# The Queen on the Application of Redcar and Cleveland Borough Council v The Secretary of State for Business, Enterprise and Regulatory Reform v EDF Energy (Northern Offshore Wind) Limited

CO/11340/2007

High Court of Justice Queen's Bench Division Administrative Court

11 July 2008

**[2008] EWHC 1847 (Admin)**

**2008 WL 2696935**

Before: Mr Justice Sullivan

Friday, 11th July 2008

## Representation

Mr Geoffrey Stephenson and Mr Kelvin Rutledge (instructed by Legal and Democratic Services Division , Town Hall, Fabian Road, South Bank, Redcar & Cleveland, Yorkshire TS6 9AR) appeared on behalf of the Claimant.
Mr John Litton (Mr Gwion Lewis appeared for the purposes of judgment only) (instructed by the Treasury Solicitor ) appeared on behalf of the Defendant.
Mr William Norris QC and Mr Gordon Nardell (instructed by Messrs Bond Pearce LLP , Bristol BS1 6DZ) appeared on behalf of the Interested Party.

## Judgment

Mr Justice Sullivan:

## Introduction

1 This is a rolled-up hearing of the claimant's application for permission to apply for judicial review, with the substantive hearing to follow if permission is granted, in respect of the defendant's decision to give consent under section 36 of the Electricity Act 1989 ("the 1989 Act") to the construction and operation of an offshore wind farm with a generating capacity of up to 100 megawatts, comprising up to 30 wind turbines off the mouth of the River Tees at Redcar. The defendant's decision is contained in a decision letter dated 17th September 2007. The interested party had applied for consent under section 36 some three and a half years earlier, on 18th March 2004. The wind farm site, which covers an area of approximately 3 kilometres by 1.5 kilometres, lies about 1.5 kilometres offshore between the mouth of the River Tees and Redcar. The 30 wind turbines have a maximum tip height of 130 metres and will be positioned in three rows, approximately 600 metres apart, each containing ten turbines. The spacing between the turbines in the rows is approximately 300 metres.

2 The turbines are each rated at between 2.3 and 3.6 megawatts. Each wind turbine incorporates a transformer which transforms the current generated by the turbine to 33 kilovolts. Interconnecting 33 kilovolt subsea electrical cables link the turbines in the three rows.

3 The wind farm is linked by three subsea 33 kilovolt cables laid in a single trench to an onshore substation (originally proposed to be at Warrenby), where the voltage is transformed to 66 kilovolts. From the onshore substation underground cables link with the local Northern Electric Distribution (NEDL) grid at NEDL's Lackenby substation.

4 The interested party's letter dated 18th March 2004 to the defendant explained that an application for planning permission under the Town and Country Planning Act 1990 ("the 1990 Act") was being made to the claimant, as the onshore local planning authority, for both the underground cabling linking the wind farm between mean low water springs and the onshore substation, and for the substation itself ("the onshore application").

5 The onshore application was not determined by the claimant and was withdrawn by the interested party on 2nd April 2008. On 5th June 2008 a new onshore application was made in respect of a relocated substation.

6 On receipt of the interested party's application under section 36 , the defendant notified all those who might have had an interest in the application, including the claimant, and invited representations.

7 The claimant objected to the proposal by letter dated 3rd August 2004:

> **"Consultation on Offshore Wind Farm Development at Redcar**
>
> I refer to the above scheme which has been forwarded to this Council for comment.
>
> The proposal was considered by the Planning Committee on 29 July 2004 who resolved as follows:
>
> Whilst the Council supports the Government's drive to secure a substantial proportion of the country's energy from sustainable resources, it OBJECTS to the proposal on the following grounds:
>
> I The proximity of the proposed wind farm to the shoreline at Redcar (approximately 1.5km offshore); the consequent visual impact and the adverse effect on the visual amenities of the Redcar area. The Council consider that the same rules should apply in respect of this site regarding distance from the shore as have been applied in the second round of licensing.
> II Concerned that the proposal will have an adverse effect on birds, a view which is endorsed in the objections made by RSPB and Teesmouth Bird Club. The application should not be determined unless it has been demonstrated that there will be no adverse effect on the integrity of the SPA; bird movements and populations and marine ecology.
> III Consider that the development will have an adverse effect on the regeneration of Redcar, including the development of Coatham Enclosure and tourism.

IV Concerned that potential contamination issues have not been fully investigated.
V Further consideration should be given to investigating the coastal process to ensure that any changes to sand movements do not have an adverse effect on the Redcar Beach area and if so suitable mitigation measures are imposed.

> If the Secretary of State is mindful to grant consent then would request that the following conditions are also imposed …"

(Two conditions were suggested, one relating to noise and the other dealing with the removal of the turbines at the end of the wind farm's operational lifetime.)

8 The letter concluded with a request:

> "… that consideration be given by the Government to asking the developer for a contribution toward regeneration schemes in the Redcar area in order to mitigate against any possible adverse effects."

9 That was the extent of the claimant's representations to the defendant prior to the decision letter.

## Invalidity

10 Notwithstanding the fact that the claimant had not made any objection to the procedure adopted by the interested party, and accepted by the defendant, of making separate applications for consent to the offshore elements of the scheme (to the defendant under the 1989 Act) and for planning permission for the onshore elements of the scheme (to the claimant under the 1990 Act), it contended for the first time in amended grounds of claim, served after an oral permission hearing before Collins J on 13th March 2008, that the section 36 consent granted by the defendant was invalid because it related to part only of the proposed generating station. Section 36(1) of the 1989 Act, as amended by the Energy Act 2004 ("the 2004 Act"), provides, so far as material, that:

> "… a generating station shall not be constructed at a relevant place (within the meaning of section 4), and a generating station at such a place shall not be extended or operated except in accordance with a consent granted by the Secretary of State."

11 Section 64 contains the following, non-exhaustive definition of "generating station":

> "'generating station', in relation to a generating station wholly or mainly driven by water, includes all structures and works for holding or channelling water for a purpose directly related to the generation of electricity by that station;"

12 Mr Stephenson submitted on behalf of the claimant that "a competent application for consent [under section 36 ] must be for the whole of a generating station within the meaning of the 1989 Act and a consent likewise must be for the whole."

13 He submitted that the offshore turbines alone were not a "generating station" because they were not capable of producing consumable power. The cables connecting the wind farm to the shore, and the onshore substation which transformed the current from 33 kilovolts to 66 kilovolts, were all component parts of an overall scheme whereby the electricity generated by the turbines offshore was converted into a usable form on land. All of the components were therefore part of the "generating station" and the defendant had no power to grant consent under section 36 for part only of a generating station.

14 The claimant relied on a witness statement dated 12th June 2008 of Mr Loftus, a Chartered Mechanical Engineer and Project Director of Scott Wilson Ltd (Engineering Consultants). I granted the claimant permission to rely on this witness statement even though it was served well out of time.

15 Mr Loftus says, *inter alia* :

> "2. I have been asked to consider exactly what comprises a 'generating station' and in particular whether such an expression includes elements such as the transformer equipment. In so far as offshore developments are concerned, I have always regarded a generating station as including not only the turbines themselves but also the necessary undersea cabling, the transformer equipment and the associated sub-station.
>
> 3. In relation to the National Grid, a 'generating station' is of no use unless the power provided by the turbines is converted into an appropriate voltage. Thus, the transformer equipment, the underground cabling, and the associated sub-station are essential not only to route the power into the National Grid, but to make the power usable.
>
> …
>
> 6. I have attached a simple diagram of an off-shore wind farm produced by the British Wind Energy Association (BWEA). BWEA is the trade and professional body for the U.K. wind and marine renewables industries. It will be seen that this shows the transformers and the substation as elements within the whole scheme. This is as I have always understood the position to be."

16 In paragraph 7 Mr Loftus referred to two papers and continued:

> "These papers support the view that windfarm projects require transformers, switchgear and subsea and onshore cables in order to export the power to the grid system."

17 There can be no dispute with the proposition that electrical power generated by turbines (whether those turbines are driven by wind or by other means and wherever

they are located, offshore or onshore) is "of no use" to the National Grid, or indeed to a local grid such as that provided by NEDL, unless it is transformed into an appropriate voltage and transmitted by cables to some form of connection with the relevant grid. However, the question for the purposes of section 36 is not whether the electricity generated by the turbines in any particular case is "of use", or "has been converted into a usable form", but where it is to be generated. The 1989 Act draws a clear distinction between the generation of electricity (in a generating station) and its transmission (by high voltage lines and electrical plant) and eventual distribution (by low voltage lines and plant) to domestic, commercial and industrial premises: see section 3A(1) and (2) and section 4(1) and the definitions of "distribute", "transmission" and "transmission system" in section 4(4) , and also section 37 of the Act which deals with the consents required for overhead electric lines. If the test was whether electricity which had been generated had been converted into a "usable form", the high voltage current in the transmission lines of the National Grid is "of no use", in the sense of being "consumable", until it has been distributed, at much lower voltage, via the network of local substations and distributor lines to individual consumers.

18 It is true that the "whole scheme" proposed by the interested party includes both the wind farm offshore and the elements comprised in the onshore application: the cabling and the onshore substation. However, it does not follow that the wind farm comprised in the section 36 application could not properly be described as a "generating station" for the purposes of that section. In ordinary language a "station" is simply a place, building or structure where a particular activity occurs. Thus, we speak of police stations, polling stations, railway stations, et cetera. A non-technical description of a "generating station" would simply be a building or structure where electricity is generated. The nature of the building or structure will depend on the means of generation: wind, water, coal, nuclear power, et cetera. An application for consent under section 36 may include ancillary facilities, such as transformers, substations and associated cabling, and, for example, coal stockpiles and handling equipment if the generating station is coal-fired, et cetera. Whether or not such ancillary facilities are included in any section 36 application will depend upon the facts of the individual case, including, in particular, the physical proximity of the ancillary facilities to the turbines themselves. In the case of an oil or coal-fired generating station the turbines and some or all of the ancillary facilities may well be housed in one building or structure or complex of buildings or structures. In the case of an offshore wind farm the turbines may well be separated by many kilometres of territorial waters from the ancillary facilities onshore. In the former case it will be sensible to include all of the elements of the scheme, including any ancillary facilities, in one application under section 36 . In the latter case it will not, not least since the environmental implications of the offshore turbines may well be entirely divorced from the environmental impact of the onshore facilities many kilometres distant.

19 As enacted, the 1989 Act did not make any express provision for offshore electricity generation. The first offshore wind farm was built in 2004.

20 The 2004 Act amended the 1989 Act so as to make express provision for this new means of electricity generation. A definition of "generate" was added in section 4(4) of the 1989 Act:

> "… 'generate', in relation to electricity, means generate at a relevant place …"

21 Subsection (5) was inserted, which defines "relevant place" as:

> "… a place in Great Britain, in the territorial sea adjacent to Great Britain or in a Renewable Energy Zone …"

22 It is clear that Parliament envisaged that electricity would be generated at places which were wholly offshore. That is reflected in section 36A (which was inserted into the 1989 Act by section 99(1) of the 2004 Act) which provides that:

> "(1) Where a consent is granted by the Secretary of State or the Scottish Ministers in relation to —
>
> (a) the construction or operation of a generating station that comprises or is to comprise (in whole or in part) renewable energy installations situated at places in relevant waters …
>
> (b) …
>
> he … may, at the same time, make a declaration under this section as respects rights of navigation so far as they pass through some or all of those places."

23 A renewable energy installation is "an offshore installation used for purposes connected with the production of energy from water or wind" (see section 104(3)(a) of the 2004 Act). The purposes in subsection (3)(a) include, in particular, "the transmission, distribution and supply of electricity generated using water or winds" (see subsection (5)(a) ).

24 "Relevant waters" are defined by section 36A(7) as:

> "'relevant waters' means waters in or adjacent to Great Britain which are between the mean low water mark and the seaward limits of the territorial sea."

25 Again, these references make it clear that Parliament envisaged that a "generating station" might comprise (in whole or in part) an installation used for the purposes of the production of energy from wind, and that such a "generating station" might be located wholly offshore.

26 By virtue of section 36(8) of the 1989 Act, the provisions of Schedule 8 to the Act are applied to applications for consent under sections 36 and 37 . Paragraph 7A , which

was inserted into Schedule 8 by section 93(2) of the 2004 Act, is, so far as material, in these terms:

> **"Generating stations not within areas of relevant planning authorities**
>
> 7A.
>
> (1) This paragraph applies to every case where an application for a consent under section 36 of this Act relates to —
>
> (a) the construction or operation of a generating station the whole or a part of which is to be, or is, at a place that is not within the area of a relevant planning authority; …
>
> (2) This Schedule shall have effect in relation to cases to which this paragraph applies with the following modifications.
>
> (3) In paragraph 1(1), for the words from 'land to which' onwards substitute 'place to which the application relates, that is, the place where it is proposed to construct the generating station, where the proposed extension will be or where the station proposed to be operated is situated.'
>
> (4) Paragraph 2 does not apply where no part of the place to which the application relates is within the area of a relevant planning authority."

27 Here is further confirmation that Parliament envisaged that something which could properly be described as a "generating station" for the purposes of the 1989 Act might be located wholly offshore, notwithstanding the fact that, to meet the claimant's test that the electricity generated must be "of use", the electricity generated offshore would (save for those cases where the electricity was to be consumed offshore, for example by an oil rig) have to be transmitted ashore and, once ashore, connected at an appropriate voltage to the national, or to some local, grid. Both as a matter of ordinary language, and on any reasonable interpretation of the provisions of the 1989 Act as amended by the 2004 Act, the "generating station" is the place, in the present case the wind farm offshore, where the electricity is generated. Once it has been generated there, at a "generating station", it is transmitted ashore. It should be noted that the simple diagram of an offshore wind farm produced by Mr Loftus (see paragraph 6 of his witness statement above) describes the different components of a typical wind farm: the rotating blades are linked via a shaft to a gearbox which "powers a generator to convert the energy into electricity." The electricity thus generated is then taken ashore by subsea cables. The short answer to the claimant's very belated challenge on the ground of invalidity is that, even upon Mr Loftus' own evidence, the place where the electricity is generated — i.e., the "generating station" for the purposes of section 36 —

is the wind farm offshore.

## Illegality

28 I turn therefore to the claimant's second ground of challenge: that the defendant's decision to grant consent without holding an inquiry was unlawful. It is common ground that, because the wind farm was located in territorial waters, outside the area for which the claimant has jurisdiction as local planning authority, the defendant was not required to hold a public inquiry before granting consent: see paragraph 2(2) , as modified by paragraph 7A(4) of Schedule 8 . Paragraph 3(2) of Schedule 8 provides that where the defendant is not required to hold a public inquiry, but where he has received objections, then he:

> "… shall consider those objections, together with all other material considerations, with a view to determining whether a public inquiry should be held with respect to the application and, if he thinks it appropriate to do so, shall cause a public inquiry to be held, either in addition to or instead of any other hearing or opportunity of stating objections to the application."

29 The claimant did not, in its letter of objection dated 3rd August 2004, or at any other time before the consent was issued on 17th September 2007, ask the defendant to hold a public inquiry. Mr Stephenson submitted that that omission is of no consequence because the defendant was required to exercise his own discretion under paragraph 3(2) , and in deciding whether an inquiry was "appropriate" he was required to consider not merely the objections (including the objection from the claimant) which he had received, but also "all other material considerations". Mr Stephenson accepted that the defendant did consider whether to hold a public inquiry, and did accurately summarise in paragraph 2.1 of the decision letter the provisions of paragraph 3(2) of Schedule 8 (see above), and did consider all of the objections that he had received. The decision letter summarises the points made in the objections under 11 headings, and then deals with each of them, point by point: "visual impact", "effect on birds", "effect on navigation", et cetera. The claimant's complaint is that the defendant failed to consider "all other material considerations" in addition to those considerations that had been identified in the objections. The decision letter considers the five matters raised in the claimant's letter of objection dated 3rd August 2004, and all of the other points made by other objectors. The claimant did not suggest, prior to the filing of the claim form in these proceedings, that there were any "other material considerations" which the defendant should consider when deciding whether or not there should be a public inquiry, must less did it identify any such considerations.

30 When the decision letter is read as a whole it is clear that the defendant did not confine his attention to the points made in the objections. For example, he did consider other matters which he regarded as being material: in particular, the possible effects on "European sites" and the adequacy of the Environmental Statement which had accompanied the application. Whether any particular consideration is material in any given case will depend upon the particular circumstances of that case: see *Stringer v*

*Minister of Housing and Local Government [1970] 1 WLR 1281* , per Cooke J at page 1294G.

31 Since the 1989 Act does not specify the considerations which the defendant must take into account under paragraph 3(2) of Schedule 8 , it is necessary to distinguish between those factors "which may and those which must be taken be taken into account": see per Lord Scarman at page 323A of *In re Findlay [1985] AC 318* , approving *CREEDNZ Inc v Governor-General [1981] 1 NZLR 172* .

32 While the claimant's failure to identify, prior to the decision letter, any other material consideration which should have been considered by the defendant is not determinative of the issue, it does mean that the court should be slow to conclude that a factor which was belatedly identified after the decision letter was one which the defendant was required, as opposed to entitled, to take into account when reaching his decision under paragraph 3(2) . If the consideration was of such importance, why was it not mentioned earlier?

33 The list of material considerations which the claimant now contends that the defendant should have taken into account is as follows:

(i) his own position as policy maker and decision-maker in the same cause, and a promotor of offshore wind farms;
(ii) his involvement in the leasing process as well as the licensing process;
(iii) the fact that the Treasury benefits directly from any surplus funds generated by the Crown Commissioners;
(iv) the need to maintain public confidence in the democratic system;
(v) the weight of objections, including that of the adjacent planning authority, to which he should have given substantial weight;
(vi) the lack of support;
(vii) the fact that the a public inquiry would:

(1) provide him with an unbiased first-hand view of certain aspects of which he had no personal knowledge, for example, visual impact;
(2) overcome public perception of bias arising out of the fact that the Secretary of State had accepted the need for a first-hand view of certain aspects including the visual aspects, but that his officer Mr Welford, having visited in December 2005 and having promised to return to complete his visit, never did so;
(3) provide him with the unbiased conclusions of an expert on issues which had been rigorously tested at inquiry, for example, the impact upon Redcar and Cleveland's regeneration initiatives for the resort; and
(4) mitigate any public perception of bias.
(viii) the fact that the application for the onshore aspect of the generating station had lain dormant for over 3 years and must have been refused eventually by Redcar and Cleveland, thus jeopardising the whole project. The Secretary of State should have called in the planning application and dealt with both matters at a public inquiry, or at least directed his mind to that possibility.

34 When considering the force of these complaints, it must be remembered that the decision letter was not addressed to the world at large. It was addressed to the interested party and copied to those who had objected to, or otherwise expressed an interest in, the application. It did not therefore need to recite matters of generality, such as the role of the defendant in the statutory scheme and the advantages and disadvantages of public inquiries in principle, of which the recipients of the letter would all have been well aware. Thus, there is no reason to suppose that the defendant was

unaware of his own position as policy-maker and decision-maker, was unaware of the fact that the Exchequer would benefit financially from the grant of leases by the Crown Estate, or was unaware of the need to maintain public confidence in the democratic system (see factors (i), (iii) and (iv)). In any event, it is difficult to see why such general considerations, which would be equally applicable to all applications under section 36 , should have been material to the decision whether it was appropriate to hold an inquiry in this particular case. Point (ii) is factually inaccurate: the defendant was not involved in the leasing process, his only function was to determine the application under section 36 .

35 Since the decision letter carefully considers all of the points that were made in the objections, it is difficult to see why it is said that the defendant failed to have regard to points (v) and (vi). The submission that the defendant should have given "substantial weight" to the objections, including the objection from the claimant, is misconceived in any event. It was for the defendant to decide what weight should be given to the objections. Given the brevity and lack of particularity in the claimant's letter of objection, it is not in the least surprising that the defendant did not conclude that an inquiry was appropriate. The lack of anything of substance, beyond mere general assertions, in the claimant's letter of objection is all the more remarkable in view of the fact that the interested party's section 36 application had been supported by a lengthy Environmental Statement which considered all of the relevant environmental issues, including the landscape and visual impacts of the proposed wind farm and its effect on birds. The view points and visual receptors used for the landscape and visual assessments in the Environmental Statement had been selected in consultation with the claimant and the two other local authorities and the Countryside Agency. The consultation period in respect of the application was extended from 21st May to 6th August 2004. The claimant's letter of objection dated 3rd August 2004 was sent almost at the end of that extended consultation period, but there was, significantly, no criticism, much less any detailed criticism, of the methodology or the assessments contained in the Environmental Statement. In brief, there was nothing whatsoever in the claimant's letter of objection which might have suggested that a public inquiry would be of assistance in determining this particular section 36 application.

36 I will deal with the claimant's points relating to Mr Welford's involvement in the decision-making process below, but the general advantages of holding a public inquiry — that there would be a report from an independent inspector, who would have visited the site and who would have heard witnesses give evidence and heard that evidence being cross-examined — would all have been well known to the defendant and the recipients of the decision letter (see factor (vii)). The defendant was not required to rehearse trite generalities. The question for the defendant was whether an inquiry was appropriate in the circumstances of this particular case. Did the objections disclose, for example, a conflict of evidence which might be best resolved by cross-examination? In the claimant's objection there was nothing beyond the most general assertions, for example, that there would be an adverse effect on the regeneration of Redcar and that potential contamination issues had not been fully investigated, and certainly nothing which would have suggested that there would have been some benefit to be derived from an inquiry in this case.

37 In a letter dated 19th December 2005, Save our Shoreline ("SOS"), a local group

established to object to the proposed wind farm, set out its principal concerns:

> "Obviously our major concern is that this proposed installation is just too close to the shore and the town. We have other concerns but this one dominates, as the turbines threaten to do, in terms of visual impact and damage to birdlife."

The letter also included a request for an inquiry:

> "We also requested that, before any decision to approve is taken, the community should be given the right to put the case to a Public Enquiry. This would bring a degree of independence to the decision making process and publicly demonstrate democracy at work.
>
> We welcome your assurance to us that this is an option that will be considered."

That was a reference to a meeting with Mr Welford, with which I will deal in due course.

38 While the letter from SOS rehearses the well-known advantages of any public inquiry, it does not explain why an inquiry was required in the circumstances of this particular case.

39 Although Mr Stephenson referred to the importance attached to the role of the public inquiry in the court's reasoning in the cases of *R (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295, [2001] UKHL 23* and *R (Whitmey) v Commons Commissioners [2005] QB 282, [2004] EWCA Civ 951* , those cases are distinguishable from the present case because the House of Lords and the Court of Appeal respectively were dealing with the question whether the procedures in those cases, when viewed as a whole, were compliant with Article 6 of the European Convention for the Protection of Human Rights ("ECHR"). In those cases it was accepted that there was a determination of the respective claimants' civil rights. In the present case the claimant accepts that it is not a "victim" for the purposes of the ECHR .

40 In answer to the question, whose civil rights and what civil rights were being determined by the defendant's decision to grant section 36 consent in this case, Mr Stephenson submitted that the objections showed that the inhabitants of Redcar were contending that their town would be spoiled by the visual impact of the wind farm which would affect the prospects of the town's regeneration and which might therefore adversely affect the value of their properties, and hence their rights under Article 1 of Protocol 1 to the ECHR were engaged.

41 The defendant considered the impact of the proposed wind farm on property prices in the decision letter. Two studies were referred to, neither of which had been at all conclusive.

42 In my judgment Article 6 was not even arguably engaged in this case because it could not be said that a conjectural loss of property values as a result of the visual

impact of a wind farm 1.5 kilometres offshore would be determinative of any of the town's inhabitants' property rights under Article 1, Protocol 1 : see the decision of Maurice Kay J (as he then was) in R (Mayor and Citizens of the City of Westminster) v Mayor of London [2002] EWHC 2440 (Admin) at paragraphs 102–105.

43 Whitmey is distinguishable for the further reason that the Court of Appeal was there concerned with a case under the Commons Registration Act 1965 , where oral evidence from witnesses who had used the disputed land over many years will be of critical importance. In such circumstances the ability to cross-examine witnesses as to their recollection is particularly valuable. By contrast, in the absence of any dispute as to the methodology employed in the Environmental Statement, there would be little to be gained by cross-examining witnesses as to their subjective opinions about the likely visual impact of the proposed turbines 1.5 kilometres offshore.

44 Finally, in respect of factor (viii), it was open to the claimant to request the Secretary of State for Communities and Local Government to call in the onshore application for planning permission and to hold a public inquiry. It did not do so, nor did it suggest that there was any aspect of the onshore application which might have warranted the holding of a public inquiry. The defendant would have been well aware of the fact that, in practice, even if he granted the section 36 consent, it would not be implemented by the interested party in the absence of permission for the onshore application, or for some other onshore connection to NEDL's grid, granted either by the claimant or by the Secretary of State for Communities and Local Government on appeal under the 1990 Act. That was no reason for the defendant to hold an inquiry into the offshore proposal.

45 For these reasons I am satisfied that the defendant did not fail to have regard to any material consideration which he was required to consider when deciding whether to hold an inquiry.

46 In the decision letter the defendant, having considered all of the points raised by the objectors, says in respect of each point:

> "The Secretary of State considers that there is no justification for calling a public inquiry because of this issue."

47 Mr Stephenson submitted that, notwithstanding the fact that the defendant had set out the correct statutory test in paragraph 2.1 of the decision letter, he had failed to consider whether an inquiry was "appropriate" and had instead considered whether an inquiry was justified, and had thereby imported "an unlawful burden of proof".

48 There is no substance whatsoever in this criticism of the decision letter. The distinction drawn by the claimant is a matter of mere semantics. Whether one says that an inquiry is not appropriate because it is not justified, or that an inquiry is not justified because it is not appropriate to hold one, the conclusion is precisely the same.

## Irrationality

49 Although a reasons challenge was made in the claim form, Mr Stephenson confirmed that it was not being pursued. A challenge to the adequacy of the Appropriate Assessment that had been carried out at the request of English Nature was also not pursued. Nor was a challenge based on an allegation of perceived bias. The interested party correctly likened the way in which the claimant's claim has been formulated, reformulated, re-reformulated and re-re-reformulated, to having to deal with "shifting sands". If I have correctly understood the way in which the sands have finally shifted following Mr Stephenson's oral submissions, that leaves only the challenge on the ground of irrationality.

50 It was not submitted that the defendant's decision not to hold an inquiry and his decision to grant consent under section 36 were irrational, in the sense that no reasonable Secretary of State could have decided that an inquiry was not appropriate and that consent should be granted. The irrationality submission was confined to the proposition that the defendant's decisions were unlawful because he had failed to have regard to a view that had been expressed by Mr Welford, who was the case officer within the Department for Business, Enterprise and Regulatory Reform (formerly the Department of Trade and Industry), and who prepared the submission dated 27th July 2007 to the responsible Minister in the Department.

51 Mr Welford describes his involvement in the decision-making process in some detail in his first witness statement. In brief, he visited Redcar on 15th and 16th December 2005 in response to a request from SOS. Having met with representatives of the interested party and SOS separately, he looked at the views of the wind farm site from various points on the shore. Following his visit he wrote a report on 22nd December 2005 to Ms Allen and Mr Mellish, other officials in his Department, setting out his views on Visual Amenity:

> **"My View on Visual Amenity**
>
> 16. Redcar itself, or rather the coastal strip of the town which encompasses the full retinue of amusement arcades and fairly run down businesses, is not especially attractive, although the town away from this thin line seems to be a mixture of styles and amenities. However, its location does give it certain advantages.
>
> 17. There is no doubt that the north western edge of the Redcar Bay area (Coatham Sands) is exposed to the view of the Corus steel plant that lies along the South Gare, a strip of land extending out to the sea and forming the southern edge of the mouth of the Tees. However, the beach is spectacular and extends the length of Redcar Bar south east towards Saltburn-by-the-Sea and on towards the high cliffs that fringe the North York Moors National Park.
>
> 18. As one moves south east along the sea edge, the Corus plant disappears behind the town and, indeed, the industrialisation along the Tees Valley is also hidden behind buildings. I can, therefore, see why the SoS argues that the wind farm would bring a new intrusion into the landscape of the beach from which there would be no hiding along the full run of the bay (although the

> significance of any impact would reflect distance from the wind farm and the angle from which it was being viewed — for example, a view straight along the turbine rows would be less intrusive than across the wind farm itself)."

52 Under the heading "Further Action", he said this:

> "4. Given the potential significance of the visual impact of the project in ultimately determining the case, and mindful of the subjective nature of the issue, I think my visit needs to be supported by another trip to the area, with either you or Richard alongside, so that there is a wider input into the debate on how to determine this application. In the meantime, we should continue to work with stakeholders and EDF to move to a decision point on the consent application for the project in the shortest possible timescale."

53 The more senior officials to whom he had reported in the Department did not agree with his suggestion that there should be another visit to the site. On the same day, Ms Allen replied by email. Having thanked Mr Welford for what she accurately described as a "commendably comprehensive report", she said:

> "Just a few points. Richard will have views but I am not sure that an additional visit would serve much purpose. I know that you have maps of the area, so, perhaps when you have prepared the paper setting out the issues on this case, you could talk us through them with the maps to hand."

54 The claimant, for understandable reasons, seizes on Mr Welford's reply in an email later that day:

> "Just a few quick thoughts — I'm sure we will need to discuss further as determination day approaches.
>
> Re the possible (re)visit to Redcar, this was based partly on the fact that I think the proposed site is too close to the town and will be such a dominating feature as to be almost overwhelming. Given my stance, someone else might want to go and have a look to argue against me. But happy to talk through the issue with my trusty map alongside whether there is or isn't a visit. …"

55 Mr Mellish responded on 29th December 2005:

> "I agree with Cathy that this is a really good report. Thanks.
>
> I also agree with her that she or I would not add much to the handling of this application through a visit. We could only offer an inexpert opinion on the possible visual impact of something that wasn't there. You seem to have thoroughly swept up the objectors' concerns already.
>
> But visual impact does seem to be the key outstanding issue. In order to move

things away from a subjective judgement in so much as we can:

[(1)] — do we know if the developer (or anyone else) has applied the assessment methodology now available in the 'Seascape and Visual Impact report'. If not, would it be reasonable to suggest to the developer that they do apply it?

[(2)] — can we play Natural England into this? I know there has been an inconsistency to date in that CCW regard themselves as having seascape responsibilities which English Nature haven't. I also realise that NE does not formally exist yet. But I think there is an expectation that NE will deal with seascape, partly because the Countryside Agency will be a constituent part and CA does have an interest in visual impacts. It might be worth a word with Victoria Copley to see if she thinks anyone would be prepared to offer advice.

Perhaps we should gather for a quick run through the key points and how we take them forward. We shouldn't allow this to drift."

56 In his witness statement Mr Welford explains that the Department:

"… decided that such a further visit would not add sufficiently to the knowledge about the visual impacts given that the developer had already set out and accepted that the impact of the project would be 'significant' and the DTI had no reason to disagree with this assessment. However, in the discussion about the next steps, it was decided that instead of another visit by DTI officials, two alternatives approaches would be considered:

• to explore with EDF whether the methodology the company used to assess the visual impact of the Teesside project was similar to that set out in the DTI's 'Seascape and Visual Impact Report';
• to try to seek comments from English Nature on the visual impact methodology in anticipation of its amalgamation with the Countryside Agency and assumption of responsibility for landscape assessment issues."

57 Under the heading "Visual Impacts", Mr Welford's first witness statement said:

"The ES accompanying the consent application for the Teesside wind farm concluded that the visual impact of the wind farm would be 'significant' for those viewers closest to it.

In November 2005, the DTI published a report on the assessment of Seascape and Visual Impact … in order to provide guidance to wind farm developers bringing forward wind farm projects as to how to deal with the seascape and visual assessment element of an Environmental Impact Assessment. During my visit to Redcar, one of the people present at the meeting with the Save our Shoreline Group asked whether the methodology used by EDF to assess the potential visual impact of the project should be re-assessed in the light of the (then) recently published Report on Seascape and Visual Impact.

> In the light of the comments made by Save Our Shoreline during the visit about the scale of the visual impact of the wind farm development, there were discussions within the Department about how we could make any assessment of the visual impact of the project as objective as possible to inform any determination of the consent application.
>
> In April 2006, DTI asked EDF … to provide additional information on visual impact to take account of the 'Seascape and Visual Impact Report'. EDF responded with a comparison of the assessment of the methodology used to prepare its visual assessment documentation and that set out in the 'Seascape and Visual and Seascape Report'.
>
> EDF's comparison was submitted to English Nature for a view on whether, in anticipation of its forthcoming amalgamation with the Countryside Agency, English Nature could offer a view on the methodology comparison provided by EDF."

That was a perfectly reasonable response to the concerns raised by objectors about visual and landscape impact.

58 To cut a long story short, after lengthy correspondence Natural England confirmed in a letter dated 22nd June 2007 that the interested party had provided "an appropriate response" to many of the concerns which Natural England had earlier expressed and that in Natural England's view any outstanding matters were "not sufficient to justify an objection to the proposals on the grounds of landscape and visual assessment."

59 The submission to Ministers prepared by Mr Welford dated 27th July 2007 ("the Report") said this under the subheading "Recommendation":

> "This is a controversial project because of its close proximity to the coastal town of Redcar where there is a good deal of concern about its potential visual impact. The options available to you in taking your decision are: (i) to refer the application to a public inquiry; (ii) to refuse consent; or (iii) to grant consent.
>
> There is no mandatory requirement for a public inquiry in this case but, in light of having received objections, there is discretion for you to call an inquiry if you feel that you need an input from an independent third party (a planning inspector) before taking a decision in this case. On balance, we would recommend not holding an inquiry. This takes into account the fact that the main issue — visual impact — has already received considerable scrutiny and it's not clear how much value an inquiry could add to the advice already received from Natural England (NE) on the visual impact consideration and the contribution towards the Government's renewables targets that this project can make. NE's advice was limited to the visual impact on designated landscapes and the way EDF carried out its visual impact methodology. The developer acknowledges in its ES that the visual impact on people close to the development will be 'significant'. These issues are covered in more detail in paragraphs 10 to 28 below. **Nevertheless, on balance, we recommend that you should agree to grant consent for the construction and**

**operation of the Teesside wind generation station** ."

60 Under the heading "Argument" the Report said:

"As indicated above, the Teesside project is a controversial one. While the proposed wind farm is relatively small (a maximum of 30 turbines), it would be very close to the town of Redcar (the closest turbines are 1.5km from the shore with the town slightly further away) and there has been a vocal campaign of opposition to the project because of the significant visual impact it will have when viewed from parts of the town and its beach. One of the strongest opponents of the project has been the MP for Redcar, Vera Baird. Other local MPs — Ashok Kumar (Middlesbrough South and East Cleveland) and Dari Taylor (Stockton South) — have also expressed their opposition to the project.

We believe that the wind farm developer has done everything it can to address the concerns that have been raised about the project. In relation to possible impacts on birds, Natural England, the Government's statutory advisers on nature conservation issues, and the RSPB have lifted their objections, subject to conditions being included in the FEPA licence. However, other objections are still in place, a number of which relate to the visual impact of the project and have been submitted either in the form of a petition signed by local businesses or directly by businesses and individuals. Details of the outstanding objections are at Annex B.

Redcar and Cleveland Borough Council has objected to the offshore development, but has not yet taken a decision on the onshore aspects of the project (a short section of underground cabling and the construction of an electrical sub-station) which is to be the subject of a separate application under the Town and Country Planning Act . …"

61 Under the headings "Visual Impact" and "Birds", the Report said:

**"Visual Impact**

10. As has been indicated already, parts of the Teesside wind farm would be around 1.5km from the shore at their closest points and only slightly further from the town of Redcar. The tips of the turbine blades in a vertical position would be between 110m and a maximum of 132m above the Mean High Water Mark. The only other comparable offshore wind farm of similar scale and proximity to shore is Scroby Sands off Caister in Norfolk, which lies a minimum of 2.5km from the coastline, where the wind turbines are 108m to the tip of the vertical blades.

11. The Environmental Statement for the Teesside project acknowledges that the visual impact of the wind farm will be significant at those viewpoints closest to the development. This includes viewpoints within Redcar and neighbouring

inhabited areas — see the attached map and photomontages for the developer's impression of how the project is likely to look. (It must be pointed out that while photomontages give a reasonable photographic representation of how a wind farm development looks, they cannot give a precise indication of how any project will be perceived by individuals viewing it. Recent studies have concluded that, in general, viewers will perceive a wind farm to be bigger and closer than indicated in the relevant montages.)

12. The developer has argued that this significant impact must be set within the industrial setting that is a strong characteristic of the particular section of coast on which the project would be located — the nearby Corus steelworks is a distinctive feature along the coast close to Redcar. However, the objectors counter that, while the industrial elements are obvious, they are not visible from large areas of the town and significant stretches of the beach. The objectors fear that the construction of the wind farm will introduce a new industrial element into the seascape/landscape where none is present at the moment and that the overall impact of the wind farm will harm the town's tourist trade and hamper efforts to regenerate the area.

13. It is inevitable that the Development will have an impact on views from Redcar and points along the coast. However, it is difficult to judge how individuals will assess that impact as their perceptions will be subjective and rely not only on visual but also other factors (for example, environmental stance). Nevertheless, for many local people the impact expected is negative.

14. In view of the scale of the visual impact issue in any decision, we approached Natural England (NE) to obtain a view on whether the mechanism that had been used by the developer to evaluate such impacts was appropriate. NE's advice was that the developer had, by and large, gone about considering its assessment in a way that was appropriate at the time its consent application was submitted. NE also offered its advice on the potential visual impact in relation to the potential impact of the project from designated landscapes for example, the North York Moors National Park, the Cleveland Way etc. rather than from within the built up area close to the proposed wind farm. The conclusion was that the impacts on these landscapes were acceptable. (NE have stressed that the basis for its assessment in this case — limiting it to designated landscapes only — does not set a precedent for the way in which it considers the visual impact of such cases in the future.)

15. We do not believe there is additional scientific or methodological advice to draw upon in determining whether the impact of the project on visual receptors in and around Redcar is acceptable or unacceptable. Consequently, we doubt that the expense and further delay caused by an inquiry would be justified in terms of the additional information that would be made available from it for Ministers in taking their decision: we have secured as much expect advice as we think possible and we have a pretty clear view of the local community's position on the proposal. Nevertheless, an inquiry is, of course, an option open to you if you feel there would be [benefit] from an analysis of the visual impacts.

**Birds**

16. Initially, NE and the RSPB objected to the proposed wind farm development because of its potential impact on birds. Other objections on this issue came from the Teesmouth Bird Club and the Tees Valley Wildlife Trust and a number of individuals. However, as indicated above, NOWL made efforts to address the issues that had been raised about bird impacts and provided further information to support their case. Nevertheless, both NE and RSPB advised that the project might have a significant impact on the nearby Teesmouth and Cleveland Coast Special Projection Area (designated under the Birds Directive) and, therefore, an Appropriate Assessment (AA) would be needed to consider the nature of the impact on a variety of species.

17. BERR environmental experts undertook an AA which concluded that the Teesside development would not cause, on its own or in combination with other projects, adverse effects on the integrity of the SPA. Both NE and the RSPB have accepted the outcome of the AA and removed their objections to the grant of consent, albeit subject to the imposition of conditions that will require the developer to monitor any adverse impacts. However, Teesmouth Bird Club and the Tees Valley Wildlife Trust have rejected the AA's conclusions and maintained their objections.

18. Given the advice from NE and RSPB, we do not consider that there is a case for referring this issue to a public inquiry."

62 The Report concluded:

"32. The decision in this case is finely balanced. The key issue for consideration is the visual impact of the project which the developer acknowledges will be significant because of its proximity to Redcar. The developer argues that the wind farm's setting, in an industrialised landscape (with a large steel plant within close viewing range), reduces the significance of those impacts: the opponents of the scheme argue that the development would further industrialise views from the town, thus removing a pleasant vista from some viewpoints. However, it is acknowledged that the measurement of the visual impact of wind farm developments is subjective and will vary from person to person. We do not feel that a public inquiry would be likely to add significantly to the information we have about visual impact of this development. We are, therefore, now in a position to consider the concerns that have been raised and weigh them against the Government's stated policy of increasing the proportion of the UK's energy generation by renewable sources.

33. We feel that, on balance, it would be justified to consent the Teesside wind farm."

63 Putting Mr Welford's email dated 22nd December 2005 to one side for the moment, there could be no reasonable criticism of this Report. It is both balanced and comprehensive, and sets out all of the relevant arguments in an impeccable manner, indeed in a manner in respect of which even the most experienced planning officer, although Mr Welford has no planning qualifications, would be proud. Unsurprisingly, this meticulously careful analysis is reflected in the decision letter itself.

64 Although Mr Stephenson submitted that the Appropriate Assessment dealt solely with protected species of birds and the claimant's objection related to the impact on birds generally, it is clear that the Environmental Statement dealt comprehensively with the impact of the proposal on birds generally, both protected and non-protected species, and the RSPB, which had objected to the proposal, had withdrawn its objection (subject to the imposition of appropriate conditions). There was, therefore, no force in this complaint. In reality, the sole complaint is that the Report does not set out Mr Welford's own opinion, as expressed in his email, that "the proposed site is too close to the town and will be such a dominating feature as to be almost overwhelming."

65 In my judgment, that criticism of the Report is misconceived for two principal reasons. First, Mr Welford explains in a second witness statement that the Report:

> "… did not include my personal comments relating to my own impression of the visual impact of the project. Not only had these been made 18 months earlier, but it is also standard practice for submissions to Ministers on consent cases to avoid stating officials' personal views. Instead, submissions aim to provide Ministers with objective advice which covers amongst other things the views of the developer, objectors and those consulted together with input from our statutory environmental advisors. In this case the submission clearly brought to the attention of Ministers the fact that the development would have a significant visual impact and that as a result it was controversial."

66 Although the Report is a model of its kind, neither Mr Welford nor any of his colleagues in the Department had any professional expertise in planning or in landscape assessment. He alone had seen the site and formed a view, but there had never been any dispute that, as the Report told Ministers, the proposal was a controversial one because of its close proximity to Redcar, where there was a great deal of concern about its potential visual impact which was acknowledged to be "significant" (the highest level of impact) in the Environmental Statement. In the absence of any detailed criticism of the methodology adopted in the Environmental Statement, the most effective way of providing Ministers with information about that significant visual impact was to produce the relevant photomontages, coupled with a warning that the viewer's perception would be of a wind farm that appeared to be bigger and closer than that depicted on the montages. In these circumstances, it was not irrational to present the view that represented the collective wisdom of the Department, rather than Mr Welford's own, personal and somewhat impressionistic view, formed on a visit some 18 months earlier.

67 Secondly, for understandable reasons the claimant seizes upon just one sentence in one email from Mr Welford to his colleagues. But Mr Welford's advice, both to his

colleagues and in conjunction with his colleagues to Ministers, must be considered as a whole. Despite the view expressed in his email later that day, his Report to his colleagues dated 22nd December 2005 had not said that the visual impact of the proposal would be overwhelming. Although he had suggested another visit, he made it clear that he was "happy to talk through the issue with [his] trusty map" whether or not there was another visit. There is nothing to suggest that he pressed his colleagues further as to the need for a visit when they demurred at his suggestion, nor is there anything to suggest that, having talked the issue through with the aid of his "trusty map", he had any concerns that the departmental view that was being presented to Ministers was understating the potential visual impact of the proposal. In summary, having expressed his personal view as to why another visit was desirable, he was content with, and indeed was the author of, the Department's collective view as expressed in the Report. There is no evidence whatsoever to support the claimant's submission that Mr Welford's own view was "suppressed". The emails show that all of the officials, including Mr Welford, were perfectly prepared to speak their minds. If, in the light of his visit to Redcar, Mr Welford had still had concerns about the advice that he and his colleagues were going to give to Ministers, he would have said so to his colleagues. As the author of the Report he did not, after having discussed the matter with his colleagues and in the light of further consideration of the visual impact issue by the interested party and Natural England, dissent from the departmental view.

68 For these reasons, the challenge on the ground of irrationality must fail.

## Delay

69 The decision letter is dated 17th September 2007. On that day the Leader of the claimant council wrote to the defendant:

> "I understand that planning permission is likely to be granted for the siting of Wind Turbines in the Tees Bay on the basis that visual amenity, particularly in relation to Redcar, will not be marred.
>
> As far as I am aware, there has been no visit to Redcar to enable such a conclusion to be reached, accordingly I confirm that if permission is granted, the Council will be seeking a judicial review of the decision."

70 The claim form was not filed until 17th December 2007. It was served upon the defendant and the interested party some days later. In a letter dated 29th November 2007, the claimant had notified the defendant (but not the interested party) that it intended to apply for judicial review. That letter did not set out any grounds, but merely stated that the claimant considered that the defendant had "erred in law in granting the consent."

71 In these circumstances, I am satisfied that although the claim was issued (just) within the 3-month period prescribed by CPR 54.5(1) , it was not filed promptly. Mr Stephenson explained that the case was a complex one and the claimant needed to obtain legal advice. While I accept that the claimant needed to obtain legal advice, that

does not explain why it was not possible for this claimant to file its claim form significantly earlier than 17th December 2007. I emphasise the words "this claimant" because this claimant is a local planning authority and, as a local planning authority, it must have been well aware of the particular need to challenge grants of planning permission (and the section 36 consent for this offshore development is akin to a grant of planning permission for an onshore development) promptly. As a local planning authority the claimant should have also been well aware of the relevant Government energy policies, which set demanding targets for the contribution to be made by renewable energy sources to the United Kingdom's energy needs by 2010 in order to meet international commitments entered into by the Government.

72 The need for promptness in challenging "planning" decisions within this policy framework is particularly acute. Delay in challenging decisions in respect of renewable energy projects is more than usually prejudicial to good administration. In addition, the interested party's evidence demonstrates specific prejudice, both in terms of significant expenditure incurred by the interested party in the three months following the decision letter, and in terms of the potential delays to the project because of the need for the interested party to enter into advance commitments in respect of such matters as, for example, grid connections, new distribution equipment, et cetera. The claimant's failure to give the interested party any warning whatsoever of the impending judicial review proceedings was particularly reprehensible.

73 Although the defendant and the interested party contended that the application for permission to apply for judicial review should be refused on the grounds of delay (this was the reason why Collins J did not grant permission following the oral hearing on 13th March 2008, but instead ordered this rolled-up hearing) the lack of promptness is not, in my judgment, so egregious that I would have been justified in refusing permission on that ground alone. Had I been persuaded by the claimant's submissions that the section 36 consent was invalid, I would have granted permission and quashed the decision notwithstanding the lack of promptness. However, in respect of the other grounds of challenge, "illegality" and "irrationality", which do not go to the heart of the consent itself but to the manner in which the interested party's application was considered by the defendant, the claimant's lack of promptness would have been a good reason for refusing to grant any relief, even if there had been some substance in either or both of those grounds.

74 This applies with particular force to the "illegality" ground. It would not have been appropriate to grant relief to this claimant, which as a local planning authority should have been well aware of the statutory framework, when it had never asked the defendant to hold an inquiry, and then, even after the event, when it did not complain promptly that the defendant had failed to take into account some material consideration in deciding not to hold an inquiry. Nor, given the lack of promptness, would it have been appropriate to grant relief if there had been some force in the complaint that there was no mention in the Report of Mr Welford's personal view, as expressed in his email dated 22nd December 2005 to his colleagues. The resulting failure to take that particular consideration into account, even if there had been an obligation on the part of the defendant to do so, would not have been so grave an error as to warrant quashing the decision in response to such a belated challenge.

75 Having heard argument over the best part of two days, the sensible course is to grant permission to apply for judicial review, but I do so only in order to refuse the substantive application.

76 Thank you.

77 Yes, Mr Lewis, is it?

78 MR LEWIS: Yes, Mr Lewis it is. My Lord, if I may just in relation to costs confirm that the claimant has agreed to pay the Secretary of State's costs at £25,000. My Lord, that has been agreed.

79 MR JUSTICE SULLIVAN: That is the case, is it, Mr Stephenson?

80 MR STEPHENSON: It is the case, my Lord, yes.

81 MR JUSTICE SULLIVAN: Right.

82 Yes, Mr Norris.

83 MR NORRIS: Your Lordship knows that the interested party also sought an order for costs, and you have I think a written submission explaining the grounds therefor.

84 MR JUSTICE SULLIVAN: Yes, thank you very much.

85 MR NORRIS: But I am happy to tell you that application can likewise be dealt with by consent, because Redcar Council has agreed to pay the interested party's costs in the sum of £22,500. So your Lordship's order will need to include nothing other than that order and that amount.

86 MR JUSTICE SULLIVAN: Confirmed again, Mr Stephenson?

87 MR STEPHENSON: Our solicitors confirmed that yesterday, my Lord, yes.

88 MR JUSTICE SULLIVAN: Right, thank you. If I may say so I think it is a very sensible agreement reached all round. I would have reached the same sort of conclusion after lengthy argument, I suspect.

89 So the formal order is the application for permission to apply for judicial review is granted, but the substantive application is dismissed. The claimant is to pay the defendant's costs summarily assessed in the sum of £25,000, and a contribution towards the interested party's costs summarily assessed in the sum of £22,500.

90 MR STEPHENSON: Exactly so.

91 MR JUSTICE SULLIVAN: Yes, Mr Stephenson.

92 MR STEPHENSON: My Lord, I merely say that the order should indicate that is agreed.

93 MR JUSTICE SULLIVAN: Oh yes, agreed. Summarily assessed in the agreed sum of £25,000 and in the agreed sum of £22,500.

94 MR STEPHENSON: My Lord, there is one small error of fact in your Lordship's judgment.

95 MR JUSTICE SULLIVAN: Yes, of course.

96 MR STEPHENSON: Just at the moment when your Lordship dealt with the irrationality point, your Lordship described our head of claim of bias as "bias", rather than "perceived bias".

97 MR JUSTICE SULLIVAN: Oh right.

98 MR STEPHENSON: It is quite important, my Lord, and I would not like anyone to think we were suggesting actual bias rather than perceived bias.

99 MR JUSTICE SULLIVAN: Shorthand writer, would you just rewrite history, put in "perceived" in front of "bias". It might seem a small thing, but I can see that people get a bit touchy about it.

100 MR STEPHENSON: Exactly so, my Lord.

101 There is just one other small point, my Lord. I need to ask your Lordship for leave to appeal on two bases. The first basis is whether the Secretary of State on the evidence in this case and the decision letter itself actually did perform its statutory duty to consider whether it was appropriate to hold a public inquiry. The second point, my Lord, is on the what we would call the Mr Welford point, whether this is in fact a point which really does vitiate the decision ( inaudible ) raise a point of irrationality. Those two points, my Lord.

102 MR JUSTICE SULLIVAN: Thank you very much.

103 I hope you will not think it discourteous, Mr Stephenson, if I say for the reasons set out in the judgment which I have just gone through, I do not grant permission because I do not think that there is a real prospect of success.

104 MR STEPHENSON: I am obliged.

105 MR JUSTICE SULLIVAN: Obviously you can try again with their Lordships, if you think it worthwhile.

106 MR STEPHENSON: Would your Lordship indicate whether time runs from the date we receive the transcript or from today?

107 MR JUSTICE SULLIVAN: I can see various gestures. It is suggested it should be today. On the other hand, it is quite a lengthy judgment. It might be more sensible if the council had an opportunity to consider it, so that, as it were, a considered view can be taken as to whether really there is any prospect as opposed to shooting from the hip. My instinct to say your time to run from when you get the approved judgment. It generally does not add much more than about a week actually to the whole process.

108 MR STEPHENSON: Indeed so, my Lord.

109 MR JUSTICE SULLIVAN: So I am making that order, having assumed, Mr Norris, that you object to it.

110 MR NORRIS: Your Lordship has rightly read what somebody once said is my body language. But what your Lordship can perhaps do to help is to suggest that the transcript should be expedited, or there is a procedure whereby that does — which I discussed with the associate earlier. If your Lordship suggests the transcript be expedited, it may be with us rather sooner than the ten days which it ordinarily takes.

111 MR JUSTICE SULLIVAN: Yes. Shorthand writer, what I am going to do is to ask that if you can get the transcript to me by no later than Thursday next week, I will look to turn it round and send it out so that the parties can have it by the end of the week. So i.e we ought to aim to get it out to me and me correct it and give it back to you done by the end of next week; is that feasible?

112 So if I expedite it those terms. Sometimes we say expedite and people have to work over the weekend and break their necks to do it. It is not quite that expeditious, but we want to try to get it out, the final version, by the end of the week. So I expedite it to that extent.

113 You do not have any observations to make about that, Mr Lewis?

114 MR LEWIS: I have been asked to make some observations on that. Given that for the time for appeal, as I understand it my Lord, has been extended to 21 days, my instructions are to express some concerns at this now extended period for appeal to a month.

115 MR JUSTICE SULLIVAN: It extends it by another seven days. But my experience is that since we are dealing with a public body rather than an individual, it might be better if they actually have the judgment in front of them and then their lawyers can give them, as it were, properly informed advice as to really what their prospects of success are.

116 MR LEWIS: I am grateful for your Lordship's assurance on expedition.

117 MR JUSTICE SULLIVAN: Thank you. Anything else?

118 MR LEWIS: No, my Lord.

119 MR JUSTICE SULLIVAN: Thank you very much.