4

2007 No. 27789/01

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW))**

**IN THE MATTER OF AN APPLICATION BY KINNEGAR RESIDENTS ACTION GROUP, PARK ROAD AND DISTRICT RESIDENTS ASSOCIATION, OLD STRANMILLIS RESIDENTS ASSOCIATION, BELFAST HOLYLAND REGENERATION ASSOCIATION AND CULTRA RESIDENTS ASSOCIATION FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A RECOMMENDATION AND REPORT BY W H WALKER CBE C Eng FI Struct E (Chairman), C SWAIN OBE MA(Cantab) MPhil FRTPI and S McDOWELL CBE AS MEMBERS OF THE EXAMINATION IN PUBLIC PANEL (EiP PANEL) IN RESPECT OF ISSUES RELATING TO THE BELFAST CITY AIRPORT PLANNING AGREEMENT 1997**

**AND IN THE MATTER OF A DECISION BY THE DEPARTMENT OF THE ENVIRONMENT PLANNING SERVICE ON THE 30TH JUNE, 2003 PURSUANT TO ARTICLE 41 OF THE PLANNING (NORTHERN IRELAND) ORDER 1991**

**SKELETON ARGUMENT ON BEHALF OF THE APPLICANTS**

The Applicants seek the following relief a set out in the Amended Order 53 Statement:

(i) An Order of Certiorari quashing the recommendation made at paragraphs 5.6.37 and 7.1.11 of the EiP Panel Report that seats for sale from BCA should be increased from 1.5 million per annum to 2.0 million per annum.

(ii) An Order of Certiorari quashing the determination issued to BCA by the Department of Environment/Planning Service on or about 30th June 2003 pursuant to Article 41 of the Planning (Northern Ireland) Order 1991.

(iii) A Declaration that the recommendation of the EiP Panel at paragraphs 5.6.37 and 7.1.11 of the Report is based on an assumption outlined at paragraph 5.6.31 which is both factually and legally incorrect.

(iv) A Declaration that an increase in the seats for sale at Belfast City Airport from 1.5 million to 2 million, as recommended by the EiP report would constitute "development" as defined in Article 11 of the Planning (Northern Ireland) Order 1991.

(v) A Declaration that the Department of Environment erred in law in convening an Examination in Public to consider amendments to the

1997 Planning Agreement when the proper action was a formal planning application and a new Environmental Impact Statement and/or a public inquiry pursuant to Article 31 of the Planning (Northern Ireland) Order 1991.

(vi) An Order of Mandamus requiring the EiP Panel to reconsider the recommendations made in relation to increased seats for sale.

(vii) An Order of Prohibition preventing the Department of Environment from acting in reliance upon the recommendation contained at paragraphs 5.6.37 and 7.1.11 of the present EiP Report that the number of seats for sale from BCA be increased from 1.5 million to 2 million.

(1) At the heart of the applicants' concern in this case is the fact that the very public body which has a statutory responsibility to enforce the 1997 Planning Agreement and consequently protect the interests of the public and, in particular, residents living along the flight path into Belfast City Airport ("BCA") is also the public body responsible for issuing a Determination which fundamentally undermined the 1997 Planning Agreement.

(2) The Determination has been described as a "hypothetical proposal"[1] but set against the context in which planning permission for a new terminal was granted on the 21st December 1999 when it was quite clearly a material issue[2], the significance of the decision becomes readily apparent. In particular, the applicants highlight the following factual matrix:-

(i) The Planning Service were the guardians of the public interest charged with enforcing the terms of the 1997 Planning Agreement which contained the covenant regarding seats for sale.

(ii) The public was not aware until the Examination in Public ("EiP") in June 2006 that any Determination had been made. This was despite representations and correspondence from the Planning Service that residents would be kept informed of any approach to change or relax current planning constraints at BCA[3];

(iii) The Minister, Lord Rooker, who initiated the EiP was not aware at the time of the announcement of the EiP that any Article 41 Determination had been made[4];

(iv) Far from being hypothetical, the authorities suggest that the effect of such a Determination is equivalent to the granting of planning permission[5];

---

[1] See para 25 of the respondent's skeleton argument dated 26th March 2007

[2] See para 6 of the applicants' initial skeleton argument

[3] See, in particular, para 19 of initial skeleton argument

[4] See paras 22 and 23 of initial skeleton argument and see also letter of the 1st November 2006 from C H Baird of the Planning Service to Roger Watts at page 159 of the Bundle

[5] See J A Dowling *Northern Ireland Planning Law* at page 79. See also Wells v Minister of Housing & Local Government [1967] 2 AER 1041; English Speaking Union of the Commonwealth v Westminster CC [1973] 26 P&CR 575; R v Tunbridge Wells BC ex parte Blue Boys Development Limited [1990] P&CR 315

(v) The application in March 2003 by BCA for a Determination came at a time when BCA were aware that they were likely to breach the seats for sale requirement which was and remains 1.5million seats for sale per annum;

(vi) The whole background operations at BCA had in any event fundamentally altered in 2001 with the announcement by British Midland Airways that they were to move the important Belfast to Heathrow route from Belfast International Airport to BCA. This introduced much larger planes on a more frequent basis and brought into focus, in particular, the seats for sale requirement;

(vii) The application for planning permission in 1999 had been predicated on the basis of the 1997 Planning Agreement and on the undertaking by BCA that they would abide by the terms of that agreement[6];

(viii) The Environmental Statement ("ES") carried out at the time of the application for a new terminal in 1999 was based on the premise that it would be no more than 1.5m seats for sale. The addition of a further 1m + passengers per annum would inevitably have had a profound effect on the ES that would have been carried out;

(ix) The determination was made at or about the time of the sale of the airport when the issue of a potential public inquiry would have been at its most sensitive.

(3) Consequently from a position where BCA were about to breach the seats for sale requirement, (having already improved the capacity of the new terminal) caused largely as a result of the transfer of flights to London Heathrow by British Midland from Belfast International Airport, BCA had the reassurance from the very people tasked to safeguard the interests of the public that a further 1m seats for sale per annum would not trigger a planning application with all of its implications. BCA could then proceed to suggest a revision of the Planning Agreement comfortable in the knowledge that nothing as potentially awkward or difficult as a planning application would surface in the interim or cloud that issue.

(4) To compound their good fortune, BCA seem to have been able to persuade the EiP Panel that:-

(i) The Article 41 Determination in June 2003 was not relevant to the terms of reference of the EiP;

(ii) Even if it had been relevant, it was the case that the 1997 Planning Agreement could have been renegotiated in 1999 in a manner which would have allowed for a substantial increase in the seats for sale[7].

(5) In the absence of any legal challenge it would be a simple and straightforward step for the relevant Minister to accept the recommendations of the EiP Panel and to move to a situation where the 1997 Planning Agreement is fundamentally changed without the need for any public inquiry

[6] See para 6 of the initial skeleton argument and see also letter of the 7th September 1999 from John Doran of BCA to J W O Morrison of the Planning Department (page 167 of the Bundle)

[7] See para 5.6.31 of the EiP Panel Report

or planning application. BCA would, therefore, be able to accommodate British Midland (and now even Ryanair) at their airport which just so happens to have sufficient capacity and the effective imprimatur of government.

(6) It is the submission of the applicants that the Article 41 Determination and the subsequent recommendation that the seats for sale covenant should be increased are inextricably linked for the purposes of this application.

(7) It is submitted at paragraph 27 of the respondent's initial skeleton argument that the Panel's report contains a judgement which the Panel was perfectly entitled to make and that this Court should refer appropriately to the function and expertise of the Panel. It is then further submitted that this judgement is in no way undermined by the contents of Mr Morrison's internal memorandum. This cannot, it is submitted, be correct if the Panel did not consider the salient documentation including *inter alia*:-

(i) The memorandum dated 15th June 1999;
(ii) Mr Doran's letter of the 7th September 1999;
(iii) The Environmental Statement which accompanied the planning application by Belfast City Airport actually states at paragraph 4.37:

> *"The proposed development will operate within the terms of the planning agreement."*

(8) If all of the relevant evidence had been available to and been considered by the Panel then it would have been extremely difficult without being irrational (in the legal sense) to come to the conclusion, as the Panel did, that had an increase in seats for sale been requested in 1999, it would have been capable of being re-negotiated through a revised Planning Agreement at the time of the 1999 planning application.

(9) At paragraph 29 of the respondent's initial skeleton argument it is suggested that the existence or absence of any BCA assurance about compliance with the 1997 Planning Agreement is immaterial and has the status of a "legal irrelevancy". Thus, it is posited that BCA were obliged to abide by the terms of the 1997 Planning Agreement irrespective of any assurances given in 1999. Such a proposition completely ignores the actual facts that pertain at the time of the making of the planning application. BCA were proposing to construct a terminal with a capacity greatly in excess of the existing seats for sale requirement. The attitude of the planning authorities towards the planning application appears to have been materially influenced by the assurance that was both sought and given by BCA regarding its approach to the 1997 Planning Agreement. If it had been otherwise, then given the increase in capacity there would have been the need for a public inquiry and an EIS which dealt with the consequences of the actual capacity of the proposed terminal as opposed to the limits contained in the seats for sale requirement of the 1997 Planning Agreement.

(10) The seats for sale covenant has been characterised as "*an odd restriction*"[8] and clearly it is unpopular with BCA. The applicants will submit however that in the absence of a seats for sale covenant the ability of the Planning Service to restrict airport growth is radically curtailed. Whilst the 1997 Planning Agreement introduced an increased Air Traffic Movement covenant of 45,000 ATM's, this gives, in the absence of the seats for sale covenant, the potential to use larger aircraft and place BCA alongside Belfast International in terms of passenger numbers. The Airport has travelled a long way since the publication of the Department's Adoption Statement in 1991 when it was stated that the Department will seek to maintain the Airport's present role and character as a regional airport serving other regional centres in the United Kingdom with short haul aircraft[9] With the introduction in 2001 of British Midland flights to Heathrow and more recently Ryanair to Stansted, BCA is well on the way to becoming a second Aldergrove. For a city the size of Belfast this is all the more remarkable.

**Was the Determination pursuant to Article 41 by the DOE in June 2003 wrong in law?**

**Procedural Challenge**

(11) There seems little doubt that at some point prior to the Article 41 determination issued in June 2003, officials in the Planning Service changed their mind that an increase in the seats for sale limit did not constitute 'development' under the Planning Order[10]. Whether this was the result of legal advice, government interference[11] or some other reason we do not know.

(12) The Respondents argue that the Article 41 Determination was a hypothetical question and emphasised that the provisions of the planning agreement remained extant. The highlighting of the existing agreement rings rather hollow, having regard to the fact that in the last 3 years BCA have been in breach of the seats for sale covenant and no enforcement action has been taken by the guardian of the public interest Such inactivity has clearly encouraged BCA who felt happy to announce, in July 2007, with great fanfare, the arrival of Ryanair, with a significant increase in the seats being offered for sale[12].

(13) It is most unfortunate that there is no record or minute of the meetings that took place between senior planning officials at the time that the determination was made. The absence of such documentation makes it impossible to analyse how the decision was reached. Nevertheless, Planning Service had undertaken in November 2002 to keep Messrs Johnsons (acting on behalf of the Cultra Residents) informed[13] and further stated in a letter to

[8] See paragraph 5 of the affidavit of Brian Ambrose of the 23rd August 2007
[9] Adoption Statement 1991
[10] See pp169 and 166 and 332
[11] The files reveal that the Secretary of State expressed a strong view that planning
[12] See fifth affidavit of Herbie McCracken
[13] See letter from J E McConnell to Johnsons and to Roger Watts 226,235

Roger Watts in May 2003 *that no formal approach had been made seeking to change operations at the airport.* Having undertaken to keep various residents groups informed about an approach to relax planning constraints the said groups had a legitimate expectation that they would be kept so informed[14].

(14) The Article 41 process is not untrammelled by the rules of fairness. Were the Planning Service of a significant public interest in the subject matter of the application fairness requires that those interested parties have a right to know and respond to the application. The fact that they, or indeed the Minister making the decision about whether or not to hold a public inquiry, were kept in the dark about such a significant development gave to BCA all the space needed to increase operations at the airport.

(15) Context in this case is vital. Public interest in airport development was acute. The airport having been granted planning permission in 1999 for a much larger terminal there was understandable public concern that the new terminal would be the precursor to the airport losing its regional character. The arrival of British Midland in 2001 compounded those concerns. Correspondence with the residents groups and the Planning Service was extensive. We know now that at the time of the making of the Planning Application the airports undertaking to abide by the terms of the 1997 Planning Agreement was crucial. The Article 41 application and subsequent determination was highly sensitive. The consequences of the decision were *de facto* very significant. Given that there must at the very least have been a doubt[15] as to whether an increase in seats for sale was 'development' in terms of the provisions of the Planning Order, it seems bizarre that the Department would have been willing to make such a determination without giving those most affected the chance to know and respond to a determination that affected their interests. In this respect the applicants submit that the determination was procedurally unfair.

(16) The importance of environmental issues and public participation in the decision-making process was highlighted in the recent case of ***The Queen on the Application of Greenpeace Limited v Secretary of State for Trade & Industry [2007] EWHC 311 (Admin)*** Mr Justice Sullivan stated:-

> 49. Whatever the position may be in other policy areas, in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive. The United Kingdom Government is a signatory to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention"). The Preamble records the parties to the Convention:

[14] R v North & East Devon Health Authority, ex parte Coghlin (Secretary of State for Health & Another intervening) [2000] 3 AER 850. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so." (see per Laws LJ at paragraph 68 of R (Nadarajah and Abdi) v Secretary of State for the Home Department [2005] EWCA Civ 1363)

"Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,
Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,
Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,
Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns
Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment, ..."

50. Article 7 deals with "Public Participation concerning Plans, Programmes and Policies relating to the Environment". The final sentence says:
"To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment."

51. Given the importance of the decision under challenge — whether new nuclear build should now be supported — it is difficult to see how a promise of anything less than "the fullest public consultation" would have been consistent with the Government's obligations under the Aarhus Convention. Mr Drabble's submission that the decision in the Energy Review "that nuclear has a role to play in the future UK generating mix" was not a statutory decision, did not itself permit any new nuclear power station to be built and was but a step in the process of the formulation of Government policy, which was continuing, is true as far as it goes, but it ignores the fact that the decision is the critical stage in the formulation of Government policy in respect of new nuclear build. To use the defendant's own words: it opens the door, which had been left ajar in 2003. Absent the decision, and the consequential proposals for implementing it, as described in Annex A to the Energy Review, the question whether new nuclear power should have any role to play in the future UK generating mix would be addressed as a material consideration at any future planning inquiry into a proposal for a new nuclear power station (as was the case at the inquiry into the proposal to construct Sizewell B).

**Substantive Challenge**

(17) Telling & Duxbury's *Planning Law and Procedure* 13th Ed at page 126 states:-

> *"It is now well established that a material change in the use of a building or other land can occur through intensification of the existing use. The question is whether the existing use has been intensified to such a degree that it has become materially different from what it was before ..."*
>
> *"Intensification may also occur through an increase in the amount of activity ..."*
>
> *"It must often be very difficult to decide at what point an intensification of use results in a material change of use, but this difficulty does not affect the general principle of law. It is worth emphasising that it is not sufficient to say that the existing use has been intensified; the vital question is the degree of intensification."*

(18) The case law that is referred to deals with matters which, it is submitted, fall far short of the kind of issue that would arise when an airport increases its operations to such a significant extent. Examples of the kind of issues that the Court has considered are set out below:-

(i) In ***Guildford RDC v Penny [1959] 2 QB 112, [1959] 2 AER 111*** the Court of Appeal in England had to decide whether an increase of caravans from 8 to 27 constituted development. It was held in that case that such an increase did not in the Court's view constitute such development. Lord Evershed MR, however, stated:-

> *"It is also, as it seems to me, obvious that increasing intensity of use or occupation may involve a substantial increase in the burden of the services which a local authority has to supply and that in truth might, in some cases at least, be material in considering whether the use of the land has been materially changed."*

(ii) ***Birmingham Corpn v Minister of Housing and Local Government and Habib Ullah [1964] 1 QB 178, [1963] 3 AER 668*** (see para 12 of the initial skeleton argument);

(iii) ***Peake v Secretary of State for Wales [1971] 22 P&CR 889*** (see para 13 of the initial skeleton argument);

(iv) In ***Williams v Ministry of Housing & Local Government [1967] 18 P&CR 514*** the owner of a nursery garden had used a timber building on the land for the sale of produce grown in the nursery garden; he then began selling imported fruit as well. The Divisional Court upheld an enforcement notice. Widgery J stated:-

> *"There is clearly, from a planning point of view, a significant difference in character between a use which involves selling the produce of the land itself, and a use which involves importing goods from elsewhere for sale. All sorts of planning considerations may arise which render one activity appropriate in a neighbourhood and the other activity quite undesirable."*

(v) In ***James v Secretary of State for Wales [1966] 1 WLR 135*** the Court of Appeal recognised that an intensification of an existing use could be a material change of use. In that instance the planning permission in place was for 1 caravan and the increase had been to 4 caravans. Lord Denning MR stated:-

> *"I do not agree that intensification of an existing use is not a material change of use. A considerable increase in the number of caravans would be a material change of use*[16]*"*

(vi) In ***Esdell Caravan Parks Limited v Hemel Hempstead RDC [1966] 1 QB 895***, in dealing with the question of intensification, Lord Denning MR stated:-

[16] At page 142b-d

> *"I doubt very much whether the occupier could increase from 24 to 78 without permission. An increase in intensity of that order may well amount to a material change of use – see the recent case of James v Secretary of State for Wales".*

(vii) Note is also taken of the comments by Donaldson LJ in ***Kensington & Chelsea RBC v Secretary of State for the Environment [1981] JPL 50*** where he emphasised the importance of a material change of use and the importance of planners formulating what was the use 'after intensification' and what was the use 'before intensification';

(viii) In ***Lilo Blum v Secretary of State for the Environment [1987] JPL 278*** Simon Brown J stated:-

> *"It is well recognised in law that the issue whether or not there had been a material change of use fell to be considered by reference to the character of the use of the land. It is equally well recognised that intensification was capable of such a nature and degree as itself to affect the character of the land and its use and thus give rise to a material change of use. Mere intensification if it fell short of changing the character of use would not constitute a material change."*

(19) Victor Moore in *A Practical Approach to Planning Law* 9th Ed at para 7.106 states:-

> *"The intensification of a use, therefore, may act as a catalyst of a material change but for that to take place there must be a change in the character of the use."*

(20) Most of the case law deals with minor changes of user or increasing the number of, for instance, caravans on a particular site. The relevant legal principles are, it is submitted, clear and the applicants submit that the addition of a further million seats per annum to a small regional airport (i.e. a 66% increase) would materially alter the nature of the use and increase substantially the burden of services at the airport and it is hard to conceive of the circumstances which would have permitted any decision-maker to hold otherwise. This is particularly the case at Belfast City Airport for the following reasons:-

(i) There is enormous public interest in respect of the development of the airport;

(ii) Planning permission in 1999 had only been granted on the basis that BCA would abide by the terms of the 1997 Planning Agreement. This undertaking had effectively prevented the holding of a Public Inquiry into the construction of a new terminal and to now characterise the undertaking as merely an intention at that stage is essentially to rewrite history confident in the knowledge that all that was sought was achieved and all that was conceded can be resiled from whenever expedient;

(iii) The Environmental Statement which accompanied the 1999 Planning Application was based on the scenario of 1.5m seats for

sale per annum. There has never been an Environmental Statement which deals with an increase to 2.5m. If the burden of services at the airport is something which should be uppermost in the mind of a planner when considering whether or not there has been intensification, how could one ever make the decision without an updated Environmental Statement?

(iv) As pointed out by Dowling in *Northern Ireland Planning Law* at page 79, where the Department determines pursuant to its powers under Article 41 that proposed operations does not amount to development or that planning permission is not required, such a determination is equivalent to the granting of planning permission.

(21) Thus it can be seen that without any updated Environmental Statement, Public Inquiry or even public knowledge, BCA at or about the time of the sale of the airport had what was in effect the equivalent of a planning permission to pursue aggressive growth and development at the airport. This has been, in fact, granted by the statutory body charged with the responsibility of protecting the public interest. The subsequent EiP initiated by the decision of a Minister who had no knowledge of the Article 41 Determination could safely proceed without the prospect of embarrassing cross-examination of Department and BCA witnesses and in the absence of crucial documentation which set the whole chronology of events in proper context. It is not remotely surprising, therefore, that the EiP Panel felt themselves able to make the assumption that an increase in seats for sale at the time of the planning application would have been capable of being negotiated.

**Is the EiP Recommendation justiciable by way of judicial review?**

(22) The applicants challenge the Article 41 Determination on both procedural and substantive grounds.

(23) The respondent's initial skeleton argument criticises trenchantly the applicants' challenge to what they refer to as a "mere recommendation". At paragraph 7 of the respondent's skeleton argument it is stated that the applicants have elected to bring proceedings at a stage of an uncompleted process. Mr McCloskey QC states:-

> *"The process in question has statutory authority and at present has no outcome. Its outcome will, of course, have legal effect and consequences. However, until that stage is reached a challenge of this kind is manifestly premature."*

(24) Paragraph 8 of the respondent's initial skeleton argument makes the point that the recommendations of the Panel have no legal effect or consequences. They are not binding as they are not binding on the Department or anyone else and their status is that of a consideration which the Department may take into account in its role as the final decision-making authority. Reference is also made at paragraph 35 of the initial skeleton to the case of ***Regina v***

***Independent Television Commission, ex parte TSW Broadcasting Limited [1996] JR 185***

(25) Paragraphs 25-31 of the applicants' initial skeleton argument deal with the justiciability of a recommendation. Reference was made to the case of ***Regina (Burkett) v Hammersmith & Fulham London Borough Council & Anor [2002] 1 WLR 1593*** where the House of Lords considered the procedural point as to when time runs for the purposes of a judicial review application. In the ***Burkett*** case proceedings had been brought within 3 months of the date when planning permission in respect of the development of a 32 acre site was granted and not from the date of the resolution of a local planning authority. Their Lordships accepted, however, that for substantive judicial review purposes a decision challenged does not have to be absolutely final. Lord Steyn stated:-

> *"In a context where there is a statutory procedure involving preliminary decisions leading to a final decision affecting legal rights, judicial review may lie against a preliminary decision not affecting legal rights. Town planning provides a classic case of this flexibility. Thus it is in principle possible to apply for judicial review in respect of a resolution to grant outline permission and for prohibition even in advance of it: see generally Wade & Forsyth, Administrative Law, p 600; Craig, Administrative Law, pp 724-725; Fordham, Judicial Review Handbook, 3rd ed 92001), para 4.8.2. It is clear therefore that if Mrs Burkett had acted in time, she could have challenged the resolution."*

(26) The ***Burkett*** case was cited by Mr Justice Richards in ***R (The Garden & Leisure Group Ltd) v North Somerset Council [2003] EWHC 1605***. The relevant passage has been cited at paragraph 28 of the initial skeleton argument. Richards J stated that whether a useful purpose is served by a challenge to the decision depends on consideration of the substantive case advanced by the claimant.

(27) The Applicants seek to challenge *inter alia* the "recommendation" made by the EIP. The Respondent says that a "mere recommendation" is not justiciable by way of judicial review. Reliance is placed on a key passage at page 611 of Wade & Forsyth.

(28) The context of this passage is critically important. It appears in a section of the text dealing with the limitations on the remedy of certiorari and prohibition. Read in context it is clear that Wade is stating the relatively uncontroversial proposition that the remedy of quashing an inchoate act or "mere recommendation" does not lie.

(29) However, the Respondent tries to make the altogether more elaborate case that **judicial review** does not lie against a mere recommendation. This is a flawed proposition. Per section 18 of the Judicature (NI) Act 1978 judicial review is not *in itself* a remedy. To speak of the non-availability of judicial review, strictly, is meaningless. The true question is whether any of the five remedies available under section 18 are available in a particular case.

(30) The Applicants in this case challenge the legality of the recommendation. The Court's attention is drawn to the fact that the Applicant's seek relief by

way of certiorari, mandamus and declaration of the EIP recommendation. There is no bar whatsoever in principle in seeking declaratory relief of a recommendation (why would there be?) The objection to certiorari of a recommendation is one based on practicality not principle (something that has not crystallised cannot be rendered a legal nullity). There can be no practical objection to seeking declaratory relief (or by extension *mandamus)* of a recommendation.

(31) Indeed, the administrative courts in England and Wales have done precisely this in ***Medway***[17]***, Wandsworth***[18] **and** ***Greenpeace***[19] where declaratory relief was granted against policy recommendations. The Respondent's obvious error in relation to the justiciability point is to conflate a limit on the remedy of *certiorari* with a limit on the availability of all the judicial review remedies pursuant to section 18 of the Judicature (NI) Act 1978. There is absolutely no reason why the Court cannot examine the legality of the recommendation with a view to granting declaratory relief, an order of mandamus. Indeed, in certain cases where a recommendation carries legal effect, it too, is potentially amenable to an order of certiorari.

**Brett Lockhart QC**
**Dr Tony McGleenan BL**
**6th September 2007**

[17] (1) Medway Council & Kent County Council (2) Essex County Council (3) Norman Mead & David Fossett v Secretary of State for Transport [2002] EWHC 2516 Admin
[18] R (on the application of Wandsworth London Borough Council and others) v Secretary of State for Transport; R (on the application of Essex County Council and others) v Secretary of State for Transport [2005] EWHC 20 (Admin), [2006] 1 EGLR 91
[19] Supra