Landmark Chambers

Habitats Update

Heather Sargent

Overview

Landmark Chambers

- AG Kokott's Opinion in C-254/19 ***Friends of the Irish Environment Ltd***
- The Court of Appeal judgment in ***Plan B Earth v Secretary of State for Transport***
- The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019
- Finnish wolves

C-254/19 *Friends of the Irish Environment Ltd*

Landmark Chambers

Case C-254/19 *Friends of the Irish Environment Ltd v An Bord Pleanála*

- Opinion of Advocate General Kokott delivered on 30 April 2020
- Art. 6(3) of the Habitats Directive (92/43/EEC): any "plan or project" that is likely to have a significant effect on a European site requires appropriate assessment
- Where a development consent is limited to a 10 year period, is a proposed extension of that period by a further 5 years a "plan or project"?
- Or are the original development consent and the extension to be regarded as a single operation such that no further assessment is necessary?

C-254/19 *Friends of the Irish Environment Ltd*

Landmark Chambers

- AG Kokott: further assessment is required:

  "the decision to extend the duration of the development consent to construct the facility, in the absence of which no works may be carried out, must be regarded as independent agreement of a project such as to trigger Article 6(3) of the Habitats Directive"

- Development consent for an LNG regasification terminal granted 13 March 2008
- 10-year time limit imposed on construction phase
- Development is not commenced
- Application made in September 2017 for a 5-year extension of the construction phase. Application granted by the Board

C-254/19 *Friends of the Irish Environment Ltd*

Landmark Chambers

- AG Kokott: the Board "agreed to the project" for the purposes of art. 6(3) by issuing the extension in 2018 (AG[28])
- Board: notes that in the context of the EIA Directive, the CJEU does not regard the renewal of an operating permit as being development consent for a project, provided that there are no works/interventions involving alterations to the physical aspects of the site: **C-275/09 *Brussels Hoofdstedelijk Gewest*** and **C-121/11 *Pro Braine*** (AG[29])
- AG Kokott: no
  - "Project" in the EIA Directive is more narrowly defined than in the Habitats Directive (**C-293/17 *Coöperatie Mobilisation for the Environment***)
  - In any event, on the facts the extension would be a development consent for a "project" under the EIA Directive too

C-254/19 *Friends of the Irish Environment Ltd*

Landmark Chambers

- AG considers (AG[30]) whether the original 2008 development consent and the 2018 extension should be regarded as a single operation
  - If they are a single operation, the extension would not need further assessment under art. 6(3): **C-226/08 *Stadt Papenburg*** and **C-293/17 *Coöperatie Mobilisation for the Environment***

- No:
  - It's not an "old" project (initially authorised prior to the advent of the Habitats Directive) so there is "much less reason to protect the project developer via the legal concept of the single operation“

C-254/19 *Friends of the Irish Environment Ltd*

Landmark Chambers

- The effort required to carry out an appropriate assessment of the extension "would be very limited": "[o]ne could essentially refer to the previous assessment and would only have to take account of any changes that have occurred since then"
- Under Irish law, the terminal cannot be constructed without a new development consent for the extension of the construction phase (AG[39])
- The extension therefore enables the works to be carried out for the first time (where otherwise they could not be) - that is an "essential difference" from recurring activities, which "will generally not have an additional adverse effect […] if they are repeated without being altered" (AG[47])

C-254/19 *Friends of the Irish Environment Ltd*

Landmark Chambers

- Notes that under the EIA Directive, a decision that is necessary to prevent an existing development consent from expiring is considered to constitute a new development consent, requiring an assessment: **C-201/02 *Wells*** (AG[45])
- Requiring the application of art. 6(3) aligns with the purpose of a temporary development consent (AG[41]) - both the factual position and the legal position (applicable regulations, etc.) might have changed by the end of the 10-year period
- On the facts: deficiencies in the initial assessment of the 2008 development consent mean that the latter is of only very limited relevance (AG[42])

C-254/19 *Friends of the Irish Environment Ltd*

Landmark Chambers

- What considerations does the competent authority have to take into account when screening the extension (i.e. the new project)?
  - The significance of the finding that the original project would not adversely affect the integrity of the relevant European site(s) depends on the reasons for that finding
  - Any “gaps” (flaws) in the assessment undertaken for the original project have to be closed

C-254/19 *Friends of the Irish Environment Ltd*

Landmark Chambers

- The new assessment has to take into account any intervening changes in the project, the protected habitats / species and scientific knowledge
- Also have to update the assessment of potential cumulative effects, to include plans and projects consented since the date of the original development consent

Plan B Earth v Secretary of State for Transport

Landmark Chambers

[2020] EWCA Civ 214

27 February 2020

Decision of the Court of Appeal in the Airports National Policy Statement ("ANPS") litigation

- What is the appropriate standard of review to be applied when considering whether there has been a breach of the requirements of art. 6(3) and/or (4) of the Habitats Directive?

Plan B Earth v Secretary of State for Transport

Landmark Chambers

- Divisional Court: ***Wednesbury*** irrationality
  - Relies on ***Smyth v SSCLG*** [2016] Env LR 7 and ***R (o.a.o. Mynydd y Gwynt) v SSBEIS*** [2018] Env LR 22

- Appellant: the appropriate standard of review is proportionality

- Court of Appeal: it is ***Wednesbury*** irrationality
  - Neither the decision of the CJEU nor the Opinion of AG Kokott in **C-723/17** ***Craeynest*** supports a different conclusion ([75])
  - There is no good reason to distinguish between the appropriate standard of review for art. 6(3) and that for art. 6(4)

Plan B Earth v Secretary of State for Transport

Landmark Chambers

The effect of art. 6(3) and (4) of the Habitats Directive is that where a plan or project will adversely affect the integrity of the relevant European site(s), it may only be consented if (i) there are no "alternative solutions"; (ii) imperative reasons of overriding public interest ("IROPI") require that it must be carried out; and (iii) all necessary compensatory measures are taken.

- Was the Secretary of State's rejection of the Gatwick second runway as an "alternative solution" for the purpose of art. 6(4) because it would not enhance the UK's aviation "hub" status lawful?

Plan B Earth v Secretary of State for Transport

Landmark Chambers

- Court of Appeal: yes
  - Endorses (at [92]) the Divisional Court judgment at [341]: in respect of a national policy statement, a proposed option is not an "alternative solution" unless it meets the core policy objectives of the statement
  - Those objectives must be "both genuine and critical" i.e. objectives such that if they were not met, no policy support would be given to the development
  - An option cannot be excluded as an "alternative solution" simply because in the policy-maker's view, another (preferred) option meets the policy objectives to a greater extent and is on balance more attractive

Plan B Earth v Secretary of State for Transport

Landmark Chambers

- Was the Divisional Court right to distinguish between "alternative solutions" under the Habitats Directive and "reasonable alternatives" under the SEA Directive?

- Court of Appeal: yes
  - The underlying purpose of each Directive is different
  - That of the SEA Directive is to ensure that environmental information is considered and to secure public participation; hence <u>all</u> reasonable alternatives must be considered and consulted upon

Plan B Earth v Secretary of State for Transport

Landmark Chambers

- Conversely, there is no duty to consult before concluding that the requirements of art. 6(4) of the Habitats Directive are met. It would have been unnecessary and inappropriate for the Secretary of State to have had to consider the Gatwick second runway as an "alternative solution" under art. 6(4) in circumstances where his judgement was that it did not meet a core objective of the policy
- Consultees were able to argue pursuant to the SEA Directive that the "hub" objective should not be decisive against the suggested alternative

The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019

Landmark Chambers

- Were due to come into force on "exit day" (31 January 2020) but will now come into force on "IP [implementation period] completion day" (31 December 2020 – 11pm)
  - References to "exit day" in these Regulations need to be read as references to "IP completion day" (see para. 1 of Part 1 of Sch. 5 to the European Union (Withdrawal Agreement) Act 2020)

- Intent: "to address failures of retained EU law to operate effectively and other deficiencies […] arising from the withdrawal of the UK from the EU"

The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019

Landmark Chambers

Amend the following legislation:

- Wildlife and Countryside Act 1981
- Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations")
- Conservation of Offshore Marine Habitats and Species Regulations 2017
- Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001

The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019

Landmark Chambers

Amendments to the Habitats Regulations:

- New reg. 3A(4): the Secretary of State / Welsh Ministers may issue guidance as to the interpretation of the requirements of the Directives (must consult with the appropriate nature conservation body and such other bodies or persons as it considers appropriate

- New reg. 9(4A): competent authorities must have regard to any such guidance

The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019

Landmark Chambers

- Reg. 64 is amended so that the Secretary of State / Welsh Ministers (instead of the European Commission) will give an opinion as to whether there are IROPI
  - In doing so, regard must be had to the national interest;
  - The JNCC must be consulted;
  - Also the devolved administrations (or the Secretary of State where the Welsh Ministers are the appropriate authority); and
  - Any other person the appropriate authority considers appropriate

The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019

Landmark Chambers

- New regs. 143 to 145
  - The Secretary of State / Welsh Ministers can amend Sch. 2 to 5 to the Habitats Regulations and the Annexes to the Habitats (and new Wild Birds) Directives if it is considered "necessary" to do so, to adapt them "to technical and scientific progress"
  - Must be done by statutory instrument and this needs approval by resolution of each House of Parliament (approval of National Assembly, in Wales)

And finally…

Landmark Chambers

Case C-674/17 *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo—Kainuu Ry* [2020] 2 CMLR 1

- The hunting of wolves in Finland

- Interesting CJEU judgment (10 October 2019) on the circumstances in which derogation permits (permitting hunting) may be granted, in accordance with the provisions of the Habitats Directive

Landmark Chambers

Thank you for listening

London
180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham
4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us
clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk

Follow us
@Landmark_LC
Landmark Chambers