Landmark CHAMBERS

Habitats Issues in Plan-Making

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Scope

1. The Habitats Directive and its aims
2. Implementing legislation in England and Wales
3. Mitigation and compensatory measures
4. Reasonable alternatives and habitats issues
5. When the only rational choice is to ignore Natural England
6. Natural England must be given great weight
7. Procedural challenges: same decision highly likely despite error
8. Sundry Cases

1. The Habitats Directive and its Aims

Article 191 of the Treaty on the Functioning of the European Union

1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,

…

- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

Habitats Directive Aims (2)

- Council Directive 92/43/EEC adopted 21 May 1992
- The Habitats Directive is "intended to be an aid to effective environmental decision making, not a legal obstacle course" ***(R (on the application of Hart District Council) v SSCLG*** [2008] 2 P & C.R. 16 at [72] per Sullivan J.
- Understanding the objective of the SEA Directive is particularly important given the need for a broad and purposive approach to the interpretation of such instruments (see, e.g., ***Walton v Scottish Ministers*** [2012] UKSC 44 at [20]-[21] per Lord Reed JSC)
- Article 1:

  "The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

Habitats Directive Aims (3)

Article 2

"1. The aim of this Directive shall be to **contribute towards ensuring bio-diversity** through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at **favourable conservation status**, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics."

Habitats Directive Aims (3)

Article 3

> "A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II , shall enable the natural habitat types and the species" habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range."

- Every country has designated Natura 2000 sites to help conserve the rare habitats and species present in their territory.
- Sites range in size from less than 1 ha to over 5,000 km² depending on the species or habitats they aim to conserve; the majority are around 100–1,000 ha.
- UK has designated around 9% of its terrestrial area as SACs, this being one of the smallest of any EU nation (Slovenia, the greatest, has designated 38%).

Article 6 of the Habitats Directive

"1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

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. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

2. Implementing Legislation in England and Wales

Conservation of Habitats and Species Regulations 2017/1012

- Consolidate and update the 2010 regulations. The 2010 regulations had been amended ten times, and there was concern that the power of consolidation would be lost after exit from the EU, so the opportunity was taken to tidy the regulations up. The Conservation of Offshore Marine Habitats and Species Regulations 2017/1013 is a further regulation consolidating amendments to the 2007 version of the same.

- Regulation 105: requirement, where a plan is likely to have a significant effect on a European site alone or in combination, to undertake appropriate assessment before a plan is given effect
- Regulation 106: Assessment of implications for European Site of neighbourhood development plans
- Regulation 107: Consideration of overriding public interest
- Regulation 108: Land Use Plans by more than one authority (joint local development documents; joint local development plan)
- Regulation 109: Compensatory Measures

3. Mitigation and Compensatory Measures

Hilde Orleans v Vlaams Gewest [2017] Env. L.R. 12 (case C-387/15)

- Regional Development Implementation Plan (the RDIP) provided for the development of the port of Antwerp in Belgium. The proposals involved in the plan entailed destroying a large part of an estuary SAC.
- In an attempt to meet this difficulty, the plan proposed that the destructive development could only proceed after "ecological core areas" had been established and confirmed as successful.
- The challenge was that the plan could only be approved insofar as an appropriate assessment showed that the plan would not adversely affect the integrity of the site at issue. It was clear there would be damage to the integrity of the Natura 2000 site. The proposed ecological core areas were compensatory measures rather than proposals which were part and parcel of a single plan. As such, they had to be justified by article 6(4) Imperative Reasons of Overriding Public Interest.

Mitigation and Compensatory Measures (2)

- ECJ held (in response to submissions made by the Belgian port authority and Belgian government) that the ecological core areas did not fall to be considered conservation areas within article 6(1) because the proposals did not ensure the conservation of the site, on the contrary they resulted in the loss of 20ha of tidal mudflats
- The plan did not comprise preventive measures within article 6(2) because it was not guaranteed that they would not cause disturbance likely to affect the objectives of the directive.
- The article 6(3) procedure therefore applied. Court also held that the measures in question could not be part of the appropriate assessment under article 6(3) and instead had to be categorised as "compensatory measures".

Mitigation and Compensatory Measures(3)

- Held at [58] that at the time of assessing the implications of the plan, the premise being hypothesised was that future benefits (which were uncertain and visible only many years into the future) would mitigate significant adverse effects (which were certain). Those future benefits could not be taken into account in the assessment.

- The case arose in the context of the earlier case of ***Briels and Others*** (C521/12). In that case the new area of habitat was to be developed only after the damaging development was complete. In ***Hilde Orleans***, the proposal was to complete the mitigation entirely in advance of the commencement of works on the port. The Court held this made no difference [56].

- Interesting twist: the Court noted at paragraph 58 that the effectiveness of the Directive would be compromised if what are in reality "compensatory measures" that require IROPI could be permitted under the name "mitigating measures" which did not feature in the text of the Directive.

Mitigation and Compensatory Measures(4)

No Adastral New Town Ltd v Suffolk Coastal DC **[2015] Env. L.R. 28**

- Challenge to a Core Strategy ("CS") adopted by Suffolk District Council
- A housing allocation was made for 1050 houses, increasing to 2000 houses in the course of the development of the core strategy close to the Deben Estuary, a Natura 2000 site. There was a risk that building new housing close to the estuary would increase visitor numbers to the estuary foreshore and thereby damage the ecological environment. This risk was proposed to be "mitigated" by building a country park which would attract dog walkers away from the foreshore.
- There were procedural errors whereby early parts of the process were not subject to appraisal and whereby the proposal to double the housing numbers was not consulted on. High Court found that those errors were subsequently cured and the Court of Appeal agreed.
- It also involved a ground on mitigation. The challenge was that it was contrary to the scheme of the Directive to leave over matters of mitigation to lower-tier plan making or specific project stages if the relevant information is known at a prior stage (c.f. **Hilde Orleans**)
- The Court addressed it at [71]-[72] The Appellant had relied on ***Commission v UK*** [2005] E.C.R. I-9017 in which it had been held that the UK had failed to implement the Habitats Directive in failing to make land use plans subject to appropriate assessment. In that case the Advocate General had said that "the adverse effects on areas of conservation must be assessed at every relevant stage of the procedure to the extent possible based on the precision of the plan. The assessment is to be updated with increasing specificity in subsequent stages of the procedure". See to similar effect **Feeney v Oxford City Council** [2011] EWHC 2699 (Admin) (a conditional commitment to a project in a plan can be lawful).
- Court of Appeal endorsed the approach of Sullivan J in ***R (Hart District Council) v SSCLG*** [2008] 2 P & C.R. 16 at [76] that "the competent authority is required to consider whether the project as a whole, including [mitigation] measures, if they are part of the project, is likely to have a significant effect on the SPA."

Mitigation and Compensatory Measures(5)

Forest of Dean Friends of the Earth v Forest of Dean DC [2014] Env. L.R. 3

- Another case dealing with the point about increasing specificity as plans evolve.
- Where the proposals set out in the first plan would be covered by more detailed development plan documents which might also require an appropriate assessment, it was logical to examine whether the proposals were likely to have a significant effect on an SAC when the more detailed documents were produced.
- At odds with **Hilde Orleans?**

Mitigation and Compensatory Measures(6)

Further cases on mitigation

Regina (DLA Delivery Ltd) v Lewes District Council **[2017] PTSR 949**

- Another challenge to a neighbourhood plan affected by the Ashdown Forest
- Mitigation of development proposed by uncertain aspiration for Suitable Alternative Natural Green Spaces.
- The Neighbourhood plan was not allocating SANGs, , and it was therefore unnecessary to resolve the location of SANGs in that plan prior to allocating locations for housing development.
- Inspector had failed to address likelihood of delivery of SANGS
- Plan not quashed: no substantial prejudice

R (Hughes) v Carmarthenshire [2013] Env. L.R. 17

- New dwellings were proposed near estuaries where there was a problem with untreated sewage overflowing when it rained due to a lack of sewerage capacity. The estuaries were eutrophic: the integrity of the site had already been compromised by the pollution. New houses were permitted in the area. Court held that where they would not be released until further works had been undertaken to achieve site integrity, that could not amount to an adverse effect.

4. Reasonable Alternatives and Habitats Issues

Article 5(1) of the SEA Directive provides

> "Where an environmental assessment is required under article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme and **reasonable alternatives** taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I."

- Reasonable alternatives usually relate to the plan or programme as a whole or to specific policies within the plan or programme.

Reasonable Alternatives (2)

No statutory definition of "reasonable alternative". Examples

- ***St Albans City and District Council v Secretary of State for Communities and Local Government*** [2010] JPL 10;
- ***Save Historic Newmarket Ltd v Forest Heath District Council*** [2011] JPL
- 1233;
- ***Heard v Broadland District Council*** [2012] PTSR D25; [2012] Env LR
- 461; and
- ***R (Buckinghamshire County Council) v Secretary of State forTransport*** [2013] EWHC 481 (Admin) (and see ***R (Buckinghamshire County Council and Others) v Secretary of State for Transport*** [2014] UKSC 3); [2013] PTSR D25.
- ***R (Chalfont St Peter Parish Council) v Chiltern District Council*** [2013] EWHC 1877 (Admin) and [2014] EWCA Civ 1393
- ***R. (on the application of RLT Built Environment Ltd) v Cornwall Council*** **[2017] J.P.L. 378**
- ***R (on the application off Friends of the Earth) v Welsh Ministers*** **[2016] Env L.R. 1**
- ***Hoare v Vale of White Horse DC*** **[2017] JPL 1406**

Reasonable Alternatives (3)

Ashdown Forest Economic Development LLP v Secretary of State for Communities and Local Government **[2016] P.T.S.R. 78**

- Concerned a challenge to the Wealden District Local Plan
- The Core Strategy Required 9,440 new homes
- It contained a policy excluding development within 400m of the Ashdown Forest and requiring the provision of SANGS within 7km. Sustainability Appraisal was undertaken of each iteration [4]
- Challenge alleged that the core strategy had failed to consider alternatives to the 7km rule. For example there was no consideration given to a 5km exclusion zone which pertained in relation to the Thames Basin Heaths SPA [27]
- Held: The identification of reasonable alternatives is a matter for the evaluative assessment of the local planning authority subject to *Wednesbury* review [42]. In order to assess what the reasonable alternatives are the local authority does have to apply its mind to the question [42]. On the facts, no evidence the local authority considered alternatives to the seven kilometre zone [50]. The fact that none were suggested does not validate a failure to consider the question at all.

5. When the only rational choice is to ignore Natural England (cumulative Impacts)

Wealden DC v SSCLG [2017] Env L.R. 1 (Jay J)

- Quashed part of the Lewes District Local Plan (the Joint Core Strategy). Claim under s.113 PCPA 2004
- Another case relating to the protection of the Ashdown Forest Special Area of Conservation
- Claim was that there had been a failure to consider whether there had been a significant effect from nitrogen dioxide deposition arising from increased traffic attributable to the plan in combination with the deposition of nitrogen dioxide arising from development set out in the neighbouring Wealden Core Strategy (WCS).
- On the evidence, the judge held that although each plan was likely to give rise to levels of nitrogen dioxide which on its own was below even the lowest precautionary threshold, but when added together the deposition levels exceeded that threshold.
- When WCS had been adopted it had been reasonable not to consider in-combination effects because the Joint Core Strategy was not yet sufficiently developed. [70]
- Natural England's advice had failed to appreciate that aggregate values for nitrogen deposition in respect of all the development across both plans needed to be considered where two plans covering a 20-year period of development were put forward. By the time of the JCS though, there was no sensible or logical basis for excluding the WCS from account [92]
- The only rational conclusion should have been to reject Natural England's advice [108]
- At the very least further inquiry of Natural England should have been made [111]
- Jay J rejected the argument that the challenge delved too far into specialist evidence and expert opinion [90]

6. Natural England Advice Must be Given Great Weight

***Shadwell Estates Ltd v Breckland DC* [2013] EWHC 12 (Admin)**

- A decision-maker should give the views of statutory consultees, in this context the "appropriate nature conservation bodies", "great" or "considerable" weight. A departure from those views requires "cogent and compelling reasons": ***R (Hart DC) v Secretary of State for Communities and Local Government*** [2008] EWHC 1204 (Admin) at [49] *per* Sullivan J, and ***R (Akester) v Department for the Environment, Food and Rural Affairs*** [2010] EWHC 232 (Admin) at [112] *per* Owen J.
- See also ***Abbotskerswell Parish Council v Teignbridge DC*** [2015] Env L.R. 20 at [74]
- In order to succeed on an allegation of a breach of article 6(3) of the Directive, Beatson J recalled that Shadwell had to produce credible evidence of a real risk to the integrity of the SPA (see ***R (Boggis and another) v Natural England* [2009] EWCA Civ 1061** at [37]. It had not done so. **[90]**
- Curious Incident of the dog in the night-time: ***R (Hughes) v Carmarthenshire* [2013] Env. L.R. 17**

7. No Prejudice/ Highly Likely Same Decision

- A number of cases fail on grounds that while there procedural errors, there was no prejudice suffered, or it is highly likely the same decision would be made in the event the procedural error had not been made.

***Hoare v Vale of White Horse DC* [2017] JPL 1406** (John Howell QC)

- Error about general conformity test, but highly likely outcome would be same if decision re-taken, so no quashing of neighbourhood plan.

***Abbotskerswell Parish Council v Teignbridge DC* [2015] Env L.R. 20 (Lang J)**

- Ascertainment of integrity a matter for the authority reviewable only on rationality grounds [33]-[36]
- Teignbridge conceded that it had failed expressly to invite the public to comment on the strategic environmental assessment after it was published. However, X's interests had not been substantially prejudiced by that failure (PCPA 2004 113(6) and (7) [92]-[95]

8. Sundry Cases

Baroness Cumberlege of Newick v SSCLG [2018] Env L.R. 10

- Error in granting planning permission for development within the 7km exclusion zone around an SPA. Planning permission granted in breach of article 6(3). PP quashed. Currently subject to appeal.

R (on *the application of Bewley Homes Plc & Ors) v Waverley Borough Council* [2017] EWHC 1776 (Admin)

- A fairly fact-specific challenge to a failure by an inspector to take account of a note submitted to him setting out submissions on the availability of SANGs. Challenge failed.

In the Matter of an application by Chris Murphy for Judicial Review [2017] NICA 51

- An application for permission to appeal to the Supreme Court from this decision has been made.

Grune Liga Sachsen and Others **[2016] EUECJ C-399/14**

- Reference for a preliminary ruling addressed circumstances arising where a plan or project (a road bridge) was approved without appropriate assessment in conformity with article 6(3) of the HD and a Site of Community Importance (the estuary) was designated shortly thereafter. The Court held at [46] that in those circumstances article 6(3) requires that the plan or project must be the subject of a subsequent review, if that review constitutes the only appropriate step for avoiding that the implementation of the plan or project. Article 6(2) of the Habitats Directive requires that that subsequent review must meet the requirements of Article 6(3) of that directive.

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