Landmark Chambers

EIA & SEA Update

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EIA

- Quiet 12 months for EIA.
- European Commission Guidance on preparation of EIA Report - http://ec.europa.eu/environment/eia/pdf/EIA_guidance_Scoping_final.pdf
- Challenges based on:

  (1) failure to screen/ defects in screening, and reasoning;

  (2) defects in Environmental Statement;

  (3) defects in reasons for decisions on EIA development.
- Very hard to win on EIA now as following round-up of recent cases demonstrate.
- Challenges have moved on to habitats (see DE) and air quality (see MDH).

R (Crematoria Management Ltd) v Welwyn Hatfield BC [2018] P.T.S.R. 1310 (1)

- LPA granted PP for development on the site of a cemetery
- Proposal - demolition of existing chapel, machinery store, lodge house and central colonnade and erection of new chapel, machinery store and crematory, with new car parking provision and enhanced landscaping.
- C, operator of a nearby crematorium, judicially reviewed PP – challenge to the lawfulness of the grant of PP on grounds that, inter alia, there was no screening opinion under EIA Regulations.
- Issue – was the proposal an infrastructure project constituting an "*urban development project*" including more than 1 ha of urban development, within paragraph 10 in the table in Schedule 2.

(2)

- Interpretation of regulations or policy was question of law for the court but where words to be construed are (i) wide in ambit; or (ii) imprecise in their meaning, judgment would necessarily be involved in applying them to the facts of the particular case.
- Therefore there are occasions when different decision-makers, confronted with same or similar facts, might legitimately apply the statutory provision or policy statement differently: applying ***R (Goodman) v Lewisham London Borough Council*** [2003] Env LR 28
- The phrase "*urban development project*" could not be given a precise meaning, a useful starting point was the dictionary definition of "urban" as "*in, relating to or characteristic of a town or city",* although a variety of other factors would also usually be relevant to that assessment, including the nature, size, and location of the development and the use to which it would be put.
- JR refused, LPA entitled to decide not an urban development project.

R (Cairns) v Hertfordshire CC [2018] EWHC 2050 (Admin)

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- JR of PP for new secondary school.
- Archeological report stated part of site contained graves tentatively ascribed to Anglo-Saxon period.
- EIA screening opinion failed to refer to archeological matters at all.
- Judge concluded screening opinion defective.
- But Lang J. did not quash, applying ***Champion***, as decision would be the same.
- The development proposed was away from site of remains and conditions imposed to deal with archeology.

Norman v Secretary of State HCLG [2018] EWHC 2910 (Admin)

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- C sought to challenge grant of PP for intensive poultry farm on appeal by an Inspector on EIA grounds.
- Under s. 288 must be a "*person aggrieved*".
- C lived 10 miles away from the development site. She did not have a private interest that is affected by the proposed development. She did not participate in the appeal before the Inspector. She did not submit representations.
- *Obiter* applying ***Walton v Scottish Ministers and Ashton v Secretary of States for Communities and Local Government –*** not person aggrieved.

Squire v Shropshire Council [2018] Env. L.R. 36 (1)

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- PP for (another) intensive poultry farm development.
- C alleged EIA was flawed because it had focused on the regulation of the development instead of undertaking a proper assessment of the direct and indirect effects.
- JR failed – useful reminder of difficulty of such challenges:

  (A) applying ***Burkett*** [2003] EWHC 1031 (Admin) *"The objective of the Directive and the Regulations, namely the making of the requisite assessment before the grant of permission, is to be achieved through a dynamic process, which starts with the statement from the developer but it does not end with the statement. The statement can be supplemented by the authority, and the environmental information includes the representations from members of the public, where they have been provided"…"*

(2)

- (B) "*The starting point is that it is for the local planning authority to decide whether the information contained in the ES is sufficient to meet the definition in the Regulations. That decision is subject to review on normal* ***Wednesbury*** *principles but information capable of meeting the requirements of the Regulations must be provided. A local planning authority is not deprived of jurisdiction to grant planning permission merely because it concludes that an environmental statement is deficient in a number of respects: see Sullivan J, as he then was, in* ***R. (Blewett) v Derbyshire CC*** *[2004] Env. L.R. 29 at [31]–[40].*"

Holohan v An Board Pleanála
Case C-461/17 (1)

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- 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"

(2)

- Preliminary reference from challenge to approval of a ring road around Kilkenny, Ireland.
- 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.
- C 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.

(3)

- Fourth question: Whether the EIAD requires an EIA to address the impact of the development on all species identified in the Statement?
- Three questions on scope of "*outline of main alternatives"* under Art 5(3)(d):
  - Whether an option considered in the EIA and discussed with stakeholders, but rejected at an early stage amounted to a "*main alternative*"?
  - Whether information needs "*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?
  - Whether requirement for reasons "*taking into account the environmental effects*" apply just to the chosen option or also to main alternatives?

(4)

- 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].

(5)

- 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.

(6)

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- 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.

(7)

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- 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"*.

(8)

- 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.

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.
  - **IneosUpstream 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.

- **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 (Hearing in December 2018, Judgment awaited).
  - SoS argued that NPPF not a “plan or programme” but statement of the Government’s planning policies at the very highest level.
- **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 (Hearing in March 2019).