

Planning Act 2008: High Court challenges

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Development Consent Orders – background



- Scope: “nationally significant infrastructure projects” (s 14)
- The role of National Policy Statements
- Examination by Inspectorate and decisions by relevant Secretary of State
- Extensive pre-application process

Development Consent Orders

- Deemed grant of planning permission
- May include other consents
- May authorise compulsory acquisition of land (including rights)

National Policy Statement: adoption

- Consultation requirements
- Need to carry out SEA and Habitats Assessment (where appropriate)
- May identify specific sites or groups of sites and accordingly detailed SEA/HRA may be required
- Parliamentary process

Role of National Policy Statements

- Section 104: where NPS has effect in relation to development of the description to which the application relates, must decide in accordance with the relevant NPS unless exceptions apply
- Exceptions in s 104(4)-(8):
 - Would breach international obligations
 - Would lead to breach of statutory duty
 - Would otherwise be unlawful
 - The adverse impact would outweigh the benefit
 - Any other prescribed circumstance

Challenges to NPSs: section 13

- Preclusive provision, limiting the circumstances in which proceedings may question “a national policy statement or anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement”
- Includes challenges to reviews of NPSs, failures to review, and decisions relating to suspension of NPSs
- Challenge by way of judicial review
- 6 week challenge period (see below)

Development Consent Orders: process

- Pre-application consultation including preliminary environmental information
- Acceptance stage
- Examination:
 - 6 month time limit
 - Written process but oral hearings may be convened
 - Those who make representations may be heard
 - More formal process for compulsory acquisition

DCO: process continued

- Reporting to Secretary (or Secretaries) of State
- Final decision based on Panel/Appointed Person report
- DCO made as a statutory instrument

Section 118



- Preclusive provision, limiting scope for questioning:
 - a DCO;
 - a refusal of development consent;
 - a refusal to accept an application;
 - various other procedural decisions; and
 - “anything else done, or omitted to be done, by the Secretary of State in relation to an application for an order granting development consent” (s 118(7))
- Note the limited scope to challenge procedural decisions (including acceptance) until *after* grant of development consent

Challenge procedure

- Claim for judicial review under CPR Part 54
- Note governed by statutory time limit (i.e. not capable of being extended under CPR 3.1(2)) – see further below
- Note because claim for judicial review, may be an “Aarhus Convention Claim” for CPR 45.41-44:
 - Fixed costs rules
 - Dependent on showing within scope of Convention – but likely to be

Time limit for challenge

- Strict time limit for challenge
- The “period of 6 weeks *beginning with*” the publication of the order/the statement of reasons
- See *Barker v Hambleton DC* [2013] P.T.S.R. 41
- See also *Kaur v S Russell & Sons Ltd* [1973] Q.B. 336

Decided cases

- Four decided cases to date
- Pending appeal to the Court of Appeal
- At least two more challenges in the pipeline

R (Gate) v Secretary of State for Transport [2014] L
J.P.L. 383 C

- DCO for link road between the M6 and Heysham in Lancashire
- Whether the DCO was for a nationally significant infrastructure project within the meaning of the Act
- Whether pre-application consultation was at a “formative stage”
- Permission to appeal refused after oral hearing

R (An Taisce) v Secretary of State for Energy and Climate Change



[2014] EWCA Civ 1111

- Challenge by National Trust for Ireland to Hinckley Point C DCO
- Claimant contended that there had been a failure to carry out transboundary consultation with the Republic of Ireland in respect of potential radiation risks and accordingly that there had been a breach of regulation 24 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009/2263

An Taisce continued



- Patterson J dismissed the claim and Court of Appeal dismissed appeal
- Held that Secretary of State had properly directed himself to the question of whether “the development is likely to have significant effects on the environment in another EEA State” and was entitled to conclude that it would not, and thus that no transboundary consultation was required
- Consideration of meaning of “likely” significant effects in the EIA Directive and role of nuclear power regulatory regime

R (Halite Energy Group Ltd) v Secretary of State for Energy and Climate Change [2014] EWHC 17 (Admin)

- Only successful challenge to date
- Secretary of State's refusal to grant development consent for an underground gas storage facility was successfully challenged by the disappointed applicant on the grounds of natural justice, misinterpretation of the relevant NPS, and rationality/reasons
- Natural justice ground arose from deciding issue on basis of matter not put to the applicant during the examination

R (FCC Environment (UK) Limited) v Secretary of State for Energy and Climate Change [2104] EWHC 947 
(Admin)

- Consideration of alternatives for purposes of compulsory acquisition
- The presumption of determination in accordance with the NPS was found also to apply to the acquisition element of the DCO
- EIA issue surrounding the delay in the process caused by special Parliamentary procedure
- Appeal from Mitting J to the Court of Appeal (with leave of Sullivan LJ) pending

Upcoming challenges

- Thames Tideway Tunnel
- Potential issues around scope of DCO powers (e.g. for commercial development)
- Inevitable challenge to any airports NPS (see Hillingdon)



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