Case No: CO/6931/2012

Neutral Citation Number: [2013] EWHC 3 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2013

Before :

THE HONOURABLE MRS JUSTICE LANG DBE

- -

Between:

(1) MALCOLM ALEXANDER MACARTHUR
(2) REGINALD THOMPSON
(as officers and on behalf of AGAINST TURBINES AT CHIPLOW (ATAC))

(3) ANTHONY JONATHAN WEIR POWELL
(4) RICHARD CHALK
(as officers and on behalf of CREAKES ACTION FOR PROTECTING THE ENVIRONMENT (CAPE)) **Claimants**

- and -

(1) THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) KING'S LYNN AND WEST NORFOLK BOROUGH COUNCIL
(3) E.ON CLIMATE & RENEWABLES UK DEVELOPMENTS LIMITED
(4) RES UK AND IRELAND LIMITED **Defendants**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

D. Hart QC and A. Ranatunga (instructed by **Butcher Andrews**) for the **Claimants**
J. Moffett (instructed by **The Treasury Solicitor**) for the **First Defendant**
J. Pike (instructed by **Cobbetts LLP**) for the **Third Defendant**
G. Nardell QC (instructed by **Eversheds LLP**) for the **Fourth Defendant**
The Second Defendant did not appear and was not represented

Hearing dates: 18th & 19th December 2012

- -

Judgment

Mrs Justice Lang:

1. The Claimants applied under section 288(1)(b) of the Town and Country Planning Act 1990 ("TCPA 1990") for an order quashing the decisions of R.P.E. Mellor, an Inspector appointed by the First Defendant, dated 3 July 2012, allowing the appeals against the decisions of King's Lynn and West Norfolk Borough Council and granting planning permission:

   i) for a wind farm development at Bagthorpe, King's Lynn, Norfolk (the 'Chiplow' site); and

   ii) for a wind farm development at Barwick Hall Farm, Barwick Road, Stanhoe, King's Lynn, Norfolk (the 'Jack's Lane' site).

The Parties

2. The Claimants commenced their claim under Part 8 CPR. Initially the First Claimant was 'Against Turbines at Chiplow' (ATAC), an action group campaigning against the wind farm development at Chiplow. However, ATAC is not a legal entity and so the claim was amended to add Mr Malcolm Macarthur and Mr Reginald Thompson as officers of, and on behalf of, ATAC. Similarly the Second Claimant was initially 'Creakes Action for Protecting the Environment' (CAPE), an action group campaigning against the wind farm development at the Jack's Lane site. It is not a legal entity either and so the claim was amended to add Mr Anthony Powell and Mr Richard Chalk as officers of, and on behalf of, CAPE. I have amended the title of the claim so that the individual claimants are named as the First to Fourth Claimants.

3. The Second, Third and Fourth Defendants were initially named as 'interested parties'. By consent, I have amended the title of the claim so that they are named as Defendants, in accordance with the published guidance of the Administrative Court[1], as there is no provision for interested parties under Part 8.

4. Shortly before the hearing, the First and Second Defendants signed a consent order, agreeing that the decisions should be quashed. All parties agreed that the Third and Fourth Defendants were entitled to be heard in opposition to the proposed quashing, before the court made any decision. In those circumstances, I could not approve the consent order. I directed the First Defendant to attend the hearing to assist the court.

Planning History

5. The Third Defendant, E.ON, applied for planning permission to construct a wind farm at the Chiplow site on 26 May 2010. Following consultation, the application was refused by the Second Defendant Council on 27 April 2011. The grounds of refusal were, inter alia, (1) that the proposed development would have a significantly harmful impact upon the landscape character and visual amenity of the local area; and (2) that it would have a harmful impact upon the setting of Bloodgate Hill fort, a Scheduled Ancient Monument, and Houghton Hall Park, a Grade 1 Historic Park, which was not outweighed by the modest contribution it would make to climate change. The cumulative effect of this development, when combined with others proposed in the

[1] 'Applications under Section 288 of the Town and Country Planning Act 1990 Notes for Guidance for Court Users'

area, was also considered to be significantly harmful. The Third Defendant appealed against the refusal of planning permission.

6. The Fourth Defendant, RES, applied for planning permission to construct a wind farm at the Jack's Lane site, on 17 August 2010. Following consultation, the application was refused by the Second Defendant Council on 2 August 2011. The grounds of refusal were, inter alia, (1) that the proposed development would have a significantly harmful impact upon the landscape character and visual amenity of the local area; and (2) that it would have an adverse effect on the setting of Bloodgate Hillfort, Barmer Church, a Grade II listed building, and Houghton Park, which was not outweighed by the modest contribution it would make to climate change. The cumulative effect of this development, when combined with others proposed in the area, was also considered to be significantly harmful. The Fourth Defendant appealed against the refusal of planning permission.

7. The Planning Inspectorate decided that the appeals should be heard together, since the two sites were approximately 2.5 km from one another, involved the same form of development and involved similar and overlapping issues, including their cumulative impact.

8. An Inquiry was held on 31 January and 1 to 22 February 2012. A site visit was made on 20-21 February 2012. Both ATAC and CAPE were formal parties to the inquiry process pursuant to Rule 6, Town and Country Planning Appeals (Determination by Inspectors)(Inquiries Procedure)(England) Rules 2000. All parties were represented by counsel, and relied on expert evidence.

9. The Inspector issued Appeal Decisions on 24 May 2012, but these were superseded by the final Appeal Decisions, containing certain minor corrections issued on 3 July 2012.

10. The Inspector allowed both appeals, giving planning permission for both wind farms. His conclusions were at paragraphs 194 to 199:

> "194. The relevant local development plan policies that are most relevant to these proposals pull in different directions. However, the recently adopted CS Policy CS08 clearly and explicitly sets out the need to balance the identified harm and the benefit as, in part, does CS Policy CS12. These local policies have been recently adopted by Kings Lynn and West Norfolk Council since the subject planning applications were refused. They continue to merit full weight as advised by the Framework. There is no material conflict between these local polices and the Framework. Thus whether the appeal proposals are in overall conformity with the adopted local development plan depends upon the outcome of balancing the identified harm with the benefits.
>
> 195. The identified harm that weighs against the proposals is:
>
> i. For each scheme, the adverse landscape and visual effects that are significant close to each windfarm but

which diminish with distance. If both windfarms are developed there are limited additional cumulative effects. This harm attracts moderate weight overall.

ii. For the Appeal A Chiplow scheme the minor harm to the setting and heritage significance of Houghton Park, Syderstone Church, Bloodgate Hillfort, and the group of listed buildings at Bagthorpe. This minor harm is of limited weight.

iii. For the Appeal B Jack's Lane scheme there is moderate harm to the setting and heritage of Bloodgate Hillfort and Barmer Church. This moderate harm is less than substantial in terms of national policy and therefore attracts only moderate weight (the cumulative effects on the heritage assets of developing both windfarms would not be materially greater than the impact of the scheme with the greatest individual impact).

iv. For the Appeal B Jack's Lane scheme there are minor residual impacts on nature conservation after mitigation that do not amount to likely significant effects. This is of limited weight.

v. In respect of both schemes, at low wind speeds there would be minor harm in respect of increased noise above current very low background levels but these would not breach local or national policies and guidance. This is of limited weight.

196. The matters which weigh in favour of the proposals are:

i. For each scheme the local, regional and national policy encouragement for the provision of renewable energy, especially to address climate change. This carries substantial weight.

ii. The contribution that each scheme, and the greater contribution of both schemes together, would make towards addressing the identified shortfall against regional targets for onshore renewable energy and towards the relevant national targets for renewable energy. This also merits substantial weight.

iii. The economic benefits of each scheme, and the greater contribution of both schemes together, in terms of energy security and economic activity. This attracts some weight.

197. Although the Appeal B Jack's Lane scheme is identified as having slightly greater impact on landscape, heritage and

> nature conservation than the Chiplow scheme, that is offset by the greater amount of installed capacity and likely increased energy production at the Jack's Lane site.
>
> …
>
> 199. I conclude here on the evidence before me that the benefits of both appeal schemes clearly outweigh the individual and cumulative identified harm. In the terms of the local Core Strategy Policy CS08 the locational and other impacts are thus not unacceptable as they are here outweighed by wider environmental and economic benefits. Similarly the public benefits here outweigh the modest loss of interest or significance of environmental assets in the terms of local Core Strategy Policy CS12 and the National Planning Policy Framework (as carried forward from the previous PPS5 Policy HE.10). Both appeal proposals are therefore in overall accord with the local development plan and with regional and national policy. The Framework urges at paragraph 14 that, for decision-taking, the Framework's presumption in favour of sustainable development means that development proposals that accord with the development plan should be approved without delay. For all these reasons both appeals should therefore be allowed and planning permission granted subject to planning conditions."

Statutory framework

11. The Third and Fourth Defendants appealed by notice to the First Defendant, the Secretary of State, under section 78 TCPA 1990. In determining the appeal, the Inspector was required to have regard to the provisions of the development plan, and to any other material considerations (ss.79(4) by reference to section 70(2) TCPA 1990). The reference to the development plan engaged the duty in section 38(6) of the Planning and Compulsory Purchase Act 2004, namely that the determination must be made in accordance with the plan unless material considerations indicate otherwise.

12. The protection of ancient monuments is provided for in the Ancient Monuments and Archaeological Areas Act 1979. Part I of that Act, inter alia, requires the Secretary of State to compile and maintain a schedule of monuments and provides for the regulation and control of works affecting such scheduled monuments through a system of limited consent and, where necessary, compensation.

13. The Claimants applied to the High Court under section 288(1) TCPA, the material parts of which provide:

> "(1) If any person –
>
> (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action, on the grounds –

(i) that the action is not within the powers of this Act, or

(ii) that any of the relevant requirements have not been complied with in relation to that action,

he may make an application to the High Court under this section."

….

"(5) On any application under this section the High Court –

(b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action."

14. The general principles of judicial review apply to applications under s. 288: *Seddon Properties Ltd v. Secretary of State for the Environment and Macclesfield BC* (1981) 42 P & CR 26.

Grounds of challenge

15. The Claimants submitted that both decisions were unlawful on two grounds:

i) they were vitiated by a material error of fact; and

ii) the reasons were inadequate.

16. Both grounds were founded upon the allegation that the Inspector failed to record or remember that at the Inquiry Dr Edis, the expert witness for the Third Defendant, had conceded in oral evidence that his written evidence had under-assessed the impact of the proposed developments upon Bloodgate Hillfort. The Claimants submitted that the Inspector had therefore made a material mistake of fact about Dr Edis' evidence and, if he had correctly directed himself on the facts, he might have reached a different conclusion.

17. The Claimants also submitted that the Inspector failed to give adequate reasons because when he concluded, in paragraph 85 of his Appeal Decisions, that he agreed with Dr Edis' evidence, he was under an obligation to address the difference between Dr Edis' written and oral evidence, and explain what conclusion he had reached. His reasons were silent on this issue. The Claimants were prejudiced, they submit because they were unable to understand how their submissions had been dealt with by the Inspector and to ascertain whether or not he had made a material error of fact about Dr Edis' evidence.

Mistake of fact

Dr Edis' written evidence

18. An Environmental Impact Assessment (EIA) for the Chiplow scheme was produced to assess the likelihood of significant environmental effects arising from that scheme. A document entitled 'Supplementary Environmental Information' (SEI) was produced by Dr. Edis in November 2011, in order to assess further the effects of the development on the historic environment following the issue of revised policy in 'Planning Policy Statement 5 (Planning for the Historic Environment)' (PPS5) and having regard to English Heritage's guidance on 'The Setting of Heritage Assets'. Dr Edis amplified his evidence in his proof of evidence submitted to the Inquiry.

19. Dr Edis' assessment methodology was based upon the Design Manual for Roads and Bridges, adapted to take account of the policy in PPS5. The methodology assessed in stages (1) the significance (value/sensitivity) of the heritage assets; (2) sources of impacts; (3) factors in the assessment of magnitude of impacts; (4) the significance of the effects.

20. Under stage (1), Bloodgate Hill fort was assessed being of a "High" significance (value/sensitivity) because as a Scheduled Ancient Monument, it was a 'Designated Heritage Asset' as defined in Annex 2 of PPS5.

21. Under stage (2), the effect of the proposed development was assessed as 'indirect', in the sense that it affected the setting of the heritage asset, defined in PPS5 as "the surroundings in which the asset is experienced".

22. Under stage (3), Dr Edis had to classify the magnitude of impact of the development within his Table 2. There were four categories: major, moderate, minor and negligible. He concluded that the Chiplow development was "negligible", assessing it as:

> "Slight change within the setting of the heritage asset, which does not affect the significance of the asset or its character, value or interest, but which could nevertheless be considered within HE10 of PPS5."

23. Under stage (4), Dr Edis assessed the magnitude of the impact in relation to the significance (value/sensitivity) of the heritage asset. This was done by reference to a matrix. In the case of Chiplow, the "negligible" impact on a "high" sensitivity asset produced a significance of effects which was "minor". It was not significant in EIA terms.

24. Dr Edis also assessed the Jack's Lane development. Stages (1) and (2) were the same as for Chiplow. Under stage (3), he concluded that the Jack's Lane development was "minor", coming within the criterion of :

> "A noticeable change amounting to a difference to a key characteristic, normally falling within HE10 of PPS5."

Under stage (4), he concluded that the "minor" impact on a "high" sensitivity asset produced a significance of effects which was "moderate".

25. In assessing the cumulative impact of both developments, he concluded that they "would have at least a moderate impact, which is significant in EIA terms, but the Jack's Lane scheme would contribute by far the greater proportion of the effect."

26. It was acknowledged by the Claimants that the 'significance of effects' matrix was simply a tool in the analysis. Slavish adherence to the matrix methodology was not conclusive and the assessment of whether (1) there would be likely significant environmental effects (the primary purpose of the SEI) and (2) whether there would be harm under the terms of national planning policy required the exercise of professional judgment in each case, as Dr Edis made clear. These were the "two strands" referred to by Dr Edis in his proof of evidence.

27. Consistently with his assessment in the SEI, Dr. Edis concluded in his witness statement that the Chiplow development would have a minor impact on the setting of the fort, whereas the Jack's Lane development would have a moderate impact. Taken together, the two wind farms would have a moderate impact, which would be significant in EIA terms.

Dr Edis's oral evidence

28. Regrettably, there was no recording of Dr Edis' oral evidence and no reliable note. I do not know whether or not the Inspector had a reliable note because the Treasury Solicitor had not investigated the 'mistake of fact' ground, having decided that the reasons were inadequate. Counsel for the First Defendant declined to make any submissions on this ground.

29. Mr Powell, the Third Claimant, said in his witness statement that when Dr Edis was cross-examined by Mr Booth for the Council, he was shown a photomontage identified as viewpoint 11B in the SEI and asked his opinion of the impact of the Chiplow scheme on Bloodgate Hill fort. According to Mr Powell, he "described the impact on the setting as 'noticeable'".

30. Mr Powell went on to describe the cross-examination of Dr Edis by counsel for the Claimants, Mr Ranatunga, in these terms:

> "I understand that Mr Ranatunga reminded him of that oral evidence given just before lunch and confirmed that that was how he described the impact of the Chiplow scheme. It was put to him that he had chosen his words carefully in giving his evidence. It was noted that when that 'noticeable' change was applied to Dr Edis's assessment methodology (and in particular the assessment of magnitude of effect) in his SEI the resulting significance of effect was 'moderate', not 'minor' as he had previously concluded in his written evidence. It is my understanding that Dr Edis conceded the point and accepted what followed from that concession, that such an impact would therefore be significant in EIA terms. In response to these questions, he also volunteered that if his assessment of the impact on the setting of Bloodgate Hillfort had to be revised upwards for the Chiplow proposal, there would be a

> consequential revision upwards of his assessment of the impact on the setting caused by the Jack's Lane proposal."

31. Mr Powell admitted in his witness statement that he did not recall this evidence in detail; it was merely a summary of what he had been told after speaking to his counsel, Mr Ranatunga and Mr Grover, the Claimants' expert witness. Neither Mr Ranatunga nor Mr Grover made witness statements or produced notes.

32. The Claimants rely upon the fact that these changes in Dr Edis' evidence were recorded and relied upon in the Claimants' and the Council's written closing statements which were finalised on 22 February, a week after Dr. Edis gave evidence on 15 February. The Claimants submitted that the effect of Dr Edis' oral evidence was that his written assessment of the impact of (1) Chiplow, (2) Jack's Lane and (3) the cumulative effect of both wind farms, had to be "revised upwards". The Council went further, submitting that, following Dr Edis' revised assessment of the impact of the Chiplow development as "minor", Dr Edis then went on to revise his assessment of the impact of Jack's Lane as "major".

33. Mr Marcus Trinick QC referred to this issue in the course of his closing submissions. There is no record of what he said. Mr Powell, in his witness statement, at paragraph 14 said that Mr Trinick:

> "disagreed with the Council that the effect of Dr Edis's revised assessment was that the impact of the Jack's Lane proposal on the setting must now be 'major'. He acknowledged that Dr Edis had stated that his revised view of the impact of the Chiplow proposal would mean a consequential revision upwards for the impact of the Jack's Lane proposal, but only that this 'upped it a bit'. I believe he thereby implicitly accepted that there had to be a revision upwards, but disagreed with the extent of that uplift."

34. Mr Trinick made a witness statement in response, stating:

> "Mr Powell is broadly correct in recording what I said in closing submissions at paragraph 14 of his witness statement, except that I do not accept the belief which he expresses in the final sentence of paragraph 14 to the effect that I implicitly accepted "that there had to be a revision upwards, but disagreed with the extent of that uplift"…. I noted that the statement contained in … the Council's closing submissions that Dr Edis had "revised his assessment of Jack's Lane to one of 'major' impact … was incorrect. I made it clear that nothing specific could be implied for the impacts of Jack's Lane from the evidence of Dr Edis, noting that RES relied on the evidence of Dr Collcutt, who had not been invited to comment on the cross examination of Dr Edis."

35. Dr Edis made a witness statement for these proceedings in which he accepted that, during the course of cross examination on behalf of the Council, he volunteered "that the Chiplow turbines would be noticeable from the hillfort".

36. Dr Edis said that, when cross-examined by Mr Ranatunga:

> "11. I accepted that the word "noticeable" appeared in Table 2, and it was put to me that if the effect was minor rather than negligible then the impact in Table 3 would be moderate. Contrary to what was later stated in paragraph 17 of the ATAC closing submissions, and paragraph 81 of the Council's closing submissions, I did not then revise or concede my position as has been suggested"

> "13. During the exchanges with Mr Ranatunga I observed that if the Chiplow impacts were to be upgraded, then it would follow that the assessment of the Jack's Lane impacts would also be upgraded. This was a hypothetical application of the mechanical effects of the SEI tables, not a concession that the Chiplow scheme had a moderate impact, or that the Jack's Lane scheme had a major impact. I distinctly recall my answer being predicated with the words "if that were the case…" and I intended my answer to imply that a major impact would clearly be overstating the effect of Jack's Lane."

37. There was no application to cross-examine any of these witnesses on their statements. On the basis of this conflicting and sometimes ambiguous evidence, and in the absence of any reliable contemporaneous record, I am unable to reach any conclusion as to whether Dr Edis revised upwards the assessment of impact he had previously made in his written evidence.

38. The Claimants submitted that Dr. Edis' acceptance that the Chiplow turbines would give rise to a noticeable change by reference to Viewpoint 11b can only have meant that there would be a difference to a key characteristic of Bloodgate Hill fort. When considering the effect on heritage assets it was the impact on the heritage significance of the asset which was in issue, as the Inspector recognised. This photomontage provided a view out west from the fort. The strategic or guarding function of the fort looking out into the landscape was accepted by Dr. Edis in his proof of evidence, and the functional suitability for use for defensive purposes was also acknowledged by the Inspector.

39. The evidence is insufficient to enable me to accept the Claimants' submission. Although Dr Edis accepted that he said that the Chiplow turbines would be "noticeable" from the fort, this is not the same as accepting that the turbines amounted to "a noticeable change amounting to a difference to a key characteristic" within the meaning of the 'minor' category in Table 2. Indeed, Dr Edis expressly addressed this distinction in meaning in his written evidence when he noted that the turbines would be 'visible' from the fort but went on to conclude that that "while the change will be noticeable, it will not be so great as to amount to a difference to a key characteristic". In the SEI, in a section headed "Bloodgate Hill Hillfort – Assessment of Impacts" he said:

> "While there is no doubt that the moving blades of the Chiplow turbines will be <u>visible</u> from the hillfort, they will not be a distraction to visitors and they will not diminish the experience

> of seeing and appreciating the monument. The surroundings of the SAM are capable of absorbing a degree of change without loss of significance, and the setting of the monument will remain so that the significance of the monument will be adequately preserved. While the change will be noticeable, it will not be so great as to amount to a difference to a key characteristic because it will only occupy some 13 degrees of arc, at a considerable distance." (emphasis added)

Even if the Claimants were correct in their recollection that Dr Edis did not make this distinction during his cross-examination, the fact that he made it so clearly in his written evidence indicates to me that the mere use of the word 'noticeable' by him is not a sufficient basis upon which to conclude that he meant 'a noticeable change amounting to a difference to a key characteristic'.

40. Dr Edis' written evidence included other passages confirming in unequivocal terms his assessment of the Chiplow turbines, for example, paragraph 28 of the SEI:

> "The effects of the proposed development on this Iron Age hillfort, at a distance of 4.2 km to 5k from the turbines, are assessed as negligible, and so the impact is assessed as minor, and not significant in EIA terms. There is a very weak impact on the setting of the SAM to be considered under Policy HE10.1 of PPS5 and to be carried forward into the planning balance, but this effect is minor. The turbines are located so far away from the SAM as to be beyond what would normally be described as its setting, and it is questionable whether Policy HE9 of PPS5 applies at all. If it is applied, then the level of harm is certainly minor and falls to be considered within Policy HE9.4, which is similar in wording to the test in HE10.1"

41. Whilst I accept that an expert might well revise his assessment at an Inquiry, particularly after hearing other experts give evidence, the revision for which the Claimants contend would be a very significant change from his written evidence. The evidence before me is insufficient for me to conclude that he made such a significant change to his evidence.

The Inspector's decision

42. The Inspector's conclusions on this part of the evidence are at paragraphs 84 and 85:

> "84. Like the hedges and farm-buildings that can be seen in various views out from the hillfort, and the site's own car park, the windfarm would be one more feature of the modern landscape that it would be necessary to disregard in order to appreciate the heritage significance of the site, a task already made difficult by previous alterations to the site's form and appearance. It is not agreed with the RES expert witness that there would be no harm. It is rather concluded that there would be a moderate but less than substantial adverse effect on the setting of the monument and hence on the significance of the

> heritage asset. In the Heritage Mitigation Measures Unilateral Undertaking submitted by RES in respect of the Jack's Lane proposal, there is an offer to fund off-site signage for the hillfort to encourage more people to visit and experience the asset. That would be of public benefit but it would not directly mitigate the identified harm.
>
> 85. Because of their lower height and greater separation distance, the Chiplow turbines, whilst still noticeable, particularly when in motion, would have a much reduced impact on the hillfort compared to the Jack's Lane turbines and would be less distracting. They too would be seen against the skyline and they would not conceal any significant elements of the present landscape. In conclusion it is agreed with the E.ON expert witness that there would be only a minor adverse effect from the Chiplow turbines on the setting and heritage significance of the SAM either as an individual development or as an additional cumulative effect if constructed in addition to the Jack's Lane turbines."

43. The Claimants submit that the Inspector made a material mistake of fact when he said, in paragraph 85, that the evidence of the E.ON expert witness was that there would only be a 'minor' adverse effect from the Chiplow turbines on the setting and heritage significance of the SAM. The Claimants submit that the Inspector based this statement upon Dr Edis' written evidence and the Inspector had either forgotten or failed to appreciate that Dr Edis, during his oral evidence, had revised his assessment of the impact of the Chiplow turbines upwards.

44. I am unable to accept this submission since I am not satisfied that Dr Edis did revise his assessment in the course of his oral evidence, for the reasons I have given above.

'Mistake of fact' as an error of law

45. In order to succeed in establishing an error of law based upon a mistake of fact, the onus is on the Claimants to show that there has indeed been a mistake in respect of a fact which is 'established', 'uncontentious' and 'objectively verifiable'.

46. In *R v Criminal Injuries Compensation Board ex parte A* [1999] 2 AC 330, the Board made its decision in ignorance of a medical report by a police doctor who reported findings consistent with the claimant's allegations of rape and buggery by a burglar. Lord Slynn said at 344G:

> "Your Lordships have been asked to say that there is jurisdiction to quash the board's decision because that decision was reached on a material error of fact. Reference has been made to *Wade & Forsyth, Administrative Law*, 7th ed. (1994), pp. 316-318 in which it is said:
>
> > 'Mere factual mistake has become a ground of judicial review, described as 'misunderstanding or ignorance of an established and relevant fact,' [*Secretary of State for*

> *Education and Science v. Tameside Metropolitan Borough Council* [1977] A.C. 1014, 1030], or acting 'upon an incorrect basis of fact' . . . This ground of review has long been familiar in French law and it has been adopted by statute in Australia. It is no less needed in this country, since decisions based upon wrong facts are a cause of injustice which the courts should be able to remedy. If a 'wrong factual basis' doctrine should become established, it would apparently be a new branch of the ultra vires doctrine, analogous to finding facts based upon no evidence or acting upon a misapprehension of law.'

De Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th ed. (1995), p. 288:

> 'The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration, or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision on any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention.'

For my part, I would accept that there is jurisdiction to quash on that ground in this case, but I prefer to decide the matter on the alternative basis argued, namely that what happened in these proceedings was a breach of the rules of natural justice and constituted unfairness. It does not seem to me to be necessary to find that anyone was at fault in order to arrive at this result. It is sufficient if objectively there is unfairness."

47. In *R v Secretary of State for the Environment ex p Alconbury* [2003] 2 AC 295, Lord Slynn referred (at [53]) to the jurisdiction to quash for "misunderstanding or ignorance of an established and relevant fact", in the context of a judicial review of the Secretary of State's decision on a called in application or a recovered appeal under the planning legislation.

48. In *E v Secretary of State for the Home Department* [2004] QB 1044, Carnwath LJ reviewed the authorities and concluded at [63] – [66]:

> "63. In our view, the CICB case points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between "ignorance of fact" and "unfairness" as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that "objectively" there was unfairness. On analysis, the "unfairness" arose from the combination of five factors:

i) An erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case);

ii) The fact was "established", in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence;

iii) The claimant could not fairly be held responsible for the error;

iv) Although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result;

v) The mistaken impression played a material part in the reasoning.

64. If that is the correct analysis, then it provides a convincing explanation of the cases where decisions have been set aside on grounds of mistake of fact. Although planning inquiries are also adversarial, the planning authority has a public interest, shared with the Secretary of State through his inspector, in ensuring that development control is carried out on the correct factual basis. Similarly, in *Tameside*, the Council and the Secretary of State, notwithstanding their policy differences, had a shared interest in decisions being made on correct information as to practicalities…

65. The apparent unfairness in CICB was accentuated because the police had in their possession the relevant information and failed to produce it. But, as we read the speeches, "fault" on their part was not essential to the reasoning of the House. What mattered was that, because of their failure, and through no fault of her own, the claimant had not had "a fair crack of the whip". (See *Fairmount Investments v Secretary of State* [1976] 1 WLR 1255 , 1266A, per Lord Russell of Killowen.) If it is said that this is taking "fairness" beyond its traditional role as an aspect of procedural irregularity, it is no further than its use in cases such as *HTV Ltd v Price Commission* [1976] ICR 170 , approved by the House of Lords in R v IRC ex p Preston [1985] AC 835 , 865–6.)

66. In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the

> above analysis of CICB. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

49. In my judgment, the Claimants cannot fulfil the requirements set out in these authorities for establishing an error of law based on mistake of fact, because they have failed to establish that there was a mistake in respect of a fact which was established, uncontentious and objectively verifiable. Although I accept that the requirements in *E* were not intended by Carnwath LJ to be a 'precise code' (at [66]), and that unfairness is the touchstone of the 'mistake of fact' ground, I consider that establishing the existence of a mistake of fact on the evidence is a fundamental requirement which a claimant must meet in order to succeed. The Claimants have failed to do so in this case.

50. Although the point is now academic, I do accept that a decision-maker's failure to correctly record or understand the evidence before it can amount to a material mistake of fact: see *Railtrack plc v Guinness Ltd* [2003] RVR 280, cited in *E* at [38], in which the issue was whether the tribunal had misunderstood the expert evidence given to it. The Court of Appeal accepted that was a proper ground of challenge on an appeal limited to questions of law, but held that it was not made out on the facts.

Inadequate reasons

51. The Claimants submitted that the Inspector was required to address the difference between Dr Edis' written and oral evidence and explain what conclusions he had reached upon this issue.

52. The Inspector was under a statutory duty to give reasons under Rule 19 of the Town and Country Planning Appeals (Determination by Inspectors)(Inquiries Procedures)(England) Rules 2000/1625.

53. The relevant principles in relation to the adequacy of reasons were summarised by Lord Brown in *South Bucks District Council and another v Porter (No 2)* [2004] 1 WLR. 1953:

> "36 The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision

> on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

54. The Inspector, in paragraph 4, identified as one of the 'main issues' the effect of the proposed developments on heritage assets and whether any identified harm was outweighed by the wider economic or environmental benefits of the wind farm developments. Bloodgate Hill fort was one of the main heritage assets under consideration. There was a dispute between the parties, reflected in the evidence of their respective expert witnesses, as to the effect the proposed developments would have on the setting of Bloodgate Hill fort. In my judgment, these were all 'principal important controversial issues' (per Lord Brown in *Porter* at [36]).

55. The Inspector, in paragraphs 79 to 85, set out his findings of fact and his conclusions in relation to the effect of the proposed developments on Bloodgate Hill fort. They were skilfully drafted, synthesising a large amount of material in a concise yet clear way. The Inspector did not identify which factual matters were in dispute and why. He made minimal reference to the evidence of the experts. He clearly set out his conclusions on the issues which the experts addressed, but he did not explain why he rejected the evidence of one expert or preferred another.

56. I found it significant that all counsel, including counsel for the Claimants, submitted that the Inspector's general approach (leaving aside the specific criticism in relation to Dr Edis' evidence) was in accordance with accepted practice and did not demonstrate inadequate reasoning.

57. Generally, decision makers are required to explain, at least in summary form, why they prefer the evidence of one expert over another. The authorities were helpfully summarised by Beatson J. in *RWE Npower Renwables Ltd v The Welsh Ministers* [2011] EWHC 1778 (Admin), at [37(6)].

> "Where the decision-maker has to choose between competing expert opinions, as opposed to competing accounts of primary fact, there will generally be a greater need for particularity. In the context of civil litigation Bingham LJ stated in *Eckersley v Binney* (1988) 18 Con LR 1 at 77 – 78 that "a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reasons…", and Henry LJ in *Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373

> that "where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other". The reasoning in Flannery's case was deployed in a planning context in *Dunster Properties v FSS* [2007] EWCA Civ 236. That case was concerned with the position where an Inspector dealing with a site departs from the views of another Inspector who previously dealt with the same site. Lloyd LJ stated (at [21]) that "although not much by way of reasons may have been called for" on the part of the second Inspector, "it was not sufficient for him, having expressed the exact opposite view from [the first Inspector] on the question of principle, to decline to comment on the inconsistency". Referring to Flannery's case and Save Britain's Heritage v No. 1 Poultry Ltd , he stated (at [22]) that if the reader cannot tell why the second Inspector disagreed with the first Inspector "the salutary safeguard has not performed its intended function". "

58. However, the balance of the authorities suggest that Inspectors are not required to give reasons for accepting or rejecting expert evidence. Although Beatson J quashed the Inspector's decision on the basis that his reasons did not enable the reader to understand why he had rejected the evidence of the experts, the Court of Appeal reversed Beatson J. at [2012] EWCA Civ 311. Pill LJ said, at [22] – [28], that the reasoning of the Inspector "was sufficient and elaboration was not required". The unsuccessful parties were well aware of the issues and the relevant evidence and they knew that the reason why they had lost was that the Inspector "found that, in his planning judgment, the harmful effect of the precise locations of turbines … on the peat bog habitat was significant". It was not suggested that this conclusion was irrational, on the evidence, and "the care with which he approached the issues and … the coherence of his general reasoning, can leave no doubt that his mind was concentrated on the issues before him".

59. The Court of Appeal took a similar approach in *Tegni Cymru Cyf v The Welsh Ministers* [2010] EWCA Civ 1635 when it overturned the decision of Wyn Williams J., [2010] EWHC 1106 (Admin), who found that the Inspector had given no or insufficient explanation of how the evidence from local residents might be sufficiently compelling to displace the case presented by the developer, given the compliance with the relevant standards on noise and the fact that the existing wind farm operated within its noise provision. Pitchford LJ concluded that the lack of detail did not affect the cogency or lawfulness of the decision and stated (at [27]) that "read as a whole the relevant paragraphs reveal an acceptable line of reasoning towards the Inspector's conclusion" and that "none of the parties could really be in any doubt what was the basis for his planning judgment".

60. I was informed by counsel that the rationale for the generous approach taken to Inspectors' reasons is that the Inspector has a unique role, in which he exercises his own planning judgment on site, and he is not confined to evaluating the evidence placed before him, like a judge. In *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74 Sullivan J. explained at [7] – [8]:

> "…..the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport? et cetera. Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable.
>
> Moreover, the Inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received on the site inspection."

61. In *Kentucky Fried Chicken (GB) Ltd v Secretary of State for the Environment and Anor* [1978] 1 EGLR 139, Lord Widgery CJ said:

> "the Inspector (who is a man of experience, and above all, specialised qualifications, who is sent to assess a problem of this kind) is supposed to use his own knowledge and, if I may say so, commonsense as well … he is not bound to accept the evidence of experts. It is exactly the same situation that justices and juries find themselves in when experts of great distinction go into the witness box before them. The inspector is no more bound to accept the evidence of the experts than are they."

62. Although some might argue that the duty to give reasons has evolved in recent times (as described by Beatson J. in the extract from *RWE NPower* quoted above), the general principle that an Inspector is not obliged to give reasons for accepting or rejecting the evidence of expert witnesses is not under challenge in this claim, and so I accept and apply it. In my judgment, the consequence is that an unsuccessful party will usually not know, in any detail, why the evidence of an expert has been accepted or rejected by the Inspector and therefore will not be able to discern whether the Inspector has correctly understood and applied the evidence of the expert. Lord Brown in *Porter*, at [36], established a high threshold for challenging reasons on the ground that it was not possible to detect whether the inspector had made an error of law:

> "The reasoning must not give rise to <u>a substantial doubt</u> as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. <u>But such adverse inference will not readily be drawn</u>." (emphasis added)

63. Applying these legal principles to the facts of this case, my conclusions are as follows.

64. The Inspector's reasoning made it clear to the Claimants why they had lost on the principal important controversial issues which were (1) the extent of the adverse

effect of the proposed developments on the setting and heritage significance of Bloodgate Hill fort, when considered individually and cumulatively, and (2) whether the identified harm was outweighed by the wider economic or environmental benefits of the wind farm developments.

65. In particular, it is clear from the Inspector's reasons why he concluded, on the evidence, that the Chiplow turbines would only have a 'minor adverse effect' on the setting and heritage significance of the fort. This was an exercise of the Inspector's planning judgment, which he reached independently, having had regard to all the evidence.

66. The evidence of Dr Edis, and whether or not there was a change between the oral and the written evidence, was not a 'principal important controversial issue' or a 'main issue'. It was merely part of the evidence relating to 'a principal important controversial issue' or 'main issue'.

67. The authorities indicate that the Inspector was not required to summarise the evidence of the experts in his decision, nor the submissions of the parties' legal representatives. It follows that he was not required to record that the Claimants and the Council contended that Dr Edis had, under cross-examination, departed from the conclusions on impact contained in his written evidence. Nor was he required to record what Dr Edis said in his written evidence or his oral evidence.

68. In paragraph 85 of the decision the Inspector set out his findings in relation to the Chiplow turbines, and concluded that there was only a minor adverse effect on the setting and heritage significance of the fort. On the authorities I have cited, this was sufficient to discharge his duty. Indeed, if he had not referred to Dr Edis at this stage, the Claimants would not have had any basis for bringing their challenge to this court. The Inspector added that he was in agreement with Dr Edis on this issue. In my judgment, his reference to Dr Edis did not trigger any additional legal requirement to record or analyse Dr Edis' evidence. He was not then required to indicate the detailed reasons why he accepted Dr Edis' expert evidence on this issue. Nor was he required to state which parts of Dr Edis' evidence he accepted and why. Thus, he was not required to state whether he accepted the matrix analysis in the SEI, on which the cross-examination had focussed, or whether he had relied on the other parts of Dr Edis' evidence. Nor was he required to state his conclusions on the submissions that, during cross-examination, Dr Edis had revised his assessment upwards from the position set out in his written evidence.

69. The Claimants submitted that the Inspector's failure to explain his conclusions about Dr Edis' evidence under cross-examination made it impossible for them discern whether or not the Inspector had made a mistake of fact, either forgetting the oral evidence of Dr Edis or misunderstanding it.

70. Applying Lord Brown's test in *Porter*, the Inspector's decision does not leave me with 'a substantial doubt' as to whether he made a mistake of fact in respect of Dr Edis' evidence. My reading of the reasons is that the Inspector agreed with the conclusions in Dr Edis' written evidence. It is therefore reasonable to draw the inference that he did not accept that Dr Edis had resiled from the conclusions in his written evidence, when he was cross-examined by the Claimants' counsel. In this context, it is significant that the Inspector finds that the Chiplow turbines would be

'noticeable' but goes on to conclude that there would only be a minor adverse effect, which is the position adopted by Dr Edis and challenged by the Claimants.

71. I am unable to conclude that the Inspector simply forgot about the cross-examination when he wrote the decision some months after the hearing. First, because the Inspector would have been reminded of the issue about Dr Edis' oral evidence by the written closing submissions from the Claimants and the Council. Second, because it would have been very careless on the part of the Inspector to forget Dr Edis' oral evidence. The decision when read as a whole, is detailed, careful and thorough, and therefore I consider that the court should be slow to draw the inference that the Inspector made a very careless mistake.

72. The First Defendant conceded that the reasons were inadequate, and that the decision should be quashed, but was reluctant to make any submissions to the court as to the reasons why. When pressed, counsel said that the First Defendant simply relied upon the grounds presented by the Claimants, without more. The First Defendant did not provide the court with any information about the Inspector's comments on the Claimants' claim, if indeed there were any such comments. Therefore I do not consider it is safe to assume that the Inspector conceded that he had made an error.

73. I have given considerable weight to the First Defendant's decision to concede the claim, but ultimately I have come to the conclusion that the concession was wrongly made. Of course, I have had the benefit of much more detailed argument than the First Defendant and his legal advisers.

74. I have found the guidance given in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P&CR 263 by Sir Thomas Bingham MR of assistance in this case, when he said at 271-2:

> "I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

75. In my judgment, on a straightforward reading of the decision letter, there is no genuine doubt as to what the Inspector decided and why, and therefore the reasons challenge must fail.

76. The Claimants' claim is dismissed.