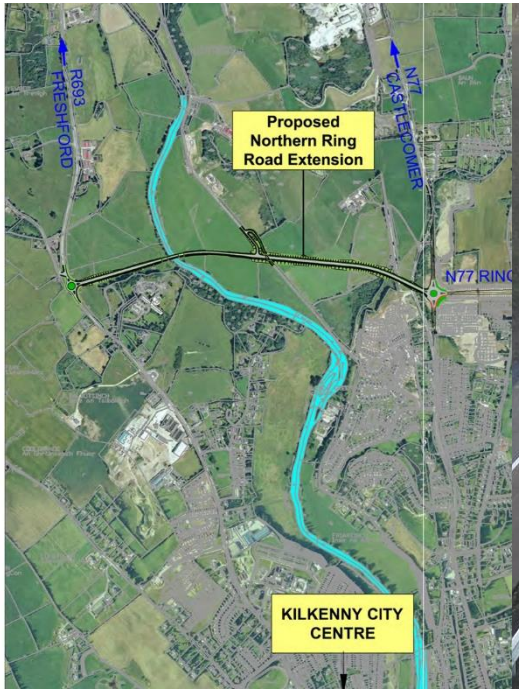
EIA & SEA Update

Matthew Dale-Harris

18 November 2018

Landmark Chambers

EIA



EIA Overview

- Fewer cases reaching higher courts than in previous years. Consequence of **Champion?**
- Guidance given by CJEU on
  - new requirement to give description of reasonable alternatives: Case C-461/17 **Holohan v An Bord Pleanála**
  - Costs: C-470/16 **North East Pylon Pressure Group v An Bord Pleanála**
- High Court on interpretation of Schedule 2, "urban development projects": **R(Crematoria Management Ltd) v Welwyn Hatfield Ltd** [2018] EWHC 382 (Admin)
- Also note decision in: **R(CPRE Kent) v Dover DC [2018] 1WLR**

Holohan

- EIA Regulations 2017 (for all projects where scoping request before 16 May 2017) brought in new requirement to include reasonable alternatives:
  - Reg. 18(3): an ES must include (inter alia) *"(d) a description of the reasonable alternatives studied by the developer, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment*"

Holohan

- EIA Regulations 2017 (for all projects where scoping request before 16 May 2017) brought in new requirement to include reasonable alternatives:
  - Reg. 18(3): an ES must include (inter alia) *"(d) a description of the reasonable alternatives* ***studied by the developer****, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment*"

Compare to SEAD?

- Choice of reasonable alternatives gave rise to significant litigation: see **Heard v Broadland District Council** [2012] Env. L.R. 23, where Ouseley J held that the Broadland Joint Core Strategy had been unlawful because the reasonable alternatives to a proposed urban extension north-east of Norwich had not been assessed.
- SEAD requires that:

  "*reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated*."

Holohan

- Preliminary reference from challenge to approval of a ring road around Kilkenny, Ireland.
- The claimant in the main proceedings challenged the adequacy of the environmental impact assessment and appropriate assessment on a number of bases. Although the 2014 EIAD did not apply, the Irish Court referred a number of questions relating to interrelation of EIA and Habitats Directive and the assessment of main alternatives.
- A option to build a bridge over affected floodplain had been discounted at an early stage on grounds of cost, and was dealt with briefly in the EIA documentation.

Holohan: questions referred

(4) Whether the EIAD requires that an EIA must address the impact of the development on each species present on the site?

Three questions on scope of "*outline of main alternatives"* under Art 5(3)(d)*:*

(5) Whether an option considered in the EIA and discussed with stakeholders, but rejected at an early stage amounted to a "*main alternative*"?

(6) Does information need "*to enable a comparison to be made between the environmental desirability of the different alternatives*" and/or identify how the environmental effects of the alternatives were taken into account?

(7) Does requirement for reasons "*taking into account the environmental effects*" apply just to chosen option or also to main alternatives?

Holohan: assessing species

- AG Kokott gave her opinion on 7 August 2018, noting that the questions on EIA alternatives were "*particularly problematic*"

- On scope of assessment of impact on species, she emphasised that only the "*main effects*" of the project need to be assessed. Main effects should be construed in the light of the purpose of the EIAD which is to ensure assessment of the effects of projects "*likely to have significant effects on the environment*": effects which are *"not likely to be significant… are not main effects within the meaning of Article 5(3)".*

- Conclusion approved by CJEU on 7 November 2018 at [58].

Holohan: assessing species

- AG went on to give further guidance:
  - "*As to which effects are to be considered significant, a number of factors may be relevant. The key points of reference, however, are to be drawn from the legal protection of the environment concerned"*.
- Therefore:
  - Potential effect on species protected under Habitats Directive are *"as a rule*" regarded as significant;
  - Effects on other species "*not normally main effects*" although particular circumstances (such as exceptional specimens) might support different conclusions.

Holohan: main alternatives

- AG:
  - [94] "*For the purposes of assessing which alternatives are to be regarded as main alternatives, the relevance of those alternatives to the environmental effects of the project or to their avoidance should be decisive.*"
  - However, Art 5(3)(d) only requires those alternatives "*studied by the developer*": drafting history confirms no need to provide information on alternatives "*which might be feasible but which he did not consider.*"
  - Accepted UK's submission that this deficit is partially remedied by SEAD.

Holohan: main alternatives (2)

- AG:
  - Information to be provided on alternatives must include "*indication of the essential reasons for* [developer's] *choice, taking into account the environmental effects*"
  - Does not oblige developer to take account of environmental effects in choosing alternatives: "*Rather, he is obliged only to make known the reasons for his choice in so far as these relate to the environmental effects*".
  - In the extant case, choice had been motivated by cost so there were no reasons which needed to be made known: the EIAD "*imposes no obligation to identify, describe and assess the environmental effects of the alternatives*"

Holohan: main alternatives (3)

- Court held:
  - Approving AG Kokott, that "*main* alternatives" are those capable of influencing the environmental effects of the project;
  - The EIAD does not require the main alternatives studied to be subject to an impact assessment equivalent to the chosen scheme.
  - Obligation to give outline applies to alternatives studied by developer, whether or not initially envisaged or whether recommended by stakeholders.

North East Pylon Pressure

- Challenge to DCO for energy connector, including 300 pylons. Application for injunction and permission refused. Costs sought in the sum of c. 500,000 euros.
- Held that costs protection under EIAD
  - Covered permission stage;
  - Only extended to parts of claims covered by EIAD;
  - Confirmed **Edwards:** prospects of success are relevant; however protection does extend to “abstract” claims – not necessary to show link to existing or potential damage to the environment.

Crematoria Management

- Challenge to pp for erection of crematorium and demolition of existing buildings on a 1.2ha site. New buildings would be confined to an area which was less than 1ha.
- No contemporaneous screening decision: officer had visited site and explained (through *post facto* witness statement) that he had considered EIA Regs 2011 when the application was received and concluded that it was not EIA development.
- Sir Wyn Williams accepted that Council had considered whether screening necessary and whether development was EIA development.
- Was the development an “urban development project” under Schedule 2 of the EIA Regs 2011?

Crematoria Management

- Claimant argued this was a question of law for the courts, not a matter of judgement to be reviewed on rationality grounds
- This issue had previously been addressed in **R(Goodman) v LBC Lewisham** [2003] Env LR 28 and the case turned on the judge's interpretation of that authority.
- Buxton LJ confirmed that interpretation of Schedule 2 was a question of law in which *"the concept of reasonable judgment…simply has no part to play*" but continued "*however, that is not the matter*" before confirming that the meaning in law was "*sufficiently imprecise… that a range of meanings may be legitimately available*"

Crematoria Management

- Sir Wyn Williams held that this second part of the reasoning was binding and was not overruled by approach of Supreme Court in **Tesco v Dundee** [2012] PTSR 983
- He went on to suggest, *obiter*, that the 1ha threshold in Schedule 2 could be rationally applied to only the area to be physically developed, and that 'urban development' was "*not apt to include the built areas which are to be demolished, especially since those areas are in substantial part to be replaced with new built areas.*"
- He also expressed *"considerable reservations about whether the landscaping of the Site could constitute 'urban development'".*

CPRE v Dover

- Planning Committee granted permission for EIA development contrary to advice.
- Requirement to give “main reasons” for the decision under regulation 24(1)(c) held to be consistent with the *Porter* standard for reasons.
- Lord Carnwath: “*I do not read the reference in the EIA Regulations to the ‘main’ reasons as materially limiting the ordinary duty in such cases. It is no different in substance from Lord Brown’s reference in Porter to the need to refer to only the ‘main issues in the dispute’. To my mind the guidance in Porter is equally relevant in the EIA context.*”

Other cases

- **Preston New Road Action Group v SSCLG** [2018] Env LR 18: Court of Appeal upheld Dove J's dismissal of claim. Inspector's conclusion that impacts of fossil fuel consumption were not a cumulative impact of the project (an exploratory fracking site) was lawful.
- **Squire v Shropshire** [2018] EWHC 1730 (Admin): High Court dismissed challenge to adequacy of an ES in relation to assessment of odour from manure storage and use off-site. EIA was a dynamic process and Council had been entitled to rely on permitting process + the EA and permitting officer's assessment that odours could be controlled and were not likely to give rise to significant effects.

Landmark Chambers

SEA

Not much to report on SEA

Two fracking challenges:

- **R(Andrews) v SSBEIS and SSHCLG** (CO/3256/2018), Holgate J refused permission for a challenge to the fracking WMS in *ex tempore judgement.* The Secretary of State argued that the WMS did not effect development consent decisions, being a reiteration of existing policy.
- **Ineos Upstream Ltd v Lord Advocate** [2018] CSOH 66, challenge to Scottish Government's announcement that they had "banned fracking". Held that they had not in fact adopted any planning policy to that effect – policy position was merely emerging.

However, several more cases in the pipeline

Landmark Chambers

- **R(Friends of the Earth) v Secretary of State for Housing, Communities and Local Government**
- Challenge to adoption of revised NPPF without undertaking strategic environmental assessment.
- Likely argument will revolve around whether it is a “plan or programme”.
- **R(Hillingdon & Ors) v Secretary of State for Transport**
- Challenge to adoption of Airports NPS. Amongst other grounds, the authorities allege that the strategic environmental assessment undertaken was inadequate.