have depended on her agreement, rather than being a matter for the court's discretion. However, that possibility indicates that the public interest in nullifying an action taken in breach of European law is not absolute, and that the remedy may in some circumstances be tailored to the extent of the practical damage, if any, suffered by a particular applicant.

136. In *Inter-Environnement Wallonie* the main issue was the application of the SEA Directive to a government order relating to protection of waters against pollution by nitrates. The court restated the same principles of "equivalence" and "effectiveness", as applicable by analogy to breach of the SEA Directive, adding:

> "47 The fundamental objective of Directive 2001/42 would be disregarded if national courts did not adopt in such actions brought before them, and subject to the limits of procedural autonomy, the measures, provided for by their national law, that are appropriate for preventing such a plan or programme, including projects to be realised under that programme, from being implemented in the absence of an environmental assessment."

137. The factual context of that case was again very different. However, it is to be noted that even there practical considerations had a part to play. Having found a breach, the court accepted that, to avoid a "legal vacuum" (para 61), the order in question could "exceptionally" (para 62) be left in operation for the short period required to carry out the SEA.

138. It would be a mistake in my view to read these cases as requiring automatic "nullification" or quashing of any schemes or orders adopted under the 1984 Act where there has been some shortfall in the SEA procedure at an earlier stage, regardless of whether it has caused any prejudice to anyone in practice, and regardless of the consequences for wider public interests. As *Wells* makes clear, the basic requirement of European law is that the remedies should be "effective" and "not less favourable" than those governing similar domestic situations. Effectiveness means no more than that the exercise of the rights granted by the Directive should not be rendered "impossible in practice or excessively difficult". Proportionality is also an important principle of European law.

139. Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source.

140. Accordingly, notwithstanding Mr Mure's concession, I would not have been disposed to accept without further argument that, in the statutory and factual context of the present case, the factors governing the exercise of the court's discretion are materially affected by the European source of the environmental assessment regime.

Form of order

141. Finally, I should say something about the form, and consequences, of the order which would have been appropriate had Mr Walton succeeded in his challenge in relation to the Fastlink, having regard to his submission that the courts would not have been bound to quash the schemes and orders, but would have had power to fashion a suitable remedy. His application did not condescend to any particulars as to how such a suitable remedy might be worded, assuming there was power to do so.

142. I agree with Mr Mure that under this statutory scheme the only power given to the court is to quash the scheme or order, not merely the decision approving it (cf Town and Country Planning (Scotland) Act 1997 sections 237-239, in which under corresponding provisions specific power is given to quash, for example, a "decision" on a planning appeal). I also agree that, given the form in which the schemes and orders were made, it is not possible to make a distinct order in respect of the Fastlink. Mr O'Neill was unable to point to any statutory or other source for a power to fashion a more limited remedy, nor to explain how in practice it would be done. However desirable such a power might be, it is not in my view open to the court to confer on itself powers which Parliament has not granted.

143. On the other hand, I would not necessarily agree with Mr Mure that under this procedure the quashing of the schemes and orders would inevitably require the whole process to be undertaken anew. It is true that, in relation to similar orders made by local authorities, which are subject to confirmation by the Secretary of State, the accepted view seems to be that the quashing of the "order" relates to the original order as made by the authority, rather than simply to its confirmation by the Minister. The result appears to be that everything that followed that action is also invalidated, regardless of whether it had any relevance to the legal defect (see *Whitworth v Secretary of State for Environment, Food & Rural Affairs* [2010] EWCA Civ 1468 paras 50-52).

144. However, where such an order is promoted by Ministers, the statute normally (as in the present case) provides for it to be made first in draft, pending the completion of the statutory procedures, and only "made" when the Minister reaches a final decision. Logically, therefore, (although it is not clear why there is a difference from the position in local authority cases) quashing the "order" affects directly only that last step, and does not necessarily invalidate the whole process. How much can be salvaged from the earlier procedures will no doubt depend on the nature of the breach, and how it can effectively be remedied.

145. I mention this point because it may be an issue of great practical importance in some cases, and it has not received much attention in the authorities or the textbooks (or even in the 1994 Law Commission report: Administrative Law: Judicial Review and Statutory Appeals, Law Com 226). It is hard to see any policy justification either for the rigidity of the powers given to the court, or, still less, for the curious variations as between similar statutory schemes. As I observed in *Whitworth*, there is a strong case for statutory reform to provide a more flexible and coherent range of powers in such cases, akin to those available in judicial review.

146. In conclusion, for the reasons given by Lord Reed I also would dismiss the appeal.

LORD HOPE

147. There is no doubt that the trunk road network on the periphery of Aberdeen is urgently in need of improvement. The decision to construct the Fastlink, whose construction is said to be essential to the success of the scheme that is now in prospect, was taken nearly seven years ago. There has been understandable frustration at the delays in the planning system, due in no small measure to Mr Walton's objection. His determination to maintain his objection has been vigorously criticised, and there have been suggestions that this was irresponsible.

148. It has to be said, however, that it became clear during the hearing of his appeal before this court that the question whether the decision to construct the Fastlink fell within the scope of the SEA raised a question of some difficulty which it was proper for this court to consider. It was a matter of concession by the appellant both before the Lord Ordinary and in the Inner House that any plan or programme such as the MTS whose preparation began before 21 July 2004 did not require an assessment in compliance with the SEA Directive: [2012] CSIH 19, para 20. Mr Mure QC sought to rely on this concession, which was accepted in the courts below, before this court too. But, as Lord Reed points out in para 63, the fact that its first formal preparatory act was taken before 21 July 2004 does not deprive a plan or programme of its character as a plan or programme within the meaning of article 2(a). The question whether the Fastlink decision was within the scope of the SEA cannot be dismissed simply on temporal grounds, which was the basis for the concession. It must be regarded as a live issue which, as it was not dealt with below, this court has to decide.

149. Having heard full argument from both sides on this issue, however, I have reached the conclusion for the reasons given by Lord Reed in paras 67-69 that the decision to construct the Fastlink was not a modification of a plan or programme within the meaning of the SEA Directive. Like him, I would reserve my opinion on the question whether the MTS as described in NESTRANS' report of March 2003 formed a plan or programme within the meaning of the Directive. Even if it was, a careful analysis of the history shows that the decision to construct the Fastlink was taken purely and solely in furtherance of a specific project to relieve congestion on the A90. It did not seek to affect or modify the legal or administrative framework for the future development consent of projects as described in the MTS.

150. I also agree that, looking at the procedure as a whole and for the reasons given by Lord Reed in paras 75-76, Mr Walton's complaint of common law unfairness is not made out. It is worth noting in support of this conclusion that, as Lord Carnwath points out in para 101, the decision of the Aarhus Compliance Committee in February 2011 to reject the complaint by Road Sense in May 2009

shows that, judged by European standards, the matters complained of did not disclose any defects in the domestic procedures that were adopted in this case. For these reasons I too would dismiss the appeal.

151. I should like however to add a few words of my own on the question of standing in the context of environmental law. They are prompted by the Extra Division's observation in para 37 that Mr Walton had placed no material before the court to support the proposition that the schemes or orders or any provision therein substantially prejudice his own interests or that they would affect his property. His residence was some significant distance from the leg of the proposal which was the particular target of his attack. There was, therefore, an initial question to be addressed, whether or not he was a person "aggrieved" for the purposes of paragraph 2 of Schedule 2 to the 1984 Act. Indicating that they were of the view that he was not such a person, the judges of the Extra Division said in para 39 that in that situation they would have had no hesitation in concluding that, had they been with Mr Walton in all or any of his attempts to attack the legality of the schemes and orders, they would not have granted the remedy of quashing them. This was because it would have been quite inappropriate that the project, whose genesis came about some 30 years ago and about which there had been a huge amount of public discussion and debate, should be stopped from proceeding by an individual in his position: para 40.

152. I think, with respect, that this is to take too narrow a view of the situations in which it is permissible for an individual to challenge a scheme or order on grounds relating to the protection of the environment. An individual may be personally affected in his private interests by the environmental issues to which an application for planning permission may give rise. Noise and disturbance to the visual amenity of his property are some obvious examples. But some environmental issues that can properly be raised by an individual are not of that character. Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf.

153. Of course, this must not be seen as an invitation to the busybody to question the validity of a scheme or order under the statute just because he objects to the scheme of the development. Individuals who wish to do this on environmental grounds will have to demonstrate that they have a genuine interest in the aspects of

the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity. There is, after all, no shortage of well-informed bodies that are equipped to raise issues of this kind, such as the Scottish Wildlife Trust and Scottish Natural Heritage in their capacity as the Scottish Ministers' statutory advisers on nature conservation. It would normally be to bodies of that kind that one would look if there were good grounds for objection. But it is well-known they do not have the resources to object to every development that might have adverse consequences for the environment. So there has to be some room for individuals who are sufficiently concerned, and sufficiently well-informed, to do this too. It will be for the court to judge in each case whether these requirements are satisfied.

154. For these reasons it would be wrong to reject Mr Walton's entitlement to bring his application on environmental grounds simply because he cannot show that his own interests would be substantially prejudiced. I agree with Lord Reed's conclusion in para 88 that he has demonstrated a genuine concern about the legality of a development which is bound to have a significant impact on the environment, and that he is entitled to be treated as a person aggrieved for the purpose of the statute.

155. The better way to meet the concerns that the Extra Division expressed about this case in para 40 would have been to weigh in the balance against any breach of the Directive that the applicant was able to establish the potential prejudice to public and private interests that would result if the schemes and orders were to be quashed. I agree with Lord Carnwath's analysis of the speeches in *Berkeley v Secretary of State for the Environment (No 1)* [2001] 2 AC 603 in the light of the subsequent authorities, including *R (Edwards) v Environment Agency* [2008] UKHL 22, [2009] 1 All ER 57 where the circumstances were very different from those in *Berkeley*. The fact that an individual may bring an objection on environmental grounds derived from European directives does not mean that the court is deprived of the discretion which it would have at common law, having considered the merits and assessed where the balance is to be struck, to refuse to give effect to the objection.

156. The scope for the exercise of that discretion in that context is not therefore as narrow as the speeches in *Berkeley* might be taken to suggest. The principles of European law to which Lord Carnwath refers in para 138 support this approach. Where there are good grounds for thinking that the countervailing prejudice to public or private interests would be very great, as there are in this case, it will be open to the court in the exercise of its discretion to reject a challenge that is based solely on the ground that a procedural requirement of European law has been breached if it is satisfied that this is where the balance should be struck.

LORD KERR AND LORD DYSON

157. We agree with the judgments of Lord Hope, Lord Reed and Lord Carnwath and for the reasons they have given, we too would dismiss the appeal.