JUDGMENT OF THE COURT (Second Chamber)

30 April 2009 *

In Case C-75/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), made by decision of 8 February 2008, received at the Court on 21 February 2008, in the proceedings

The Queen, on the application of

Christopher Mellor

v

Secretary of State for Communities and Local Government,

* Language of the case: English.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot (Rapporteur), K. Schiemann, P. Kūris and L. Bay Larsen, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr C. Mellor, by R. Harwood, Barrister and R. Buxton, Solicitor,

— the United Kingdom Government, by L. Seeboruth, acting as Agent,

— the Commission of the European Communities, by P. Oliver and J.-B. Laignelot, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 January 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17) ('Directive 85/337').

2 The reference has been made in the course of proceedings between Mr Mellor and the Secretary of State for Communities and Local Government ('the Secretary of State'), relating to whether or not it is necessary to give reasons for the determination made by the competent national authority not to proceed to an environmental impact assessment ('EIA') when evaluating a request for development consent to build a hospital, a project falling within Annex II to Directive 85/337.

Legal context

Community legislation

3 Article 2(1) of Directive 85/337 provides:

‘Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.’

4 Article 4 of Directive 85/337 states:

‘1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State,

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

5 Article 6 of Directive 85/337 provides:

‘1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the request for development consent. Member States shall designate the authorities to be consulted for this purpose in general terms or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to these authorities. Detailed arrangements for consultation shall be laid down by the Member States.

2. The public shall be informed, whether by public notices or other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

(a) the request for development consent;

(b) the fact that the project is subject to an environmental impact assessment procedure …;

…

(d) the nature of possible decisions or, where there is one, the draft decision;

…

(f) an indication of the times and places where and means by which the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

(a) any information gathered pursuant to Article 5;

(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information …, information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.

6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.'

6 Article 9 of Directive 85/337 states:

'1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

— the content of the decision and any conditions attached thereto,

— having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process,

— a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.

2. The competent authority or authorities shall inform any Member State which has been consulted pursuant to Article 7, forwarding to it the information referred to in paragraph 1 of this Article.

The consulted Member States shall ensure that that information is made available in an appropriate manner to the public concerned in their own territory.'

7 Article 10a of Directive 85/337 provides:

'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

…'

National legislation

8 The rules governing EIA, laid down by Directive 85/337, were originally implemented by The Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (S.I. 1988/1199).

9 Following the amendments to Directive 85/337 made by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5), those regulations were replaced by The Town and

Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (S.I. 1999/293), as amended by The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 2006 (S.I. 2006/3295), ('the EIA Regulations').

10 Schedules 1 to 3 to the EIA Regulations correspond to Annexes I to III to Directive 85/337.

11 Regulation 2(1) of the EIA Regulations provides that an '"EIA application" means an application for planning permission for EIA development', that is to say a development for which an EIA is necessary.

12 Under that same provision, 'EIA development' means:

'(a) Schedule 1 development;

or

(b) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location.'

13 It is apparent from Regulation 2(1) of the EIA Regulations that a development is a 'Schedule 2 Development' when it is a:

'… development, other than exempt development, of a description mentioned in Column 1 of the table in Schedule 2 where –

(a) any part of that development is to be carried out in a sensitive area; or

(b) any applicable threshold or criterion in the corresponding part of Column 2 of that table is respectively exceeded or met in relation to that development.'

14 Section 10(b) of Schedule 2 to the EIA Regulations concerns 'urban development projects' (column one) the area of which exceeds 0.5 hectares (column two).

15 Under Regulation 2(1)(h) of the EIA Regulations, areas of outstanding natural beauty are 'sensitive areas'.

16 It is apparent from Regulation 4(2) of the EIA Regulations that a Schedule 2 development is regarded as EIA development, that is to say, a development for which an EIA is necessary, where the applicant voluntarily submits an 'environmental statement' for the purposes of the EIA Regulations, or upon the adoption by the relevant planning authority, on an application or of its own motion, of a screening opinion to the effect that the development is EIA development.

17 Where a request for Schedule 2 Development consent is not accompanied by an environmental statement, determinations concerning the need for an EIA are made by the relevant planning authority in the form of screening opinion and by the Secretary of State in the form of a screening direction.

18 Under Regulation 2(1) of the EIA Regulations:

— a 'screening opinion' means 'a written statement of the opinion of the relevant planning authority as to whether development is EIA development'; and

— a 'screening direction' means 'a direction made by the Secretary of State as to whether development is EIA development'.

19 Under Regulation 4(3) of the EIA Regulations, a screening direction issued by the Secretary of State overrides environmental statements and screening opinions adopted by the local planning authority.

20 In accordance with Regulation 5(4) of the EIA Regulations, a screening opinion must be adopted within three weeks, or such longer period as may be agreed in writing with the person making the request.

21 Pursuant to Regulation 5(6) of the EIA Regulations, where an authority fails to adopt a screening opinion within the relevant period, or adopts an opinion to the effect that the development is EIA development, the person who requested the opinion may request the Secretary of State to make a screening direction.

22 According to Regulation 4(6) of the EIA Regulations, where a screening opinion or a screening direction to the effect that development is EIA development is adopted, 'that opinion or direction shall be accompanied by a written statement giving clearly and precisely the full reasons for that conclusion'.

23 In accordance with Regulation 4(5) of the EIA Regulations, a screening opinion or screening direction must take into account the criteria set out in Schedule 3 to the EIA Regulations.

24 Among the criteria set out in Schedule 3 to the EIA Regulations are:

— 'Characteristics of development';

— 'Location of development', and

— 'Characteristics of the potential impact'.

25 The EIA Regulations do not, however, provide for communication of the reasons for a screening opinion or screening direction which does not classify the development in question as EIA development.

The dispute in the main proceedings and the questions referred for a preliminary ruling

26 It is apparent from the order for reference that, in October 2004, Partnerships in Care ('PiC') lodged an application with the competent local planning authority, Harrogate Borough Council ('the Council'), for planning permission to construct a medium secure hospital unit at HMS Forest Moor on a site in the open countryside of the Nidderdale Area of Outstanding Natural Beauty ('Nidderdale AONB') on which a former naval base had been located. Planning permission was granted in August 2005.

27 Following proceedings brought by a local resident, the planning permission was quashed by the High Court of Justice (England and Wales), Queen's Bench Division, on 5 April 2006, on the ground, inter alia, that the Council had failed to adopt an EIA screening opinion.

28 On 7 July 2006, PiC's planning consultants applied to the Council for a screening opinion under Regulation 5 of the EIA Regulations.

29 On 24 July 2006, Residents for the Protection of Nidderdale then wrote to the Council arguing that an EIA was required for the project.

30 On 25 August 2006, the Council issued its screening opinion which concluded that the proposed development would not have a significant effect on the environment such as to warrant an EIA.

31 On 4 September 2006, Mr Mellor wrote to the Council on behalf of the Residents for the Protection of Nidderdale arguing that the screening opinion ought to have insisted on an EIA.

32 On 3 October 2006, PiC, relying on the Council's opinion of 25 August 2006, submitted the planning application at issue in the main proceedings.

33 On 20 October 2006, PiC's planning consultants, having been informed that the Council was changing its position on the need for an EIA, wrote to the Government Office for Yorkshire and the Humber to ask the Secretary of State for a screening direction.

34 On 23 October 2006, the Council did in fact alter its position in a fresh screening opinion and, on the basis of information provided by Mr Mellor and having sought further advice, decided that an EIA was required.

35 On 4 December 2006, the Secretary of State, to whom the matter had been referred by the PiC, issued a screening direction which was contrary to the latest opinion issued by the Council.

36 Considering that the development at issue was a 'Schedule 2 Development' within the meaning of the EIA Regulations, the Secretary of State decided as follows:

'… in the opinion of the Secretary of State and having taken into account the selection criteria in Schedule 3 to the 1999 Regulations and the representations made by Mr C. Mellor on behalf of Residents for the Protection of Nidderdale, the proposal would not be likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

Accordingly, in exercise of the powers conferred on him by regulation 6(4) of the 1999 Regulations the Secretary of State hereby directs that the proposed development described in your request and the documents submitted with it, is not "EIA development" within the meaning of the 1999 Regulations. Any permitted development rights which your proposal may enjoy under the Town and Country Planning (General Permitted Development) Order 1995 are therefore unaffected.

Having regard to the above direction the planning application mentioned may proceed without submission of an environmental statement.'

37 On 20 February 2007, Mr Mellor applied to the High Court of Justice (England and Wales), Queen's Bench Division, for judicial review of the Secretary of State's decision, seeking to have that screening direction quashed.

38 The High Court refused leave to apply for judicial review on the basis that the Court of Appeal (England and Wales) (Civil Division) had decided in *R* v *Secretary of State for The Environment, Transport and The Regions ex p Marson* (*1998)*, ENV LR 761, that, first, reasons did not have to be given for refusing to direct that an EIA was required and, second, if reasons were required, then the reasons normally provided by the Secretary of State were adequate.

39 In those circumstances, the Court of Appeal (England and Wales) (Civil Division), hearing the appeal, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Whether under Article 4 of [Directive 85/337] Member States must make available to the public reasons for a determination that in respect of an Annex II [to that directive] project there is no requirement to subject the project to assessment in accordance with Articles 5 to 10 of [that] directive?

2. If the answer to Question 1 is in the affirmative whether that requirement was satisfied by the content of the letter dated 4 December 2006 from the Secretary of State?

3. If the answer to Question 2 is in the negative, what is the extent of the requirement to give reasons in this context?'

The questions referred for a preliminary ruling

The first question

40 By its first question, the referring court seeks to ascertain whether Article 4 of Directive 85/337 must be interpreted as meaning that Member States are obliged to communicate to the public the reasons for a determination not to subject an Annex II project to an EIA.

Observations submitted to the Court

41 The appellant in the main proceedings takes the view that a determination that an EIA is not required must be sufficiently reasoned in order to guarantee effective judicial protection of the environment and the rights of citizens.

42 He points out that that issue has already been considered by the Court in Case C-87/02 *Commission* v *Italy* [2004] ECR I-5975, paragraph 49, in which the Court found that the Italian Republic had failed to fulfil its obligations on account of its failure to provide reasons for a decree deciding that the project at issue in that case did not require to be subjected to an EIA.

43 He claims, in addition, that the merits of his view are underlined by the amendments made to Directive 85/337 in 1997. Since those amendments, that directive requires the competent authority, as is apparent from Article 4(3), to take account of the relevant selection criteria set out in Annex III to that directive when deciding whether a project

falling under Annex II to that directive must be subject to an EIA and requires, pursuant to Article 4(4), that the determination on whether or not to have recourse to an EIA be made available to the public. The public cannot, however, assess the lawfulness of such a determination if the reasons for that determination are not given.

44 The United Kingdom Government contends, first, that, in contrast to other provisions of secondary Community law on the environment, Article 4 of Directive 85/337 does not require reasons to be given for a determination as to whether an EIA must be carried out. It concludes that the Community legislature chose not to impose a duty to state reasons in respect of that determination.

45 The United Kingdom of Great Britain and Northern Ireland contends, secondly, that the line of reasoning based on the Court's decision in *Commission* v *Italy*, cited above, cannot be applied in the dispute in the main proceedings since, in the case that gave rise to that judgment, the failure to fulfil obligations was based on the failure to indicate that the competent authority had carried out any screening at all of the need to subject the project at issue to an EIA or not, such screening being provided for under national law in accordance with Article 4(2) of Directive 85/337. The failure to fulfil obligations complained of did not concern the failure to give reasons for the determination not to subject the project to such an assessment.

46 The Commission of the European Communities disputes the United Kingdom's interpretation of the *Commission* v *Italy* judgment, cited above, pointing out, inter alia, that despite the absence of the word 'reasoning' in paragraph 49 of that judgment, it is obvious from that paragraph that the competent authority must make reference, in one way or the other, to all the information showing that it applied the correct criteria and took the relevant factors into account. That requirement is equivalent to a duty to state reasons.

47 The Commission submits, furthermore, that the amendments made by Directive 97/11, in particular the obligation on Member States to make public their determinations on whether or not to carry out an EIA under Article 4(4) of Directive 85/337, make the duty to state reasons for such determinations all the more necessary. In the Commission's view, that obligation would be devoid of purpose if there were no adequate statement of reasons for the determinations in question.

The Court's reply

48 An objective of Directive 85/337 is — as recital 5 in its preamble states — inter alia, to introduce general principles for EIAs governing public and private projects likely to have a major effect on the environment, with a view to supplementing and coordinating development consent procedures.

49 Directive 85/337 provides that certain projects listed in Annex I are required to be made subject to such assessment.

50 On the other hand, projects which appear in Annex II must only be subject to such an assessment if they are likely to have significant effects on the environment and, in that regard, Directive 85/337 allows the Member States some discretion. Nevertheless, the limits of that discretion are to be found in the obligation on the Member States, set out in Article 2(1) of Directive 85/337, to make projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment subject to an assessment (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50, and Case C-486/04 *Commission* v *Italy* [2006] ECR I-11025, paragraph 53).

51 It is thus clear from the objectives of Directive 85/337 that the competent national authorities, when they receive a request for development consent for an Annex II project, must carry out a specific evaluation as to whether, taking account of the criteria set out in Annex III to that directive, an EIA should be carried out.

52 Thus the Court, in its judgment of 10 June 2004 in *Commission* v *Italy*, cited above, found that the Italian Republic had failed to fulfil its obligations under Directive 85/337, since it was clear from all the evidence which had been submitted to the Court that the competent authorities had not carried out 'screening' of the need for an assessment, provided for in Italian legislation to ensure application of Article 4(2) and (3) of Directive 85/337.

53 In that judgment, the obligation arising from Article 4(2) of Directive 85/337 to ensure that a project does not require an assessment before deciding to dispense with such an assessment was at issue.

54 As there was nothing in the evidence in the case-file submitted to the Court to indicate that such an evaluation had taken place in the course of the administrative consent procedure for a bypass project, the Court held that a failure to fulfil obligations resulting from Directive 85/337, as alleged by the Commission, was established.

55 The Court pointed out, moreover, in paragraph 49 of that judgment, that the determination by which the competent authority takes the view that a project's characteristics do not require it to be subjected to an EIA must contain or be

accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of Directive 85/337.

56 It does not follow, however, from Directive 85/337, or from the case-law of the Court, in particular, from that judgment, that a determination not to subject a project to an EIA must, itself, contain the reasons for which the competent authority determined that an assessment was unnecessary.

57 It is apparent, however, that third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority has actually determined, in accordance with the rules laid down by national law, that an EIA was or was not necessary.

58 Furthermore, interested parties, as well as other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with the competent authority's screening obligation. That requirement may be met, as in the main proceedings, by the possibility of bringing an action directly against the determination not to carry out an EIA.

59 In that regard, effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general, that the court to which the matter is referred may require the competent authority to notify its reasons. However where it is more particularly a question of securing the effective protection of a right conferred by Community law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request (see Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15).

60 That subsequent communication may take the form, not only of an express statement of the reasons, but also of information and relevant documents being made available in response to the request made.

61 In the light of the foregoing, the answer to the first question is that Article 4 of Directive 85/337 must be interpreted as not requiring that a determination, that it is unnecessary to subject a project falling within Annex II to that directive to an EIA, should itself contain the reasons for the competent authority's decision that the latter was unnecessary. However, if an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the determination or the relevant information and documents in response to the request made.

Second and third questions

62 By its second and third questions, the referring court asks the Court of Justice on the one hand whether, in the event of an affirmative reply to Question 1, the content of a determination such as that at issue in the main proceedings will satisfy the duty to state reasons incumbent on the competent authorities and, on the other hand, if need be, to define the form that the statement of reasons should take.

63 While, as is clear from the reply to the first question, the reasons need not necessarily be contained in the determination not to carry out an EIA itself, the competent administrative authority can, under the applicable national legislation or of its own motion, indicate in the determination the reasons on which it is based.

64 In that case, the determination must be such as to enable interested parties to decide whether to appeal against the determination in question, taking into account any factors which might subsequently be brought to their attention.

65 It cannot, in those circumstances, be ruled out that in the case in the main proceedings the Secretary of State's reasons might be considered sufficient, taking into account, in particular, factors which have already been brought to the attention of interested parties, provided that the latter can ask for and obtain from the competent authorities, subject to judicial review, the necessary supplementary information to fill any gaps in that reasoning.

66 The answer to the second and third questions is therefore that, if a determination of a Member State not to subject a project falling within Annex II to Directive 85/337 to an EIA in accordance with Articles 5 to 10 of that directive states the reasons on which it is based, that determination is sufficiently reasoned where the reasons which it contains, added to factors which have already been brought to the attention of interested parties, and supplemented by any necessary additional information that the competent national administration is required to provide to those interested parties at their request, can enable them to decide whether to appeal against that decision.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 4 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as not requiring that a determination, that it is unnecessary to subject a project falling within Annex II to that directive to an environmental impact assessment, should itself contain the reasons for the competent authority's decision that the latter was unnecessary. However, if an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the determination or the relevant information and documents in response to the request made.**

2. **If a determination of a Member State not to subject a project, falling within Annex II to Directive 85/337 as amended by Directive 2003/35, to an environmental impact assessment in accordance with Articles 5 to 10 of that directive, states the reasons on which it is based, that determination is sufficiently reasoned where the reasons which it contains, added to factors which have already been brought to the attention of interested parties, and supplemented by any necessary additional information which the competent national administration is required to provide to those interested parties at their request, can enable them to decide whether to appeal against that decision.**

[Signatures]