

SEWAGE TREATMENT IN NORTHERN IRELAND: HOTSPOTS

OPINION

Summary

The policy that EHS should not object to planning applications in the 'hotspot' locations where sewerage infrastructure does not comply with the Urban Waste Water Treatment Directive 91/271/EEC is unlawful. It is irrational. It fetters the discretion of the EHS in such a way that it cannot fulfil its statutory obligations. It frustrates the realisation of the objectives of, and hinders the achievement of the results required by, the Directive. It is in breach of Article 10 of the EC Treaty and conflict with s 24 of the Northern Ireland Act 1998.

Introduction

1. I am asked to advise on the legality of a policy¹ that the NI Environment and Heritage Service (EHS)² should not object to applications for planning permission for development in 56 'hotspot' locations where there is inadequate sewage treatment infrastructure. The inadequate infrastructure leads variously to failures to meet the Urban Waste Water Treatment Directive (UWWTD), breaches of other EC Directives and EHS's own standards, and overloading of the sewerage network and/or the waste water treatment works (WWTWs). EHS formerly considered that in these hotspot locations planning permission for any new development should only be granted subject to such problems being adequately addressed.
2. In around May 2002, the Northern Ireland Assembly decided to 'hold' planning applications which the EHS had recommended for refusal in order to investigate the scale of the problem. After an investigation and a 'risk assessment', and

¹ Set out originally in a statement by Dermot Nesbitt, former NI Minister of the Environment, on 7 October 2002 and endorsed by the current Minister Angela Smith MP in recent correspondence.

² A Government agency within the NI Department of the Environment (DOE) with a duty to promote the cleanliness of water, and a consultee on planning applications.

lobbying by industry in NI, in October 2002 the Administration³ decided on a general policy that EHS should no longer object but rather merely alert the Planning Service (PS)⁴ to the environmental issues in medium and high impact areas. This policy has been continued by the new Administration, absent, so it is said, any change of circumstances.

3. Friends of the Earth (FOE) are concerned that this policy results in the further loading of the sewerage system in NI, which in turn exacerbates breaches of EC Directives, in particular the UWWTD, and causes new breaches. FOE have also made a number of complaints to the European Commission about the lack of compliance with the UWWTD in NI.⁵
4. FOE direct my attention particularly to:
 - a. the UWWTD⁶;
 - b. the Urban Waste Water Treatment Regulations (Northern Ireland) 1995 (“the Regulations”);
 - c. Article 10 of the Treaty of the European Union;
 - d. S 24 of the Northern Ireland Act 1998.
5. The general policy appears to fetter the discretion of the EHS to consider the factors relevant to each proposal on which it makes comments and thereby frustrates the legislative purpose of the constitutional provisions which establish it. It is in my opinion irrational to decide in advance that the balance of factors will inevitably justify a decision by the EHS not to object to individual proposals as they come forward for consideration. It frustrates the realisation of the objectives of, and achievement of the results required by, the Directive.

³ Used [in this Opinion](#) to refer to both the devolved NI Assembly and the Secretary of State for NI as appropriate.

⁴ A Government agency with the DOE which administers the DOE’s planning functions; see Planning (Northern Ireland) Order 1991

⁵ See complaint by John Woods FoE NI 2nd May 2003. A Reasoned Opinion has apparently been produced but not obtained by FOE

⁶ 91/271/EEC, hereafter generally ‘the Directive’

6. Despite the Administration's initial legal advice having "emphasised the need for a precautionary approach, taking account of both European and domestic law"⁷, the Administration has adopted the position that the UWWTD does not demand that development be halted in an area which does not meet the UWWTD requirements⁸. Even if this is so in some circumstances, it is not a legally adequate justification for the general policy.

Background to the Policy

7. Although Northern Ireland is an integral part both of the European Union and United Kingdom it has comparatively poor environmental protection. As the Chairman of the United Kingdom Environmental Law Association observed in May 2004 '*Northern Ireland has a uniquely serious problem of weak environmental regulation and enforcement...A new sense of priority for the environment in Northern Ireland is urgently required....*'⁹ The Administration accepts that NI's sewerage infrastructure falls "*well below modern standards*"¹⁰. EHS had "*expressed concern about the implications of further development with regard to environmental compliance and pollution risks*" in such circumstances in the hotspot areas.
8. The general policy, continued by Angela Smith MP as Minister, set out in the statement of Mr Nesbitt is summarised in her letter of 30 July 2003, which states:

"The instructions given to EHS by Dermot Nesbitt on responding to planning applications in the 56 locations... are as follows:

- In the 14 areas... where the environmental impact is low, EHS will not object to the granting of planning permission.
- In the remaining 42 locations, where the environmental impact is medium or high, EHS will alert Planning Service to the environmental issues, but will not object to the granting of planning permission."

⁷ Mr Nesbitt, Assembly Debate 7th October 2002

⁸ letter of 29 April 2003 from the Minister Angela Smith MP to John Woods FoE NI

⁹ E law No 19, the journal of the United Kingdom Environmental law Association for May 2004 at p 19

¹⁰ Mr Nesbitt, Assembly Debate 7th October 2002

9. During the 'hold' on planning applications, EHS carried out a 'risk assessment'. The relevant definitions which were employed in carrying out the 'risk assessment' used to prepare the policy articulated by Mr Nesbitt were:

“High impact causes continuing breach of EC Directive and/or failure to meet EHS standard and/or pollution.

Medium impact causes intermittent breach of EC Directive and/or failure to meet EHS standard and/or pollution.

Low impact: risk of breach of EC Directive and/or EHS standard and/or pollution”.

10. A more recent categorisation¹¹ uses four categories for the areas in relation to which EHS were concerned. 13 areas were placed in category 1, being “the most serious situation”, “where the level of sewage treatment provided is inadequate to comply with [the Regulations] and there may also be a risk of failing another EU Directive”. Category 2, where the WWTWs are overloaded and unable to comply with discharge standards, occurred in five places. There were 26 category 3 areas, where a breach of the UWWTD would not occur until 2005¹² but there is a breach of the EHS’s own standard and another Directive. Category 4, where the EHS standard was breached or the system was inadequate, arose in 12 locations.
11. In the 42 medium and high impact locations, the EHS would not therefore object even though breaches of standards and/or pollution were certain to occur.
12. The policy is stated to represent a pragmatic approach, balancing the protection of the environment and economic growth and social development. It was said that “[*To impose*] an absolute constraint on development [*in the hotspot areas*] until such time as the deficiencies in the sewerage infrastructure can be corrected would have a crippling effect on physical development across Northern Ireland”¹³” [*and*] continuing to hold up planning applications could potentially destabilize the housing market, which is a vital element of the Northern Ireland economy” .

¹¹ Letter dated 25 March 2004 to FOE from the Water Service

¹² Article 7 of the UWWTD.

¹³ Mr Nesbitt Assembly Debate 7th October 2002

13. The decision taken to adopt the policy relied on the implementation of proposed remedial works within a timescale of either three or five years. The policy statement said: “our approach is based on the Water Service’s¹⁴ commitment to deliver the capital works programme as currently planned”. An “exposure period of between 3 and 5 years over which to allow capital improvements to take place” was said to represent “an acceptable compromise”.¹⁵ In the 42 original medium and high impact areas, 23 locations were to have remedial works within three years, and the remaining 19 locations were to have such works within five years. The policy therefore relied heavily on the commitment of DRD Water Service to deliver the necessary capital investment and infrastructure improvements on which reliance was being placed.

14. It now appears that the original timetable will not be met in all cases, including in high impact areas. The best that the Water Service can say is that whilst “the majority of the programme is generally on target for completion”, 16 locations are now being addressed within a PPP/PFI programme such that construction “will be delivered progressively between 2007 and 2009”¹⁶ (i.e., at least in some cases outside of the period on which the Policy was originally based). Those 16 locations include 6 low impact, 7 medium impact, and 3 high impact). It can be seen that the programme has already slipped from its position at the time of the original enunciation of the policy. The factual basis for the policy therefore appears to have changed somewhat since it was made in October 2002.

15. It appears to be accepted that there is a “current risk of impact” at the hotspot locations, and that “any further increase in the sewage load received by the relevant Waste Water Treatment Works... from development could only increase that impact”¹⁷.

16. The Administration also recognises that¹⁸:

¹⁴ A Government agency within the Department for Regional Development, which operates the sewage system in NI.

¹⁵ Letter dated 30 July 2003 from Angela Smith to FOE; see also the letter dated 25 March 2004 from Water Service.

¹⁶ Letter dated 25 March 2004 to FOE from Water Service

¹⁷ Letter from Angela Smith to FOE dated 30 July 2003

¹⁸ Letter from Angela Smith to FOE dated 29 April 2003

“Allowing development to proceed prior to the completion of the required improvements to the sewerage infrastructure has the potential to exacerbate the existing environmental impact and increase the risk of non-compliance with environmental standards and a number of EC Directives”.

17. There was an explicit recognition in the policy that as development was allowed before remedial works were carried out, the situation may deteriorate further. The policy statement included the following [tab 2.1]:

“... I acknowledge that it means that developments will continue to connect to the public sewer in areas where the current inadequacy of the sewage collection and treatment systems is having a high or medium environmental impact, and will continue to do so for some years, pending completion of the Water Service’s capital works programme. [...]

My aim is to avoid any serious exacerbation of pollution in those areas. I therefore caution that, in the longer term, it may not be sustainable to continue to connect developments to non-compliant sewerage systems in which remedial works remain some way off.”

18. Development already permitted will cause harm to the achievement of the objectives of the Directive. There will be further and greater environmental harm as more development is permitted. FOE’s policy position is that more could be done, such as halting development at high impact hotspots, or at hotspots over a certain size, or prioritising works in high impact areas over lower impact areas.

The UWWTD

19. Article 1 of the UWWTD provides:

“This Directive concerns the collection, treatment and discharge of urban waste water and the treatment and discharge of waste water from certain industrial sectors.

The objective of the Directive is to protect the environment from the adverse effects of the abovementioned waste water discharges”.

20. The UWWTD sets out to achieve this objective by providing that Member States shall ensure that all urban areas over certain sizes are provided with collecting

systems and treatment facilities. There are particular requirements depending on the population equivalent ('pe') of the relevant urban area ('agglomeration') and the area in to which the waste water is discharged. These are summarised in the table below.

Art	Requirement	Qualification	Threshold p.e.	Deadline
3(1)	Collecting systems		> 15,000	31.12.00
3(1)	Collecting systems		2,000 – 15,000	31.12.05
3(1)	Collecting systems	Sensitive area	> 10,000	31.12.98
4(1)	Secondary treatment		> 15,000	31.12.00
4(1)	Secondary treatment		10,000 – 15,000	31.12.05
4(1)	Secondary treatment	Fresh water and estuaries	2,000 – 10,000	31.12.05
5(2)	More stringent treatment	Sensitive area	> 10,000	31.12.98
6(2)	Less stringent treatment	Less sensitive areas: coastal	10,000 – 150,000	
6(2)	Less stringent treatment	Less sensitive areas: estuary	2,000 – 10,000	
7	Appropriate treatment	Fresh water and estuaries	< 2,000	31.12.05
7	Appropriate treatment	Coastal	< 10,000	31.12.05

21. In addition, discharges from the urban WWTWs described in Articles 4(1) and 5(2) must satisfy the relevant requirements set out in Annex IB to the UWWTD: Articles 4(3) and 5(3). Two tables set out requirements for maximum concentrations of certain materials and a minimum percentage reduction of such materials by treatment.

22. Article 10 also states that:

“Member states shall ensure that the urban waste water treatment plants built to comply with the requirements of Articles 4, 5, 6 and 7 are designed, constructed, operated and maintained to ensure sufficient performance under all normal local climatic conditions...”.

23. It appears to me that allowing further development in the hotspot areas can create, or exacerbate, failures to meet the requirements of the UWWTD in the following circumstances:

- a. new development increases the p.e. of an urban area such that it moves in to a new threshold band so as to change the nature or timing of an obligation, or to engage an obligation for the first time;
- b. the increased load from new development means that the remedial works planned cannot any longer secure compliance with the UWWTD's

requirements by the relevant deadline or at all. For example the increased load may mean that WWTWs cannot meet the requirements for maximum concentrations of certain materials or the minimum percentage reductions set out in the tables in Annex IB of the UWWTD (Articles 4(3) and 5(3));

- c. further development compounding an existing failure to comply with the UWWTD (not itself initiating a breach of that directive) may contribute to, and increase the seriousness of, the failure, and in certain circumstances prolong the failure. This would be contrary to the purposes of the Directive, Article 1 of which sets out the objective of protecting the environment from the adverse effects of waste water discharges.

24. I now turn to examine the legislation transposing the Directive into Northern Ireland law, in particular the Urban Waste Water Treatment Regulations (Northern Ireland) 1995 ('the Regulations')¹⁹

The Urban Waste Water Treatment Regulations (Northern Ireland) 1995

25. The Water and Sewerage Services (Northern Ireland) Order 1973 ("the 1973 Order") places by Article 3(1) an obligation on the DOE²⁰ to provide and maintain sewers for draining domestic sewage, surface water and trade effluent, and to make provision for effectually dealing with the contents of its sewers.

26. Regulation 4 of the UWWTR (NI) 1995 is said to supplement the duty in Article 3(1) (see Regulation 4(1)). There is imposed "a duty to ensure that collecting systems which satisfy the requirements of Schedule 2 are provided": Regulation 4(2). This appears to implement Article 3(1) of the UWWTD.

27. There is also imposed "a duty to ensure that urban waste water... is, before discharge, subject to treatment": Regulation 4(4).

28. Regulation 4(4) seeks to transpose Article 10 by amending DoE's obligation under article 3(1)(c) of the 1973 Order to make provision for effectually dealing

¹⁹ As amended by The Urban Waste Water Treatment (Amendment) Regulations (Northern Ireland) 2003.

²⁰ The Order places the duty on the Ministry, being the Ministry of Development; however, the Regulations refer to the Department, being the DOE – footnotes 7 and 8 to the Regulations state that the functions of the Ministry of Development have been transferred to the DOE.

with the contents of its sewers to include a duty to ensure that UWW entering these systems, is, before discharge, subject to the treatment standards laid down and that treatment plants built are designed, constructed and operated to ensure sufficient performance under all normal local climatic conditions.

29. Regulation 5 then sets out the requirements as to the provision of treatment, which appear to mirror the provisions of Articles 4, 5 and 7 of the UWWTD.
30. Regulation 6(1) deals with discharges from WWTWs under Regulations 5(1), (2) and (5), and provides that discharges “shall satisfy the relevant requirements of Part 1 of Schedule 3”.²¹ This reflects Articles 4(3) and 5(3) of the UWWTD.
31. As the Regulations are intended to transpose the UWWTD, I am of the opinion that to the extent that there are failures to meet the requirements of the UWWTD there are similar failures to meet the duties in the Regulations. These duties are binding duties upon the DOE and can in my view be relied upon in any challenge to the policy, or actions based on it, imposed by the DOE’s minister. The terms of the UWWTD, construed purposively as is appropriate for an EC Directive, in particular as to its objective as set out in Article 1, could be relied upon in the interpretation of the Regulations if necessary under the principle of convergent construction²².

Obligations to Meet the Requirements of the UWWTD and the Regulations

32. The EHS (as an agency within the DOE) is under statutory duties as set out in Article 4 of The Water (Northern Ireland) Order 1999 (“the 1999 Order”):²³

“(1) The Department²⁴ shall:

²¹ Schedule 3 appears to reflect Annex IB and is available at http://www.hms.gov.uk/sr/sr1995/Nisr_19950012_en_4.htm

²² The felicitous phrase adopted by Lord Justice Sedley in *R v Durham CC ex p Huddleston* [2000] 1 WLR 1484 at [9] to describe the process, sometimes called 'indirect effect', whereby domestic legislation must be interpreted, if possible, in such a way as to be compatible with EC law. The principle was established by the ECJ in *Marleasing SA v La Comercial Internacional de Alimentacion* [1990] ECR I-4135. The House of Lords has held that it may require the reading in of additional words to legislation: *Litster v Forth Dry Dock & Engineering* [1990] 1 AC 546, *Pickstone v Freemans* [1989] 1 AC 66 (see Lord Oliver of Aylmerton at p125 G-H)

²³ Available at <http://www.legislation.hms.gov.uk/si/si1999/19990662.htm>.

²⁴ The DOE: Article 3(1).

- (a) promote the conservation of the water resources of Northern Ireland;
 - (b) promote the cleanliness of water in waterways²⁵ and underground strata.
- (2) The Department shall, in exercising its functions in relation to the conservation of water resources and the cleanliness of water, have regard to:
- (a) the needs of industry and agriculture;
 - (b) the protection of fisheries;
 - (c) the protection of public health;
 - (d) the preservation of amenity and the conservation of flora and fauna; and
 - (e) the conservation of geological or physiographical features of special interest and any feature of archaeological, historical, architectural or traditional interest.”

33. Article 10 (formerly 5) of the EC Treaty²⁶ provides:

“Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”

Article 249 (formerly 189) provides:

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed but shall leave to the national authorities the choice of form and methods.

34. Sections 1 and 2 of the European Communities Act 1972 effectively transpose these general obligations into domestic UK law. The NI Administration is subject to a statutory limitation, which removes the power to act to the extent that the act is contrary to EC law. The Northern Ireland Act 1998 provides in s 4 (1)(b) that “a Minister or Northern Ireland department has no power to... do any act, so far as the... act is incompatible with Community law”. Although the express wording does not necessarily make unlawful a failure to take action where that is required

²⁵ "Waterway" includes any river, stream, watercourse, inland water (whether natural or artificial) or tidal waters and any channel or passage of whatever kind (whether natural or artificial) through which water flows: Article 2(2).

²⁶ The Treaty Establishing the European Community.

by EC law, in my opinion the principle of convergent construction²⁷ requires that it should be so construed.

35. If therefore the granting of permission for additional housing would frustrate and hinder the achievement of the purpose of the Directive it would be in conflict with Articles 10 and 249 and prohibited by s 24 (1) (b) NI Act 1998. As the ECJ observed in *Inter Environmente Wallonie*

'It should be recalled at the outset that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation by the third paragraph of Article 189 [now 249] of the treaty and by the directive itself.....That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts....Member States....must refrain from taking any measures liable seriously to compromise the result prescribed'²⁸

The ECJ treats the underlying purpose and objectives of a Directive as determining the result which a Member State is required to achieve²⁹. The Court held in *Palin Granite*³⁰ that environmental directives must be interpreted in the light of the Treaty obligation in Article 174 (2) to achieve a 'high level of protection'³¹ of the environment applying the 'precautionary principle' and on the basis of 'preventive action'.

36. If an emanation of the state³² with responsibilities for the environment such as the EHS, an agency within the DoE, expressed a view as a consultee on a planning

²⁷ The felicitous phrase adopted by Lord Justice Sedley in *R v Durham CC ex p Huddleston* [2000] 1 WLR 1484 at [9] to describe the process, sometimes called 'indirect effect', whereby domestic legislation must be interpreted, if possible, in such a way as to be compatible with EC law. The principle was established by the ECJ in *Marleasing SA v La Comercial Internacional de Alimentacion* 1990] ECR I-4135. The House of Lords has held that it may require the reading in of additional words to legislation *Litster v Forth Dry Dock & Engineering* [1990] 1 AC 546, *Pickstone v Freemans* [1989] 1 AC 66 (see Lord Oliver of Aylmerton at p125 G-H)

²⁸ *Inter Environmente Wallonie v Region Wallonne* Case C-129/96 [1998] 1 CMLR 1057 [40]-[41]and [45]

²⁹ see for example the Blackpool Bathing Waters case *Comm v United Kingdom* case C-56/90 [1993] ECR I-4109 [33]-[34] and *Comm v Belgium* case C-307/98.25th May 2000 at [28]

³⁰ *Palin Granite Oy v Vehmasson* Case C-9/00 18th April 2002 at [23] and [36]

³¹ In *Commission v Italy*³¹ the Court held that the UWWT Directive had to be interpreted in the light of the Treaty objective of aiming at a 'high level of protection' of the environment (Art 174(2)).

³² A wide range of public bodies are treated under EC law as 'emanations' or 'organs' of the State and obliged to use their powers to fulfil the State's obligations under Article 10 of the EC Treaty. There can be no doubt that the DoE and its agencies are emanations or organs of the state..(see for example *Costanzo (Fratelli) v Milano* Case 103/88 [1989] ECR 1839 [31])

application which failed to reflect that approach it would be acting unlawfully. If it failed to express any view in such circumstances its failure so to do would also be unlawful. Decisions as to the exercise of its powers must be made in accordance with the objects of the legislation granting the powers. As Lord Reid observed in *Padfield*

“Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act... [I]f the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.”³³

37. One means of permitting additional housing in compliance with the Directive would have been to provide sufficient infrastructure in appropriate places to enable new dwellings to be built without causing any new or exacerbated non compliance with its requirements. That has not happened. The question therefore arises as to whether the creation or exacerbation, by new housing, of instances of non compliance with the Directive is relevant to the grant of planning permission. In my opinion it is. The range of considerations relevant to the grant of planning permission is wide³⁴. There can in my view be no doubt about the relevance of the creation or exacerbation of conflicts with a Directive whose object is environmental protection. I turn therefore to the approach which should be taken in the consideration of such proposals.

38. The starting point must be a recognition that housing development which creates new, exacerbates or prolongs instances of non compliance frustrates and hinders the achievement of the underlying purpose and objectives³⁵ of the Directive. The aim of the Directive is 'to protect the environment from the adverse effects of the [relevant] waste water discharges'³⁶. Its provisions are based on a pragmatic,

³³ - *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, per Lord Reid at 1030. Lord Bridge of Harwich made similar observations in *R v LB Tower Hamlets ex p Chetnik* [1988] AC 858 at 872

³⁴ Article 25 of the Planning (Northern Ireland) Order 1991 requires the Department to have regard to the development plan and 'any other material considerations'. This term in the equivalent Anglo Welsh legislation (S 70 TCPA 1990) has been given a wide interpretation by (see for example *Stringer v MHLG* [1970] 1 WLR 1281)

³⁵ The ECJ treat the underlying purpose and objectives of a Directive as determining the result which a Member State is required to achieve *Comm v United Kingdom* case C-56/90 [1993] ECR I-4109 [33]-[34].

³⁶ Article 1

common sense, quantitative approach, in which the amount of sewage is not only important but in fact determinative of the requirements for collection and treatment. The adoption by the Community of the preventive principle in Article 174 (2) of the Treaty and the recognition by the ECJ³⁷ of its role in interpreting the results required by directives is highly germane. There must therefore in my opinion be a presumption that permission will be refused for development which creates or significantly exacerbates or prolongs such instances of non compliance.

39. The question then arises as to whether, and if so in what circumstances, planning permission for such development may be permitted. The Directive does not make any express provision for derogations. It is therefore highly questionable whether any other approach than a moratorium pending achievement of compliance is lawful. The ECJ does not permit derogations additional to those expressly permitted in a Directive save perhaps in cases of physical impossibility. As it observed in relation to the Bathing Waters Directive 76/160/EEC

...it is not sufficient to take all reasonably practicable measures...The Directive requires Member States to ensure that certain results are achieved and, apart from derogations provided for, does not allow them to rely on particular circumstances to justify a failure to fulfil that obligation³⁸.

Such derogations as do exist must be construed strictly³⁹. Any implied power to derogate from the Directive can hardly be on a broader basis than that which is generally provided in such environmental directives as do make such provision. The Drinking Water Directive 80/778/EEC for example permits⁴⁰ derogations in emergencies where there is neither an alternative source of supply nor unacceptable risk to public health. The Habitats Directive 92/43/EEC grants a general derogation power⁴¹ for '...imperative reasons of overriding public interest, including those of a social or economic nature' where there is no satisfactory alternative provided that there is no prejudice to favourable conservation status of species population levels.

³⁷ *Palin Granite Oy v Vehmasson* Case C-9/00 18th April 2002 at [23] and [36]

³⁸ *Comm v Germany* C-198/97 8th June 1999 at [35]

³⁹ *Comm v Germany* Case 237-90 [1992] ECR I -5973 [14]

⁴⁰ Article 10 (1) DWD 80/778/EEC

⁴¹ Article 16 (1)

40. If admissible at all such a reason would, in my opinion, have to be an imperative reason of overriding public importance. It would have to be based on a public interest equivalent, or superior, to that of the protection of the environment. A narrow approach would have to be taken to that concept⁴². There would have to be no alternative. That would be different from the approach of Mr Nesbitt as explained in his statement to the Assembly on 7 October 2002 and the Minister Angela Smith as explained in her letter of 30th July 2003.⁴³ A judgement by the relevant authority that provision of the necessary infrastructure could not be achieved more quickly without an unacceptable cost would not be an admissible reason⁴⁴. I do not consider that the general importance of the housing construction industry for the provision of employment in the NI economy could constitute such a reason. Nor could the effect on house prices. There are mechanisms open to the Administration to safeguard these interests which do not conflict with environmental directives. An urgent need for additional dwellings for the homeless and inadequately housed could however perhaps constitute such a reason. The following factors would need to be among those considered on a case by case basis in relation to each location where significant housing was proposed:

- (a) the extent and urgency of the need for housing
- (b) the extent to which the relevant housing need could be met in locations, other than those proposed by applicants, which would not involve any conflicts with the Directive or would involve less serious or briefer conflicts with the Directive (for example by avoiding the 'high risk' hotspots)
- (c) the extent to which a *Grampian*⁴⁵ condition requiring the installation of the necessary infrastructure before occupation could

⁴² *Comm v Germany* Case 237-90 [1992] ECR I -5973 [14]

⁴³ to John Woods Director FoE NI at p 2

⁴⁴ *Comm v Germany* Case 237-90 [1992] ECR I -5973 [15-[16] The definition of estuarine waters so as to reduce the cost of compliance with the UWWT Directive was held to be unlawful by Harrison J in *R v SSE ex p Kingston upon Hull* [1996] Env LR 248 Cost was held by the ECJ to be an inadmissible consideration in relation to non compliance with the Drinking Water Directive 80/778/EEC in *Comm v Belgium* [1990] ECR 2821

⁴⁵ In *Grampian Regional City Council v City of Aberdeen District Council* 47 PCR 633 the House of Lords established the principle that it was open to a planning authority to impose a condition that prohibited the effective enjoyment of the benefits of a planning permission in the absence of the fulfilment of a condition not within the control of the applicant

avoid creation or exacerbation of the conflict. The 'polluter pays principle' embodied in Article 174 (2) of the Treaty would support such a condition

- (d) the extent to which other conditions relating to the design of the development (such as a prohibition on sink waste disposal units) could reduce the burden
- (e) the extent to which other conditions relating to matters such as the treatment of food or other waste (such as the establishment of Estate Composting Plans akin to Green Travel Plans) could reduce the burden from the proposed development or provide compensation for its additional waste by reducing that from existing development

41 The Legal Defects of the Policy and Decisions Made Thereunder

The legal defects of the public decision makers involved in the formulation and operation of the policy may be expressed in UK terms in various ways. To some extent how they are expressed is a matter of professional taste, as the concepts used by courts in quashing decisions have porous boundaries.

42 Irrationality:

The creation or exacerbation of conflicts with the Directive are material to any decision on whether or not to grant planning permission for housing development. The responsibilities of the EHS are such that in the absence of countervailing considerations it has a duty to object to housing developments which would do so. The policy imposed on EHS is such that it never addresses its mind to the relevant considerations where 'hotspot' proposals come forward. It never objects. It merely alerts the Planning Service in the more serious cases. It is irrational to conclude that the creation or exacerbation of conflicts with the Directive are always justified. That

is the effect of the operation of the policy. Irrationality in the decision making process vitiates a decision⁴⁶ and calls for judicial intervention, usually by quashing.

43 Failure to Take Account of Material Considerations

If housing permissions can at present lawfully be permitted in the 'hotspots', a decision to that effect by the Planning Service would have to have regard on a case by case basis to the factors which I have set out above in paragraph 40 above. It seems unlikely that it does at present. Nor does it seem that changes of circumstance since the original promulgation of the policy by Mr Nesbitt in 2002 have been considered by the Minister.

44 Fettering of Discretion

There is a general principle that a public decision maker must not fetter the future exercise of its discretion. It may have a general policy but must be willing to depart from that if circumstances call for it. However as Lord Browne Wilkinson observed

..... if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised. If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful...⁴⁷.

The policy imposed on the EHS infringes the principle.

45 Error of Law

The underlying rationale for the policy must be either a failure to appreciate that the UK has to abstain from action that would frustrate the objectives and hinder the securing of the results required by the Directive or an assumption that the grant of permission for housing development in the hotspots would not do so. This is a fundamental error of law which vitiates both the policy and actions taken in accordance with it. Errors of law are the first broad category of circumstances which

⁴⁶ *CCSU v Minister for Civil Service* [1985] AC 374 Lord Diplock at 410

⁴⁷ *R v Home Secretary, ex p Venables* [1998] AC 407, *per* Lord Browne-Wilkinson at 496-497

Lord Diplock identified in *CCSU*⁴⁸ as calling for judicial review. Lord Bingham of Cornhill, with whom Lord Hope of Craighead, Lord Hutton and Lord Millett agreed, in *Berkeley*⁴⁹ considered that the duty under Article 10 of the treaty was a factor pointing towards an order to quash action in breach of a directive's requirements as the proper response to a non negligible contravention. This naturally flows from the ECJ's approach set out in *Francovich*

Article 5 [now 10]...[imposes] an obligation to nullify the unlawful consequences of a breach of community law⁵⁰

Robert McCracken QC
2, Harcourt Buildings,
Temple
London EC4Y 9DB

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⁴⁸ *CCSU v Minister for Civil Service* [1985] AC 374 Lord Diplock at 410

⁴⁹ *Berkeley v Secretary of State for the Environment* [2001] AC 603 (HL)

⁵⁰ *Francovich v Italy* Case C-6/90 and 9/90 [1993] 2 CMLR 66 at [36]