Landmark Chambers

EIA and SEA update

Richard Turney

Overview

- EIA case law
- SEA case law
- Standard of review

C-461/17 Holohan [2019] P.T.S.R. 1054

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- Reference related to both Habitats and EIA matters

- Fourth question sought to ascertain whether the developer was required “to supply information that expressly addresses the potentially significant impact on all the species identified in the statement that is supplied pursuant to those provisions”

- The duty is limited to significant effects (J58)

Holohan (2)

Landmark Chambers

- Fifth, sixth and seventh questions related to the information required in respect of rejected alternatives

- As to what are “the main alternatives”, “the decisive factor, in order to identify those alternatives that should be regarded as “main” alternatives, is whether or not those alternatives influence the environmental effects of the project. In that regard, the time when an alternative is rejected by the developer is of no relevance” (J65)

- Since only an “outline” is required, the EIAD does not require the main alternatives studied to be subject to an impact assessment equivalent to that of the approved project (J66)

Holohan (3)

Landmark Chambers

- The “outline” must be “supplied with respect to all the main alternatives that were studied by the developer, whether those were initially envisaged by him or by the competent authority or whether they were recommended by some stakeholders” (J68)

- Practical points:

  – EIA remains focused on “significant effects”
  – Alternatives do not need to be subject to full EIA
  – However scope of alternatives may include those suggested by others

C-293/17 Coöperatie Mobilisation [2019] Env. L.R. 27

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- Focus was on Habitats Directive and air quality issues
- However note the observations regarding the scope of the EIAD, where the definition of “project” is more limited than the Habitats Directive
- Court reaffirmed the case law in (e.g. in *Brussels Hoofdstedelijk*) that projects under the EIAD require works or interventions altering physical aspects of the site in question

R (Squire) v Shropshire [2019] Env LR 36

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- Judicial review of permission for intensive poultry-rearing facility dismissed by High Court
- Court of Appeal disagreed, finding a breach of the EIA Regulations
- The issue related to the impacts of spreading poultry manure on surrounding land
- High Court had relied on need for an EA permit for the operations

Squire (2)

Landmark Chambers

- Lindblom LJ held that effect of the environmental permit had properly been understood to include manure spreading, but the scope of the “manure management plan” has been misunderstood, because it would not result in any management of manure spread beyond the applicant’s landholding [60]

- Similarly the EIA was flawed for failing to assess the impacts of manure spreading outside the landholding as an indirect effect of the project [69]

- There was no recognition of impacts of manure spreading outside the application site [73]

Squire (3)

Landmark Chambers

- Reminder that full effects need to be considered
- For facilities which produce waste (or other product) for use elsewhere this may include impacts beyond the site
- Caution as to reliance on EPR
- Note the attempt to address matters through a later s 106 failed [81-82]

R (Wingfield) v Canterbury CC [2019] EWHC 1975 (Admin)

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- Alleged “salami slicing” of two mixed use developments in Canterbury
- Important to note that this was not a case where the “slicing” had avoided EIA: both projects had been subject to EIA (J71, and see *PNRAG* [2018] EWCA Civ 9, at [69])
- Whether a single project is a matter of judgment subject to *Wednesbury* review (J63)
- Lang J set out a series of factors relevant to that judgment

Wingfield (2): relevant factors

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- **Common ownership –** where two sites are owned or promoted by the same person, this may indicate that they constitute a single project (Larkfleet at [60]);
- **Simultaneous determinations –** where two applications are considered and determined by the same committee on the same day and subject to reports which cross refer to one another, this may indicate that they constitute a single project (Burridge at [41] and [79]);
- **Functional interdependence –** where one part of a development could not function without another, this may indicate that they constitute a single project (Burridge at [32], [42] and [78]);
- **Stand-alone projects –** where a development is justified on its own merits and would be pursued independently of another development, this may indicate that it constitutes a single individual project that is not an integral part of a more substantial scheme (Bowen-West at [24 – 25]).

R (FoE) v SSHCLG [2019] PTSR 1540

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- Challenge to revised NPPF on basis that needed to be subject to SEA
- Questions:
  - Is it a “plan or programme”? Dove J treated this as being answered by the next questions
  - Is it “required” by legislative, regulatory or administrative provision?
  - Does it “set the framework” for development consent

FoE (2)

Landmark Chambers

- Held that not “required…”
  - No provision requiring production of national policy or regulating it
  - Fact that material consideration in planning decisions not enough:

“The Framework is a voluntary measure, promulgated pursuant to an express or implied power but not produced as a result of any legislative or administrative provisions which regulate or determine the procedure for preparing or adopting it, and thus the definition from article 2(a)… does not apply to the Framework, and it falls outside the definition of a plan or programme which would be the subject of SEA.”

FoE (3)

Landmark Chambers

- However, it does “set the framework”
  - Establishes “policy concepts” such as Green Belt
  - Applies particular analytical approach
  - Treatment of particular statutory designations
  - Detailed policies relevant to some applications (e.g. ancient woodland)

C-305/18 Verdi Ambiente e Societa [2019] Env LR 33

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- Italian legislation revised upwards the capacity of existing waste incineration facilities and provided for the construction of new facilities

- CJEU held that such provisions did were “plans or programmes” and thus subject to SEA if the Italian courts found that they set the framework for development consent

- Fact that SEA would be carried out at regional level was irrelevant

R (Berks, Bucks & Oxon WT) v SST [2019] EWHC 1786 (Admin)

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- Challenge to SST's acceptance of HE's preferred choice for Oxford to Cambridge "expressway"

- Argued that the decision was a "plan" for SEA purposes and had not been subject to SEA

- Held (Lang J) that this was not a "plan", applying *Terre Wallone* since it did not "stipulate" a route corridor or restrict the route but merely to progress two preferred corridors [41]

Berks, Bucks & Oxon (2)

Landmark Chambers

- Further it was not “required” by administrative provisions, being an ad hoc decision to prefer certain corridors [53]

- Similarly it did not “set the framework” for development consent since it lacked the necessary “potent influence” over the outcome: “By the time of the development consent procedures, the decision would simply be part of the project’s history” [56]

Standard of review: up for grabs?

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- Various attempts to argue for a different standard of review, including in Airports NPS litigation

- Such arguments have consistently been rejected by the CA: e.g. *Bowen-West* and *Evans*

- Some support said to derive from comments of AG Kokott in *Craeynest* and Aarhus Convention Compliance Committee in the Port of Tyne case (ACCC/2008/33)

Standard of review: up for grabs?

Landmark Chambers

- CA decision on Airports will revisit this point
- CJEU has not definitively ruled on the argument: conceptual difficulties around procedural autonomy and effectiveness create a risk
- ACCC will hear further argument on this tomorrow in ACCC/2017/156 where Friends of the Earth and others argue that the conventional ***Wednesbury*** standard of review is not compatible with Article 9
- Big question is what more intensive review looks like in this context (proportionality? Something else?)

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