Landmark CHAMBERS

Infrastructure projects: common issues for legal challenges

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Common issues for legal challenges

- Vesting orders – compulsory purchase
- Planning and JR principles
- EIA
- SEA
- Habitats

Vesting orders - compulsory purchase

- Often key to delivery of infrastructure and regeneration
- Raises issues of proportionality, constitutionality and human rights given public interference with private rights
- Examples – arts. 87 to 93 of Planning (NI) Order 1991; s. 97 & Sched 6 of the Local Government Act (Northern Ireland) 1972; art. 110-113 of Roads (Northern Ireland) Order 1993 (applying Sched 6 of the 1972 Act with modifications)
- Importance of complying with procedure -
  - ***Cowan v Dept of Economic Development*** [2000] NI 122 (failure to consider an inquiry or even to allow further representations)
  - ***Re Bowden's Application*** [2003] NIQB 78 (failure to use the statutory challenge procedure under Sched 6 LGA 1972 but use of Ord 53/JR instead)
  - ***Keys & McGinley v DRD*** [2006] NIQB 89 (failure to give notice of intention to vest but would not have made difference to outcome)

Vesting orders (2)

- A1P1 requires the fair balance to be struck to demonstrate that the protection of the individual's right to possessions is outweighed by the public interest in acquisition (***James v. UK*** (1986) 8 EHRR 123 at [50]) often expressed in policy & decisions (e.g. the Victoria Square Vesting Order 2003) as showing a "compelling case in the public interest"
- ***Chesterfield Properties PLC v. Secretary of State*** (1997) 76 P. & C.R. 117
- ***Cowan v. Dept of Economic Development*** [2000] NI 122 (similar approach taken to ECHR in ***Tesco Stores Ltd v. Sec of State*** (2000) P & CR 427)
- ***R. (Clays Lane Housing Cooperative) v. Housing Corp*** [2005] 1 W.L.R. 2229
- ***R. (Hall) v. First Secretary of State*** [2008] J.P.L. 63 "compelling case" policy test meets ECHR requirements
- ***R. (Sainsbury's Supermarkets Ltd) v Wolverhampton CC*** [2011] 1 AC 437 - the serious invasion of proprietary rights required a strict approach to the application of principles to be adopted and off-site benefits of a proposed development could only be taken into account if they were related to or connected with the development for which the compulsory acquisition was made that was a real rather than a fanciful or remote one

Vesting orders (3)

- ***Horada v. Secretary of State*** [2016] PTSR 1271 a robust approach was taken to requiring reasons to explain why recommendations had not been accepted by the minister, *per* Lord Thomas CJ –
  - "59 In this case, it was particularly important that a proper and easy to understand explanation be given by the Secretary of State for rejecting the inspector's recommendation. The livelihoods of the traders are put at risk by the proposed development. The inspector has given her reasons on a matter of vital concern to the traders in a way that could readily be understood by them. The Secretary of State must explain his decision in the same readily understandable way."
- The courts will not generally require a detailed consideration of each individual interest when considering whether there is a compelling case for acquisition - ***Alternative A5 Alliance's Application*** [2013] NIQB 30 at [180]—[183]

Planning and judicial review (1)

- Planning aspects of project decisions subject to the usual grounds of JR challenges. See e.g. Girvan J. in ***Bow Street Mall Ltd's Application*** [2006] NIQB 28 at [43] and Treacy J. in ***Newry Chamber of Commerce & Trade's Application*** [2015] NIQB 65 at [44]. Recent formulation at appellate level by Lindblom LJ in ***St Modwen Developments Ltd v Secretary of State*** [2017] EWCA Civ 1643 at [6]
- Other issues e.g. fairness, including apparent bias – ***Alternative A5 Alliance's Application*** [2013] NIQB 30 applying e.g. ***Porter v Magill*** [2002] 2 AC 357 ***R v Jones*** [2010] NICC 39, ***Belfast International Airport's Application*** [2011] NIQB 34.
- On the duty to give reasons in planning decisions see the Supreme Court in ***Dover DC v CPRE*** [2018] 1 WLR 108 both in EIA cases and generally. The extent of the duty to give reasons in planning cases beyond any statutory requirements was recognised obiter by Lord Carnwath especially where the decision maker failed to explain why it did not follow the recommendations made to it

Planning and judicial review (2)

- Attempts by courts to discourage inappropriate challenges based on the construction of policy following ***Tesco v Dundee CC*** [2012] PTSR 983
  - NB Lord Reed in ***Tesco*** at [18] and [19] – distinguished between interpretation (law) and application (planning judgment) of policy and noted that plan policy was "not analogous in its nature or its purpose to a statute or a contract" and was often framed in broad terms or used language that required the exercise of judgment by the decision-maker
  - ***Hopkins Homes Ltd v Secretary of State*** [2017] 1 WLR 1865 Lord Carnwath at [22]-[26] – "24 In the first place, it is important that the role of the court is not overstated. Lord Reed JSC's application of the principles in the particular case (para 18) needs to be read in the context of the relatively specific policy there under consideration. … As he recognised (para 19), some policies in the development plan may be expressed in much broader terms, and may not require, nor lend themselves to, the same level of legal analysis. 25 It must be remembered that, whether in a development plan or in a non-statutory statement … these are statements of policy, not statutory texts, and must be read in that light. Even where there are disputes over interpretation, they may well not be determinative of the outcome."

Planning and judicial review (3)

- In ***Hopkins Homes*** Lord Carnwath issued a warning at [26] to those bringing challenges based on policy:
  - "26 Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies, as in the *Tesco* case. … However, the judges are entitled to look to applicants, seeking to rely on matters of planning policy in applications to quash planning decisions (at local or appellate level), to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgment in the application of that policy; and not to elide the two."
- Lord Gill, agreeing, at [72]-[74] reinforced Lord Reed's prescription and stated that the same approach applies to non-statutory policy or guidance as to development plan policy –
  - "I consider that it is the proper role of the courts to interpret a policy where the meaning of it is contested, while that of the planning authority is to apply the policy to the facts of the individual case."
- Litigants have been slow to respond, it seems

Planning and judicial review (4)

- Rejection of over complication by Court of Appeal in ***East Staffordshire BC v Secretary of State*** [2018] PTSR 88 per Lindblom LJ:
  - "50 I would, however, stress the need for the court to adopt, if it can, a simple approach in cases such as this. Excessive legalism has no place in the planning system, or in proceedings before the Planning Court, or in subsequent appeals to this court. **The court should always resist over complication of concepts that are basically simple. Planning decision-making is far from being a mechanical, or quasi-mathematical activity. It is essentially a flexible process, not rigid or formulaic.** It involves, largely, an exercise of planning judgment, in which the decision-maker must understand relevant national and local policy correctly and apply it lawfully to the particular facts and circumstances of the case in hand, in accordance with the requirements of the statutory scheme. The duties imposed by [the legislation] leave with the decision-maker a wide discretion. **The making of a planning decision is, therefore, quite different from the adjudication by a court on an issue of law** ... I would endorse, and emphasise, the observations to the same effect made by Holgate J in the ***Trustees of the Barker Mill Estates case*** [2017] PTSR 408 , paras 140–143."

Environmental impact assessment (1)

- The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 (in force from 16.5.17 reg. 1) transposes Directive 2011/92/EU as amended by Council Directive 2014/52/EU.
- Other provisions amended to implement the 2014 directive e.g. art 67 of the Roads Order 1993 by the Roads (Environmental Impact Assessment) Regulations (Northern Ireland) 2017.
- However, the Offshore Electricity Development (Environmental Impact Assessment) (Revocation) Regulations (Northern Ireland) 2018 revoked the Offshore Electricity Development EIA Regs 2008 on the basis that EIA is implemented in relation to relevant consents, insofar as they relate to offshore developments, by the Marine Works (Environmental Impact Assessment) Regulations 2007, as amended by the Marine Works (Environmental Impact Assessment) (amendment) Regulations 2011 which extended the regulated activity covered by those Regulations to include activities requiring the relevant consents in question.

Environmental impact assessment (2)

- Transitional provisions in reg. 48 continue to apply the revoked 2015 EIA Regulations where an ES was submitted, or screening opinion or direction made or sought prior to 16.5.17
- EIA is the totality of the process undertaken including the responses of consultees and the public to the ES (reg. 5(1) makes this explicit)
- Screening and scoping – reg. 8
- Duties on public bodies to facilitate preparation of ES – regs. 9 and 10
- Publicity and consultation – critical part of EIA – regs. 18-20
- Duty to inform consultees and the public of decisions reg 27
- Transboundary effects regs. 29-30 – see ***Alternative A5 Alliance*** at [70]-[74]
- Provisions for EIA where unauthorised development and deemed applications with s. 145(5) of the 2011 Act Part 9 regs. 31-40 (reg. 29 list of unauthorised development expanded to include a wider range of "enforcement functions")

Environmental impact assessment (3)

- Sched 4 requirements of ES modified e.g. alternatives –
  - "2. A description of **the reasonable alternatives** (for example in terms of development design, technology, location, size and scale) **studied by the applicant or appellant**, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for selecting the chosen option, including a comparison of the environmental effects."
- Note that the EIA requirements of the arts. 67-67C of the Roads Order 1993 remain, even as amended in 2017, in different form to those in the EIA Regs. 2017 and continue to operate by referring to requirements in the EIA Directive (as amended in 2014) rather than adopting the approach of transposition in the planning context. This seems to be a common characteristic of roads assessments - compare the similar provisions of ss. 105ZA-105D of the Highways Act 1980

Environmental impact assessment (4)

- Adequacy of ES. Treacy J. in ***Newry Chamber of Commerce's Application*** [2015] NIQB 65 at [75]
  - "Compliance with EIA requirements does not require perfection: see ***R (Blewett) v Derbyshire County Council*** [2004] Env LR 29 at [32]-[42]."
- In addition to Sullivan J's important judgment in ***Blewett*** see Lord Hoffman in ***R. (Edwards) v. Environment Agency*** at [38] and [61] endorsing Sullivan J in ***Blewett*** & ***R (Jones) v Mansfield DC*** [2004] Env LR 391
- Distinction between issue of whether ought to be EIA at all and what the scope of the EIA should be - ***Bowen-West v. Sec of State*** [2012] Env. L.R. 22, at [32]-[33]

Environmental impact assessment (5)

- Discretion where failures to meet EIA requirements:
  - ***Berkeley v Secretary of State*** [2001] 2 AC 603 not authority for the fact that discretion may be not be applied. See Lord Hoffman in ***Edwards*** at [62]-[64] – ***Berkeley*** to be read in context of a failure to comply with the EIAD at all.
  - ***Walton v. Scottish Ministers*** [2013] PTSR 51 at [131]-[140]
    - "139. Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source."

Environmental impact assessment (6)

- Lord Carnwath in ***Champion*** at [55]-[62] considered ***Gemeinde Altrip v. Land Rheinland-Pfalz*** (Case C-72/12) [2014] PTSR 311 at [49-[54] which recognised some degree of flexibility for the national courts to consider whether rights had been impaired, found it consistent with ***Walton***, and held:
  - "58. …. It leaves it open to the court to take the view, by relying "on the evidence provided by the developer or the competent authorities and, more generally, on the case file documents submitted to that court" that the contested decision "would not have been different without the procedural defect invoked by that applicant". In making that assessment it should take account of "the seriousness of the defect invoked" and the extent to which it has deprived the public concerned of the guarantees designed to allow access to information and participation in decision-making in accordance with the objectives of the EIA Directive."
  - "62 … Although the proposal should have been subject to assessment under the EIA Regulations , that failure did not in the event prevent the fullest possible investigation of the proposal and the involvement of the public. There is no reason to think that a different process would have resulted in a different decision"

Environmental impact assessment (7)

- Examples of refusals to quash
  - ***West Kensington Estate Tenants & Residents Association v. Hammersmith & Fulham LBC*** [2013] EWHC 2834 (Admin) Lindblom J. refused to quash for a strict failure to comply strictly with SEA requirements (production of a statement of compliance with SEA process) since the technical error could be readily corrected by a direction (paras. [203]-[209])
  - R***. (Devon Wildlife Trust) v. Teignbridge DC*** [2015] EWHC 2159 (Admin) Hickinbottom J. refused to quash for failure to screen or undertake EIA because the authority had decided that the relevant information would have to be provided pursuant to the appropriate assessment to be undertaken under the Habitats regime

SEA (1)

- Scope – only to plans and programmes so in many infrastructure cases unlikely to be directly relevant to project authorisation. However, the policy basis of the project, if it has been publicly announced, may engage the SEAD even if it is not produced under a legal requirement if it sets the framework for future development
- ***Re Seaport Investments Ltd*** [2008] Env. L.R. 23 and [2012] Env. L.R. 21 (CJEU)
- ***Central Craigavon Ltd v DOENI*** [2011] NICA 17R – must be there must be an obligation or duty on the authority to produce the plan or programme.
- ***Alternative A5 Alliance*** – Stephens J. applied wider approach ***Inter-Environment Brussels ASBL v Région de Bruxelles-Capitale*** (C-567/10) [2012] 2 CMLR 909 (doubted by the Supreme Court in HS2) – to Northern Ireland Programme for Government 2008–2011 (AB/5/2325), the Investment Strategy for Northern Ireland 2008/2018 (AB/5/2360) and the Department for Regional Development Investment Delivery Plan for Roads 2008 (AB/5/2337).

SEA (2)

- ***R (Buckinghamshire CC) v. Sec of State*** [2014] 1 W.L.R. 324 – the Government White Paper on HS2 did not engage the SEAD since it did not set the framework for the legislation which requires the decision maker to be legally constrained in making project decisions and Parliament was not so constrained. It was merely a proposal. Lord Neuberger (and the SC) at [175]-[189] doubted the ***Inter–Environment Bruxelles*** judgment and preferred the approach of AG Kokott
- Same approach to validity and adequacy as in EIA cases. Note if flaws are detected at a late stage in the assessment process, it may be possible to remedy them without invalidating the exercise and the subsequent decision to permit: ***Cogent Land LLP v. Rochford DC*** [2013] 1 P. & C.R. 2 approved in ***No Adastral New Town Ltd v. Suffolk Coastal DC*** [2015] Env. L.R. 28 at [48]-[60].
- The issue of reasonable alternatives has been a frequent source of failure – see e.g. ***Save Historic Newmarket Ltd v Forest Heath DC*** [2011] JPL 1233 and ***Ashdown Forest Economic Development LLP v Sec of State*** [2016] P.T.S.R. 78
- See also ***Heard v. Broadland District Council*** [2012] Env LR 23 on the breadth of judgment of the decision-maker
- Safeguarding directions are not subject to SEA - ***R. (HS2 Action Alliance Ltd) v Secretary of State*** [2015] P.T.S.R. 1025 (see s. 56(1) of the 2011 Act)

Habitats (1)

- Habitats Directive (Directive 92/43/EEC) art. 6(3), (4) and Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 regs. 43-48, 49 (planning) and 62 (road construction).
- Critical provisions since, unlike EIA and SEA, application of HD and HR can lead to refusal or permission or other required consent. They are also approached on a precautionary basis so the reasonable elimination of risk remains critical.
- ***Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij*** (C-127/02) [2005] Env. L.R. 14
- ***R (Boggis) v Natural England*** [2010] PTSR 725
- ***Sandale Developments*** [2010] NIQB 43
- ***Sweetman v An Bord Pleanala*** (C-258/11) [2014] PTSR 1092
- ***Briels v Minister van Infrastructuur en Milieu*** (C-521/12) [2014] PTSR 1120
- ***Newry Chamber of Commerce's Application*** [2015] NIQB 65
- ***R (Champion) v North Norfolk DC*** [2015] 1 WLR 3710

Habitats (2)

- Two stage approach
  - Screening as to whether there is likely to be a significant effect -;
  - If not screened out, appropriate assessment (AA) to determine whether there will be an adverse effect on the integrity of the European Site. Consent can only be granted if there is no such adverse effect.
- Screening threshold low - required if there is simply a risk of adverse effects. The "should we bother to check" test (see AG Sharpston at [50] in ***Sweetman***).
- Consultation not required but good practice (also assists in identifying issues)
- Also important with a large project to ensure that assessments are kept up to date since otherwise the final decision may be susceptible to review as occurred in ***Alternative A5 Alliance's Application*** [2013] NIQB 30. Treacy J. in ***Newry Chamber of Commerce's Application*** [2015] NIQB 65 mere fact the assessment is of some age may not invalidate it, provided data remains sound for assessment purposes. Underlines need for expert review as data/surveys age. See also Morgan LCJ in ***Re Murphy's Application*** [2017] NICA 51 at [25]-[26] – "no time constraint on the duration of an appropriate assessment and in the case of major infrastructural projects there is often a likelihood of some time lag between authorization and implementation of the project"

Habitats (2A)

- ***Re Friends of the Earth Application*** [2018] Env LR 7 – CA quashed minister's decision not to issue stop notice against Lough Neagh sand traders for dredging because the minister failed to take into account that the precautionary approach required him to consider the lack of evidence of no harm, rather than simply the absence of evidence of harm (Weatherup LJ)
- ***R (Mynnyd y Gwynt Ltd) v. Sec of State*** [2018] EWCA Civ 231 decision-maker entitled to conclude that evidence reasonably required to determine an AA and conclude there was not adverse effect from a windfarm (in terms of risk to red kite colliding with rotor blades) had not been provided by the applicant for a development consent order. Sec of State entitled to conclude that he was not convinced the the windfarm would not have an adverse effect on integrity of SPA (Peter Jackson LJ)

Habitats (3)

- ***Newry Chamber of Commerce's Application*** [2015] NIQB 65 Treacy J rejected an attack on a screening assessment by the production of ex post facto expert evidence before the Court (citing Sullivan J. in ***R (Boggis) v Natural England*** [2010] PTSR 725 at [37]):
  - "[64] I am in agreement with the Respondent that these are matters of expert judgment which cannot legitimately be condemned as unreasonable. Furthermore, this is not a matter for an impermissible merits debate before this court.… The NIEA, the Rivers Agency, and the Loughs Agency were all consulted on the planning application. Each confirmed that they had no objection to the development. The Respondent was entitled to give considerable weight to the non objections of these statutory bodies … "
  - "[66] At no stage prior to the Permission did the applicant put forward "credible evidence that there was a real, rather than a hypothetical, risk which should have been considered"."

Habitats (4)

- Importance at AA stage of being able to resolve all potential issues ("no reasonable scientific doubt") otherwise derogation procedure applies. Exceptional and difficult to meet – requirements to demonstrate no alternatives, IROPI and the provision of compensatory habitat "to ensure that the overall coherence of Natura 2000 is protected."
- Requirements for an appropriate assessment? High standard required but no prescribed form -
  - ***Sweetman*** at [44]
  - ***Champion*** at [34]-[42] (reviewing CJEU authorities) – "41 … Appropriate" is not a technical term. It indicates no more than that the assessment should be appropriate to the task in hand: that task being to satisfy the responsible authority that the project "will not adversely affect the integrity of the site concerned" taking account of the matters set in the article. "
  - ***Briels*** "27 The assessment carried out under article 6(3) of the Habitats Directive 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: see Sweetman's case, para 44."

Habitats (5)

- Important question whether offsetting measures be built into the project to prevent an adverse effect arising and so remove the risk and allowing the requirement for an AA.
- Accepted in the domestic courts at least so far as mitigation measures to prevent adverse effects from arising in the first place – see ***No Adastral New Town Ltd v Suffolk Coastal DC*** [2015] Env. L.R. 28 approved in ***Champion***. Also ***Smyth v Secretary of State*** [2015] PTSR 1417 and ***Re Murphy's Application*** [2017] NICA 51. The question is whether there was sufficient information to enable the decision-maker to be duly satisfied that the proposed mitigation could be achieved in practice to prevent likely significant effects from arising.
- However, note the CJEU's concerns in ***Briels v Minister van Infrastructuur en Milieu*** (C-521/12) [2014] PTSR 1120 and ***Orleans v Vlaams Gewest*** (C-387/15) [2017] Env. L.R. 12 where there is destruction of habitat
- Where compensatory measure are proposed in order to offset the permanent destruction of a Natura 2000 Site, these cannot be measures mitigating or offsetting any potential adverse effects and can only be considered by application the derogation provisions, if they apply.

Habitats (6)

- ***Briels*** (road project with permanent loss of protected meadow habitat)
  - "21 … in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of article 6(3) of the Habitats Directive the site needs to be preserved at a favourable conservation status; **this entails the lasting preservation** of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the Directive: Sweetman's case, para 39."
  - 28 …. article 6(3) … requires the competent national authority to assess the implications of the project for the Natura 2000 site concerned … taking into account **the protective measures forming part of that project** aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site.
  - 29 However, protective measures provided for in a project which are aimed at compensating for the negative effects of the project on a Natura 2000 site cannot be taken into account in the assessment of the implications of the project provided for in article 6(3) ."

Habitats

- ***Orleans v Vlaams Gewest*** - measures contained in a plan or project not directly connected/necessary to the management of a European site providing, prior to the occurrence of adverse effects on the habitat, for the future creation of an area of that type, but where completion of the measures will take place *following* the assessment of the significance of any adverse effects on integrity, may not be taken into consideration in that assessment
- Also a preventive measure complies with art.6(2) only if it is guaranteed that it will not cause any disturbance likely significantly to affect the objectives of that directive, particularly its conservation objectives)[39]-[40])
- However, if the likely effects do not involve a loss of habitat then the project may incorporate offsetting measures which obviate the need for an AA. See ***Re Murphy's Application*** [2017] NICA 51 -

Habitats (7)

- Morgan LCJ –
  - "40 In this case the protected feature is the Whooper Swan. There is no direct impact on the protected feature. The foraging lands are not themselves a protected feature. The appropriate assessment and the Statement indicate that with the field amalgamation measures there will be no adverse impact on the protected feature. The measures in this case are aimed at avoiding or reducing any significant adverse effects on the protected feature. They are plainly mitigating measures."
- Art 6(2) may need to be considered if art 6(3) has not been complied with - ***Grüne Liga Sachsen eV v. Freistaat Sachsen*** Case C-399/14 [2016] P.T.S.R. 1240 and ***Re Murphy's Application*** at [27]-[35] where the court found that there had been compliance with art. 6(3)