Lessons for Local Plans from the Heathrow Decision on the SEA Directive and Regs

R (Plan B) v Secretary of State for Transport [2020] EWCA Civ 214

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THE BACKGROUND FACTS

- **Cs challenged SS's designation of the Airports National Policy Statement** on 26th June 2018 (s.5 Planning Act 2008)
  - S.5(3): SS must carry out "Appraisal of Sustainability" before designating ANPS
  - Appraisal of Sustainability incorporates the requirements of SEA Dir/Regs, including info required in the Environmental Report (Reg 12/Art 5 & Annex I)
- **ANPS favoured a 3rd runway at Heathrow** to maintain the UK's status as a leading aviation "hub" by increasing aviation capacity
- Claims against ANPS under 4 broad heads: focussing on Strategic Environmental Assessment Directive/Regulations issues
- Rolled up hearing in Div Court in March 2019: claims rejected
- **Appeal heard in late 2019**: Cs won on single issue relating to taking Paris Agreement into consideration under SEA Regs, all other claims rejected

THE SEA DIRECTIVE/REGS

- Purpose: “provide for a high level of protection of the environment”, “contribute to the integration of environmental considerations into the preparation and adoption of plans/programmes with a view to promoting sustainable development” (Art 1)
- Required for, among others, specified kinds of Plans/ Programmes– e.g. town and country planning/land use – **and** which “set framework for future development consent” (Reg 5)
- Required for Local Plans as part of (wider) Sustainability Appraisals (**SA**) under PCPA 2004 and rel. regs
- SEA/S.A. process (iterative) requires: environmental report (containing info in Sch 2 Regs/Art 5 & Annex I Dir), consultation, consideration (+ further consultation if changes), further report on adopted P/P (Reg 16) and monitoring
- In Local Plans, the SA is the LPA’s responsibility

Issue 1: Standard for Court reviewing Environmental Reports

- Div Court applied *Blewett* (Sullivan J.) on Environ. Statement under the EIA Directive & Regs:
  - Starting point: for the LPA to decide whether info is sufficient to meet the definition of ES in the EIA Regs, subject to review under *Wednesbury* principles;
  - Info "capable of meeting the requirements" should be provided, but a failure does not mean it fails to qualify as an ES/ Environmental Report (altho may lead to refusing app.) unless the doc "could not *reasonably* be described" as ES under the Regs
  - Both EIA and SEA Dirs & Regs permit defective statement to be "cured" by publishing and consulting on supplementary material
  - If explicitly required matter is unaddressed, likely non-compliance
  - Decisions on (non)inclusion of info, nature/level of detail/analysis: all matters of judgment for the LPA
- Simply "practical application of conventional" JR principles

Issue 1: Standard for review

Cs' challenge to ANPS and Div Court:

1. Div Court wrong: not just evaluation qu for decision-maker.
   i. Greater scrutiny required to ensure that the info submitted is sufficient for purposes of SEA Directive.
   ii. Purposive interpretation means asking if E.R. is "of sufficient quality to allow for effective comment by those affected", Art 12(2)
   iii. Context: SEA Dir = "structured review" to ensure compliance

HELD: **NO.** Language of Art 5 & Annex I leave Authority with "**wide range of autonomous judgment on the adequacy**" of info; LA is "**free to form a reasonable view of its own on nature and amount of info required**" = Wednesbury review

More intense review would mean Ct substituting its own view.

Not Ct's role to "adjudicate on the content" of E.R.

Issue 1: Standard for review

Cs' challenge:

2. Div Court understated the "*Blewett* standard":
   i. EIA Dir. requires the "resulting environmental information" to provide "as full a picture as possible" – ditto for SEA Dir.
   ii. So Ct needs to check that "nothing less than the full picture" has been provided: the SS failed to ensure that the E.R. for the ANPS provided this level of content and assessment

HELD: **NO.** Not in text of Art 5(1): as full a picture as "may reasonably be required" subject to various issues raised in Art 5 (e.g. "extent to which certain matters are more appropriately assessed at different levels in the decision-making process".

No "exhaustive provision" of either info or assessment.

AND deficiencies can be overcome during the process, to end up with "as full a picture as possible"

Issue 1: Standard for review

Cs' challenge:

3. "*Blewett* standard" is wrong for the SEA Dir:
   i. Under the EIA Dir: assessing likely sig. environ. effects of an individual project, within a decision-making process where the project is also judged against policy
   ii. Under SEA Dir: assessing the environmental effects of the policy itself: there is no other forum for formally testing the sustainability of the policy before it is adopted
   iii. Need something more rigorous, therefore, than *Blewett*

HELD: **NO.** No reason to apply a "more taxing approach" to compliance with SEA Dir than with EIA Dir in *Blewett:* European and domestic authorities agree: "responsible authority must be accorded a **substantial area of judgment** in relation to compliance with the required information"

Issue 2: Failure to explain "outline of relationship" with other Ps/Ps

Cs challenged SA's assessment of the ANPS's interaction with other Ps/Ps:

- SA failed to properly address the relationship with rel. Local Dev. Plans, London Plan: cumulative assessment of impacts was insufficient.
- That individual analysis of plans would be complex does not excuse failure.

HELD: **NO.** Annex I/Sch 2 requires "an outline of the… relationship with other rel. Ps/Ps": this was done, rel. Ps/Ps not ignored. Provs are "not unduly onerous", do not stipulate a particular approach and leave "a reasonably generous discretion" on how to do the work

SS was "**at liberty to decide how far** the analysis should be taken" and his "decision not to analyse these matters at the level of each local authority was not open to challenge". A cumulative consideration of Local Plan policies and allocations was sufficient, esp. given "national policy context"

NB. EIA regime kicks in later down the line when specific app for development consent order (s.103 PA) is considered: SEA assessment does not pre-determine findings of EIA process for that app.

Issue 3: Failed to identify environmental characteristics of areas likely to be sig. affected

Cs attacked from 2 main directions: decision to use "indicative flight paths" and threshold for noise assessment. Must avoid underestimating the area affected (Annex I(c)), applying precautionary principle

HELD: **NO.** Decision to use indicative flight paths not irrational, given the stage of decision-making reached (no siting/dimensions or design of new runway and separate airspace change process).

SS's decision based on expert advice: "classic exercise of planning judgment" with "**substantial margin of appreciation**"

Court's "reviewing role does not stretch to determining disputed issues of technical, expert evidence"

Issue 4: Does SEA Dir require account to be taken of the Paris Agreement?

HELD: YES. S5(8) PA 2008 required SS to explain in ANPS **how** he had taken into account Gov. policy, which means he must have first taken it into account. Gov. policy included commitment to Paris Agreement.

SS was advised that he **must not** take account of the P.Ag and so **did not take it into account at all**: misdirection (see also s.10 PA 2008).

Paris Agreement was relevant to the ANPS (altho SS has "wide margin of discretion" in deciding what is "relevant").

To fail to take it into account was a breach of the SEA Dir requirement to consider "international" "environmental protection objectives" (Annex I(e)), even unincorporated int. agreements. **Sufficient to vitiate.**

What does this mean for Local Authorities when preparing Local Plans and other docs requiring SEAs/SAs?


FREEDOM!!!!

Well, sort of…

Plenty of discretion for decision-maker

Lots of discretion given to the Local Authority to determine:

- Whether info provided in the S.A (or Env Report) is sufficient: LPA has a "wide range of autonomous judgment on the adequacy" of info and is "free to form a reasonable view of its own on nature and amount of info required", subject only to Wednesbury review
- Re-iteration that defects can be corrected during the process by further assessment, consultation and consideration (subject to defect being so sig that could not reasonably consider the document an E.R.)
- Annex I/Sch 2 information requirements (on outline of rel. with other plans, likely similar approach to other requirements) are "not unduly onerous" "do not stipulate a particular approach" and leave "a reasonably generous discretion" on how to do the work.
- D-M is "**at liberty to decide how far** the analysis should be taken"
- If making decisions on how to analyse/what approach to take, based on expert evidence, then this is a matter for the D-M: Ct will not arbitrate squabbles about expert evidence.

But SEAs/SAs are not toothless and are not the end of the story: more detailed assessments will come in form of EIA, so don't fail to ask the question at SEA stage because do not want the answer!

Thank you

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