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Habitats case law: review of the year

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Key themes

- Article 6(4): IROPI, alternatives and compensation
- The standard of review
- Timing of appropriate assessment

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Article 6(4)

Heathrow litigation

- Airports NPS adopted on the basis that adverse effect on integrity could not be excluded but that there were IROPI and no alternatives
- That conclusion was challenged by the Mayor of London and the local authorities
- The particular issue concerned the rejection of a second runway at Gatwick as an alternative

Court of Appeal in Heathrow [2020] PTSR 1446

- CA upheld DC findings that SST was entitled to rely on the "hub objective" to exclude Gatwick as an alternative

- That aim was central to the ANPS, and the fact that Gatwick was treated as a "credible option" did not mean it was an "alternative" for the purposes of the Art 6(4)

- CA relies on AG Opinion in *Portugal*: *"Among the alternatives shortlisted … the choice does not inevitably have to be determined by which alternative least adversely affects the site concerned. Instead, the choice requires a balance to be struck between the adverse effect on the integrity of the SPA and the relevant reasons of overriding public interest."*

Alternatives: SEA v HRA

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- The SEA process could legitimately consider “reasonable alternatives” which were then excluded as “alternatives” for the purposes of HRA:

“the Habitats Directive has a determining effect on the inclusion or exclusion of alternatives. By contrast, the identification of “reasonable alternatives” under the SEA Directive is a requirement designed to inform the following consultation process. It was, therefore, permissible, in the preparation of the ANPS, to retain the Gatwick second runway scheme as a “reasonable alternative” in the Appraisal of Sustainability throughout the process. However good a plan or project the alternative in question might be in itself, and even if there may be a strong case on environmental grounds for preferring it to the plan or project actually proposed, the SEA Directive does not dictate that it be adopted and the proposed plan or project rejected.”

C-411/19 WWF Italia v Presidenza del Consiglio dei Ministri

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- Derogation under Art 6(4) must be interpreted strictly and economic impacts of alternatives alone are not sufficient to reject them

- The AA cannot be revisited at the “derogation” stage e.g. by requiring further studies, because the derogation must weigh up the environmental impacts against the “IROPI”

- The AA must include an assessment of protective measures, so further measures cannot be added without revisiting the AA

- Compensatory measures may, of course, be applied subsequently

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STANDARD OF REVIEW

Heathrow and the standard of review

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- CA rejected an argument that a different standard of review was required:

"First, although the Advocate General in Craeynest [2020] Env LR 4 indicated that in some cases a more intensive standard of review will apply, this was especially—as she put it (in point 43 of her opinion)—"where they are particularly serious interferences with fundamental rights". The Hillingdon claimants have not shown how any fundamental EU rights have been interfered with in this case, let alone seriously interfered with or made "impossible in practice" to exercise. Secondly, as the court said in Craeynest, there is a clear strand of EU case law that respects the discretion of member states to lay down procedural rules for the protection of EU law rights. Wednesbury irrationality is the normal standard of review applicable in judicial review proceedings in this jurisdiction where interferences are alleged with rights of various kinds, including rights arising in domestic environmental law. And it seems to us appropriate in principle, and not less favourable, to apply the same standard to rights under EU law. Nor does it render the exercise of EU rights virtually impossible or excessively difficult in practice. In our view, therefore, there is no justification for applying a more intense standard of review than Wednesbury to the operation of the provisions of article 6(4) of the Habitats Directive. Neither the court's decision in Craeynest nor the Advocate General's opinion supports a different conclusion."

The CJEU and standard of review

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- Some doubts as to how *Wednesbury* would be regarded by CJEU, particularly in the context of derogation under Art 6(4)

- See e.g. *WWF Italia*: “for the referring court to verify” whether alternatives exist

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TIMING: WHEN DOES THE ASSESSMENT HAVE TO BE CARRIED OUT?

Keep Bourne End Green v Buckinghamshire CC [2020] EWHC 1984 (Admin)

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- Challenge to plan allocation of 32 Ha of land for housing

- Council could rely on “multi-stage decision-making process” to confine the assessment to the acceptability in principle of the proposed mitigation measures for the Burnham Beeches SAC

- Confirms the need for “credible evidence of a real, rather than a hypothetical risk of harm” to mount a challenge based on HRA defects

C-254/19 Friends of the Irish Environment v An Bord Pleanala

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- Main issue was whether an extension of time to implement consent for an LNG regasification terminal triggered Article 6(3)
- Extension of time is a “project” for EIA and Habitats purposes
- In certain circumstances “having regard in particular to the regularity or nature of those activities or the conditions under which they are carried out”, extensions of time could be considered “one and the same project” and thus exempt from new assessment
- That is not the case (at least) where the previous consent has lapsed – a new assessment is required
- It is lawful (and necessary) to take into account previous assessments, but they must be complete and up to date

R (Hudson) v Windsor and Maidenhead RLBC [2020] JPL 779

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- Failure to carry out appropriate assessment not fatal to planning permission
- The OR itself was incapable of amounting an AA on the facts
- However the applicant's assessments had demonstrated that mitigation measures could address any adverse effects, and NE was satisfied as to the measures
- In those circumstances, relief was refused under s 31 SCA 1981

Thank you for listening

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