

## \*337 Regina (Morge) v Hampshire County Council



Positive/Neutral Judicial Consideration

### Court

Supreme Court

### Judgment Date

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[2011] P.T.S.R. 337



Supreme Court

Lord Walker of Gestingthorpe , Baroness Hale of Richmond , Lord Brown  
of Eaton-under-Heywood , Lord Mance , Lord Kerr of Tonaghmore JJSC

2010 Nov 8; 2011 Jan 19

*European Union—Environment—Natural habitats—Local planning authority granting permission for development affecting species or habitat of European protected species—Whether effects of development constituting “deliberate disturbance” of protected species—Whether planning decision made in breach of requirements of Council Directive— Council Directive 92/43/EEC, art 12(1)(b)*

*Planning—Development—Natural habitats—European protected species—Application for planning permission for development affecting species or habitats of bats—Planning authority granting planning permission in reliance, inter alia, on withdrawal by Natural England of opposition to planning application—Whether effects of development constituting “deliberate disturbance” of protected species—Whether planning decision made in breach of requirements of Council Directive — Conservation (Natural Habitats, etc) Regulations 1994 (SI 1994/2716) (as amended by Conservation (Natural Habitats, etc) (Amendment) Regulations 2007 (SI 2007/1843), reg 5 and Conservation (Natural Habitats, etc) (Amendment) (England and Wales) Regulations 2009 (SI 2009/6), reg 7), regs 3(4), 39(1) — Council Directive 92/43/EEC, art 12(1)(b)*

The defendant local authority, which was also the planning authority for the area, applied for planning permission for a development whereby a bus route would run alongside a disused railway track. The track was overgrown with vegetation and bats, a European protected species within [Annex IV of Council Directive 92/43/EEC](#) (“the Habitats Directive”) <sup>1</sup>, lived and/or foraged there. Natural England, the Government’s adviser on nature conservation and the body responsible for enforcing the Directive, initially objected to the planning application on the grounds, inter alia, of the impact of the proposed development on bats. The defendant then commissioned an updated bat survey and, as a result of the findings of the survey, Natural England withdrew its objections to the planning application. Thereafter the defendant’s planning committee, having also considered the reports of the defendant’s planning officers, granted planning permission for the development. The claimant, a local resident, sought judicial review of that decision, claiming that the defendant had acted unlawfully in failing to have regard to the strict protection afforded to bat species by [article 12\(1\) of the Habitats Directive](#), and in breach of [regulation 3\(4\) of the Conservation \(Natural Habitats, etc\) Regulations 1994](#) <sup>2</sup> by failing to “have regard to the requirements of the [Habitats Directive](#) so far as they may be affected by the exercise of [the defendant’s] functions”. In dismissing the claim the judge held, inter alia, that [article 12\(1\)\(b\) of the Habitats Directive](#) was not concerned with any indirect effect of the development upon the “deterioration or destruction of breeding sites or resting places” and that in the circumstances the proposals did not lead, either directly or indirectly, to the “deliberate disturbance” of the bats within the meaning of [\\*338 article 12\(1\)\(b\)](#). The Court of Appeal dismissed the claimant’s appeal on the grounds, inter alia, that [article 12\(1\)\(b\)](#) was

concerned with the protection of the species, and the loss of habitats or disturbance to one or more bats did not necessarily constitute disturbance of the species.

On the claimant's appeal—

*Held*, (1) that in determining the level of disturbance required to fall within the prohibition in [article 12\(1\)\(b\) of the Habitats Directive](#) consideration had to be given to the fact that it was an article affording protection specifically to species and not to specimens of the species, nor to habitats, although the disturbance of habitats could indirectly impact on species; that [article 12\(1\)\(b\)](#) did not preclude an assessment of the nature and extent of the negative impact of the defendant's activities upon the species and whether it was sufficient to constitute a “disturbance” of the species; that it was implicit in [article 12\(1\)\(b\)](#) that activity during the period of breeding, rearing, hibernation and migration was more likely to have a negative impact on the species so as to constitute the prohibited “disturbance” than activity at other times; that consideration had to be given to the rarity and conservation status of the species and the impact of the disturbance on the local population of a protected species; that individuals of a rare protected species were more important to a local population than individuals of a more abundant protected species, and disturbance of species which were declining in number were likely to be more harmful than disturbance to species which were increasing in numbers; and that, therefore, a case by case approach with careful reflection on the characteristics and survival chances of the species concerned was required when determining whether there was a level of “disturbance” which fell within the prohibition in [article 12\(1\)\(b\)](#) (post, paras 19–25, 33, 34, 48, 77–79).

(2) Dismissing the appeal (Lord Kerr of Tonaghmore JSC dissenting), that the planning committee's only obligation under [regulation 3\(4\)](#) of the 1994 Regulations was to have regard to the requirements of the [Habitats Directive](#) when deciding whether to grant planning permission; that the United Kingdom had chosen to implement the Directive by making a breach of the [article 12](#) prohibition a criminal offence under [regulation 39\(1\)](#) of the 1994 Regulations and it was the function of Natural England, and not of the planning authority, to enforce compliance with the Directive by prosecuting those who had committed offences; that the grant of planning permission did not provide a defence to the offence, so that even if planning permission was given there were criminal sanctions available for any offending activity, and it was wrong in principle when Natural England had the primary responsibility for ensuring compliance with the Directive also to place a substantial burden on the planning authority, in effect, to police the fulfilment of Natural England's own duty; that since Natural England had expressed itself satisfied that the proposed development would be compliant with [article 12](#) of the Directive and had withdrawn its objections to the development, the planning committee was entitled to presume that Natural England was correct; that it could not be said that Natural England had misunderstood the ambit of [article 12\(1\)\(b\)](#) or that the planning committee had been materially misled or left insufficiently informed; that [regulation 3\(4\)](#) did not require members of the planning committee to consider and decide for themselves whether the development would occasion such disturbance to bats as in fact and law would constitute a violation of [article 12\(1\)\(b\)](#) of the Directive; that the planning committee also knew that the necessary measures had been planned to compensate for the loss of foraging; and that, accordingly, in reaching its decision to grant planning permission the defendant authority had had regard to the requirements of the Directive to the extent necessary to fulfil its obligation under [regulation 3\(4\)](#) of the Regulations (post, paras 26–32, 33, 34, 44–47, 48, 50, 54–56).

Decision of the *Court of Appeal* [2010] EWCA Civ 608 ; [2010] PTSR 1882 affirmed on partly different grounds.

**\*339**

The following case is referred to in the judgment of Baroness Hale of Richmond JSC:

*R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295; [2001] WLR 1389; [2001] 2 All ER 929, HL(E)

The following additional cases were cited in argument:

*Berkeley v Secretary of State for the Environment* [2001] 2 AC 603; [2000] 3 WLR 420; [2000] 3 All ER 897, HL(E)  
*Commission of the European Communities v Kingdom of Spain (Case C-221/04)* [2006] ECR I-4515, ECJ  
R (Hulme) v Secretary of State for Communities and Local Government [2010] EWHC 2386 (Admin)  
*R (Newsum) v Welsh Assembly Government* [2004] EWCA Civ 1565; [2005] PLR 107, CA  
R (Woolley) v Cheshire East Borough Council [2009] EWHC 1227 (Admin); [2010] Env LR 57

**APPEAL** from the Court of Appeal

By permission of the Supreme Court (Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood and Lord Mance JJSC) granted on 27 July 2010, the claimant, Vivienne Morge, appealed from a decision of the Court of Appeal (Ward, Hughes and Patten LJ) on 10 June 2010, dismissing the claimant's appeal from the judgment of Judge Bidder QC sitting as a judge of the Queen's Bench Division in the Administrative Court on 17 November 2009, refusing the claimant's claim for judicial review of a decision of the defendant planning authority, Hampshire County Council, on 29 July 2009, to grant planning permission for a development providing a bus route between Fareham and Gosport in South East Hampshire to run alongside a disused railway track.

The facts are stated in the judgments of Lord Brown of Eaton-under-Heywood, Baroness Hale of Richmond and Lord Kerr of Tonaghmore JJSC.

*Charles George QC, Gregory Jones and Sarah Sackman* (instructed by *Edwin Coe LLP*, London agents for *Swain & Co, Havant*) for the claimant.

*Neil Cameron QC and Sasha White* (instructed by *Sharpe Pritchard* for *Head of Legal Services, Hampshire County Council, Winchester*) for the local planning authority.

The court took time for consideration.

19 January 2011. The following judgments were handed down.

**LORD BROWN OF EATON-UNDER-HEYWOOD JSC**

1. This appeal concerns a planning permission granted on 29 July 2009 for a proposed three-mile (4.7km) stretch of roadway to provide a rapid bus service between Fareham and Gosport in South East Hampshire. The permission was challenged on environmental grounds including not least its likely impact on several species of European protected bats inhabiting the general area around the proposed busway. The challenge having failed before Judge Bidder QC (sitting as a High Court judge) on 17 November 2009; [2009] EWHC 2940 (Admin)—and before the *Court of Appeal (Ward, Hughes and Patten LJ) on 10 June 2010*; [2010] PTSR 1882—this \*340 court on 27 July 2010 gave the appellant limited permission to appeal so as to raise two issues of some general importance.

2. Issue one concerns the proper interpretation of [article 12\(1\)\(b\) of Council Directive 92/43/EEC of 21 May 1992](#) on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L206, p 7) (“the [Habitats Directive](#)”), which provides that:

“Member states shall take the requisite measures to establish a system of strict protection for the animal species listed [the protected species] in their natural range, prohibiting ... (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration ...”

3. Issue two concerns the proper application of [regulation 3\(4\) of the Conservation \(Natural Habitats, etc\) Regulations 1994](#) (SI 1994/2716) (as amended first by the [Conservation \(Natural Habitats, etc\) \(Amendment\) Regulations 2007](#) and then by the [Conservation \(Natural Habitats, etc\) \(Amendment\) \(England and Wales\) Regulations 2009](#)), by which domestic effect is given to the Directive:

“every competent authority in the exercise of any of their functions, shall have regard to the requirements of the [Habitats Directive](#) so far as they [the requirements] may be affected by the exercise of those functions.”

With that briefest of introductions let me turn to the essential factual context in which these issues now arise, noting as I do so that altogether fuller descriptions of the facts can be found in the judgments below.

4. The proposed new rapid busway—the first and larger phase of which is already substantially under way, applications for interlocutory relief to stay its continuance having been refused by the Court of Appeal and refused by this court on granting leave to appeal—runs along the path of an old railway line, last used in 1991. The scheme provides for buses to be able to join existing roads at various points along the route. It will create a new and efficient form of public transport to the benefit of many residents, workers and visitors to the region. Central Government has committed £20m to it.

5. Although most of the scheme lies within a built-up area, there are a number of designated nature conservation sites nearby and, unsurprisingly, once the railway line ceased to be used, the surrounding area became thickly overgrown with vegetation and an ecological corridor for various flora and fauna. Although, therefore, the scheme was widely supported, it also attracted a substantial number of objectors one of whom is Mrs Morge, the appellant, who lives close by.

6. The respondent authority is both the local planning authority for the relevant area and also the applicant for planning permission through its agent, Transport for South Hampshire, who submitted a planning application on 31 March 2009. Taking it very shortly, on 30 April 2009 Natural England (the Government's adviser on nature conservation) objected to the planning application in part because of their concerns about the impact of the development on bats (an objection reiterated on 29 June 2009). As a result the respondent authority commissioned an updated bat survey (“UBS”) which was submitted on 9 July 2009. On 17 July 2009, largely as a result of the UBS, Natural England withdrew their objections. \*341 There then followed a decision report prepared by the respondent's planning officers, a further letter from Natural England dated 23 July 2009, an addendum decision report from the officers, and on 29 July 2009 a three hour meeting of the respondent's regulatory committee which concluded with the grant of planning permission for the scheme by a majority of six to five with two abstentions.

7. The UBS is a document of some 70 pages. For present purposes, however, its main findings can be summarised as follows. No roosts were found on the site. The removal of trees and vegetation, however, would result in a loss of good quality bat foraging habitats. This would have a moderate adverse impact at local level on foraging bats for some nine years, the impact thereafter reducing, because of mitigating measures, to slight adverse/neutral. In addition the busway would sever a particular flight path followed by common pipistrelle bats, increasing their risk of collision with buses (without, however, given the proposed mitigation of this risk, a significant impact on bats at a local level).

8. The officers' decision report (again a lengthy document) included these passages with regard to the bats:

“3.7 Detailed ecological surveys have been undertaken across the site over the last 18 months ... A number of bat species roost and forage along the corridor ... Accordingly, a strategy to mitigate the impact on these species has been developed. The main principles of the strategy [include] enhancement of the habitat of the retained embankment to provide continued habitat for displaced species. Bat surveys have also been carried out to enable appropriate measures to be implemented ...”

“5.6 Natural England initially raised objections on the grounds that the application contains insufficient survey information to demonstrate whether or not the development would have an adverse effect on bats ... which are [a] legally protected species. Further survey work was undertaken in response to this objection and provided to Natural England. Following receipt of this information Natural England are now satisfied that the necessary information has been provided and have withdrawn their objection. They recommend that if the council is minded to grant permission for this

scheme conditions be attached requiring implementation of the mitigation and compensation measures set out in the reports ...”

**“Nature conservation impact**

“8.17 The requirements of the [Habitats Regulations](#) need to be considered ...”

“8.19 The surveys also identified the presence of a diversity of bat species, which are protected, using the trees alongside the track for foraging. An Updated Bat Survey Method Statement and Mitigation Strategy has been submitted with measures to ensure there is no significant adverse impact to them from these proposals ...”

**“Conclusion**

“8.24 Suitable mitigation measures are proposed for ... protected species ...”

The addendum report dealt specifically with the [Habitats Regulations](#) and repeated that Natural England, having initially objected to the application \*342 and required further survey information regarding protected species, were now satisfied and had withdrawn their objection.

9. Against this essential factual background I turn now to the two main issues arising.

**Issue 1 —the proper interpretation of article 12(1)(b) of the Habitats Directive**

[Article 12\(1\)\(b\)](#) must, of course, be interpreted in the light of the Directive as a whole. Included amongst the recitals in its preamble is this:

“Whereas, in the European territory of the member states, natural habitats are continuing to deteriorate and an increasing number of wild species are seriously threatened; whereas given that the threatened habitats and species form part of the community's natural heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at community level in order to conserve them.”

10. [Article 1](#) is the definition article and defines “species of Community interest” in four categories, respectively “endangered”, “vulnerable”, “rare”, and “endemic and requiring particular attention [for various specified reasons]”. The six species of protected bats affected by the proposed busway fall variously into the second, third and fourth of those categories. [Article 1\(i\)](#) defines “conservation status of a species” to mean “the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations”. It further provides:

“The conservation status will be taken as ‘favourable’ when: population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.”

Article 2(2) provides that “Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of community interest.”

11. There then follow articles 3 to 11 under the head “Conservation of natural habitats and habitats of species”. Within these provisions one should note article 6(2) :

“Member states shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.”

12. Articles 12 to 16 inclusive then follow under the head “Protection of species”. I have already set out article 12(1)(b) . Article 16 provides for derogation and so far as material provides:

“1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, \*343 member states may derogate from the provisions of articles 12 ... (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment.”

13. Besides the issues now before us the Court of Appeal had to deal in addition with challenges based upon article 12(1)(d) of the Directive and upon the respondent's decision not to treat the proposal as an EIA development (matters upon which this court refused leave to appeal). Ward LJ gave the only reasoned judgment, one of infinite care and thoughtfulness and, I may add, one of enormous assistance to this court in its consideration of this further appeal.

14. As a background to deciding the meaning of article 12(1)(b) , Ward LJ necessarily had regard to the European Commission's views upon the scope of the Directive, as set out in a guidance document issued in February 2007 which include the following:

“(37) Disturbance (eg by noise, source of light) does not necessarily directly affect the physical integrity of a species but can nevertheless have an indirect negative effect on the species (eg by forcing them to use lots of energy to flee; bats, for example, when disturbed during hibernation, heat up as a consequence and take flight, so are less likely to survive the winter due to high loss of energy resources). The intensity, duration and frequency of repetition of disturbances are important parameters when assessing their impact on a species. Different species will have different sensitivities or reactions to the same type of disturbance, which has to be taken into account in any meaningful protection system. Factors causing disturbance for one species might not create disturbance for another. Also, the sensitivity of a single species might be different depending on the season or on certain periods of its life cycle eg (breeding period). Article 12(1)(b) takes into account this possibility by stressing that disturbances should be prohibited particularly during the sensitive periods of breeding, rearing, hibernation and migration. Again, a species-by-species approach is needed to determine in detail the meaning of ‘disturbance’.

“(38) The disturbance under article 12(1)(b) must be deliberate ... and not accidental. On the other hand, while ‘disturbance’ under article 6(2) must be significant, this is not the case in article 12(1), where the legislator did not explicitly add this qualification. This does not exclude, however, some room for manoeuvre in determining what can be described as disturbance. It would also seem logical that for disturbance of a protected species to occur a certain negative impact likely to be detrimental must be involved.

“(39) In order to assess a disturbance, consideration must be given to its effect on the conservation status of the species at population level and biogeographic level in a member state ... For instance, any disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a reduction in the occupied area should be regarded as a ‘disturbance’ in terms of article 12. On the other hand, sporadic disturbances without any likely negative impact on the species, such as for example scaring away a wolf from \*344 entering a sheep enclosure in order to prevent damage, should not be considered as disturbance under article 12. Once again, it has to be stressed that the case by case approach means that the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation, as explained above.”

No problem arises as to what is meant by “deliberate” in [article 12\(1\)\(b\)](#) . As stated by the commission in para 33 of their guidance:

“‘Deliberate’ actions are to be understood as actions by a person who knows, in light of the relevant legislation that applies to the species involved, and the general information delivered to the public, that his action will most likely lead to an offence against the species, but intends this offence or, if not, consciously accepts the foreseeable results of his action.”

Put more simply, a deliberate disturbance is an intentional act knowing that it will or may have a particular consequence, namely disturbance of the relevant protected species. The critical, and altogether more difficult, question is what precisely in this context is meant by “disturbance”.

15. Having, as I too have sought to do, thus cleared the ground and recognised that the central difficulty in the case lies in determining the level of disturbance required to fall within the prohibition, Ward LJ rejected the appellant's contention that any disturbing activity save only that properly to be characterised as *de minimis*—too negligible for the law to be concerned with—constitutes disturbance within the article. As Ward LJ pointed out [\[2010\] PTSR 1882](#) , the example given in para 38 of the commission's guidance (scaring away a wolf from the sheep fold) “must be an *a fortiori*, rather than a typical one”. The judgment then continues (and I make no apology for quoting it at some length):

“35. ... the disturbance does not have to be significant but, as para 38 of the guidance explains, there must be some room for manoeuvre which suggests the threshold is somewhere between *de minimis* and significant. It must be certain, that is to say, identifiable. It must be real, not fanciful. Something above a discernible disturbance, not necessarily a significant one, is required. Given that there is a spectrum of activity, the decision-maker must exercise his or her judgment consistently with the aim to be achieved. Given the broad policy objective which I explored ... above [‘to ensure that the population of the species is maintained at a level which will ensure the species' conservation so as to protect the distribution and abundance of the species in the long term’], disturbing one bat, or even two or three, may or may not amount to disturbance of the species in the long term. It is a matter of fact and degree in each case.

“36. [Counsel for the claimant] seizes on the words in para 38 ... of the guidance, ‘a certain negative impact likely to be detrimental must be involved’ and he elevates this statement into a test for establishing a disturbance. His difficulty is that that does not answer the critical question: when does the negative impact become detrimental? Para 39 seems to me to spell out the proper approach, namely to give consideration to the ‘effect on the conservation status of the species at population level and biogeographic level’. This in my judgment is an \*345 important refinement. The impact must be certain or real, it must be negative or adverse to the bats and it will be likely to be detrimental when it negatively or adversely affects the conservation status of the species. ‘Conservation status of a species’ is a term of art [which] ... means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its population. That is why the guidance at para 39 makes the point that the disturbing activity must be such as ‘affects the survival chances ... of a protected species’. Furthermore, ‘the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation’, to quote the concluding sentence of para 39. The summary in the guidance ... has the same emphasis: ‘Disturbance is detrimental for a protected species eg by reducing survival chances, breeding success or reproductive ability. A species-by-species approach needs to be taken as different species will react differently to potentially disturbing activities.’

“37. Having regard to the aim and purpose of the Directive and of article 16 and having due consideration of the guidance, I am driven to conclude that for there to be disturbance within the meaning of article 12(1)(b) that disturbance must have a detrimental impact so as to affect the conservation status of the species at population level ...”

“39. In my judgment whether the disturbance will have a certain negative impact which is likely to be detrimental must be judged in the light of and having regard to the effect of the disturbance on the conservation status of the species, ie, how the disturbance affects the long-term distribution and abundance of the population of bats. I remind myself that according to the [commission's] guidance ... ‘favourable conservation status could be described as a situation where a ... species is doing sufficiently well in terms of quality and quantity and has good prospects of continuing to do so in the future’. Whether there is a disturbance of the species must be judged in that light.”

16. Finally, in a passage in the judgment headed “Overall conclusions”, Ward LJ, expressing himself satisfied that the respondent's planning committee had due regard to the requirements of the Directive, said:

“73. I have been troubled by the fact that the conclusion of the bat survey upon which such reliance was placed is to the effect that no *significant* impacts to bats are anticipated. The disturbance does not have to be significant and this is a misdirection or misunderstanding of ... [article] 12(1)(b) ... of the [Habitats Directive](#) . The question for me is, therefore, whether the conclusions can be upheld. I am satisfied that the decision of the planning committee should not be quashed.

“74. I reach that conclusion for these reasons. I am satisfied that the loss of foraging habitat occasioned by cutting a swathe through the vegetation does not offend article 12(1)(b) which is concerned with protection of the species not with conservation of the species' natural habitats. I am satisfied that that bald statement that the bats have to travel further and expend more energy in foraging does not justify a conclusion that the conservation status of the bats is imperilled or at risk. There is no evidence which would allow the planning committee to \*346 conclude that the long-term distribution and abundance of the bat population is at risk. There is no evidence that they will lose so much energy (as they might when disturbed during hibernation) that the habitat will not still provide enough sustenance for their survival, or their survival would be in jeopardy. There is no evidence that the population of the species

will not maintain itself on a long-term basis. There is therefore no evidence of any activity which would as a matter of law constitute a disturbance as the word has to [be] understood.

“75. As I have already concluded, the risk of collision cannot amount to a disturbance and article 12(1)(b) is not engaged in that respect.”

17. Mr George QC submits that the Court of Appeal were wrong to hold that [article 12\(1\)\(b\)](#) is breached only when the activity in question goes so far as to imperil the conservation status of the species at population level, ie, that only then does the activity amount to a “disturbance” of the species. This, he points out (and, indeed, Ward LJ himself recognised), puts the threshold for engaging the article higher than Mr Cameron QC for the respondent put it, Mr Cameron's main concern being that such a construction would sit uneasily with [article 16\(1\)](#) (a provision which itself necessarily implies that [article 12\(1\)\(b\)](#) may need to be, and be capable of being, derogated from notwithstanding that this is only permissible where it is “not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status”). The Court of Appeal's construction is also, submits Mr George, inconsistent with an additional reasoned opinion addressed to the UK by the commission dated 18 September 2008 with regard, inter alia, to what was then the new [regulation 39\(1\)](#), inserted by the 2007 Amendment Regulations, providing for an offence where someone

“(b) deliberately disturbs wild animals of any species in such a way as to be likely significantly to affect—(i) the ability of any significant group of animals of that species to survive, breed or rear or nurture their young ...”

The prohibition in the Directive, the commission pointed out in their opinion, “is not limited to *significant* disturbances of *significant groups* of animals”. [Article 12\(1\)\(b\)](#) of the Directive, the opinion later suggested, “covers all disturbance of protected species”.

18. Whilst not actually conceding that the Court of Appeal approach is wrong, Mr Cameron contends now that the proper approach is to ask whether the activity in question produces “a certain negative impact likely to be detrimental to the species having regard to its effect on the conservation status of the species”.

19. In my judgment certain broad considerations must clearly govern the approach to [article 12\(1\)\(b\)](#). First, that it is an article affording protection specifically to species and not to habitats, although obviously, as here, disturbance of habitats can also indirectly impact on species. Secondly, and perhaps more importantly, the prohibition encompassed in [article 12\(1\)\(b\)](#), in contrast to that in [article 12\(1\)\(a\)](#), relates to the protection of “species”, not the protection of “specimens of these species”. Thirdly, whilst it is true that the word “significant” is omitted from [article 12\(1\)\(b\)](#)—in contrast to [article 6\(2\)](#) and, indeed, [article 12\(4\)](#) which envisages accidental capture and [\\*347](#) killing having “a significant negative impact on the [protected] species”—that cannot preclude an assessment of the nature and extent of the negative impact of the activity in question upon the species and, ultimately, a judgment as to whether that is sufficient to constitute a “disturbance” of the species. Fourthly, it is implicit in [article 12\(1\)\(b\)](#) that activity during the period of breeding, rearing, hibernation and migration is more likely to have a sufficient negative impact on the species to constitute prohibited “disturbance” than activity at other times.

20. Beyond noting these broad considerations it seems to me difficult to take the question of the proper interpretation and application of [article 12\(1\)\(b\)](#) much further than it is taken in the commission's own guidance document. (The commission's suggestion in their September 2008 Additional Reasoned Opinion that [article 12\(1\)\(b\)](#) “covers all disturbance of protected species” in truth begs rather than answers the question as to what activity in fact constitutes such “disturbance” and cannot sensibly be thought to involve a departure from their 2007 guidance.) Clearly the illustrations given in para 39 of the guidance—on the one hand “any disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a reduction in the occupied area”, on the other hand “scaring away a wolf from entering a sheep enclosure”—represent no more than the ends of the spectrum within which the question arises as to whether any given activity constitutes a disturbance. Equally clearly, to my mind, the suggestion in para 39 that “consideration must be given to its effect

[the effect of the activity in question] on the conservation status of the species at population level and biogeographic level” does not carry with it the implication that only activity which *does* have an effect on the conservation status of the species (ie which imperils its favourable conservation status) is sufficient to constitute “disturbance”.

21. I find myself, therefore, in respectful disagreement with Ward LJ's conclusion [2010] PTSR 1882, para 37 “that for there to be disturbance within the meaning of [article 12\(1\)\(b\)](#) that disturbance must have a detrimental impact so as to affect the conservation status of the species at population level”. Nor can I accept his view, at para 36, that “the guidance, at para 39, makes the point that the disturbing activity must be such as ‘affects the survival chances ... of a protected species’”. On the contrary, as I have already indicated, para 39 of the guidance uses disturbing activity of that sort merely to illustrate one end of the spectrum. Rather the guidance explains that, within the spectrum, every case has to be judged on its own merits. A “species-by-species approach is needed” and, indeed, even with regard to a single species, the position “might be different depending on the season or on certain periods of its life cycle”: see para 37 of the guidance. As para 39 of the guidance concludes:

“it has to be stressed that the case-by-case approach means that the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation, as explained above.”

22. Two further considerations can, I think, usefully be identified to be borne in mind by the competent authorities deciding these cases \*348 (considerations which seem to me in any event implicit in the commission's guidance). First (and this I take from a letter recently written to the respondent by Mr Huw Thomas, Head of the Protected and Non-Native Species Policy at DEFRA, the department responsible for policy with regard to the Directive):

“Consideration should ... be given to the rarity and conservation status of the species in question and the impact of the disturbance on the local population of a particular protected species. Individuals of a rare species are more important to a local population than individuals of more abundant species. Similarly, disturbance to species that are declining in numbers is likely to be more harmful than disturbance to species that are increasing in numbers.”

23. Second (and this is now enshrined in [regulation 41\(2\) of the Conservation of Habitats and Species Regulations 2010](#) (SI 2010/490)):

“disturbance of animals includes in particular any disturbance which is likely (a) to impair their ability (i) to survive, to breed or reproduce, or to rear or nurture their young, or (ii) in the case of animals of a hibernating or migratory species, to hibernate or migrate; or (b) to affect significantly the local distribution or abundance of the species to which they belong.”

Note, however, that disturbing activity likely to have these identified consequences is included “in particular” in the prohibition; it does not follow that other activity having an adverse impact on the species may not also offend the prohibition.

24. In summary, therefore, whilst I prefer Mr Cameron's suggested approach to this article (see para 18 above) than that adopted by the court below or that contended for by Mr George, it seems to me in the last analysis somewhat simplistic. To say that

regard must be had to the effect of the activity on the conservation status of the species is not to say that it is prohibited only if it *does* affect that status. And the rest of the formulation is hardly illuminating.

25. Tempting although in one sense it is to refer the whole question as to the proper interpretation and application of [article 12\(1\)\(b\)](#) to the Court of Justice of the European Union pursuant to article 267 of the Lisbon Treaty, I would not for my part do so. It seems to me unrealistic to suppose that the Court of Justice would feel able to provide any greater or different assistance than we have here sought to give.

#### **Issue two —The proper application of regulation 3(4) of the 1994 Regulations (as amended)**

26. I can deal with this issue altogether more briefly. [Article 12\(1\)](#) requires member states to “take the requisite measures to establish a system of strict protection for the animal species listed in [Annex IV\(a\)](#) in their natural range”. Wisely or otherwise, the UK chose to implement the Directive by making a breach of the [article 12](#) prohibition a criminal offence. [Regulation 39](#) of the 1994 Regulations (as amended) provides that “(1) A person commits an offence if he ... (b) deliberately disturbs wild animals of any such species [ie a European protected species]”. It is Natural England, we are told, who bear the primary responsibility for policing this provision.

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27. It used to be the position that the implementation of a planning permission was a defence to a [regulation 39](#) offence. That, however, is no longer so and to my mind this is an important consideration when it comes to determining the nature and extent of the [regulation 3\(4\)](#) duty on a planning authority deliberating whether or not to grant a particular planning permission.

28. Ward LJ dealt with this question in para 61 of his judgment:

“The planning committee must grant or refuse planning permission in such a way that will ‘establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range ...’ If in this case the committee is satisfied that the development will not offend article 12(1)(b) or (d) it may grant permission. If satisfied that it will breach any part of article 12(1) it must then consider whether the appropriate authority, here Natural England, will permit a derogation and grant a licence under regulation 44. Natural England can only grant that licence if it concludes that (i) despite the breach of regulation 39 (and therefore of article 12) there is no satisfactory alternative; (ii) the development will not be detrimental to the maintenance of the population of bats at favourable conservation status; and (iii) the development should be permitted for imperative reasons of overriding public importance. If the planning committee conclude that Natural England will not grant a licence it must refuse planning permission. If on the other hand it is likely that it will grant the licence then the planning committee may grant conditional planning permission. If it is uncertain whether or not a licence will be granted, then it must refuse planning permission.”

29. In my judgment this goes too far and puts too great a responsibility on the planning committee whose only obligation under [regulation 3\(4\)](#) is, I repeat, to “have regard to the requirements of the [Habitats Directive](#) so far as [those requirements] may be affected by” their decision whether or not to grant a planning permission. Obviously, in the days when the implementation of such a permission provided a defence to the [regulation 39](#) offence of acting contrary to [article 12\(1\)](#), the planning committee, before granting a permission, would have needed to be satisfied either that the development in question would not offend [article 12\(1\)](#) or that a derogation from that article would be permitted and a licence granted. Now, however, I cannot see why a planning permission (and, indeed, a full planning permission save only as to conditions necessary to secure any required mitigating measures) should not ordinarily be granted save only in cases where the planning committee conclude that the proposed development would both (a) be likely to offend [article 12\(1\)](#) and (b) be unlikely to be licensed pursuant to the derogation powers. After all, even if development permission is given, the criminal sanction against any offending (and unlicensed) activity remains available and it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of Natural England's own duty.

30. Where, as here, Natural England express themselves satisfied that a proposed development will be compliant with [article 12](#), the planning authority are to my mind entitled to presume that that is so. The planning [\\*350](#) committee here plainly had regard to the requirements of the Directive: they knew from the officers' decision report and addendum report (see para 8 above and the first paragraph of the addendum report as set out in para 72 of Lord Kerr of Tonaghmore JSC's judgment) not only that Natural England had withdrawn their objection to the scheme but also that necessary measures had been planned to compensate for the loss of foraging. For my part I am less troubled than Ward LJ appears to have been (see his para 73 set out at para 16 above) about the UBS's conclusions that “no *significant* impacts to bats are anticipated”—and, indeed, about the decision report's reference to “measures to ensure there is no significant adverse impact to [protected bats]”. It is certainly not to be supposed that Natural England misunderstood the proper ambit of [article 12\(1\)\(b\)](#) nor does it seem to me that the planning committee were materially misled or left insufficiently informed about this matter. Having regard to the considerations outlined in para 29 above, I cannot agree with Lord Kerr JSC's view, implicit in paras 75 and 76 of his judgment, that [regulation 3\(4\)](#) required the committee members to consider and decide for themselves whether the development would or would not occasion such disturbance to bats as in fact and in law to constitute a violation of [article 12\(1\)\(b\)](#) of the Directive.

31. Even, moreover, had the planning committee thought it necessary or appropriate to decide the question for themselves and applied to [article 12\(1\)\(b\)](#) the less exacting test described above rather than Ward LJ's test of imperilling the bats' conservation status, there is no good reason to suppose that they would not have reached the same overall conclusion as expressed in paras 74 and 75 of Ward LJ's judgment: see para 16 above.

32. I would in the result dismiss this appeal.

#### LORD WALKER OF GESTINGTHORPE JSC

33. For the reasons given in the judgment of Lord Brown of Eaton-under-Heywood JSC, with which I agree, and for the further reasons given by Baroness Hale of Richmond and Lord Mance JJSC, I would dismiss this appeal.

#### BARONESS HALE OF RICHMOND JSC

34. On the first issue, I have nothing to add to the judgment of Lord Brown of Eaton-under-Heywood JSC, with which I agree. I also agree with him on the second issue, but add a few observations of my own because we are not all of the same mind.

35. The issue is whether the regulatory committee of Hampshire County Council (the planning authority for this purpose) complied with their duty to “have regard to the requirements of the [Habitats Directive](#) so far as they may be affected by the exercise” of their planning functions: the [Conservation \(Natural Habitats, etc\) Regulations 1994, regulation 3\(4\)](#) (“the Habitats Regulations”); see also the [Conservation of Habitats and Species Regulations 2010, regulation 9\(5\)](#). It is, of course, always important that the legal requirements are properly complied with, perhaps the more so in cases such as this, where the county council is both the applicant for planning permission and the planning authority deciding whether it should be granted.

36. Some may think this an unusual and even unsatisfactory situation, but it comes about because in this country planning decisions are taken by [\\*351](#) democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities. As Lord Hoffmann put it in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, para 69: “In a democratic country, decisions about what the general interest requires are made by democratically elected bodies or persons accountable to them.” Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's, to weigh the competing public and private interests involved.

37. It is important to understand the chronology in this case. The planning application was dated 31 March 2009. Natural England was consulted. Their first reply is dated 30 April. In it they objected to the application on the ground that “the application contains insufficient survey information to demonstrate whether or not the development would have an adverse effect on legally protected species”. Specifically, they were concerned about the impact upon bats and great crested newts. Reference was made

to “the impacts of the development and mitigation upon European protected species” and the council were reminded of, among other things, their duty under [regulation 3\(4\)](#) . This objection was maintained in a letter dated 29 June 2009.

38. Further information on great crested newts and the updated bat survey were submitted in early July in response to this. Based on this information, Natural England wrote on 17 July 2009 withdrawing their objection, subject to recommendations about the conditions to be imposed if planning permission were granted. This letter also contained comments about common widespread reptiles and asking that these too be addressed although Natural England were not lodging an objection in relation to them.

39. Natural England wrote again on 23 July with their “final response” to the proposal. This dealt, first, with the fact that the site was close to the Portsmouth Harbour Site of Special Scientific Interest, itself part of the Portsmouth Harbour Special Protection Area and Ramsar site and gave their advice on the requirements of [regulation 48\(1\)\(a\) of the Habitats Regulations](#) . [Regulation 48\(1\)\(a\)](#) imposes a specific obligation on planning authorities, among others, to make an “appropriate assessment” of the implications for a European protected site before granting permission for a proposal which is likely to have a significant effect upon the site. The letter advised that, provided that specified avoidance measures were fully implemented, the proposal would not be likely to have a significant effect upon the protected sites. Thus they had no objection on this score and permission could be granted. The letter went on to deal with “Protected species and biodiversity” under a separate heading, repeated that they had withdrawn their objection subject to the implementation of all the recommended mitigation, but reminded the council that “whilst we have withdrawn our objection to the scheme in relation to European protected [\\*352](#) species, we have ongoing concerns regarding other legally protected species on site ...” A separate paragraph went on to deal with biodiversity.

40. The officer's report was prepared for the committee meeting, which was due to take place on 29 July 2009, before receipt of the letter of 23 July. It is 31 pages long. The executive summary lists “the main issues raised”, including “concern at the procedure because this is a county council scheme” and “nature conservation impact” (para 1.4). The account of the “Proposals” refers to the detailed ecological surveys undertaken, including the bat surveys “carried out to enable appropriate measures to be implemented”; but states that the impact on the designated sites would be negligible (para 3.7). The section on “Consultations” includes a paragraph explaining that Natural England had initially objected “on the grounds that the application contains insufficient survey information to demonstrate whether or not the development would have an adverse effect on bats and great crested newts which are legally protected species” but that they had withdrawn their objection after further survey work was undertaken (para 5.6).

41. The section on “Nature conservation impact” deals first with the proximity to the protected sites and points out that the requirements of the [Habitats Regulations](#) needed to be considered (para 8.17). This is a reference to the specific obligation in [regulation 48\(1\)\(a\)](#) . It went on to explain why it was thought that an “appropriate assessment” was not needed, noting that Natural England had raised no concerns about any impact on these sites (para 8.18). The report then turns to the corridor itself, referring to the environmental report submitted with the application, which dealt with badgers, bats, great crested newts, and reptiles; on bats, it states that “An Updated Bat Survey Method Statement and Mitigation Strategy has been submitted with measures to ensure there is no significant adverse impact to them for these proposals” (para 8.19).

42. The report concludes by recommending that no appropriate assessment is required under the [Habitats Regulations](#) (para 9.2); that planning permission be granted (para 9.3); and that the proposed development accords with the development plan and the relevant policies, because, among other things “suitable mitigation measures are proposed for badgers and protected species” (para 9.4). There is a cross reference to the annexed policy C18 on protected species, which states that

“Development which would adversely affect species, or their habitats, protected by the [Habitats Regulations 1994](#) , the [Wildlife and Countryside Act 1981](#) or other legislation will not be permitted unless measures can be undertaken which prevent harm to the species or damage to the habitats. Where appropriate, a permission will be conditioned or a legal agreement sought to secure the protection of the species or their [habitat].”

43. After receiving the letter from Natural England dated 23 July, an addendum to the report was prepared, dealing with three issues which had arisen since the report was finalised. Under the heading “[Habitats Regulations](#)” it deals first with the objections raised by Natural England “requiring additional survey information concerning potential for the presence of great crested newts

and bats, which are protected species”. It points out that the survey work was undertaken and Natural England had withdrawn their objection. In two separate paragraphs, it goes on to explain \*353 that Natural England had now given specific advice on the requirements of [regulation 48\(1\)\(a\)](#) (thus reinforcing the recommendation made in para 9.2 of the main report).

44. It is quite clear from all of this that separate consideration was being given both to the effect upon European protected species and to the effect upon the protected sites, that both were being considered under the [Habitats Regulations](#) , and that the applicable policy on protected species, which also refers to the [Habitats Regulations 1994](#) , was being applied. It is true that the report does not expressly mention either [regulation 3\(4\)](#) or [article 12](#) of the Directive. In my view, it is quite unnecessary for a report such as this to spell out in detail every single one of the legal obligations which are involved in any decision. Councillors were being advised to consider whether the proposed development would have an adverse effect on species or habitats protected by the 1994 Regulations. That in my view is enough to demonstrate that they “had regard” to the requirements of the [Habitats Directive](#) for the purpose of [regulation 3\(4\)](#) . That is all they have to do in this context, whereas [regulation 48\(1\)\(a\)](#) imposes a more specific obligation to make an “appropriate assessment” if a proposal is likely to have a significant effect upon a European site. It is not surprising, therefore, that the report deals more specifically with that obligation than it does with the more general obligation in [regulation 3\(4\)](#) .

45. Furthermore, the United Kingdom has chosen to implement [article 12](#) of the Directive by creating criminal offences. It is not the function of a planning authority to police those offences. Matters would, as Lord Brown JSC points out, have been different if the grant of planning permission were an automatic defence. But it is so no longer. And it is the function of Natural England to enforce the Directive by prosecuting for these criminal offences (or granting licences to derogate from the requirements of the Directive). The planning authority were entitled to draw the conclusion that, having been initially concerned but having withdrawn their objection, Natural England were content that the requirements of the Regulations, and thus the Directive, were being complied with. Indeed, it seems to me that, if any complaint were to be made on this score, it should have been addressed to Natural England rather than to the planning authority. They were the people with the expertise to assess the meaning of the updated bat survey and whether it did indeed meet the requirements of the Directive. The planning authority could perhaps have reached a different conclusion from Natural England but they were not required to make their own independent assessment.

46. But if I am wrong about this, and the planning authority did have to make an independent assessment in terms of [article 12\(1\)\(b\)](#) , there is absolutely no reason to think that they would have reached a different conclusion and refused planning permission on this account. They may have reached their decision by a majority of six votes to five. But the minutes make it clear that there were a great many other problems to worry about with this scheme. While the “impact on nature” was among the many matters upon which members questioned officers, this was not one of their listed concerns. If this scheme was not going to get planning permission, it would be because of the local residents' concerns about the impact upon them rather than because of the members' concerns about the impact upon the bats.

47. I would therefore dismiss this appeal on both issues.

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LORD MANCE JSC

48. I agree with the reasoning and conclusions of Lord Brown of Eaton-under-Heywood and Baroness Hale of Richmond JJSC on each of the issues. I add only a few words because the court is divided on the second.

49. Lord Kerr of Tonaghmore JSC's dissent on this issue is, I understand, based on the premise that (a) Natural England had not expressed a view that the proposal would not involve any breach of the [Habitats Directive](#) , and (b) if it had, the planning committee was not informed of this: see his paras 73 and 74.

50. For the reasons given in Lord Brown JSC's and Baroness Hale JSC's judgments, I cannot agree with either aspect of this premise.

51. I add the following in relation to the suggestion that Natural England was, in its letter of 17 July 2009, “preoccupied with matters that were quite separate from the question whether there would be disturbance to bats such as would be in breach of [article 12](#) of the Directive” or that the letter was “principally taken up with the question of possible impact on common widespread reptiles”: see para 69 below.

52. It is true that the longer part of the text of the letter of 17 July related to the latter topic, in relation to which Natural England at the end of the letter made clear it was not lodging an objection, but was only asking that further attention be given

and comments supplied. But the first, and in the circumstances obviously more significant, aspect of the letter consisted in its first three paragraphs. These withdrew Natural England's previous objection made on 30 April and reiterated on 29 June in relation to great crested newts and bats. The withdrawal was in the light of the information, including the updated bat survey, which the council had earlier in July supplied. In withdrawing their objection, Natural England emphasised the importance of the mitigation procedures outlined in [section 10](#) of the survey, and added the further recommendation that the council look closely at the requirement for night working and keep any periods of such working "to an absolute minimum". This confirms the attention it gave to the information supplied.

53. When making its objection in its letter dated 30 April, Natural England had said:

"Our concerns relate specifically to the likely impact upon bats and great crested newts. The protection afforded these species is explained in Part IV and Annex A of Circular 06/2005 *Biodiversity and Geological Conservation—Statutory Obligations and their Impact within the Planning System*."

Part IV of Circular 06/2005 stated that the [Conservation \(Natural Habitats, etc\) Regulations 1994](#) implemented the requirements of the [Habitats Directive](#) and that it was unlawful under [regulation 39](#) deliberately to disturb a wild animal of a European protected species. [Annex A](#) identified all species of bats as wild animals of European protected species.

54. It is therefore clear that Natural England was, from the outset, focusing on the protected status of all species of bats under the Directive and domestic law; and that its withdrawal of its objection on 17 July was directly relevant to the planning committee's performance of its role under [regulation 3\(4\)](#) to "have regard to the requirements of" that Directive in the exercise of its functions. The planning officer's first report dated 29 July \*355 summarised the position for the planning committee in accurate terms. Thereafter, as Lord Brown and Baroness Hale JJSC record, Natural England's further letter dated 23 July arrived, reiterating Natural England's as the position stated in its letter dated 17 July. This too was again accurately summarised to the committee by the planning officer in his addendum dated 29 July to his previous report.

55. With regard to the updated bat survey, there is no reason to believe that Natural England did not, when evaluating this, understand both the legal requirements and their general role and responsibilities at the stage at which they were approached by the council. The survey repays study as a whole, and I merely make clear that I do not share the scepticism which Lord Kerr JSC feels about some of its statements or agree in all respects with his detailed account of its terms and their effect. The important point is, however, that Natural England was well placed to evaluate this survey, and, having done so, gave the advice they did. This was, in substance, accurately communicated to the planning committee, in a manner to which the committee was entitled to have, and must be assumed to have had, regard.

56. In addition to my agreement with the other parts of Lord Brown JSC's and Baroness Hale JSC's judgments, I confirm my specific agreement with Baroness Hale JSC's penultimate paragraph.

LORD KERR OF TONAGHMORE JSC

57. As legislative provisions go, [regulation 3\(4\) of the Conservation \(Natural Habitats, etc\) Regulations 1994](#) ("the Habitats Regulations") is relatively straightforward. Its terms are uncomplicated and direct. It provides:

"every competent authority in the exercise of any of their functions, shall have regard to the requirements of the [Habitats Directive](#) so far as they may be affected by the exercise of those functions."

58. In plain language this means that if you are an authority contemplating a decision that might have an impact on what the Directive requires, you must take its requirements into account before you reach that decision. Of course, if you know that another agency has examined the question and has concluded that none of those requirements will be affected, and if you are confident that such agency is qualified to make that judgment, this may be sufficient to meet your obligation under the regulation. What lies at the heart of this appeal is whether the regulatory committee of Hampshire County Council, when it came to make the decision whether to grant the planning permission involved in this case, either had regard itself to the requirements of the [Habitats Directive](#) or had sufficient information to allow it to conclude that some other agency, in whose judgment it could repose trust, had done so and had concluded that no violation arose.

59. An old and currently disused railway line runs between Gosport and Fareham in South Hampshire. A section of this, between Redlands Lane, Fareham and Military Road, Gosport is some 4.7km in length. On 31 March 2009 Hampshire County Council, acting on behalf of Transport for South Hampshire, applied for planning permission to develop this section in order to create what is described as a “busway”. Transport for South Hampshire is a name used to describe three local authorities, [\\*356](#) Hampshire County Council, Gosport Borough Council and Fareham Borough Council. Planning permission was granted on 29 July 2009.

60. At present there is serious congestion on the main road between Gosport and Fareham. It is planned that the busway should operate by allowing buses to join existing roads at various points along the route and that a fast, efficient and reliable public transport service will ensue. It will also be possible to cycle on the route. Local residents will be encouraged to use buses and bicycles in preference to their private vehicles and it is hoped that the congestion will thereby be relieved. The busway is to be constructed in two phases, 1A and 1B. Clearance work for the first of these is already underway and funding is available to complete this phase. The second phase does not yet have funding. Its future development is not assured.

61. The railway line along which the busway is to be developed was closed as a result of recommendations made in the Beeching report of 1963. It appears that closure did not finally take effect until June 1991, however. In that month the last train ran along the line. Since then the area has become overgrown. It is now regarded as “an ecological corridor for various flora and fauna”. Several species of bats fly through and forage in the area but no bat roosts have been found on the planning application site itself. There are two bat roosts in proximity to the route: one in Savernake Close, near the southern section of phase 1A, the other at Orange Grove which is close to the northern section of phase 1B.

62. All bats are European protected species, falling within [Annex IV\(a\) of Council Directive 92/43/EEC](#) (“the Habitats Directive”). [Article 12](#) of this Directive requires member states to “take the requisite measures to establish a system of strict protection for the animal species” listed in the annex. The [Conservation \(Natural Habitats, etc\) Regulations 1994](#) were made for the purpose of implementing the [Habitats Directive](#). The Regulations prescribe a number of measures (most notably in relation to this case, [regulation 39](#)) which seek to achieve this level of protection. Derogation from these measures is permitted to those who obtain a licence from the appropriate authority. Natural England is the nature conservation body specified in the Regulations as the licensing authority in relation to European protected species.

63. Although the issue of a licence is quite separate from the grant of planning permission, Natural England is regularly consulted on applications for development where the [Habitats Directive](#) and the Regulations are likely to be in play and so it was that in April 2009 a letter was sent by the Environment department of the council seeking Natural England’s views about the proposal. On 30 April 2009, Natural England replied, objecting to the scheme and recommending that planning permission be refused.

64. Bat surveys had been undertaken in 2008. These considered the suitability of the habitat for bats; they also examined how bats used the site and which species of bats were present. Clearly, however, the detail of the information yielded by these surveys was insufficient to satisfy Natural England’s requirements for it stated that the application contained “insufficient survey information to demonstrate whether or not the development would have an adverse effect on legally protected species”. The letter also recommended that the local planning authority should consider all the points made in an annex that was attached to the letter. [\\*357](#) This provided guidance on survey requirements and on how the authority should fulfil its duties on

“biodiversity issues under [among others] ... [regulation 3 \(4\) of the Conservation \(Natural Habitats, etc\) Regulations 1994](#) ... to ensure that the potential impact of the development on species and habitats of principal importance is addressed.”

65. Amendments to the scheme were undertaken but these did not allay Natural England's concerns and their objection to the planning application was repeated in a letter of 29 June 2009.

66. An updated bat survey (leading to the publication of a report entitled "Survey Method Statement and Mitigation Strategy") was carried out on behalf of the council. The survey identified two species of bat which had not been detected in the 2008 survey. Greater levels of foraging and commuting were also recorded along the disused railway. No roost sites were found but the presence of a common pipistrelle roost was confirmed approximately 40 metres from planned works. The report concluded that the works would result in the loss of a number of trees with low to moderate "roost potential" and approximately seven trees with moderate to high roost potential. Although no known roosts would be lost, because of the difficulty in identifying tree roosts, the Bat Conservation Trust recommends that it should be assumed that trees with high potential as roosts are *in fact* used as roosts. On this basis a number of roosts will be lost as a result of the works. Impact on commuting of bats between foraging habitats was also anticipated. It was felt that this could be restored in the longer term but, until restoration was complete, at least four species of bats that had been detected in the area would be affected. It was concluded that the removal of trees and vegetation would result in the loss of good quality habitats for foraging. Loss of foraging habitats would have an inevitable adverse impact on three species of local bats with one of these (*Myotis* sp) being more severely affected. This was characterised as a moderate impact at local level during the time that the vegetation was being re-established, a period estimated in the survey to be at least seven years. On the issue of the long term impact of the loss of foraging habitats the report was somewhat ambivalent. At one point it suggested that there would be a long term "slight adverse to neutral" impact. Later, it suggested that it was "probable" that the re-creation of good foraging habitats would result in an eventual neutral impact. The introduction of artificial lighting would affect the quality of foraging habitat by attracting insects from unlit areas. Although this would favour some species, it would adversely affect others. Moreover, increased lighting can delay the emergence of bats from roosts and so reduce foraging opportunities. Lighting also constitutes a barrier to bats gaining access to foraging areas. Although the report is silent on the duration of these effects, it must be presumed that they will be permanent. In a somewhat bland claim, however, the authors assert that "with mitigation to reduce light spill and the selection of lights with a low UV output, the impact of lighting on bats is not anticipated to be significant". Increased noise levels would also have an adverse impact on some species of bats, the brown long-eared in particular. The report concludes at this point that it is probable that there would be a slight adverse impact on foraging habitats from operational noise. Again, the report does not expressly state how long this would last \*358 but, since the noise source is the operation of the busway, it must be presumed to be permanent.

67. The overall conclusion of the report was that it was probable that there would be a short term moderate adverse impact on bats. (As Lord Brown of Eaton-under Heywood JSC has pointed out, this "short term" impact is likely to continue for some nine years.) If planned mitigation measures are successful, the long-term impact of the works was anticipated to be "slight adverse". On this basis the authors of the report concluded that no "significant impacts" to bats were anticipated. This general conclusion requires to be treated with some caution, in my opinion. There can be no doubt that effects which could not be described as insignificant *will* occur for some seven to nine years at least. Thereafter, while the long term impact may not be quantitatively substantial, it will be permanent.

68. The bat survey, together with further information, was sent to Natural England in July 2009. In consequence, the objection to the application was withdrawn. Natural England considered that planning permission could now be granted, albeit subject to certain conditions. The letter relaying the withdrawal of the objection contained the following:

"Natural England has reviewed the further information submitted (Great Crested Newt Survey Method Statement and Mitigation Strategy, June 2009 and Updated Bat Survey Method Statement and Mitigation Strategy, July 2009) and can now confirm that we are able to withdraw our objection of 30 April 2009, subject to the following comments: We recommend that should the council be minded to grant permission for this scheme, conditions be attached requiring implementation of all the mitigation/compensation detailed within these reports. Particularly at section 10 of the Bat Report and section 6 of the Great Crested Newt Report. We would also recommend that the council look closely at the requirement for night time working and associated flood lighting. Natural England would not advocate

night time working for reasons of disturbance/disruption to the lifecycle of nocturnal wildlife and the council should ensure these periods are kept to an absolute minimum.”

69. The head of planning and development made a report (referred to as “the officer's decision report”) to the regulatory committee of the council which was to take the planning decision on 29 July 2009. The impact on nature conservation was one of the issues of concern identified in the report. Lord Brown JSC has quoted in para 8 of his judgment many of the material parts of the report that touch on this issue and I will not repeat all of those here. It is important, however, I believe, to understand the context of the statement in para 8.17 (quoted in part by Lord Brown JSC) that the [Habitats Regulations](#) needed to be considered. The full paragraph reads as follows:

“The site is not within any designated sites of importance for nature conservation. However the site is within 30 metres, at its closest, to the Portsmouth Harbour Special Protection Area (SPA) and Portsmouth Harbour RAMSAR site. *Therefore* the requirements of the [Habitats Regulations](#) need to be considered.” (My emphasis.)

70. As Lord Brown JSC has pointed out, the report in para 8.19 stated that the updated bat survey report contained “measures *to ensure* [emphasis added] there is no significant adverse impact” to bats from the proposals. \*359 This appears to me to be a gloss on what had in fact been said in the report. The actual claim made (itself, in my opinion, not free from controversy) was that it was *anticipated* that there would be no significant impacts on bats *if* the mitigation measures succeeded.

71. Two points about the decision officer's report should be noted, therefore. Firstly, the enjoinder to consider the [Habitats Regulations](#) was made because of the proximity of the works to sites requiring special protection rather than in relation to the need to avoid disturbance of bats in the ecological corridor itself. Secondly, it conveyed to the members of the regulatory committee the clear message that the updated bat survey report provided assurance that there would be no significant impact on bats. No reference was made to the moderate adverse impact that would occur over the seven to nine year period that regeneration of the forage areas would take nor to the permanent, albeit slight, impact that those measures could not eliminate.

72. Lord Brown JSC has said that the addendum to the officer's report dealt specifically with the [Habitats Regulations](#) . It did, but the context again requires to be carefully noted. In order to do this, I believe that the entire section dealing with the Regulations must be set out. It is in these terms:

#### “**Habitats Regulations**”

“As stated in the report Natural England initially raised a holding objection to the application, requiring additional survey information concerning potential for the presence of great crested newts and bats, which are protected species. This survey work was undertaken and sent to Natural England, who are now satisfied and subsequently withdrew their objection. As also stated in the report the application site lies close to habitats which form part of the Portsmouth Harbour Site of Special Scientific Interest (SSSI). This SSSI is part of the Portsmouth Harbour Special Protection Area (SPA) and Ramsar Site. Under the [Conservation \(Natural Habitats, etc\) Regulations 1994](#) , as amended (‘the Habitats Regulations’) the county council is the competent authority and has to make an assessment of the impacts of the proposal on this European site, therefore the second recommendation for the committee is to agree that the proposal is unlikely to have a significant impact on the European site. It was implied that by withdrawing their objection Natural England did not consider there would be any significant impact, but they did not specifically give their advice. Since the report was finalised Natural England have now given specific advice on the requirements of [regulation 48\(1\)\(a\)](#) of the ‘ [Habitats Regulations](#)

' . They raise no objection subject to the avoidance measures included in the application being fully implemented and advise that their view is that either alone or in combination with other plans or projects, this proposal would not be likely to have a significant effect on the European site and the permission may be granted under the terms of the [Habitats Regulations](#) .”

73. [Regulation 48\(1\)\(a\)](#) requires a competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which is likely to have a significant effect on a European site in Great Britain to make an appropriate assessment of the implications for the site in view of that site's conservation objectives. It has nothing to do with the need to ensure that there is no disturbance of species of bats. \*360 The addendum to the decision officer's report, therefore, offered no information whatever to the regulatory committee on the vital question whether the proposal would comply with [article 12 of the Habitats Directive](#) . Indeed, it is clear from an examination of the letter from Natural England of 17 July 2009 that it was preoccupied with matters that were quite separate from the question whether there would be disturbance to bats such as would be in breach of [article 12](#) of the Directive. The letter was principally taken up with the question of possible impact on common widespread reptiles. In so far as the letter dealt with the question of the impact on bats, its tone certainly did not convey a view that the planning committee need not consider that matter further. On the contrary, on a fair reading of the letter, Natural England was making it clear that this issue required to be addressed by the committee, not only in terms of the conditions to be applied but also as to whether night time working would be unacceptable because of disturbance to wildlife.

74. The committee considered the report of the decision officer and the addendum to it and received an oral presentation from officers of the council. The minutes of their meeting record the following in relation to the oral presentation:

“In introducing the report, officers informed members that the proposal formed part of the strategy to improve the reliability and quality of public transport in South Hampshire and the access to Gosport and Fareham. A Traffic Regulation Order would be imposed on the bus way to allow only cycles, buses and emergency vehicles to use it. Members were advised that an environmental impact assessment (EIA) was not required as the proposal was a freestanding project that did not give rise to 'significant environmental effects'. Notwithstanding that, the county council considered that important nature conservation, amenity and traffic issues had to be properly addressed and reports on these matters had been taken into account. The addendum to the report provided reassurance that Natural England had no objection to the proposals and confirmed their view that an appropriate assessment under the [Habitat Regulations](#) was not required and provided further clarification about the application and the issue of 'screening' under the EIA Regulations.”

75. At best, this had the potential to mislead. A committee member might well think that Natural England had concluded that there would be no violation of [article 39\(1\)\(b\)](#) of the 1994 Regulations (which forbids the deliberate disturbance of wild animals of a European protected species) or, more particularly, [article 12 of the Habitats Directive](#) . Of course the true position was that Natural England had expressed no explicit opinion whatever on that question. At most, it might be presumed that this was its view. Even if that presumption could be made, however, it does not affect the clear indication in the letter of 17 July 2009 that this matter was still one which required the committee's attention. I can find nothing in the letter which suggests that Natural England regarded this matter as closed. Nor do I believe that the letter could have been properly interpreted by the committee as relieving it of the need to consider the issue.

76. The critical issue on this appeal, therefore, is whether there is any evidence that the regulatory committee considered at all the duty that it was required to fulfil under [regulation 3\(4\)](#) of the 1994 Regulations.

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77. In addressing this question I should immediately say that I agree with Lord Brown JSC on his analysis of the nature of the requirement in [article 12\(1\)\(b\) of the Habitats Directive](#) . As he has observed, a number of broad considerations underlie the

application of the article. It is designed to protect species (not specimens of species) and its focus is on the protection of species rather than habitats, although, naturally, if major intrusion on habitats is involved, that may have an impact on the protection of the species. Not every disturbance will constitute a breach of the article. The nature and extent of the disturbance must be assessed on a case by case basis.

78. The European Commission's guidance document of February 2007 contains a number of wise observations as to how the application of the article should be approached. While the word “significant” has not been employed in [article 12\(1\)\(b\)](#), a “certain negative impact likely to be detrimental must be involved”. In making any evaluation of the level of disturbance, the impact on survival chances, breeding success or reproductive ability of the affected species are all obviously relevant factors. Like Lord Brown JSC, I am sanguine about Mr Cameron's formulation of the test as one involving the question whether there has been “a certain negative impact likely to have been detrimental to the species, having regard to its effect on the conservation status of the species”. And also like Lord Brown JSC, I consider that the Court of Appeal pitched the test too high in saying that disturbance must have “a detrimental impact on the conservation status of the species at population level” or constitute a threat to the survival of the protected species.

79. Trying to refine the test beyond the broad considerations identified by Lord Brown JSC and those contained in the commission's guidance document is not only difficult, it is, in my view, pointless. In particular, I do not believe that the necessary examination is assisted by recourse to such expressions as *de minimis*. A careful investigation of the factors outlined in Lord Brown JSC's judgment (as well as others that might bear on the question in a particular case) is required. The answer is not supplied by a pat conclusion as to whether the disturbance is more than trifling.

80. Ultimately, however, and with regret, where I must depart from Lord Brown JSC is on his conclusion that the regulatory committee had regard to the requirements of the [Habitats Directive](#). True it is, as Lord Brown JSC says, that they knew that Natural England had withdrawn its objection. But that cannot substitute, in my opinion, for a consideration of the requirements of the [Habitats Directive](#). [Regulation 3\(4\)](#) requires every competent authority to have regard to the [Habitats Directive](#) in the exercise of its functions. The regulatory committee was unquestionably a competent authority. It need scarcely be said that, in deciding whether to grant planning permission, it was performing a function. Moreover the discharge of that function clearly carried potential implications for an animal species for which the [Habitats Directive](#) requires strict protection.

81. Neither the written material submitted to the committee nor the oral presentation made by officers of the council referred to the [Habitats Directive](#). The reference to Natural England's consideration of the [Habitats Regulations](#), if it was properly understood, could only have conveyed to the committee that that consideration had been for a purpose wholly different from the need to protect bats. It could in no sense, therefore, substitute for a consideration of the [Habitats Directive](#) by the committee \*362 members whose decision might well directly contravene one of the Directive's central requirements. It is for that reason that I have concluded that those requirements had to be considered by the committee members themselves.

82. It may well be that, if Natural England had unambiguously expressed the view that the proposal would not involve any breach of the [Habitats Directive](#) and the committee had been informed of that, it would not have been necessary for the committee members to go behind that view. But that had not happened. It was simply not possible for the committee to properly conclude that Natural England had said that the proposal would not be in breach of the [Habitats Directive](#) in relation to bats. Absent such a statement, they were bound to make that judgment for themselves and to consider whether, on the available evidence the exercise of their functions would have an effect on the requirements of the Directive. I am afraid that I am driven to the conclusion that they plainly did not do so.

83. As I have said, Natural England (at the time that it was considering the [Habitats Regulations](#) in July 2009) had not explicitly addressed the question whether the disturbance of bats that the proposal would unquestionably entail would give rise to a violation of the Directive. The main focus of the letter of 19 July was on an entirely different question. Lord Brown JSC may well be correct when he says that it is not to be supposed that Natural England misunderstood the proper ambit of [article 12\(1\)\(b\)](#), but the unalterable fact is that it did not say that it had concluded that no violation would be involved, much less that the planning committee did not need to consider the question.

84. It is, of course, tempting to reach one's own conclusion as to whether the undoubted impact on the various species of bats that will be occasioned by this development is sufficient—or not—to meet the requirement of disturbance within the meaning of [article 12](#). But this is not the function of a reviewing court. Unless satisfied that, on the material evidence, the deciding authority could have reached no conclusion other than that there would not be such a disturbance, it is no part of a court's duty to speculate on what the regulatory committee would have decided if it had received the necessary information about the requirements of the [Habitats Directive](#), much less to reach its own view as to whether those requirements had been met. Since the planning

permission was granted on a vote of six in favour and five against, with two abstentions, it is, in my view, quite impossible to say what the committee would have decided if it had been armed with the necessary knowledge to allow it to fulfil its statutory obligation. Other members of the court have expressed the view that this is what the committee would have decided. Had I felt it possible to do so, I would have been glad to be able to reach that conclusion. As it is, I simply cannot.

85. I would therefore allow the appeal and quash the planning permission.

*Appeal dismissed .*

*Shiranikha Herbert, Barrister \*363*

### Footnotes

- 1 1 Council Directive 92/43/EEC, art 12(1)(b) : see post, para 2.
- 2 Conservation (Natural Habitats, etc) Regulations 1994, reg 3(4) : see post, para 3. Reg 39(1) , as amended: see post, para 26.

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