Landmark Chambers

UKELA Annual Conference – 28 June 2019

ENVIRONMENTAL CASE LAW UPDATE

Matthew Fraser

Landmark Chambers

Introduction

1. This paper considers some key environmental law cases which have arisen over the past 12 months or so. It is confined to recent cases dealing with:

   (1) Air Quality;

   (2) Protection of habitats;

   (3) Climate Change.

Air Quality

ClientEarth

2. Air quality continues to be a headline issue in environmental law. The past few years in this field have been dominated by the ***ClientEarth*** litigation, which led to the Government's first Air Quality Plan ("**AQP**") being quashed in 2015[1], the second AQP being quashed in 2016[2], and the third AQP, in early 2018, being remitted back to the Government to cure a failure to contain sufficient measures to ensure compliance with the Air Quality Directive and Regulations in 45 local authority areas[3].

3. The third AQP had proceeded on the basis that local air quality plans were only required in areas where nitrogen dioxide levels were projected to exceed limits beyond 2021,

[1] *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs (No 1)* [2015] 4 All ER 724
[2] *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2017] PTSR 203
[3] *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs (No 3)* [2018] EWHC 315 (Admin)

Landmark Chambers
Registered office:
180 Fleet Street, London
EC4A 2HG | DX: 1042 (LDE)
London
+44 (0) 20 7430 1221
Birmingham
+44 (0) 121 752 0800
Contact
clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk
@Landmark_LC

and thus 45 local authority areas were excluded from the obligation. The High Court ordered the Government to amend the third AQP to address those 45 areas, because the Directive's obligation was zone-specific and each zone plan had to aim for compliance by the soonest date possible. Following the carrying out of local feasibility studies to identify measures to bring forward compliance with limits, the Government's supplemented third AQP was published on 5 October 2018. That plan has not been challenged in court, but ClientEarth is carefully monitoring the progress of local authorities.

4. Some elements of the third AQP have already been introduced, most notably the Ultra-Low Emissions Zone ("**ULEZ**") and the T-Charge in Central London, and others are planned, including an extension of ULEZ to all of Inner London, new standards for heavy vehicles across London from October 2020, bus replacement and refitting, incentives for zero-emission taxis, and stopping the licensing of new diesel vehicles.

Shirley

5. Meanwhile, the Court of Appeal in ***Shirley***[4] has upheld the decision of the High Court that, in the event of a failure to achieve compliance with limit values, the Air Quality Directive does not require any steps beyond the preparation and implementation of an efficacious air quality plan. In particular, it does not impose a moratorium on grants of planning permission for development that might perpetuate or increase exceedances of limit values, nor does it impose a requirement that decisions on such proposals must be taken only at ministerial level (rather than by local authorities).

6. The case concerned an application for planning permission for 4,000 dwellings to the south east of Canterbury. Canterbury City Council had declared an Air Quality Management Area ("**AQMA**") to include most of the area within the city centre ring

[4] *R. (Shirley) v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 22 (see [32]-[33] per Lindblom LJ in particular).

road, because of high levels of NO2. The Council granted the application, and the Secretary of State for the Environment refused to call it in for his own determination under section 77 of the Town and Country Planning Act 1990. The Court of Appeal dismissed the claim that the Secretary of State had been obliged by the Air Quality Directive to call it in (and refuse it).

7. An application for permission to appeal to the Supreme Court is pending.

Spurrier

8. Air quality was the subject of 6 of the 27 grounds of challenge to the Secretary of State for Transport's decision to designate the Airports National Policy Statement ("**ANPS**"), which set out the Government's preference for a new third runway at Heathrow Airport[5]. The independent Airports Commission had considered the air quality implications when recommending Heathrow back in July 2015, and the Transport Secretary carried out further work on a range of matters including air quality prior to the publication of the draft ANPS in October 2016 for consultation. The issue was also considered in the scrutiny by the Transport Select Committee.

9. The Secretary of State concluded that the Heathrow scheme could be undertaken without a breach of the UK's obligations under the Air Quality Directive.

10. In two long judgments, extending to 669 and 211 paragraphs respectively, the Divisional Court dismissed the five claims on all 27 grounds. Air quality is dealt with in the ***Spurrier*** decision at [220]-[285]. The claimants' main grounds were that: (i) in concluding that the Heathrow scheme could be undertaken without breaching the UK's obligations under the Air Quality Directive, the Secretary of State failed to apply the precautionary principle; (ii) the Secretary of State acted irrationally by adopting a policy (i.e. a third

[5] *R. (Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin) and *R. (on the application of Heathrow Hub Ltd) v Secretary of State for Transport* [2019] EWHC 1069 (Admin)

runway that does not jeopardise compliance with the Air Quality Directive) that was probably undeliverable, and (iii) the Secretary of State relied upon unjustified assumptions about the deliverability of public transport schemes and the effectiveness of Clean Air Zones [269]. The court found that none of these grounds was even arguable, let alone meritorious.

11. The Court noted that the ANPS itself prevents the possibility of a breach of the air quality requirements, by expressly providing that "failure to demonstrate [that the scheme will not affect the UK's ability to comply with legal obligations] will result in refusal of development consent" – the "reddest of red lines … it is an absolute requirement, without caveat": [265].

12. Four of the five claimants in the airports judicial review have submitted applications for permission to appeal. All of them are still outstanding.

Craeynest

13. The last case to mention on air quality is the judgment on 26 June 2019 of the Court of Justice of the EU ("**CJEU**") in a case called ***Craeynest***[6]. The CJEU held that a national court must have the power to decide whether the sampling points for air quality monitoring have been correctly selected in accordance with the rules of the AQD, and must also have the power to order sampling at specified locations in the event of non-compliance.

14. The decision is significant because it shows that a court's review is not confined to some form of *Wednesbury* standard, but instead must engage directly with the exercise and stand in the shoes of the competent authority.

[6] *Craeynest and Others*, Case C-723/17

Landmark Chambers
Registered office:
180 Fleet Street, London
EC4A 2HG | DX: 1042 (LDE)
London
+44 (0) 20 7430 1221
Birmingham
+44 (0) 121 752 0800
Contact
clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk
@Landmark_LC

Habitats

15. The fall-out following the Court of Justice of the European Union's judgment in ***People Over Wind***[7] has constituted the main focus of habitats case law over the last year. The CJEU in that case held that mitigation measures cannot be taken into account when deciding whether a proposal is "likely to have a significant effect" on a protected habitat so as to engage the requirement to carry out an "appropriate assessment" (commonly called the "screening stage") in Article 6(3) of the Habitats Directive. They can instead only be considered as part of the "appropriate assessment" itself.

Grace

16. That decision was swiftly followed by ***Grace***[8], also by the CJEU, which re-affirmed that:

(1) "Compensatory" measures (i.e. to compensate for the negative effect of a project) cannot be taken into account in the "appropriate assessment". Instead, such measures are only relevant (and required) once it has been concluded that (1) an adverse effect on the integrity of a protected site cannot be ruled out by the "appropriate assessment", (2) there are no alternative solutions and (3) the project must be carried out for "imperative reasons of overriding public interest"[9] under Article 6(4) of the Habitats Directive.

(2) While "mitigation" measures (i.e. measures which reduce or eliminate the negative effect of a project) can be taken into account in the "appropriate assessment", this is only so "when it is sufficiently certain that a measure will make an effective contribution to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area"[10].

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[7] *People Over Wind v Coillte Teoranta* (C-323/17) [2018] P.T.S.R. 1668
[8] *Grace v An Bord Pleanala* (C-164/17) [2019] P.T.S.R. 266
[9] See para. 50.
[10] See para. 51.

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@Landmark_LC

Cairns

17. In the UK, the first decision to grapple with ***People Over Wind*** was ***Cairns***[11], in which the High Court held that the exclusion of mitigation measures at the screening stage is confined to the habitats context, and had no application to the regulatory regime for environmental impact assessment. Given the recent trend in Luxembourg, it is an open question whether the CJEU would reach the same view.

Langton

18. Less than a fortnight later, the High Court handed down judgment in ***Langton***[12], a case about badger culling. No appropriate assessment had been undertaken by Natural England when granting licences to cull badgers. The question arose as to whether the conditions which had been attached to licences constituted "mitigation" measures that would be caught by the rule in ***People Over Wind***.

19. Sir Ross Cranston in the High Court held that they were not mitigation measures, but instead "integral features of the project", and so could be taken into account at the screening stage. The decision has been controversial, with some finding it difficult to reconcile with the CJEU case law. An application for permission to appeal to the Court of Appeal has been granted, and the appeal will be heard (and broadcast live online) on 2 July 2019.

Coöperatie Mobilisation and *Holohan*

20. Hot on the heels of ***People Over Wind*** and ***Grace***, the CJEU issued two other important habitats judgments in November 2018:

[11] *R. (on the application of Cairns) v Hertfordshire CC* [2019] Env. L.R. 6, see [28]-[29].
[12] *R. (Langton) v Secretary of State for Environment, Food and Rural Affairs* [2019] Env. L.R. 9

(1) ***Coöperatie Mobilisation***[13] interpreted the meaning of "project" in habitats law, finding that the grazing of cattle and the application of fertilizers on or below the surface of land in the vicinity of a protected site may constitute a (single and continuous) "project", even if it would not constitute a "project" for EIA purposes (due to the absence of physical intervention in the natural surroundings): [64]-[68]. The CJEU also re-stated that mitigation measures could only be taken into account in the appropriate assessment if the expected benefits of those measures are certain at the time of that assessment: [126]-[130].

(2) ***Holohan***[14] gives further guidance on the content of an appropriate assessment. As well as assessing the habitats/species for which the site has been listed, the assessment must cover (1) habitats/species present on the site and for which the site has not been listed; (2) habitats/species outside the site, insofar as they affect the conservation objectives of the site and might be affected by the proposed plan/project: [40].

Canterbury

21. Not unexpectedly, a number of consents in the UK were granted without an appropriate assessment (due to mitigation measures screening out a proposal), only for ***People Over Wind*** to reveal that perhaps an assessment had been required (once the mitigation was properly excluded at the screening stage). This issue arose in two joined challenges to decisions by the Secretary of State to grant permission for (1) a new 800-dwelling mixed-use scheme near Canterbury, and (2) 30 dwellings outside Crondall, an historic village in Surrey[15].

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[13] Cases C-293/17 & C-294/17 Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu v College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland; and Stichting Werkgroep Behoud de Peel v College van gedeputeerde staten van Noord-Brabant

[14] *Holohan v An Bord Pleanala* (C-461/17) [2019] Env. L.R. 16

[15] *Canterbury City Council v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1211 (Admin)

Landmark Chambers
Registered office:
180 Fleet Street, London
EC4A 2HG | DX: 1042 (LDE)
London
+44 (0) 20 7430 1221
Birmingham
+44 (0) 121 752 0800
Contact
clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk
@Landmark_LC

22. In both cases, the Secretary of State accepted that there had been an error of law because the approach in ***People Over Wind*** had not been adopted in deciding whether an appropriate assessment was required. In defence to the challenges, the Secretary of State instead maintained that the decisions would have been same even if an assessment had been carried out (and so the court should not quash the decisions).

23. The judge (Dove J) agreed with this defence in the Canterbury case. He found that the screening statement was "entirely uncontroversial and undisputed" and contained "in substance" all the information that an appropriate assessment would contain: [97]-[100]. The judge noted that there was no defined methodology or format for an appropriate assessment.

24. However, the decision in the Crondall case was not so fortunate. There had been local objections, concerning the sufficiency of the mitigation measures, which had not been addressed. Prior to the decision, a change in national policy (see para. 177 of the NPPF[16]) following ***People Over Wind*** had deprived the proposal of the so-called "tilted balance" in NPPF para. 11(d)(ii)[17]. Despite this, the Inspector had applied the tilted balance in favour of the scheme. The judge did not think it would be appropriate for the court to exercise planning judgement and re-evaluate the proposal without deploying that balance, especially given the "loose threads" in respect of the local objections: [114]-[116].

Spurrier

25. Habitats law was also in contention in the airports litigation. It was submitted that the Secretary of State acted unlawfully in not treating the Gatwick option as an alternative for the purposes of articles 6(3) and 6(4) of the Habitats Directive. The Secretary of State

[16] National Planning Policy Framework

[17] According to this tilted balance, proposals should be granted permission unless the harms "significantly and demonstrably" outweigh the benefits.

had excluded Gatwick because it would not fulfil the Government's aim of maintaining the UK's "hub status". The court held that there was nothing unlawful in finding the Gatwick scheme to not be a "true" alternative for habitats assessment purposes, given the non-fulfilment of the "hub status" objective: ***Spurrier*** at [355].

Heather Hill

26. Finally on habitats, the Irish High Court has recently held[18] that a requirement in a planning permission to use "best practice measures" in construction management constitutes a mitigation measure caught by the rule in ***People Over Wind***. At [165], Simons J attempted to define the scope of such a measure: "[t]*he litmus test must be whether the measure is intended to avoid or reduce harmful effects*".

27. At [176], the judge said: "[t]*he key determinant of whether a measure is an avoidance / reduction measure is its intended purpose. This can only be ascertained by reference to the predicted impact of the proposed development on a European site, and whether the measure is intended to avoid or reduce a potential impact*". The screening assessment in that case had excluded likely significant effects caused by emissions into the Galway Bay SAC and SPA due to the combination of (1) the quick dissipation of any emissions by tidal currents and (2) the use of "best practice measures". The planning permission (for housing development) was quashed due to the lack of an appropriate assessment.

Climate Change

Banks

28. In a judgment handed down in November 2018[19], Ouseley J quashed the decision of the Secretary of State to refuse planning permission for an open cast coal mine in Northumberland, on the coast at Druridge Bay. The Secretary of State's decision was

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[18] *Heather Hill Management Company CLG v An Bord Pleanála* [2019] IEHC 450 (21 June 2019)
[19] *H J Banks & Company Ltd v Secretary of State and Others* [2018] EWHC 3141 (Admin)

contrary to his Inspector's recommendation following a three-week inquiry concerning the proposal, which would involve mining up to three million tonnes of coal from 325 hectares of farmland near the village of Widdrington.

29. The High Court application, brought by the mining firm H.J. Banks and Company Limited, challenged the decision on essentially two grounds. The first concerned a failure to correctly interpret and apply paragraph 149 of the (then applicable) 2012 version of the NPPF. The second ground – more interesting from a climate change perspective – was that the Secretary of State had failed to give adequate reasons in respect of giving significant weight to the greenhouse gas emissions that would result from the end use of coal. Allowing the application on both grounds, the judge held that, while there was no error in respect of failing to give reasons for alleged departures from previous decisions, the Secretary of State had failed to properly explain his conclusion that refusing permission for the development could lead to a reduction in the amount of greenhouse gas emissions, rather than it leading to a substitution of an equivalent amount from an imported source.

30. On 7 June 2019, the Court of Appeal dismissed an application for permission to appeal by Save Druridge, a local action group. The Government is in the process of re-considering the application for planning permission, and promised an update at the end of June 2019.

Spurrier

31. Climate change was, for obvious reasons, a major issue in the challenge to the airports NPS. The contention advanced was that the Secretary of State had acted unlawfully by not taking into account the Paris Agreement, which seeks to hold the increase in global

average temperature to “well below” 2 degrees Celsius above pre-industrial levels, and to pursue efforts to limit that increase to 1.5 degrees[20].

32. The Divisional Court held that the Paris Agreement has no effect in domestic law because it is an international agreement which – albeit ratified – has not been incorporated into UK law. This reflects the dualist legal system in the UK. An international treaty is not part of the domestic legal order unless there is UK legislation to incorporate it. The Government has, instead of simply incorporating the Paris Agreement, adopted the approach set out in the Climate Change Act 2008, which imposes a carbon cap emissions limit through carbon budgeting. Section 2 of that Act gives the Secretary of State the power to amend the Act to take into account the Paris Agreement. In addition, the Divisional Court noted that the climate change issue would be re-visited at the stage of applying for a development consent order, at which point the up-to-date position on climate change could be taken on board.

Urgenda

33. In a Dutch case brought by an environmental group called Urgenda, together with 900 Dutch citizens[21], the claimants seek to compel the Dutch Government to bring forward measures to reduce greenhouse gas emissions by at least 25% by the end of 2020, when compared to the level at 1990, in order to comply with Kyoto commitments.

34. The Dutch Government accepted that it could be doing more to address climate change impact (and that what it was doing could only lead to a reduction by 14-17%), but rejected the notion that it had a legal duty to do more. Back in 2015, the District Court of the Hague agreed with Urgenda, and ordered the Government to comply with the proposed target. It held that the Government had a duty to take measures to address the serious and undisputed threat to humans and the environment by climate change,

[20] ***Spurrier*** at [602].
[21] For more information, see https://www.urgenda.nl/en/themas/climate-case/.

in order to remedy the court's finding of "unlawful hazardous negligence" under Dutch law.

35. The Government appealed, but the Court of Appeal of the Hague dismissed the appeal in October 2018, albeit basing their decision on Articles 2 and 8 of the European Convention on Human Rights ("**ECHR**"), which protect the right to life and the right to private and family life respectively, rather than on Dutch tort law. The Court's English press release stated:

> "Considering the great dangers that are likely to occur, more ambitious measures have to be taken in the short term to reduce greenhouse gas emissions in order to protect the life and family life of citizens in the Netherlands. The Court of Appeal has based its ruling on the State's legal duty to ensure the protection of the life and family life of citizens, also in the long term. This legal duty is enshrined in the European Convention of Human Rights (ECHR).
>
> The Court disagrees with the State that courts have no right to take decisions in this area. The Court has to apply directly effective provisions of treaties to which the Netherlands is party. These provisions form part of the Dutch legal order and even take precedence over deviating Dutch laws."

36. The latter paragraph emphasises the difference between the UK's dualist system (which caused the Paris Agreement to lack direct domestic effect) and the Dutch monist system, where international treaties such as the ECHR are directly part of the domestic legal order. That said, the ECHR has effectively been incorporated into UK law by the Human Rights Act 1998. The implications of this for similar human rights litigation in the UK is an interesting question for another day.

37. As Lord Carnwath rightly recognised in a recent lecture, the Urgenda case "*has rightly been treated as a landmark case, in its recognition that the threat posed by climate change can be seen as a human rights issue*"[22]. The matter is now currently before the Dutch Supreme Court, who held a hearing on 24 May 2019. The Supreme Court's verdict is awaited with interest.

[22] Lord Carnwath, "Human Rights and the Environment", at the Institute of International and European Affairs, Dublin, 20 June 2019 https://www.supremecourt.uk/docs/speech-190620.pdf

Landmark Chambers
Registered office:
180 Fleet Street, London
EC4A 2HG | DX: 1042 (LDE)

London
+44 (0) 20 7430 1221

Birmingham
+44 (0) 121 752 0800

Contact
clerks@landmarkchambers.co.uk

www.landmarkchambers.co.uk
@Landmark_LC

38. A similar case has been brought in Ireland by Friends of the Irish Environment, which was heard in the High Court earlier in the year. Judgment is also awaited. Similarly, on the other side of the world, in May 2019 residents of the Torres Strait Islands, which are north of Queensland, Australia, filed a case with the UN Human Rights Committee against the Australian Government, complaining that not enough is being done to adopt sufficient greenhouse gas targets, or adequate flood defences, in order to prevent regular flooding of their land and detrimental effects on the marine environment due to rising sea temperatures.

39. No decision is forecast until 2021. As ClientEarth point out, although any decision would be non-binding, "*if successful, it would be the first decision from an international body finding that nation states have a duty to reduce their emissions under human rights law*"[23].

40. The use of human rights law in climate change litigation will be a critical development to watch over the next few years.

[23] https://www.climateliabilitynews.org/2019/05/12/australia-human-rights-torres-strait-islanders/. See also: ClientEarth's press release - https://www.clientearth.org/human-rights-and-climate-change-world-first-case-to-protect-indigenous-australians/

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Registered office:
180 Fleet Street, London
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London
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