Risk and transboundary EIA: how low does one need to go?

R on the application of An Taisce (The National Trust for Ireland) v Secretary of State for Energy and Climate Change [2014] EWCA Civ 1111

Fran Aldson *Barrister, Six Pump Court**

One word, various meanings. In recent years, the question of the exact interpretation of ' ''likely'' to have significant effects on the environment' in the context of the Environmental Impact Assessment (EIA) Directive[1] has exercised senior members of the English judiciary. The one area of agreement is that it does not have the meaning that most native English speakers would naturally attribute to it – more probable than not.[2] Just how low a risk of significant effects on the environment needs to be to trigger an EIA remains, however, the subject of much conjecture.

It is this question that lay at the heart of the Court of Appeal's consideration of *An Taisce*'s application for judicial review of the government's approval of a new nuclear reactor at Hinkley Point in Somerset. It is a question that the Court of Appeal ultimately felt unable to answer in full but, regrettably, neither did it feel the need for a reference to the Court of Justice of the EU (CJEU) to determine the meaning. To the delight of some and the frustration of others, the question remains open for another case on a different day.

One of the distinctive features of this appeal in contrast to the others that have sought to nail down the flighty concept of 'likely' is that it concerned transboundary EIA. In bringing the case, *An Taisce* relied upon Article 7 of the EIA Directive, which reads as follows:

> 1. Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:
>
> (a) a description of the project, together with any available information on its transboundary impact;
>
> (b) information on the nature of the decision which may be taken.
>
> The Member State in whose territory the project is intended to be carried out shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in para 2 of this Article.

An EIA was conducted within the UK in accordance with Articles 4–6 of the directive; however, the Secretary of State did not carry out a transboundary assessment following a screening opinion conducted by the Planning Inspectorate. That screening had concluded that: 'On the

* The views expressed in this article are entirely the author's own.

1 Directive 2011/92/EU.

2 Judgment para 11 at 5.

basis that licensing and monitoring conditions are effective, impacts will not be significant . . . The probability of a radiological impact is considered to be low on the basis of the regulatory regimes in place'.[3]

Concerns about transboundary impacts were not limited solely to Ireland; the Austrian Government had contacted the Department for Energy and Climate Change (DECC) to request the chance to consider the application. The Austrian Government then obtained an expert report which it sent to DECC. The report met with a cool response from the Secretary of State, who commented:

> Effectively the report says that unless it can be demonstrated that a severe accident (involving significant radiological release) cannot occur, then no matter how unlikely it is, I must consider its consequences as part of the development consent process, having regard, in particular, to the possible deleterious effects on Austria. However, in my view such accidents are so unlikely to occur that it would not be reasonable to 'scope in' such an issue for environmental impact assessment purposes.

As noted by Mrs Justice Patterson in the court below, the statistics contained within the Austrian report meant that the probability of an accident of the type considered therein was less than once in every 10 million years of reactor operation, so remote as to render the Secretary of State's decision to ignore it lawful.

An Taisce took a different view. A risk, however small or remote, was sufficient, it argued, to trigger Article 7 of the EIA Directive. The Secretary of State had therefore acted unlawfully in failing to consult the public of the Republic of Ireland in accordance with Article 7.

The two grounds relied upon were as follows: first, the Secretary of State had misdirected himself as to the meaning of 'likely' within Article 7 by 'scoping out' severe nuclear accidents on the basis that they were very unlikely (the 'likelihood' ground); secondly, that even if the Secretary of State was correct as to the meaning of 'likely', he had erred in relying on the existence of the UK nuclear regulatory regime to fill gaps in current knowledge when reaching his conclusion as to the likelihood of nuclear accidents (the 'regulatory regime' ground).

In considering the first ground, the Court of Appeal returned first to the much-trodden territory of the CJEU's judgment in *Waddenzee*.[4] *An Taisce* argued that there is parity in meaning between the requirement for an appropriate assessment under s 6(3) of the Habitats Directive if there is a 'probability or risk' of significant effects on the environment, and the 'likely to have a significant effect' test for an EIA in s 2(1) of the Directive. In respect of the Habitats Directive test, the courts have determined the test to be a stringent one. In *Waddenzee*, it was held that there is a 'probability or risk' of significant risks if the adverse effects cannot be excluded on the basis of objective evidence.[5]

Support for *An Taisce*'s argument was found in paragraph 44 of the *Waddenzee* judgment, which referred to the 'essentially similar' text of Article 2(1) of the EIA Directive and Article 6(3) of the Habitats Directive. *An Taisce* further sought to rely on the Espoo Convention,[6] which is given effect by Article 7 of the EIA Directive. In an admirable display of linguistic gymnastics, it was submitted that the Russian translation of the Convention, one of only three authentic texts, uses the word 'may', whose meaning helpfully ranges from a high possibility to a possibility that cannot be excluded.

The other argument advanced which caused the Court of Appeal some difficulty concerned a report by the Espoo Convention's Implementation Committee, in which it said that notification of transboundary environmental impact from proposed activities 'is always necessary, unless significant adverse transboundary impact can be excluded with certainty'. This observation was made in the context of a Meeting of the Parties and concerned what the Court of Appeal referred to as the *Danube Black Sea* case.

The chair of the Implementation Committee, having learned of this appeal and requested a copy of Patterson J's judgment, wrote to the UK Government informing them that it had considered this issue in February 2014 at its 30th Session. The Committee's letter to the government expressly endorsed the view it had given in relation to *Danube Black Sea* as to the circumstances in which the Convention required transboundary consultation. The Committee therefore had a 'profound suspicion of non-compliance' by the UK Government and would request their attendance at the Committee's 32nd Session in December 2014.

The Court of Appeal both rejected *An Taisce*'s arguments on the 'likelihood' ground, and the need for a preliminary reference to the CJEU, as follows. In respect of the *Waddenzee* argument, it held that just because the text of the Habitats and EIA Directives were 'essentially similar' in terms of the level of risk required to trigger the duty to assess, it did not mean that the risk threshold was the same. In the court's view, the Habitats Directive has a different purpose from the EIA Directive; whilst the EIA Directive is about assessing proposals rather than prescribing a particular outcome, the Habitats Directive aims to secure a high level of environmental protection for certain natural areas. A lower risk threshold in respect of the Habitats Directive is therefore justified in view of its purpose:

> In order to achieve this very high level of protection for special areas of conservation an equally stringent approach is required at the screening stage . . . It is for this reason that in a case falling within the Habitats Directive an 'appropriate assessment' must be carried out unless the risk of significant effects on the site concerned can be 'excluded on the basis of objective information'. . . . there is no obvious reason why such a strict approach should apply to the screening stage of the EIA Directive, which merely seeks to ensure that any likely significant effects on the environment are identified and properly taken into account in the decision-making process.[7]

3 ibid 3.
4 Case C–127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Bogels v Staatssecretaris van Landbouw, Natuutbeheer en Visserij (Waddenzee)*.
5 ibid para 45.
6 Convention on Environmental Impact Assessment in a Transboundary Context, Espoo 1991.
7 Judgment (n 2) paras 18–19.

Furthermore, the court found that even if the meaning of the relevant provisions of the two directives is 'essentially similar', it does not follow that the 'cannot be excluded on the basis of objective information' meaning given to 'likely to have a significant effect' in the context of Article 6(3) of the Habitats Directive should be taken to mean 'zero risk'. In the court's view, there is no evidence that a 'zero risk' approach to the likelihood of significant environmental effects is justified, even in light of *Waddenzee*. The Secretary of State had determined that 'cannot be excluded on the basis of objective information' did not require assessment of a risk whose probability was very remote. There was no error of law in his so doing.

The court also turned to wider policy considerations to support its analysis on the 'likelihood' ground. Were the claimant's submissions to be correct and were it the case that environmental statements had to deal with 'every possible significant effect', the 'already very lengthy' Environmental Statements for many major projects would be in danger of causing the public and decision-makers to 'lose the wood for the trees' when consulted.

The second part of the court's consideration of the 'likelihood' ground concerned the views expressed by the Implementation Committee of the Espoo Convention. At permission stage, the court had been sufficiently taken with this argument as to deem it a 'compelling reason' for granting permission to appeal. At the full hearing, however, the court found it seemingly straightforward to dismiss the claimant's submission regarding the committee's unequivocal view as to the meaning of 'likely' for the purposes of transboundary EIA. For all its expertise, the Implementation Committee 'is not a legally qualified body' and therefore its observations on the threshold for cross-border EIA were 'best practice' rather than a statement of the legal position.

As to a reference to the CJEU to determine the matter, the court concluded that it was unnecessary because the Secretary of State had not been required to write 'an academic dissertation on the concept of likelihood in the EIA Directive; he was deciding whether to grant development consent for a particular project'. In other words, as desirable as it would have been to answer a key riddle of EU environmental law, it was not strictly necessary in order to determine the appeal.

Yet in its extensive exploration of 'likelihood', the Court of Appeal did at least shed some light on what it is not: 'The word "likely" and the concept of likelihood, implies at least some degree of flexibility. There comes a point when the probability of a significant effect is so remote that it ceases to be "likely", however broad the concept of likelihood'.

What 'likely' is not, in the context of the EIA Directive, therefore has an additional dimension. The lower threshold is clear. It is exactly at what level of risk an assessment is triggered that remains somewhat elusive.

The Court of Appeal dispensed with the second ground with more ease, although perhaps more controversially. Indeed, had the second ground stood alone, Sullivan LJ stated that he would not have given permission. The words of Patterson J below were endorsed expressly: 'In my judgment there is no reason that precludes the Secretary of State from being able to have regard to, and rely upon, the existence of a stringently operated regulatory regime for future control'.

The court held that major projects will often not have been fully designed by the time an EIA is conducted, and that decision-makers will frequently be called upon to judge whether gaps and uncertainties mean there is a likelihood of significant environmental effects. As regards Hinkley C, by the time of the EIA the Office for Nuclear Regulation (ONR) had already expressed confidence that the reactor could be 'built and operated in the UK . . . in a way that is safe and secure'.[8]

An Taisce sought to argue that there was a material difference in law between reliance on a regulator applying controls, which it has already identified from assessments already conducted, and reliance on current gaps in knowledge being filled by the existence of a regulator who could make future assessments. The court gave this argument short shrift, describing it as 'both unrealistic and unsupported by any authority',[9] largely on the basis that many major development projects will have changes in design after an EIA has been conducted, meaning gaps and uncertainties will always exist. The argument also came in for criticism from a practical and public policy angle:

> To require the elimination of the prospect of all design changes before the environmental assessment of major projects could proceed would be self-defeating. The promoters of such projects would be likely to incur the, in some cases, very considerable expense, not to mention delay, in resolving all the outstanding design issues, without the assurance of a planning permission . . . If the environmental impact process is not to be an obstacle to major developments, the planning authority (in this case the Defendant) must be able to grant planning permission so as to give the necessary assurance if it is satisfied that the outstanding design issues – which may include detailed design changes – can and will be addressed in the regulatory process.[10]

Whilst the Court of Appeal's reasoning is logical and persuasive, it does perhaps overlook one issue. In an era of austerity and economic liberalism, where regulators are facing swingeing cutbacks and staff shortages, the courts perhaps need to exercise some caution before placing considerable reliance on the ability of regulators to ensure that vital environmental safeguards are upheld.

Interestingly, despite the government winning this case and seemingly being set on a clear path to construct Hinkley C, the decision of the Austrian Government in January 2015 to take legal proceedings before the Court of Justice of the EU against the state subsidies being used to finance the new reactor is predicted, at the very least, to halt its progress by up to two years. Not the victory the Irish National Trust wanted, but no doubt welcome nonetheless.

8 ibid para 49.
9 ibid para 51.
10 ibid.