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Environmental Law Update

7 May 2020

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Update on Air Quality Law and Practice

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Esther Drabkin-Reiter

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Overview

- Impact of covid-19
- Recent case law
- Policy update

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Impact of covid-19 on air quality issues

- Falling air pollution levels
- Behavioural changes
- Implementation of Clean Air Zones in certain cities delayed
- Possible effects on development management

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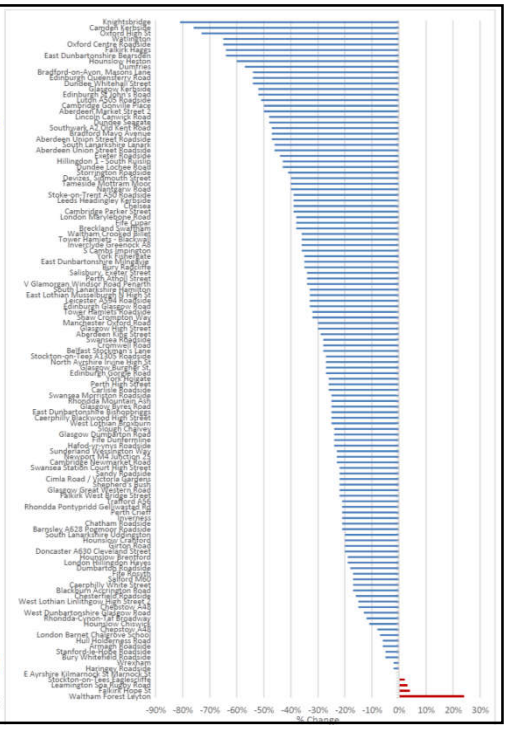
Graph showing relative percentage change in NOx (adjusted to remove meteorological and seasonal variations) at 122 road sites across the UK.

Comparing mean of period 24 March – 9 April 2020 with 1 January – 14 March 2020.

Source: Air Quality Consultants



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R (Shirley) v SSHCLG [2019] EWCA Civ 22

Challenge to refusal of SoS to call in planning application. CA held:

- Air Quality Directive (AQD) does not generate a freestanding responsibility to take particular action on planning consents
- Preparation of an air quality plan is the single means prescribed in AQD for addressing breaches of limit values
- AQD does not narrow the broad call-in discretion of SoS
- Where there are concerns about air quality in planning, JR of LPA decision is a sufficient supervisory jurisdiction
- The EU law is *acte clair* and therefore no need for a preliminary reference

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C-723/17 *Craeynest*

Preliminary reference raising questions concerning choice of air sampling locations in Brussels. CJEU held:

- Discretion of national authorities in choice of location is limited by criteria laid down in AQD
- National courts have jurisdiction to take all necessary measures to ensure compliance with those criteria
- Averaging to avoid exceedances - cannot avoid exceedances by averaging results from across different sampling points

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Gladman v SSHCLG [2019] EWCA Civ 1543

S.288 challenge to Inspector's refusal to grant PP. CA held:

- Duty to procedure and implement an air quality plan does not mean LPAs should presume the UK will become compliant with AQD in the near future
- AQD not a "parallel consenting regime" to which para 183 NPPF is directed
- No legal onus on inspector to formulate conditions that might make development acceptable but which none of the parties had raised

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Kenyon v SSHCLG [2020] EWCA Civ 302

Challenge to LPA's negative EIA screening decision.

- CA affirmed established position that likelihood of significant effects is a matter for the decision-maker
- Mere proximity of proposed development to an AQMA and increase in traffic does not require a finding of LSE
- No need for decision maker to set out all information and statistics relied on in relation to air quality – e.g. data on trip frequency, standard emissions and exceedances – when issuing screening opinion

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Policy developments

Clean Air Zone Framework (Feb 2020)

- Govt expects local authorities to follow Framework
- Compliance will be taken into account in funding decisions
- Minimum requirements: signs, reference to CAZ in local plans, facilitation of ULEV take up, improvement of public transport and private hire emissions standards
- Classes of vehicles for charging CAZ set out in Annex A

Update to PPG on Air Quality (Nov 2019)

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What was the Green Deal?

- Mechanism introduced in 2012 to facilitate the funding of energy saving measures. Concluded in 2015.
- Created by Chapter 1 of the Energy Act 2011
- Objectives of financing a broad range of energy efficiency improvements, creating a competitive and enduring market for energy efficiency
- Key feature is “Green Deal Plans” enabling energy saving measures to paid for by entering into a credit agreement which is paid back via the property’s energy bills

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How it worked

- **Stage 1**: Government registered assessor conducts an assessment of the property to see what improvements could be made and how much it could save on energy bills. 45 different energy saving measures available including heating, insulation, and renewable energy generation
- **Stage 2**: Owner chooses a Green Deal provider to carry out the work. Only work that would reduce the energy bill highlighted by the assessor would qualify.
- **Stage 3**: Green Deal plan entered into. This is a contract between the owner and the provider stating what work will be done and how much it will cost. The Green Deal Provider then arranges a Green Deal installer to do the work. Measures funded by the Green Deal Finance Company.
- **Stage 4:** Works complete. Homeowner or tenant pays off the cost in instalments through their electricity bill.

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Key Features

- All the participants: Assessors/ advisors, Installers, and Providers all accredited by a certification body and registered with the Green Deal Oversight and Registration Body (which managed authorisations on behalf of the Secretary of State
- All participants required to comply with the Code of Practice published under the Green Deal Framework (Disclosure, Acknowledgement, Redress etc.) Regulations 2012
- The "Golden Rule" was that works could only be funded by the Green Deal if the estimated savings on bills would exceed the cost of the work.
- When transferring an interest/ licence in relation to a property, the existence of the Green Deal Plan must be disclosed. The plan runs with the property.

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Feed in Tariff

- Outside the Green Deal
- Payments by licensed electricity suppliers for for renewable energy (photovoltaic panels, wind turbines, micro combined heat and power, hydroelectric or anaerobic digesters) generated/ exported
- FiT contracts often entered into simultaneously with Green Deal Plans

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Regulation

- Regulated under the Energy Act 2011 and the Green Deal Framework (Disclosure, Acknowledgement, Redress etc.) Regulations 2012
- Code of Practice governing green deal participants issued by the Secretary of State under Regulation 10. Regulations require participants to comply with the code of practice.
- Regulation 53 empowers the Secretary of State to impose sanctions including cancellation, reduction, compliance notice, financial penalty, and suspension/ withdrawal of authorisation
- Regulation 79 requires that sanctions be proportionate to the breach in relation to which they are imposed

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Sanctions Process

- Regulation 52 - sanctions may only be imposed where an eligible complaint is made or referred to the Secretary of State, or where information is received from an authorised person.
- Regulation 72 - the Secretary of State must give notice of his intention to impose a sanction on anyone considered to be an affected person (an “intention notice”).
- Regulations 77 and 78 require notice of the decision
- Regulation 87 provides for an appeal to the FTT

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Issues

- Home Energy & Lifestyle Management (a Green Deal Provider) sold 4,263 PV Panels
- HELMS assigns benefit of loans repayments to GDFC Limited in return for cash sum
- September 2015 fined £200,000 by ICO for sales calls and November 2015 find £10,500 by DECC for breaches of Code of Practice
- Entered liquidation in 2016
- 2017 GDFC Assets sold to Greenstone Finance, Aurium Capital Markets and Honeycomb Investment Trust

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FTT Decisions

- *Mason v SoS* BEIS NV/2019/0018/P
- *Leach v SoS BEIS* NV/2019/0019
- *Tibbs v SoS BEIS* NV/2019/0020 /P

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Leach v SoS BEIS

"This is the first appeal under these Regulations to require determination by the Tribunal" and "gives rise to a complex set of legal issues"

SoS imposed sanction reducing plan to level would have been had the plan been perly described. FTT allows appeal but remits to SoS:

"I agree with the Secretary of State that HELMS committed a number of breaches of the Code of Practice, which put them in breach of the over-arching requirement to comply with the Code of Practice. I agree that these breaches were "severe" within the terms of regulation 67 (1) (a) and that the bill payer, Mrs Leach, thereby suffered "substantive loss" for the purposes of regulation 67 (3)."

"The other documentary evidence before me suggests that HELMS' modus operandi had been found by the relevant authorities to include bamboozling its customers on this very point. A fresh decision must consider this evidence carefully and weigh it against GDFC's heavy reliance on the strictly compliant format of the contractual documentation."

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FTB Quarterly Environmental Update
CLIMATE CHANGE AND NET ZERO

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Pathway

1. Statutory context
2. Current position and tensions
3. Key recent cases:
   - (i) R (Plan B Earth) v SST [2020] EWCA Civ 214
   - (ii) Packham v SST [2020] EWHC 829
   - (iii) R (ClientEarth) v SSBEIS
   - (iv) R (Bennett) v Cumbria CC

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Committee on Climate Change

Climate Change Act 2008

Draft Order laid before Parliament under sections 2(6) and 91(1) of the Climate Change Act 2008, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2019 No.

CLIMATE CHANGE

The Climate Change Act 2008 (2050 Target Amendment) Order 2019

Made - - - - ***

Coming into force in accordance with article 1

A draft of this instrument was laid before and approved by a resolution of each House of Parliament, in accordance with sections 2(6) and 91(1) of the Climate Change Act 2008 ("the Act")(a).

Before the draft was laid, the Secretary of State—

(a) obtained and took into account the advice of the Committee on Climate Change, in accordance with section 3(1)(a) of the Act; and

(b) took into account representations made by the Scottish Ministers, the Welsh Ministers and the Department of Agriculture, Environment and Rural Affairs in Northern Ireland in accordance with section 3(1)(b) of the Act(b),

The Secretary of State considers that since the Act was passed, there have been significant developments in scientific knowledge about climate change that make it appropriate to amend the percentage specified in section 1(1) of the Act.

Accordingly, the Secretary of State, in exercise of the power conferred by section 2(1)(a) of the Act, makes the following Order:

Citation and commencement

1. This Order may be cited as the Climate Change Act 2008 (2050 Target Amendment) Order 2019 and comes into force on the day after the day on which it is made.

(a) 2008 c.27
(b) see sections 95 and 96 of the Act for definitions of "national authority" and "relevant Northern Ireland Department".

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Climate Change Act 2008

- Embedded legislation – targets and budgets (once set) can only be changed if there are "significant developments" in scientific knowledge, or European or international law or policy" (s.2(4), s.6(2) etc.)
- Enforcement by way of reports and statements to Parliament, where if the budget or target is not met "the statement must explain why it has not been met" (s.18(6), s.20(6))

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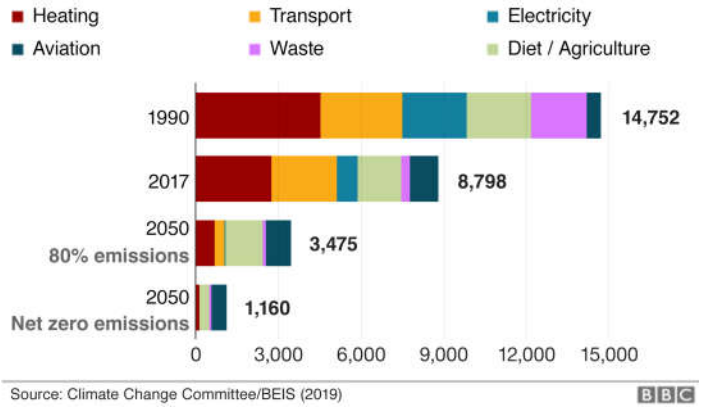
Household emissions in 1990,2017 and 2050

Annual emissions, kilogrammes of CO2



Source: Climate Change Committee/BEIS (2019)

BBC

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Increasing recognition

- Number of court cases (http://climatecasechart.com/)
- Recognition in policy – see s.19(1A) PCPA 2004
- Declarations of climate emergency

Pond Farm, North Norfolk (APP/Y2620/W/15/3134132)

- Recognition in the courts:

"The issue of climate change is a matter of profound national and international importance …" Plan B [277]

R (McLennan) v Medway Council [2019] EWHC 1738 (Admin)

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Tensions

(1) Policy vs. decision-making

(2) Regulation vs. market

(3) Precaution vs. prediction

(4) Polycentricity (cf. Lon Fuller (1978) 92 Harv L Rev 353)

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Heathrow – Plan B Earth

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The facts

- Challenge to the Airports NPS
- 80% reduction target in CCA 2008 (consistent with 2°C); Paris Agreement: "well below 2°C"; 1.5°C
- SoS not take Paris Agreement into account when designating ANPS (at [186]) – was there a requirement to do so?

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Plan B Earth

Section 5(8) Planning Act 2008

(7) A national policy statement must give reasons for the policy set out in the statement.

(8) The reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaption to, climate change…

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Court of Appeal's findings

- "Government policy" has no technical meaning; applied in their ordinary sense to the facts of a given situation (at 224);
- Not limited to the legal requirements of CCA (at 224);
- Overall – Gov's commitment to the Paris Agreement was "clearly" part of Gov policy – that followed form the UK's ratification of the agreement and various ministerial statements (228)

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Friends of the Earth

Section 10

(1) This section applies to the Secretary of State's functions under sections 5 and 6.

(2) The Secretary of State must, in exercising those functions, do so with the objective of contributing to the achievement of sustainable development.

(3) For the purposes of subsection (2) the Secretary of State must (in particular) have regard to the desirability of –

(a) mitigating, and adapting to, climate change; …

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Court of Appeal's findings

- Accept that SoS erred by not asking himself whether he could take the Paris Agreement into account under s10 (at 236)
- And, if he had done so – "the only reasonable view open to him was that the Paris Agreement was so obviously material that it had to be taken into account" (at 237)

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HS2 – Packham

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The facts

- 11 February 2020 – Gov decision to go ahead with HS2
- Follow recommendations of the Oakervee Report
- Recognition that the construction-phase would add to carbon emissions
- But report stated that:
  - "[o]n balance, taking into account both the construction and operation of HS2, it appears that HS2 is likely to be close to carbon neutral, though it is not clear whether overall HS2 is positive or negative for greenhouse gas emissions…"
  - "HS2 could help deliver the government's commitment to bring all greenhouse gas emissions to net zero by 2050"

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Claimant's argument

- The Gov had failed to take into account how the construction of HS2 would impact on Paris Agreement requirements
- That was an obviously material consideration
- The Paris Agreement's focus is not limited to NZ by 2050, but on restricting the global increase in temp by that point
- The Gov needed to consider how construction-related emissions (prior to 2050) were consistent with the Paris Agreement

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Divisional Court's findings

- The report (and the decision-maker) did not only look at the effect of HS2 on climate change in 2050
- The report considered the effects of the project before and after 2050 resulting from construction and the first 60 years of operation
- The conclusion that the project would be "likely to be close to carbon neutral" relates to the overall period (before and after 2050)
- It was obvious from the report that (i) the construction phase would increase carbon emissions pre-2050 and (ii) this would only be off-set by carbon savings arising from the operation of the scheme over a longer period of time

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Drax – ClientEarth

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The facts

- Grant of development consent for energy NSIP
- Construction and operation of two gas-fired generating units (combined capacity of 3,800MW)
- Applicant estimated net increase in GHGs = +90%
- Dev would be CCR but no requirement for CCS
- Expect Unit X to be constructed by 2022/2023; Unit Y by 2027
- Dev designed to operate for 25 years (no time-limiting condition)

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➢ How are GHGs to be assessed under EN-1/EN-2?

CO2 emissions are a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology). However, given the characteristics of these and other technologies, as noted in Part 3 of this NPS, and the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS (see Section 2.2 above), Government has determined that CO2 emissions are not reasons to prohibit the consenting of projects which use these technologies or to impose more restrictions on them in the planning policy framework than are set out in the energy NPSs (e.g. the CCR and, for coal, CCS requirements). Any ES on air emissions will include an assessment of CO2 emissions, but the policies set out in Section 2, including the EU ETS, apply to these emissions. The [decision-maker] does not, therefore need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address CO2 emissions or any Emissions Performance Standard that may apply to plant. (para 5.2.2 of EN-1)

➢ Procedural fairness – NZ target introduced post-examination

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Coal extraction – Bennett

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The facts

- Resolution to grant PP by Cumbria County Council
- New underground metallurgical coal mine
- 50 years' continuous coal-mining operations
- 2.43 million tonnes p/a of "coking coal" and 350,000 tonnes p/a of "middlings coal"
- Operations of mine considered to be "carbon neutral" due to production substitution
- No assessment of GHGs from operation of mine in ES

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EIA argument

- Reference to "climatic factors" (Town and County Planning (EIA) Regs 2011, Sch 4, Part 1, para 3) must include assessment of GHG emissions from dev
- D/IP argue that a separate estimate of GHG emissions was not "reasonably required to assess the environmental effects" because it was reasonably adjudged that these emissions would be counter-balanced by broadly equivalent savings elsewhere through production substitution
- C argue *inter alia* that any counter-balancing effect needed to be reported on in the EIA

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Net Zero arguments

- When considering whether to grant permission for dev that will emit GHGs post-2050, the decision-maker must have regard to the level of offsetting/mitigation required to reach NZ
- NZ is a qualitative shift from 80% - all emissions must be offset/mitigated
- CCA 2008 100% reduction by reference to "net UK carbon account" – only UK emissions (so production substitution argument not relevant)

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Environmental Law Quarterly Seminar

7 May 2020

Caselaw update (1)

Mark Westmoreland Smith

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Introduction

- ***Kenyon v Secretary Of State For Housing, Communities And Local Government*** [2020] EWCA Civ 302
- ***Repsol Sinopec Resources UK Limited v the Secretary Of State For Business, Energy and Industrial Strategy*** [GGE/2019/0001/BEIS]

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Kenyon – the facts

- 150 houses on a disused sports complex.
- C applied for JR of a direction issued by the Secretary of State that the proposed development was not EIA development.
- Grounds as originally pleaded:
  - (1) The Secretary of State failed properly to consider the cumulative environmental effects of the proposal in his screening direction;
  - (2) The Secretary of State placed undue reliance upon conditions in an attempt to remedy the adverse environmental effects; and
  - (3) The Secretary of State failed to consider other relevant environmental matters including loss of woodland, open space; flood risk; and increases in greenhouse gas emissions.

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Kenyon – public law takeaways

(1) Judicial review is limited to legal grounds alone and the court's will be alert to attempts to challenge the merits by the backdoor;

(2) Do not seek to rely on documents not before the decision maker;

(3) "Challenge creep" ought not be tolerated;

(4) The forensic approach to legal challenges is to be deprecated;

(5) Challenges based on a deficit of evidence will face an uphill task; and

(6) Appeals to the court of appeal are to be made on points of law.

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Kenyon – public law takeaways (1)

Judicial review is limited to legal grounds alone and the court's will be alert to attempts to challenge the merits by the backdoor

- Para 2 of judgment:
  - *"The arguments on appeal ranged far and wide and included, somewhat surprisingly, a close review of the evidence before the first respondent and, subsequently, the judge. It was difficult to discern any substantial points of principle from any of this: speaking for myself, I wondered if the most important point to arise from the appeal hearing was the need to ensure that appeals in cases of this kind do not become another weary trot around a well-worn course."*

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Kenyon – public law takeaways (2)

Do not seek to rely on documents not before the decision maker

- Para 28 of judgment:
  - *"In judicial review proceedings it is generally inappropriate for parties to seek to rely on documents (and to advance arguments based on those documents) which were not available to the decision-maker. Taken at its highest, such an approach undermines the entire process of judicial review. It runs the risk that the court will be asked to conduct a kind of rolling review, in which nothing is ever finalised or settled, and it does not matter what information was available at the time the decision was taken. This serves only to encourage the all-too-prevalent attitude that, in judicial review applications, it is always possible to 'have another go'. The parties' references to the reports noted in the preceding paragraph were designed to do exactly that, with each side seeking to rely on particular paragraphs in support of their submissions about the rationality (or otherwise) of a decision made without sight of any of them. ."*

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Kenyon – public law takeaways (3)

Challenge creep

- CoA permission related to part of Ground 1 as originally pleaded.
- Grounds of appeal – five grounds.
- Para 41 of judgment:
  - *"Since I have formed a clear view on the merits of these five grounds, I propose to address them in detail, notwithstanding the myriad difficulties of principle to which I have referred. However, in another case, those observations might be thought to be sufficient to dismiss this appeal outright."*

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Kenyon – public law takeaways (4)

The forensic approach to legal challenges is to be deprecated

- Para 45 of judgment:
  - *"[The Appellant] spent a good deal of time identifying particular paragraphs in particular documents and seeking to point out the potential gaps and omissions within them. Some of this came down to an alleged failure to cross-reference properly. In my judgment, that is not a proper approach to a judicial review application of this sort, let alone an appeal."*

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Kenyon – public law takeaways (5)

Challenges based on a deficit of evidence will face an uphill task

- Para 43 of judgment:
  - *"An appellant seeking to argue that the decision-maker (and, by extension, the judge) reached a conclusion for which there was no evidential basis invariably faces an uphill task. Such a task is made even more difficult in a situation like the present case, given that the screening direction is a preliminary, broad-based assessment of environmental impacts, undertaken by those with relevant training and planning expertise."*

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Kenyon – public law takeaways (6)

Appeals to court of appeal are on points of law

- The judge observed that the Appellant made "*copious references to the screening opinion and decision, but never once referred to the judge's judgment, much less indicate where or how it was that the judge erred in law*"

- Para 39 of the judgment:
  - *"In my view, this relaxed attitude to the judge's rejection of the judicial review challenge, and her reasons for that decision, was unsatisfactory. In this case an experienced planning judge has considered the application for judicial review, evaluated the relevant material, and ruled that there was sufficient evidence for the decision made. On an appeal, it is incumbent upon an appellant to demonstrate that the judge erred in law in reaching such a conclusion. That requires considerably more than an attempt to reargue the case from the documents all over again."*

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Kenyon – EIA takeaways

(1) Test to be applied at the screening stage is whether the development is likely to have significant effects (i.e. whether there is a real risk);

(2) Questions of whether there is sufficient information to issue a screening opinion, and whether a proposed development was likely to have significant effects on the environment, are matters of judgment for the decision-maker;

(3) Comments on the proper approach to the application of the precautionary principle at the application stage; and

(4) Comments on the nature of screening opinions.

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Kenyon – EIA takeaways (1)

Test to be applied at the screening stage is whether the development is likely to have significant effects

- Judge reaffirmed test by reference to ***R (Loader) v Secretary of State for Communities and Local Government*** [2012] EWCA Civ 869

- At paragraph 43 of which Pill LJ said: *"43. What emerges is that the test to be applied is: "is this project likely to have significant effects on the environment?…The criteria to be applied are set out in the regulations and judgment is to be exercised by planning authorities focusing on the circumstances of the particular case…Only if there is a manifest error of assessment will the ECJ intervene. The decision maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental impact, at the date of the decision. Depending on the information available, the decision maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot be taken. Subject to that, proposals for ameliorative or remedial measures may be taken into account by the decision maker."*

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Kenyon – EIA takeaways (2)

Sufficiency of information

- The questions of whether there is sufficient information to issue a screening opinion, and whether a proposed development was likely to have significant effects on the environment, are matters of judgment for the decision-maker:
    - See *R (on the application of Birchall Gardens) v Hertfordshire CC* [2016] EWHC 2794 (Admin) at [66] and [67] and *Evans v Secretary of State* [2013] EWCA civ 115.

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Kenyon – EIA takeaways (3)

The precautionary principle

- Recital (2) of the EU directive (2011/92/EU of 13 December 2011).
- Precautionary principle will only apply if there is "*a reasonable doubt in the mind of the primary decision-maker*" [Judgement, paragraph 66].
- In screening decisions there are three options: it is EIA development, it is not EIA development, is may or may not be EIA development:
    - The precautionary principle only has application to the third option.

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Kenyon – EIA takeaways (4)

The nature of screening decisions

- A screening opinion is not intended to involve a detailed assessment of factors relevant to the grant of planning permission.
- It does not involve a full assessment of any identifiable environmental effects.
- It involves only a decision, almost inevitably on the basis of less than complete information, as to whether an EIA needs to be undertaken at all.
- This means that the court should not impose too high a burden on planning authorities in relation to what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment [Paragraph 13 of the judgment].

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Repsol

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Environmental Law Quarterly Seminar

7 May 2020

Caselaw update (2)

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Ross (Stop Stansted Expansion) v Sec of State Transport [2020] EWHC 226 (Admin)

- Challenge to decision NOT to regard Stansded expansion as NSIP

- Either by automatic qualification as NSIP or by exercise of discretion under section 35 PA 2008
- Scheme for creation of 2 taxiways, and 9 new aircraft stands
- Phase 3 of 3 stage expansion project
- App made to LPA, SSE said should be determined as NSIP
- Sec of State (for Transport) refused

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Stansted

- Planning app said would increase mppa from 35 to 43 (8)
- NSIP threshold is “permitted” or “capable” 10 mppa (s23(1) PA 08)
- Argument focused on issue of whether “capable” meant what the new infrastructure would theoretically capable of accommodating OR realistic and likely usage
- Additional issue of whether taxiways part of runway

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Stansted – Conclusions Ground 1

- Basis of judgement and/or material considerations
- Issue of capability requires judgement – *Wednesbury* grounds apply, with particular reference to difficulty of challenging expert driven view *(Mott)*
- Not theoretical or hypothetical but "an analysis based on how the infrastructure is likely to perform"
- Possibility of restrictions on night flights being lifted not supported by any evidence

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New framework for environmental governance

- Environmental targets
- Environmental Improvement plans (EIPs)
- Policy statement on environmental principles
- Statements about new environmental laws
- The Office for Environmental Protection (OEP)

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Stansted – Ground 2 background

Section 35 PA 2008

"(1) The Secretary of State may give a direction for development to be treated as development for which development consent is required…

(2) The Secretary of State may give a direction under subsection (1) only if –

(a) the development is or forms part of –

(i) a project (or proposed project (in the field of energy, transport, water, waste water or waste,… [and]

…

(c) the Secretary of State thinks the project (or proposed project) is of national significance… "

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Stansted – Ground 2 background

Guidance November 2013: *Extension of the nationally significant infrastructure planning regime to business and commercial projects*"

"…the Secretary of State will consider all relevant matters, including:

whether a project is likely to have a significant economic impact, or is important for driving growth in the economy;

whether a project has an impact across an area wider than a single local authority area;

whether a project is of a substantial physical size – further details are set out below; or

whether a project is important to the delivery of a nationally significant infrastructure project or other significant development."

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Stansted – Ground 2 background

"…the Secretary of State will also consider any matter which the Secretary of State considers relevant to whether a direction should be made. This will include:

whether a project is likely to require multiple consents or authorisations, and which, in consequence, would benefit from the single authorisation process offered by the nationally significant infrastructure regime;

Although size in itself will not be the determining factor in whether a project is nationally significant or not, the Secretary of State would not normally expect to receive requests for directions in relation to projects not of that are not of a substantial size…"

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Stansted – importance of the distinction

- Need case often established by NPS
- Policy established in NPS often favourable eg landscape
- One consent/one decision maker
- Ability to apply for associated infrastructure
- Higher profile, more engagement statutory undertakers?
- Set timings

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Stansted – Ground 2 conclusions

- Broad discretion - "task of the Claimants… is daunting"
- Alleged failure to appreciate that part of a larger project not made out – alleged facts not known to Sec of State and did not bear forensic construction claimed by C
- Carbon emissions consideration already dealt with in national policy documents (Making Best Use document with NPS)
- No evidence economic effects more than regional

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Stansted - Takeaways

- Re-affirmation of difficulty of challenge to judgements, especially where expert-driven and/or modelling
- Issue of what infrastructure is capable of…. based on actual likelihood not theoretical possibility
- A matter of judgement for Sec of State (see above!)
- Ability to disregard possible changes if not likely
- Broad nature of s35 discretion
- Ability to rely on matters already decided by national policy

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