

Habitats: case-law update

James Maurici Q.C.
Landmark Chambers

7 recent cases

- (1) *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government* [2012] Env. L.R. 34 (29 March 2012, CA E&W);
- (2) *Walton v Scottish Ministers* [2013] P.T.S.R. 51 (17 October 2012, SC (Sc.));
- (3) *Alternative A5 Alliance's Application for Judicial Review* [2013] NIQB 30 (12 March 2013, HC NI);
- (4) *R. (Buckinghamshire CC) v Secretary of State for Transport* [2013] EWHC 481 (Admin) (15 March 2013, HC E&W);
- (5) *Sweetman v An Bord Pleanala* [2013] 3 C.M.L.R. 16 (11 April 2013, CJEU);
- (6) *Elliott v Secretary of State for Communities and Local Government* [2013] EWCA Civ 703 (23 April 2013, CA E&W);
- (7) *R. (Prideaux) v Buckinghamshire CC* [2013] Env. L.R. 32 (29 April 2013, HC E&W).

Cases relevant to:

- Scope of Habitats Directive: **Buckinghamshire**
- Stage 1: screening under Art. 6(3): **Alternative A5**
- Stage 2: undertaking an AA under Art. 6(3):
 - **Cornwall**; and
 - **Sweetman - A-G** – case “*unusual*” – much of CJEU case-law on situations where no AA undertaken; in **Sweetman** there was an AA undertaken with “*great care*” but issue was with conclusion reached
- The inter-relationship between grant of planning permission and NE’s licensing functions in respect of protected species: **Elliott and Prideaux**
- The discretion not to quash in a challenge alleging failures in relation to EU law including habitats: **Walton**

Focus on: habitats protection



- Article 6:
 - 3. *Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.*
 - 4. *If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.*
- Regs. 61 and 62 of the Conservation of Habitats and Species Regulations 2010 transpose these requirements.
- Also Arts 12 & 16 transposed by regs. 41 & 53 protection of species.

Scope: Buckinghamshire (1)

- 5 JRs of Command Paper “*High Speed Rail: Investing in Britain's Future – Decisions and Next Steps*”, the DNS.
- New high speed rail network connecting London to Birmingham, and then on to Leeds and Manchester, in a second phase - the Y Network. DNS – Hybrid Bill for each phase.
- One of grounds was habitats – lack of AA for the DNS.
- S/S argued:
 - the DNS was not itself a “plan” and was not even said to be a “project” (that would follow via Bill process);
 - In any event screening concluded no likely significant effects from Phase 1 in relation to protected sites;
 - No analysis of Phase 2 could have been undertaken at the time of the DNS, for want of a route capable of such assessment.

Scope: Buckinghamshire (2)



- Judge held:
 - (1) DNS not a “plan” applying *R (Boggis) v Natural England* [2010] PTSR 725 - DNS is a decision by the promoter of a project as to the project for which development consent will be sought from another body - Parliament, the decision-maker, why, in what form and through what process;
 - (2) “*the DNS, of itself, lacks legal consequences*”;
 - (3) Habitats Directive need to be complied with before Parliament in Bill grants consent for project – HS2 Phase 1.
- Appeal to CA but not on habitats grounds; but on similar issue of whether a “plan or programme” for SEA Directive purposes; appeal fails 2:1;
- Further appeal to Supreme Court (7 Judges); heard last week.

Screening: A5 (1)



- Recent quashing by High Court, NI of decision of the Minister for Regional Development re A5 Western Transport Corridor dual carriageway scheme
- C alleged a failure to carry out an AA of rivers Foyle and Finn SAC under the Habitats Directive.
- Assessment entitled “*Screening Report – SAC Watercourses. A5 Western Transport Corridor*” by Department’s consultants concluded – “*unlikely to lead to significant effects upon the SAC watercourse*” – so no AA

Screening: A5 (2)

- Grounds:
 - a) erred in considering mitigation proposed at the screening stage to determine the significant effects on the SAC;
 - (b) erred in considering mitigation proposals at the screening stage to determine the significant effects on SACs *where there is doubt as to the efficacy of the mitigation proposals.*
 - (c) a continuing obligation to screen - in the light of evidence of the Loughs Agency at inquiry erred in not concluding need for an AA thereafter.

Screening: A5 (3)



- (1) MITIGATION AT SCREENING STAGE:
 - C relied on A-G in **Sweetman** at para. 71 “[i]n principle, the possibility of avoiding or minimising adverse effects should be irrelevant as regards determining the need for an appropriate assessment. It appears doubtful that such measures could be carried out with sufficient precision in the absence of the factual basis of a specific assessment”
 - Contrary to **R (Hart District Council) v Secretary of State for the Communities and Local Government** [2008] EWHC 1204 Sullivan J and see also more recently: **Hargreaves v SSCLG** [2012] Env L.R. 9 and **R. (Long) v Monmouthshire CC** [2012] EWHC 3130 (Admin).

Screening: A5 (4)



- (2) TEST:

- Applying **Hart** – can have regard to mitigation in screening but as Sullivan J said “*If the competent authority does not agree with the proponents' view as to the likely efficacy of the proposed mitigation measures, or is left in some doubt as to the efficacy, then it will require an appropriate assessment because it will not have been able to exclude the risk of a significant effect on the basis of objective information ...*”
- HC, NI proceeded on basis – at screening stage could consider mitigation – test as above ...

Screening: A5(5)

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- Witness at inquiry for Loughs Agency - with the primary responsibility for the Foyle and the Finn.
- Court held his evidence raised doubts as to the efficacy of the remedial measures and consequently if the remedial measures were not effective likely significant effects on the integrity of the Foyle and the Finn SAC.
- Evidence was unchallenged so that the risk of likely significant effects on the integrity of the SAC could not be excluded on the basis of objective information.
- Accordingly an AA should have been but was not carried out
- Department must have had doubts as to efficacy given evidence.

AA: Cornwall Waste Forum (1)

- Challenge to S/S's grant of PP for Energy-from-waste plants
- A key concern by objectors – impact of emissions from the stack on 2 nearby SACs
- PINS/inspector indicated inquiry would consider Habitats issues and if Inspector concluded likely significant effect would undertake AA
- EfWs also needed environmental permit from EA
 - Pre-inquiry EA indicated minded to grant as not any adverse effects
 - Post-inquiry, pre- planning decision EA issues consent
- EA relied on so called - 1% rule – an increment in the pollution load of less than 1% not significant
- Inspector and S/S said EA most appropriate “competent authority” and relied on its grant of permit as showing no need for AA of permission

AA: Cornwall Waste Forum (2)



- C's alleged breach of legitimate expectation given pre-inquiry correspondence saying Inspector would consider if significant effect and if so do AA on planning appeal
- C's said they had at inquiry criticised 1% rule EA relied on and Inspector and S/S not considered that
- Collins J. upheld claim and quashed PP
- S/S and developer appealed to the CA
- CA allowed appeal
- Background: Reg. 65(2) if more than one competent authority ("CA") – CA1 not need assess under reg. 61 if plan or project more appropriately assessed by CA2.

AA: Cornwall Waste Forum (3)



- Carnwath LJ 3 reasons legitimate expectation argument fails:
 - (i) any promise by PINS could not bind S/S as decision maker
 - (ii) when promise made need for AA thought to depend on number of issues not just emissions from stack but situation changed so only Habitats issue was re: stack – matter for EA
 - (iii) on harm from emissions from the stack S/S entitled to rely on EA's expertise unless C's show flawed.
- C's had not in claim before the Court (or any other proceedings) mounted legal challenge to 1% rule

AA: Cornwall Waste Forum (4)



- C's sought permission to appeal from the Supreme Court
- Argued did not matter not challenged 1% rule in claim as Court had duty of own motion to consider its lawfulness: see ***Kraaijveld***
- SC rejected “*the [CJEU]’s existing jurisprudence already provides a sufficient answer and the answer is so obvious as to leave no scope for any reasonable doubt*”
 - ***Van Schijndel***
 - ***Van der Weerd***
- provided the party affected had had a “*genuine opportunity*” to raise the issue of EU law, the principle of effectiveness did not require the Court to take the point of its own motion where that would have been procedurally inappropriate

AA: Sweetman (1)

- Hugely important CJEU case on Article 6(3) and (4) of the Directive
 - A-G Sharpston opinion, 22 November 2012
 - CJEU decision 11 April 2003
- FACTS: reference from Eire - JR of approval of N6 Galway City Outer Bypass road scheme
- CJEU note “*the implementation of the ... road scheme would result in the permanent and irreparable loss of part of the Lough Corrib SCI’s limestone pavement, which is a priority natural habitat type specially protected by the Habitats Directive*” 1.47 ha of limestone pavement out of total of 270 ha in SCI affected
- An Bord conclude “*no adverse effect on integrity of the site*” albeit a severe localised effect
- Reference meaning of “*adverse effect on the integrity of the site*”

AA: Sweetman (2)



- CJEU conclude:
 - *“the provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive”* (32)
 - *“Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities – once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site”* (40)

AA: Sweetman (3)



- *“The competent national authorities cannot therefore authorise interventions where there is a risk of lasting harm to the ecological characteristics of sites which host priority natural habitat types. That would particularly be so where there is a risk that an intervention of a particular kind will bring about the disappearance or the partial and irreparable destruction of a priority natural habitat type present on the site concerned” (43);*
- *An AA cannot “have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned” (44)*

AA: Sweetman (4)



- “... the Lough Corrib SCI was designated as a site hosting a priority habitat type because, in particular, of the presence in that site of limestone pavement, a natural resource which, once destroyed, cannot be replaced ... the conservation objective thus corresponds to maintenance at a favourable conservation status of that site’s constitutive characteristics, namely the presence of limestone pavement” (45)
- “Consequently, if ... that plan or project will lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type whose conservation was the objective that justified the designation of the site concerned as an SCI, the view should be taken that such a plan or project will adversely affect the integrity of that site” (46)
- “[i]n those circumstances, that plan or project cannot be authorised on the basis of Article 6(3) of the Habitats Directive...” (47)

AA: Sweetman (5)



- A-G's opinion deserves careful consideration:
 - Useful & fuller account of the facts: 13 – 25;
 - Useful account of objectives of Directive; and role of Article 6(2)(3) and (4): 37ff “*[c]ollectively, therefore, these three paragraphs seek to pre-empt damage being done to the site or (in exceptional cases where damage has, for imperative reasons, to be tolerated) to minimise that damage. They should therefore be construed as a whole*” (43);
 - On screening “*possibility*” of significant effect enough; only plans and programmes “*that have no appreciable effect on the site*” excluded

AA: Sweetman (5)



- *“It is the essential unity of the site that is relevant. To put it another way, the notion of ‘integrity’ must be understood as referring to the continued wholeness and soundness of the constitutive characteristics of the site concerned.”* (54);
- *“in determining whether the integrity of the site is affected, the essential question the decision-maker must ask is ‘why was this particular site designated and what are its conservation objectives?’”* (56);
- EXAMPLE 1: *“A plan or project may involve some strictly temporary loss of amenity which is capable of being fully undone – in other words, the site can be restored to its proper conservation status within a short period of time. An example might be the digging of a trench through earth in order to run a subterranean pipeline across the corner of a site. Provided that any disturbance to the site could be made good, there would not ... be an adverse effect on the integrity of the site.”* (59)

AA: Sweetman (6)



- EXAMPLE 2: “ ... measures which involve the permanent destruction of a part of the habitat in relation to whose existence the site was designated are ... destined by definition to be categorised as adverse. The conservation objectives of the site are, by virtue of that destruction, liable to be fundamentally – and irreversibly – compromised. The facts underlying the present reference fall into this category” (60).
- EXAMPLE 3: “The third situation comprises plans or projects whose effect on the site will lie between those two extremes. The Court has not heard detailed argument as to whether such plans or projects should (or should not) be considered to generate an ‘adverse effect on the integrity of the site’. I consider that it would be prudent to leave this point open to be decided in a later case” (61).

AA: Sweetman (7)



- Article 6(4) requirements rigorous but not insuperable “of the 15 to 20 requests so far made to [the Commission] for delivery of an opinion under that provision, only one has received a negative response” (66);
- “To require the Member States to ‘take all compensatory measures necessary’ when a plan or project is carried out under [Article 6(4)] so as to preserve the overall coherence of Natura 2000 while, at the same time, allowing them to authorise more minor projects to proceed under [Article 6(3)] even though some permanent or long-lasting damage or destruction may be involved would be incompatible with the general scheme ... Such an interpretation would also fail to prevent what the Commission terms the ‘death by a thousand cuts’ phenomenon, that is to say, cumulative habitat loss as a result of multiple, or at least a number of, lower level projects being allowed to proceed on the same site” (67)

Planning/ licencing interface : *Elliott and Prideaux* – introduction (1)



- Article 12: MS required to prohibit in respect of animal species listed in Annex IV (a) (“EPS”) inter alia:
 - deliberate capture/killing of specimens such species in the wild;
 - deliberate disturbance of such species, esp. during the period of breeding, rearing, hibernation and migration;
 - Deterioration/destruction of breeding sites or resting places
- Article 16 allows MS to licence such activities
 - “*if no satisfactory alternative*”;
 - “*the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range*” and,
 - if for (among other things) “*imperative reasons of overriding public interest, including those of a social or economic nature*”
- Transposed: regs. 41 and 53 of the 2010 Regulations

Planning/licencing interface : *Elliott and Prideaux* – introduction (2)



- Required consideration of SC decision in ***Morge*** [2011] 1 W.L.R. 268
 - A planning decision maker not exercising licencing functions re protected species under reg. 53 of 2010 Regulations
 - Its role governed by what is now reg. 9(5) “*in exercising any of their functions, must have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions*”
 - Pre-***Morge*** in SC view was if planning decision-maker was uncertain whether or not a licence under reg.53 would be granted, pp should be refused (see ***Morge*** (CA) and ***Woolley) v Cheshire East BC*** [2010] Env. L.R. 5)

Planning/licencing interface : *Elliott and Prideaux* – introduction (3)



- Lord Brown in *Morge* (at para. 29)
 - “ ... *I cannot see why a planning permission ... should not ordinarily be granted save only in cases where the planning committee conclude that the proposed development would both (a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers. After all, even if development permission is given, the criminal sanction against any offending (and unlicensed) activity remains available and it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfillment of Natural England's own duty.*”
- See also Lord Brown at para. 30; Lady Hale at paras. 44 – 45; Lord Mance at para. 55 and Lord Kerr’s dissenting judgment at para. 82.

Planning/licencing interface : *Elliott and Prideaux* – introduction (4)



- *Morge* - facts:
 - NE initially objected to the planning application on grounds of the impact of the proposed development on bats;
 - An updated bat survey was the carried out and, as a result of the findings of the survey, NE withdrew its objections to the planning application;
 - Some suggestion in speeches NE “*express themselves satisfied that a proposed development will be compliant with article 12*” – did it go so far?

Planning/licencing interface

: *Elliott* (1)



- Challenge to PP by S/S for regeneration of Crystal Palace Park.
- Evidence of impact of the development on foraging bats (protected under Art. 12)
- Inspector concluded proposals would not critically harm bat commuting routes; noted approval of an ecological management plan by the LPA before works commenced would give scope for adequate mitigation of harmful effects.
- Proposals were not objected to by Natural England.
- Inspector's report noted S/S might consider the benefits of the proposals amounted to Imperative Reasons of Overriding Public Importance (IROPI) under Art 16.
- The S/S did not mention IROPI but accepted Inspector's recommendation and granted PP

Planning/licencing interface

: *Elliott* (2)



- In *Elliott* – never an objection from NE, what can be read from this?
- Judge at first instance said:
 - *“Natural England may not in terms have expressed itself satisfied that the proposals in the Masterplan would comply with Art. 12 of the Habitats Directive. Natural England was only not objecting to the proposals – presumably on the basis that the impact on the foraging and roosting habitats of bats would be relatively modest. But the upshot was that when the Secretary of State was obliged to have regard to the requirements of the Habitats Directive to the extent that they may be affected by his planning functions under the 1990 Act, he was entitled to have regard to Natural England’s views about the impact of the proposals on the foraging and roosting habitats of bats, and to grant planning permission unless it was likely that (a) a licence under reg.53 would be required and (b) when it was applied for, it would be refused.”*

Planning/licencing interface

: *Elliott (3)*

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- “... the Secretary of State took the view that it was likely that a licence under reg.53 would be granted if it was sought, all the more so for him to have thought that it was unlikely that it would not be granted if it was sought ...”
- That despite no express mention of IROPI in DL ...
- Appeal to CA; rejected.
- Rejected also argument that need for or benefit of raising funds out of the residential development could not be IROPI

Planning/licencing interface

: *Prideaux (1)*

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- EfW facility; access road along disused railway and require demolition of buildings
- C argued significant detrimental effect on habitats of 3 EPS
- Council addressed whether NE would licence; and alternatives
- The EfW was urgently needed in waste terms
- Challenge on basis failed to consider likely effects on EPS by not considering alternatives to the access road.

Planning/licencing interface

: *Prideaux (2)*



- Lindblom J careful and detailed analysis of *Morge* and *Elliott* – see paras. 81 – 123
- Considers Commission Guidance document on strict protection of species of Community interest under the Habitats Directive and its advice on whether there is no other satisfactory alternative under Art. 16
- Re-emphasised duty of the CC was to have regard to Habitats Directive; not to enforce its compliance that for NE
- Confirmed *Woolley* approach was not good law after *Morge* (*Wooley* not specifically mentioned in *Morge*, SC)

Planning/licencing interface

: *Prideaux (3)*



- Alternative routes for access road considered in EIA;
- Route chosen only one that removed all traffic from local roads – huge environmental benefit
- Alternatives not acceptable for various reasons
- Decision-maker not confined merely to comparing which route least harmful to EPS and only allowing that route
- Art 16(1) says no “reasonable alternative” not “no alternative”
- Not as strict as Art 6(3) and (4) re habitats
- Commission guidance not the law

Planning/licencing interface

: *Prideaux (4)*



- Reject suggestion alternative must be regarded as satisfactory – or only satisfactory – if less harmful to EPS
 - Otherwise *“As Mr Maurici pointed out, this could have very odd results. For example, it might be seen as justifying the destruction of a [SSSI] where no species protected under the Habitats Directive were present, even if the impacts of the proposed development on [EPS] were going to be modest and easily overcome”*
- Other considerations than EPS relevant in considering alternatives; a view supported by Commission Guidance
- To be satisfactory other option must be “real” not “theoretical”; if alternative unacceptable in planning terms not “reasonable”

Planning/licencing interface

: *Prideaux (5)*

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- What is a satisfactory alternative depends on what sought to be achieved via derogation; see by analogy Case C-344/03 **Commission v Finland** [2005] ECR I-11033 hunting of long-tailed duck
- CC entitled to give great weight to NE's lack of objection on EPS grounds; it had objected on other grounds (re SSSI) not EPS; and then withdrawn on SSSI
- No hint from NE that derogation licences may not be granted
- In **Morge** Ne opposed and withdrew; here never opposed – but no material difference.

Discretion not to quash: *Walton* (1)

- *Walton* SC case on appeal from Scotland
- In Scottish Courts – a habitats case
- Before SC – an SEA case
- Concerned Aberdeen Western Peripheral Route
- Further retreat from *Berkeley v Secretary of State for the Environment* [2001] 2 A.C. 603 e.g. that where breach of EU law narrow discretion not to quash
- All obiter ...
- See *R (Jones) v Mansfield* [2004] Env. L.R. 21 (CA), *Bown v SSLGTR* [2004] Env LR 509 (CA) and *Edwards v Environment Agency* [2009] 1 All E.R. 57 (HL).

Discretion not to quash: *Walton* (2)



- In *Walton* R conceded if there was a “*substantial failure*” to comply with SEA Directive, then Court should hold the remedy (see Lord Reed at 77)
- Lord Carnwath at 137 need not necessarily follow “*where there has been some shortfall in the SEA procedure at an earlier stage, regardless of whether it has caused any prejudice to anyone in practice, and regardless of the consequences for wider public interests.*”
- Lord Carnwath at 131 - where the consequence to the public and private interests from quashing a decision which is in breach of SEA is very great “*it would be extraordinary*” if, in considering its discretion whether to grant relief “*the court were precluded by principles of domestic or European law from weighing that prejudice in the balance*”

Discretion not to quash: *Walton* (3)



- Lord Reed expressed similar sentiments.
 - At 155 said the Court should “*weigh in the balance against any breach of the Directive that the applicant was able to establish the potential prejudice to public and private interests that would result if the [plan/programme] were to be quashed*”.
 - And at 156 “*Where there are good grounds for thinking that the countervailing prejudice to public or private interests would be very great, as there are in this case, it will be open to the court in the exercise of its discretion to reject a challenge that is based solely on the ground that a procedural requirement of European law has been breached if it is satisfied that this is where the balance should be struck.*”

Discretion not to quash: *Walton* (4)



- Chimes with habitats case of *Boggis* (see above), CA said:
 - “a breach of article 6(3) of the Habitats Directive is not established merely because, some time after the “plan or project” has been authorised, a third party alleges that there was a risk that it would have a significant effect on the site which should have been considered, and since that risk was not considered at all it cannot have been “excluded on the basis of objective information that the plan or project will have significant effects on the site concerned” ... a claimant who alleges that there was a risk which should have been considered by the authorising authority so that it could decide whether that risk could be “excluded on the basis of objective information”, must produce credible evidence that there was a real, rather than a hypothetical, risk which should have been considered”