Landmark Chambers

EIA and the Habitats Regulations: Recent developments

Heather Sargent

Landmark Chambers

Art. 6 of the Habitats Directive

- 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" to establish whether it will "adversely affect the integrity of the site"
- Art. 6(4): if there will be an adverse effect on integrity, a plan/project can be consented if there are "imperative reasons of overriding public interest", provided that there are no "alternative solutions" and "all compensatory measures necessary to ensure the overall coherence of Natura 2000" are taken

Mynydd y Gwynt

Landmark Chambers

***R (Mynydd y Gwynt Ltd) v SSBEIS* [2018] PTSR 1274**

- Court of Appeal, 22 February 2018 (Peter Jackson LJ; Floyd & Lewison LJJ agreeing)

- Application for a DCO for a 27-turbine wind farm on a site adjoining the Elenydd Mallaen Special Protection Area ("SPA") whose qualifying species include the red kite

- Application refused by the Secretary of State because she is not satisfied that the project would not have an adverse effect on the integrity of the SPA

Mynydd y Gwynt

Landmark Chambers

- Secretary of State accepts NRW's advice that:
  - It has not been proven beyond reasonable scientific doubt that the red kite using the project site do not come from the SPA;
  - There is no certainty that the mitigation proposed by the claimant would be effective;
  - There are concerns about the age and methodology of the surveys; and
  - Information has not been provided about the in-combination effect together with other wind farms

Mynydd y Gwynt

Landmark Chambers

- Secretary of State reasons that the burden of proof is on the claimant to demonstrate that the proposed development will <u>not</u> adversely affect the SPA, rather than on NRW to demonstrate that harm <u>will</u> occur
- Secretary of State considers that she can only grant development consent where there is a <u>positive</u> assessment of no adverse effect on integrity; she considers that she does not have that information
- Judicial review claim is unsuccessful in the High Court (Hickinbottom J) and the appeal to the Court of Appeal is dismissed

Mynydd y Gwynt

“[26] The Secretary of State was required to exercise a judgment at the junction between two important social objectives - renewable energy and species protection. She was faced with a conflict of views between her statutory conservation adviser and her examiner. She asked for further assistance: NRW responded, the claimant did not. I accept that the Secretary of State might have been persuaded by the arguments that found favour with the examiner, but in the overall circumstances I consider that she was entitled to accept the advice of NRW and conclude that she did not have the information necessary to enable her to grant the application.”

Landmark Chambers

Mynydd y Gwynt

On the detailed arguments:

- On the obligation to provide such "information" as the competent authority may reasonably require:
  - "I can see no reason to put a limit on what "information" might entail. Using the normal meaning of the word, it can clearly extend beyond raw data to explanation, analysis and professional opinion. […] If a request is unreasonable, the applicant can say so."([29])

- Use of the expression "burden of proof" is "not helpful" in this context but Hickinbottom J had not erred in observing that "the burden is upon [the applicant] to ensure that the competent authority is provided with sufficient information to convince the authority…"

Mynydd y Gwynt

- Rejection of the argument that the claimant had effectively been required "to prove a negative beyond reasonable doubt"
  - "…the Secretary of State was not asking for absolute certainty about the red kite population. Rather, she required clarity. She was entitled to take the view that did not emerge from the information before her"

- Rejection of the argument that the Secretary of State's decision is inconsistent with the conclusions reached in (i) the Mid-Wales Inquiry; and (ii) the Bryn Blaen decision (i.e. conclusion of no likely significant effect upon the red kite population in combination with the claimant's project)

Berks Bucks and Oxon Wildlife Trust

R (o.a.o. Berks Bucks and Oxon Wildlife Trust) v SST **[2019] EWHC 1786 (Admin)**

- Lang J, 10 July 2019
- Judicial review challenge to SST's decision to accept Highways England's recommendation on the choice of a preferred corridor for the proposed new Oxford to Cambridge Expressway
  - One of the grounds of challenge is that no Habitats Regulations Assessment ("HRA") was carried out
- SST: there is no legal requirement to undertake HRA at this early stage when no definite decisions on corridor / route have been made; the assessment will come as part of the DCO process

Berks Bucks and Oxon Wildlife Trust

- Lang J concludes that HRA was not required because there was no “plan” or “project”:
  - The decision merely accepted the recommendation to take forward (to the next stage of development) two mutually exclusive preferred corridors “but it **did not prevent consideration of routes outside the preferred corridors at a later stage**” ([69])
  - “It was a step taken in the course of the preparation of a project, and not a plan”

Landmark Chambers

Berks Bucks and Oxon Wildlife Trust

- Furthermore:
  - The decision was not likely to have a significant effect on the Special Areas of Conservation ("SACs") because it would not result in the execution of work or any intervention in the environment
  - "It was an early preliminary step in the definition of a project yet to take shape" ([71])
  - "Clearly distinguishable" from Case C-6/04 ***Commission v UK*** where a statutory development plan did have a considerable influence on development decisions (and as a result, on the protected site)

People Over Wind

C-323/17 *People Over Wind & Peter Sweetman v Coillte Teoranta*

- CJEU, 12 April 2018; reported as [2018] PTSR 1668
- Measures that are intended to mitigate the harmful effects of the plan/project should not be taken into account at the "screening" stage – i.e. when determining whether the plan/project is "likely to have significant effects" on a protected site
- For further consideration of ***People Over Wind*** in domestic courts, see:
  - ***Canterbury City Council v SSHCLG*** [2019] JPL 1321
  - ***Gladman Developments Ltd v SSHCLG*** [2020] Env LR 7

Grace & Sweetman

Landmark Chambers

C-164/17 *Grace & Sweetman v An Bord Pleanála*

- CJEU, 25 July 2018
- Factual context: permission granted for a 16 turbine wind farm in an SPA; the Board concludes that there will not be an adverse effect on the integrity of the SPA
- The proposed development includes a management plan, which includes measures that seek to ensure that the **total area** of suitable hen harrier habitat will not be reduced

Grace & Sweetman

- “[S]ome parts of the SPA would no longer be able, if the project went ahead, to provide a suitable habitat but […] a management plan would seek to ensure that a part of the SPA that could provide suitable habitat is not reduced and indeed may be enhanced”
- Question for the CJEU: are those measures **mitigating** measures, such that they can be taken into account under art. 6(3) in determining whether there will be an adverse effect on integrity? Or are they **compensatory** measures, which can only be considered under art. 6(4)?
- Answer: the measures cannot be taken into account under art. 6(3) but fall to be considered under art. 6(4)

Holohan

Landmark Chambers

C-461/17 *Holohan v An Bord Pleanála*

- CJEU, 7 November 2018; reported as [2019] PTSR 1054
- Factual context: grant of development consent for the extension of a ring-road
- Question: does an “appropriate assessment” (“AA”) have to:
  - catalogue **all** the habitats and species for which a site is protected; and
  - assess potential effects on both (i) species present on the site but for which the site is **not** listed; and (ii) habitats and species **outside** the site boundary?

Holohan

Landmark Chambers

- Answer:
  - Yes, **all** the habitats and species for which a site is protected must be catalogued in the AA – **although** “it may be sufficient to establish [...] that only certain protected habitat types and species are present in the part of the protected area that is affected by the project and that the other protected habitat types and species present on the site are not liable to be affected”;
  - The implications of the project for (i) species present on the site but for which the site is **not** listed; and (ii) habitats and species **outside** the site boundary must be identified and examined **to the extent that those implications are liable to affect the conservation objectives of the site**

Inter-Environnement

Landmark Chambers

C-411/17 *Inter-Environnement Wallonie ASBL v Conseil des ministres*

- CJEU, 29 July 2019
- Factual context: Belgian legislation provides for the reactivation of a nuclear power station for a 10 year period and for the deferral by 10 years of the date initially set for deactivation of another nuclear power station
- CJEU concludes that there is a “project” for the purposes of the Habitats Directive and that an appropriate assessment **is** required

Inter-Environnement

Art. 6(4)

- If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for **imperative reasons of overriding public interest**, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

- Where the site concerned hosts a **priority natural habitat type and/or a priority species**, the only considerations which may be raised are those relating to human health or **public safety**, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

Inter-Environnement

- The objective of “ensuring security of the electricity supply in a Member State at all times” constitutes an imperative reason of overriding public interest for the purpose of art. 6(4)

- **But** if the protected site likely to be affected by a project hosts a “priority” natural habitat or species, “only a need to nullify a genuine and serious threat of rupture of that Member State’s electricity supply” constitutes a “public security ground” within the meaning of art. 6(4)

Coming soon…

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

- 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?
- Opinion of Advocate General Kokott delivered on 30 April 2020: 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"

EIA

Holohan

Landmark Chambers

- The obligation to supply information in an environmental statement (“ES”) “does not extend to **all** effects on **all** species present, but is restricted to the **significant** effects”
- The latter concept is “to be interpreted in the light of Article 1(1) and Article 2(1) of the EIA Directive, according to which projects that are likely to have significant effects on the environment must be subject to an assessment of their effects”
- So the developer must “supply information that expressly addresses the **significant** effects of its project on all species identified” in the ES

Holohan

Landmark Chambers

- Also: the developer "must supply information in relation to the environmental impact of both the chosen option and of **all** the main alternatives studied […] together with the reasons for his choice, taking into account at least the environmental effects, **even if such an alternative was rejected at an early stage**"

Inter-Environnement

Landmark Chambers

- Where a piece of infrastructure is brought back into use, or the lifetime of the project is extended, is there a (new) “project” for the purposes of the EIA Directive?
- CJEU: the legislative measures at issue entail major upgrade work to the power stations in question
  - The legislative measures “cannot be artificially dissociated from the work to which they are inextricably linked”
  - The measures and the upgrading work together constitute a single project
  - It doesn’t matter that the implementation of the legislative measures will require subsequent acts such as the issue of a specific consent

Landmark Chambers

Thank you for listening

hsargent@landmarkchambers.co.uk

© Copyright Landmark Chambers 2020
Disclaimer: The contents of this presentation do not constitute legal advice and should not be relied upon as a substitute for legal counsel.