Scan for PEP Newsletter
Winter 2024

Rose Grogan

Ruth Keating

Christopher Moss

Environmental Case Law Update

39 Essex CHAMBERS

39 Essex Chambers
#39Events

R (Boswell) v Secretary of State for Transport
[2024] EWCA Civ 145

R (Boswell) v Secretary of State for Transport [2024] EWCA Civ 145

Factual Background

3 road schemes in Norfolk – improvements for the A47.

Designated as NSIPS – EIA's were required for each under the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017

Sch 4 para 5 of the 2017 regulations provides that the EIA was required to include a description of the likely significant effects of the development on the climate, and the cumulation of the effects with other 'existing and/or approved projects' also, the impact of the project on climate.

In addition, obligation under Climate Change Act 2008 to ensure that the UK Carbon Account does not exceed the budget for each period

Also relevant was paragraph 5.18 of the National Policy Statement for National Networks which provides:

"any increase in carbon emissions is not a reason to refuse development consent, unless the increase[s] in carbon emissions resulting from the proposed scheme are so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets".

R (Boswell) v Secretary of State for Transport [2024] EWCA Civ 145

Factual Background

Secretary of State considered each proposal

Acknowledged the relevance of cumulative impacts but noted that there was no single or agreed approach to assessing the cumulative impact of carbon emissions and considered it was acceptable to consider the impact of each scheme individually against the national carbon budget

Each scheme represented an increase in emissions of 0.001-0.004%

SoS concluded the schemes were compatible with netzero

Development consent granted for each

R (Boswell) v Secretary of State for Transport [2024] EWCA Civ 145

Claimant's Arguments

The Claimant argued that Sch 4 (5)(e) and (f) of the 2014 regulations required the Secretary of State to look at the cumulative impact of the three schemes together

These were said to be part of the "existing and/or approved projects"

If looked at this way, the 3 schemes, and other relevant developments, amounted to 0.47% of the carbon budget

Claimant argued that the failure to consider the cumulative impact in this way rendered the decisions unlawful

R (Boswell) v Secretary of State for Transport [2024] EWCA Civ 145

First Instance Decision – Thornton J

Rejected the challenge

Referring to previous decisions in *Bowen-West v Secretary of State for Communities and Local Government Northamptonshire CC & Ors* [2012] EWCA Civ 321; *R (Preston New Road Action Group) v Secretary of State for Communities and Local Government* [2018] Env LR 18 - she held that assessment of the cumulative impacts of carbon emissions was a matter of judgment for the decision maker. To be interfered with only on rationality grounds

The question of what impacts should be cumulatively assessed, how such cumulative impacts might occur, the significance of such cumulative impacts and how that significance should itself be assessed were all matters of evaluative judgment, not matters of law.

R (Boswell) v Secretary of State for Transport [2024] EWCA Civ 145

First Instance Decision – Thornton J Continued

The SoS' approach was reasonable given –

- There was no single required approach to assessing cumulative impact
- There was no sector specific or local area specific carbon budget – comparing against the national carbon budget was therefore appropriate
- The impacts of carbon emissions are felt globally. It would be scientifically arbitrary to combine local schemes for comparison against a carbon budget

Dr Boswell's case was really a challenge to the acceptability of the carbon impacts of the 3 schemes – this is not a question for the courts

R (Boswell) v Secretary of State for Transport [2024] EWCA Civ 145

Court of Appeal

Permission granted to appeal on the question of whether the Judge had been wrong to hold that the requirement to consider the significance of the cumulative GHG emissions had been discharged by the SoS

Sir Launcelot Henderson dismissed the appeal

R (Boswell) v Secretary of State for Transport [2024] EWCA Civ 145

Court of Appeal

- It was for the decision maker to assess the likely significant effects of a scheme in an appropriate manner – challenge must be on rationality grounds – [53]
- SoS had taken into account Dr Boswell's submissions at the examination stage of the EiA process but decided that there was no meaningful basis, in this particular context, upon which a wider cumulative assessment of carbon emissions could be undertaken –[54]-[56]
- Held that there is "no logical basis upon which any such wider exercise could have been founded, and the inevitably arbitrary choice of the other sources of carbon emissions to be considered would only have given a spurious impression of precision to the resulting assessment." [51]
- The Court went on to describe the exercise as "scientifically pointless" and that no meaningful wider assessment of cumulative emissions should take place due to the lack of geographical boundary given the receptor is the whole planet [52]

R (Global Feedback) v Secretary of State for Environment Food and Rural Affairs [2023] EWCA Civ 1549

Government food strategy

Presented to Parliament
by the Secretary of State for Environment, Food and Rural Affairs
by Command of Her Majesty

June 2022

R (Global Feedback) v Secretary of State for Environment Food and Rural Affairs [2023] EWCA Civ 1549

Factual Background

S13(1) Climate Change Act 2008 provides:

> (1)The Secretary of State must prepare such proposals and policies as the Secretary of State considers will enable the carbon budgets that have been set under this Act to be met.

The challenge was brought to the Department for the Environment, Farming, and Rural Affairs' 2022 food strategy on the basis that:

(a) It was a proposal or policy falling within s13(1) and that the Secretary of State had failed to consider whether the proposal would enable the meeting of the carbon budgets .

(b) That the Secretary of State for the Environment, Farming and Rural Affairs had unlawfully failed to give significant weight to, or give cogent reasons for departing from, the advice of the Climate Change Committee who had, essentially, recommended that:

> The Government's Food Strategy should set out clear targets for the food system's impact on health, nature and climate and that this should include the role of consumers and the wider supply chain

Background Continued

Permission refused on the papers and at oral renewal

The Claimant appealed to the Court of Appeal on 5 grounds, 2 were listed for permission

CoA granted permission on 2 grounds and reserved the claim for JR.

Grounds slightly evolved before the final hearing such that the two questions to consider were:

1. Was the duty under section 13 of the 2008 Act engaged in the development and adoption of the Food Strategy?

   The Claimant argued that the duty on "the Secretary of State" applied to all Secretaries of State

2. If the answer to that question is yes, when adopting the Food Strategy, did SSEFRA, or SSBEIS, need to be aware of, give significant weight to, and give cogent reasons for departing from, the advice of the CCC on diet and climate change?

Question 1 – was s13(1) engaged?

No.

The Court of Appeal noted that the starting principle is that "the office of the Secretary of State is one, and in law each Secretary of State is capable of performing the duties of all or any of the departments" [68]

However this is subject to the specific facts and statutory context

The 2008 Act envisages the duties in Part 1 being discharged by one Secretary of State – unlike in Northern Ireland where such work is split between different ministers and departments [78]

The Secretary of State for Energy Security and Net Zero was responsible for setting carbon budgets and are "uniquely well placed to discharge the duty in section 13…has an overview of the whole economy, is conscious of the likely levels of greenhouse gas emissions in all sectors of it for the budgetary period or periods in question, and is able to judge the potential for appropriate action to ensure the meeting of carbon budgets " [83]

Question 1 continued

At [85] the Court went on to note:

> "This is not to say, however, that other ministers and departments are unable to prepare measures of their own that may have the effect of reducing greenhouse gas emissions and assisting the achievement of "net zero"… **This, however, is a discretionary process** and is not itself subject to any statutory procedure. **It does not oblige any other minister or department to "prepare such proposals and policies as [they consider] will enable carbon budgets … to be met"**

Question 2

Strictly, it did not arise due to Question 1 being answered in the negative

Court of Appeal considered it in any event and also answered it with a no

There are a number of express provisions in the 2008 Act in which the SOS is required to obtain or take into account the advice of the CCC before taking certain actions (such as the setting of carbon budgets or amending target percentages), s13(1) does not include such a duty and it would be wrong for the court to impose such a duty in the absence of specific legislation to that effect. [113]-[114]

R (Global Feedback) v Secretary of State for Environment Food and Rural Affairs [2023] EWCA Civ 1549

Impact

A number of other cases have raised this argument about the scope of the s13(1) duty – the challenge to the Jet Zero Strategy for example that argues this extends to the Secretary of State for Transport

Decision on PTA to SC outstanding – if that is a negative - this decision could put the s13(1) argument to bed – if you're not the SSESNZ, you don't need to worry about s13(1)

Satisfactory outcome?

Like *Boswell*, legally clear and not necessarily surprising

Conceivably could have read s13(1) standing apart from the rest of Part 1 of the 2008 Act – other departments plainly have significant scope in policy making to impact net zero – most clearly DfT and LUHC

Outcome somewhat disappointing given obiter at [85] that other Ministers' preparation of such policies to achieve net zero is an entirely discretionary process

CG Fry & Son Ltd v Secretary of State for Levelling Up, Housing and Communities [2023] EWHC 1622 (Admin)

Background

- The issue of nutrient neutrality.
- Phosphate loading of protected water habitats, leading to eutrophication. There is a risk of the problem being exacerbated by water generated by new developments which contain phosphates, principally from foul water. The Home Builders Federation states that, due to the unavailability of mitigation options, this issue is holding up the building of 44,000 homes in England which already have planning permission.
- Somerset Council, refused to discharge certain conditions attached to the planning permission. That was because there had not been an appropriate assessment under the Habitats Regulations 2017. Consequently, certain precommencement conditions had not been discharged, and phase 3 of the development had not been able to proceed.
- The Claimant therefore launched the claim for statutory review under section 288 of Town and Country Planning Act 1990, challenging the Inspector's decision.
- As a matter of law the challenge raises issues about the scope and application following the UK's withdrawal from the European Union of the Habitats Regulations 2017 and the Habitats Directive on which it was based (para 4).

CG Fry & Son Ltd v Secretary of State for Levelling Up, Housing and Communities [2023] EWHC 1622 (Admin)

Facts

- In 2015, outline planning permission was granted for the development to take place in eight phases. In June 2020, the Claimant obtained reserved matters approval for phase 3 relating to 190 dwellings, subject to conditions.
- In 2020, Natural England published an advice note to Somerset local authorities on development in relation to the Somerset Levels and Moors Ramsar site, which it considered was at risk from the effects of eutrophication (caused by excessive phosphates), an issue that could be exacerbated by foul water generated by new developments. It advised that local authorities should undertake an HRA assessment of the implications of a project and only grant consent if it was ascertained that any development would not have an adverse effect of the integrity of the site.
- In 2021, the Claimant sought discharge of the conditions. The Defendant local authority withheld approval on the basis that an HRA assessment was required before the conditions could be discharged.
- On appeal, the planning inspector determined that the requirement for an HRA assessment under regulation 63 applied to the discharge of conditions stage, regardless of the specific subject matter of the conditions.
- The Claimant argued that the inspector wrongly construed the Regulations and should not have applied regulation 63 to the discharge of conditions on a reserved matters approval.
- It contended that the relevant provision was regulation 70 and that confined assessments to the planning permission stage. The Claimant further argued that even if regulation 63 applied, the scope of the appropriate assessment should reflect the scope of the conditions being considered.

CG Fry & Son Ltd v Secretary of State for Levelling Up, Housing and Communities [2023] EWHC 1622 (Admin)

Decision

- Claimant's claim dismissed.
- As Sir Ross Cranston said, it is for others to resolve the significant public policy issues underlying this claim, raised by the Home Builders Federation and the Ministerial Statement (para 4).
- Ground 1: Inspector misconstrued Habitats Regulations 2017
  - While on a strict reading of the Habitats Regulations 2017 the assessment provisions of regulation 63 do not cover the discharge of conditions, in his view they do apply as a result of firstly, article 6(3) of the Habitats Directive, secondly, a purposive interpretation of their provisions and thirdly, case law binding on the court (para 48).
- Ground 2: NPPF, paragraph 181
  - The impacts on the Somerset Levels and Moors Ramsar Site and paragraph 181 of the NPPF cannot be said to be irrelevant considerations in this development. It is open to the Secretary of State to introduce such a consideration as a matter of national planning policy (para 67).
- Ground 3: scope of regulation 63
  - Regulation 63 requires an appropriate assessment to consider the implications of the project, not the implications of the part of the project to which the consent relates. In this regard regulation 63 is consistent (unsurprisingly) with the Habitats Directive.

R (on the application of Together Against Sizewell C Ltd) v Secretary of State for Energy Security and Net Zero [2023] EWCA Civ 1517

Background

- The question at the heart of the appeal was whether the Secretary of State for Business, Energy and Industrial Strategy erred in law by failing to carry out an "appropriate assessment" of the effects on European sites of the permanent supply of potable water to a proposed nuclear power station, either as part of the same project or cumulatively as a separate but connected project, under regulation 63 of the Habitats Regulations.
- The appeal was against the order of Holgate J dated 22 June 2023 refusing an application by the Appellant, Together Against Sizewell C Limited (TASC), for permission to apply for judicial review of the Sizewell C (Nuclear Generating Station) Order 2022 (the Order) for the construction, operation, maintenance and decommissioning of a third nuclear power station at Sizewell on the Suffolk coast, known as "Sizewell C".
- The Order was made by the Secretary of State for Business, Energy and Industrial Strategy under section 114 of the Planning Act 2008 on 20 July 2022. (Statutory functions had since been transferred to the Secretary of State for Energy Security and Net Zero, who had therefore been the Defendant in proceedings.)

R (on the application of Together Against Sizewell C Ltd) v Secretary of State for Energy Security and Net Zero [2023] EWCA Civ 1517

Decision

- The appeal raises two main issues:

  (1) Was the Secretary of State wrong in law to treat the permanent supply of potable water, which was necessary for the operation of the power station, as not being part of the same project for the purposes of carrying out an appropriate assessment under the Habitats Regulations (ground 1)?

  (2) If the Secretary of State was right to regard the permanent water supply as a separate project, did he err in failing to carry out, under the Habitats Regulations, a cumulative assessment of its effects together with those of the power station itself (ground 2)?

- The Court of Appeal agreed with Holgate J's conclusions on both issues.

R (on the application of Together Against Sizewell C Ltd) v Secretary of State for Energy Security and Net Zero [2023] EWCA Civ 1517

Decision

- Ground 1:
  - What constitutes the relevant project, as a matter of fact and the decision-maker's evaluative – or planning – judgment, will always depend on the facts and circumstances of the particular case (para 70).
  - Three points: (1) the decision-maker must be alert to the mischief of "salamislicing" or "project-splitting". (2) The effects may be cumulative, but the projects themselves separate and different. (3) Without seeking to prescribe the method by which a decision-maker should judge the nature and scope of a project, it is possible to identify several factors capable of influencing such an exercise. Relevant considerations can include "common ownership", "functional interdependence", the question of whether the project stands on its own and would be promoted independently of other development, and the question of "simultaneous determination"(para 71).
  - There was no inevitable link between the two projects (para 81).

R (on the application of Together Against Sizewell C Ltd) v Secretary of State for Energy Security and Net Zero [2023] EWCA Civ 1517

Decision

- Ground 2:
  - It is a different, and separate, project (para 92).
  - A decision-maker may rationally reach the conclusion that the consideration of cumulative impacts is still inchoate may be deferred to a later consent stage (para 93).
  - The decision to defer assessment of the impacts of the provision of a permanent water supply to a later stage was a rational, lawful decision. There was insufficient detailed information on the precise means by which a permanent water supply would be provided (para 94).
  - There was no evidential basis for assuming or inferring that the relevant regulators would fail to carry out their statutory duties to assess whether the permanent water supply would adversely affect the integrity of a European site (para 95).
  - There was no proper basis for considering that the decision to defer assessment of the permanent water supply was irrational because of the risk that the power station might be partially or wholly constructed. On the facts, such a prospect was speculative and theoretical (para 96).

R (on the application of Greenpeace Ltd) v Secretary of State for Energy Security and Net Zero [2023] EWHC 2608 (Admin)

Background

- These two claims for judicial review are concerned primarily with decisions taken by the Secretary of State in connection with the licensing by the Oil and Gas Authority (the OGA) of further offshore oil and gas exploration and production, in particular the 33rd licensing round.
- A central issue was whether the Secretary of State acted unlawfully by not including in his assessment of the Plan downstream emissions of GHGs from the end use by consumers of oil and gas as a fuel, or "scope 3" emissions.
- The Secretary of State's policy for further licensing was contained in his nonstatutory Offshore Energy Plan (the Plan). By the Environmental Assessment of Plans and Programmes Regulations 2004 he was required to carry out a SEA of the Plan.
- In September 2022, the Secretary of State approved a climate compatibility checkpoint to assist Ministers in what matters to take into account when considering whether to support the OGA in launching a new licensing round.
- The design of the checkpoint had been subject to a consultation and initially included a consideration of downstream emissions from end uses (test 5). However, test 5 was omitted from the final design.
- In October 2022, the OGA launched the 33rd round of licensing.

R (on the application of Greenpeace Ltd) v Secretary of State for Energy Security and Net Zero [2023] EWHC 2608 (Admin)

Decision

- 7 issues before the Court.
- Challenge unsuccessful.
- The court was only concerned with determining questions of law (para 21).
- *Finch* applied.
- The Secretary of State's contemporaneous reasoning for not assessing end use emissions was that there was insufficient causal connection. A decision-maker might conclude that even if the combustion of hydrocarbons by UK consumers fell within the objectives of a UK policy for the extraction of those hydrocarbons, the intervening stages involved physical, functional or temporal separation such that there was insufficient causal connection between that extraction and consumption. Not an irrational basis (paras 100, 106, 112-113).
- Entitled to conclude that not undertaking further licensing rounds would increase imports. Matters of judgment and not irrational (paras 131 and135).
- Lawfulness of the decision to omit test 5 in the checkpoint – the checkpoint was not a statutory plan or policy, it was an informative, non-binding document to assist Ministers (paras 142, 149).
- Failure to publish reasons - there was no common law duty to give reasons for administrative decisions. The checkpoint was a non-statutory test, no obligation to produce the document nor under a statutory obligation to apply it (paras 154, 157-158).

Forward Look: Trends for 2024

- Climate Change Act 2008
  - *Feedback* appeal to the Supreme Court: decision on permission to appeal awaited.
  - *Jet Zero* and *Biomass* strategy cases stayed behind *Feedback*
  - Carbon Budget Delivery Plan challenge heard February 2024
  - *Packham v SSESNZ and SST* granted permission in February 2024.

- Infrastructure
  - *R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2024] EWHC 339 handed down February 2024 – application for permission to appeal to Court of Appeal pending.
  - *Good Law Project v SSESNZ* issued February 2024 challenging decision not to include onshore wind in National Policy Statements for Energy
  - *Sizewell* application to Supreme Court pending

Forward Look: Trends for 2024

- Environment Act 2021
  - Duty to have regard to environmental principles
  - Air quality long term targets – e.g. reduction of PM 2.5
- EIA and SEA
  - *Finch* still awaiting decision from Supreme Court
  - New Environmental Outcomes Reports in Part 6 Levelling-up and Regeneration Act 2023
- More work for lawyers (and judges)!