Jedwell v Denbighshire County Council – EIA Reasoning - Ex Post Facto Evidence And Cross Examination In Judicial Review - Jedwell v Denbighshire County Council [2015] EWCA Civ 1232

EIA Screening – Requirement For Reasons

It is a fundamental principle of environmental decision making in the UK and in Europe that processes should be transparent and reasoning provided for decisions.

However, when it comes to procedure in the Environmental Impact Assessment (EIA) decision making process, the truth is a little more nuanced because of the way in which the EIA Directive is implemented by member states- even within the UK.

EIA procedure in England has, since 2011, be governed by regulations which require that reasons be given for negative and positive screening opinions (i.e. whether or not a development requires full scrutiny under an EIA). The opinion must be "accompanied by a written statement giving clearly and precisely the full reasons for that conclusion."

Developments in Wales, however, are still governed by the older Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 which the 2011 Regulations replaced in England. The obligation to give reasons under regulation 4(6) of the 1999 Regulations only arises where the decision is positive (i.e. an Environmental Statement is necessary).

However, the requirement to give reasons for negative screening opinions also has its source in European and domestic case law. The relevant principles are set out in R (oao Mellor) v Secretary of State for Communities and Local Government [2010] Env LR 18 and in R (Bateman) v South Cambridgeshire DC [2011] EWCA Civ 157. In short, the LPA is under a duty to provide reasoning for a negative screening decision either in the decision itself or subsequently upon request. Furthermore, the reasoning need not be elaborate, but must demonstrate that the issues have been understood and considered.

Jedwell v Denbighshire County Council [2015] EWCA Civ 1232

In Jedwell v Denbighshire County Council [2015] EWCA Civ 1232, Lord Justice Lewison delivered the sole judgment in an appeal from the High Court which considered screening opinion reasoning and whether cross-examination could be used in judicial review.

In 2013 the LPA granted planning permission for two wind turbines close to protected areas including Snowdonia National Park, the Clwydian Range and the Dee Valley Areas of Outstanding Natural Beauty and, other sites, including a designated Special Area of Conservation ("SAC"), Special Protected Area ("SPA"), Site of Special Scientific Interest ("SSSI") and a National Nature Reserve ("NNR")

Before granting permission the LPA adopted a negative screening opinion. One statutory consultee – CCW (now NRW) - indicated that although an EIA was not necessary, in order to assess cumulative impact, it recommended that a Landscape and Visual Impact Assessment (LVIA) be undertaken. Having described the development as "Schedule 2" (i.e. requiring screening) in her screening opinion, the planning officer added:

"having regard to the guidance given in the Regulations and the Circular, the proposed development would not give rise to significant effects in this instance." The covering letter added that the Council would still expect "detailed supporting information to be submitted with the planning application."

But despite the negative screening, the officer's report recommended refusal on the basis that the development would have an adverse impact on the setting of protected landscape areas and that insufficient information had been provided to demonstrate the proposal would not give rise to adverse cumulative effects when considered in combination with operational and consented windfarm development. After a long deferral, the Committee resolved to grant planning permission. The Claimant's solicitors then wrote to the LPA alleging that the screening opinion was flawed and that in consequence the grant of planning permission was unlawful.

The Claimant asked for further reasoning for why the negative screening opinion was made, specifying that this constituted a request for contemporaneous reasons – not reasoning added as an afterthought. The Council replied there was "nothing further to add to what has already been said". However, 18 months after the grant of planning permission and after the issue of proceedings, a witness statement from the planning officer was produced (although not served until later) to provide reasons for the negative screening.

Late Evidence

The Judge at the Administrative Court held that the reasoning disclosed up to the point of permission was inadequate but, crucially, he also held that the defect in process was rescued by the witness statement. The Claimant applied for permission to cross examine the planning officer to determine if the statement related to the reasoning at the time of the decision or whether it was ex post facto and therefore inadmissible. But permission was refused and the Claimant then appealed.

In the Court of Appeal, Lord Justice Lewison agreed that the original screening opinion was "simply the statement of a conclusion. It contained no reasoning at all. A reader of the opinion would ascertain what decision the Council had made, but not why it had made it. It is, in my judgment, clear that the original screening opinion was inadequately reasoned".

However could the later evidence cure the deficient screening? In Mellor the court considered that the purpose (or at least one of the purposes) of requiring the competent authority to give reasons for a negative screening opinion was to enable an interested person to decide whether to challenge it by way of judicial review. That necessarily meant that the reasoning must be given before the proceedings are begun.

Lewison LJ commented:

"I am inclined to think that once a Mellor request for reasons has been made, a competent authority must supply those reasons within a reasonable time; and that a breach of the legal obligation to supply reasons cannot arise until a reasonable time has elapsed".

Cross-Examination

The Claimant applied before the appeal stage to cross-examine the planning officer to determine if it was ex post facto. But cross-examination is rarely permitted in cases of judicial review. As Lord Diplock explained in O'Reilly v Mackman [1983] 2 AC 237, 282:

"The facts....can seldom be a matter of relevant dispute upon an application for judicial review, since the tribunal or authority's findings of fact, as distinguished from the legal consequences of the facts that they have found, are not open to review by the court in the exercise of its supervisory powers....to allow cross-examination presents the court with a temptation, not always easily resisted, to substitute its own view of the facts for that of the decision-making body upon whom the exclusive jurisdiction to determine facts has been conferred by Parliament."

However, despite the strength of this rule of thumb, he concluded that, "it should be allowed whenever the justice of the particular case so requires." Lewison LJ followed this reasoning, adding, "There is therefore no doubt that, in an appropriate case, the court may require a witness to attend for cross-examination." Lewison LJ continued,

"In our case the question of fact was whether Mrs Shaw's evidence was an ex post facto justification of the decision to issue the negative screening opinion, or was an account of her actual reasoning process at the time. That was not an issue for the local planning authority to determine: it was a question for the court. The judge did not ask himself the critical question: what did justice require?"

He concluded:

"In my judgment this was one of those admittedly rare cases in which cross-examination was necessary in order for justice both to be done and to be seen to be done....If I may borrow a famous dictum of Lord Macnaghten: with the light before him, why should the judge grope in the dark? In my judgment the judge approached the question of cross-examination in a way that was wrong in principle".

Lewison LJ therefore allowed the appeal and remitted the case to the Administrative Court.

Comment

The judgment clarifies the points made in Mellor and Bateman on providing reasons in screening. It also suggests that Courts can go behind the documented process to investigate intention in decision making – which sits uncomfortably with the principle of objective public law scrutiny. Timing of those reasons given after the decision will also be important.

The judgement also touched on discretion to quash where the EIA process is defective. The Claimant had argued that if there had been a breach of EU law in the EIA process, there would be little discretion but to quash the decision. But Lewison LJ reaffirmed the principle established in R (Champion) v North Norfolk District Council [2015] UKSC 52, [2015] 1 WLR 3710 (see ELM issue) that judicial discretion applies – even when the defect relates to the EIA Directive. This means, of course, that when the case returns to the High Court, the judge – if he decides the reasoning was inadequate for EIA purposes - may still refuse to quash the decision.

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First appeared in the December 2015 edition of Environmental Law Monthly and reproduced here with the kind permission of the publisher.