



OUTER HOUSE, COURT OF SESSION

[2020] CSOH 88

P363/20

NOTE BY LORD BOYD OF DUNCANSBY

In the petition of

GREENPEACE LTD

for Judicial review of the lawfulness of the grant of consent given by the Secretary of State for Business Energy and Industrial Strategy under regulation 5A of the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999 and the grant of consent by the Oil and Gas Authority to BP Exploration Operating Company Limited for the development of and production from the Vorlich field.

**Petitioner:** Crawford QC, Welsh, advocate; Harper Macleod  
**First Respondent:** Dean of Faculty, MacGregor QC; Office of the Advocate General  
**Second Respondent:** Campbell, advocate; MBS Solicitors  
**Interested Parties:** Cormack QC; Pinsent Masons LLP

1 October 2020

[1] This is an application by Greenpeace under section 27A of the Court of Session Act 1988 for permission to bring a petition for judicial review. Having considered the papers I put this out for an oral hearing. The petitioner and the Secretary of State (the first respondent) lodged short written submissions. I am grateful to them and to counsel for all the parties for both the written and succinct oral submissions.

[2] I have decided to refuse permission to proceed. This short opinion sets out in brief terms my reasons.

[3] The petition seeks the following orders:

- a) Declarator that the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999 fail fully to transpose the Environmental Impact Assessment Directive (as amended).
- b) Reduction of the Secretary of State for Business, Energy and Industrial Strategy's decision to agree to the grant of consent for the field development Vorlich project on 7 August 2018.
- c) Reduction of the Oil and Gas Authority's grant of consent to BP Exploration Operating Company for the field development Vorlich project (licence P1588 and P363).
- d) Such further orders (including an order for expenses) as may seem to the court to be just and reasonable in all the circumstances of the case.

[4] By letter dated 23 September 2020 the petitioner's agents intimated that they no longer sought the order at c) above.

[5] The petitioner raised judicial review proceedings in the High Court in England following on the grant of consent by the Oil and Gas Authority (OGA) on the application to drill in the Vorlich field. The history of those proceedings is set out in the pleadings. The action was settled on a consent order. There was some discussion before me on the terms of the order and its scope. At this point however it should be recorded that the Secretary of State accepts that the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999 (the Regulations) failed to fully transpose the Environmental Impact Assessment Directive (the Directive). The Secretary of State is presently conducting a comprehensive review of the Regulations. I understand that a consultation paper has been published and Ms Crawford referred to it in the course of her submissions.

[6] The Interested parties, BP and Ithaca, hold a licence to search and bore for and get petroleum from the Vorlich field. The licence is subject to a model clause that requires consent for the drilling for oil. This consent is granted by the second respondent, the OGA, but subject to the agreement of the Secretary of State. The process is set out in the Regulations.

[7] An application for consent for this type of operation must be accompanied by an environmental impact assessment (EIA). This is then considered by the Secretary of State who must consult with various bodies and consider representations. He may ask for additional information. It is clear from section 5A of the Regulations that environmental considerations play a major, if not decisive, part in the decision of the Secretary of State as to whether he should agree to the grant of consent. It is then for the OGA to decide whether or not to grant consent. The OGA explain that in deciding whether consent should be granted it is concerned only with technical, financial and competency issues. It is not concerned with environmental issues. Put another way, the only consideration of the environmental aspects of an application for drilling consent is by the Secretary of State.

[8] There is a procedure under Regulation 16 where an aggrieved party may bring an application to the Court for an order quashing the grant of consent. Such applications are dealt with under chapter 41 of the Rules of Court.

[9] Regulation 16 is in the following terms:

“(1) On the application of any person aggrieved by the grant of consent in respect of a relevant project in relation to which an environmental statement was required to be submitted by virtue of regulation 5(1) above (agreement of the Secretary of State in respect of relevant projects), the court may grant an order quashing the grant of consent where it is satisfied that the consent was granted in contravention of regulation 5(4) or regulation 5A(1)(a) above (consideration of environmental statement etc.) or that the interests of the applicant have been substantially prejudiced by any failure to comply with any other requirement of these Regulations.”

[10] Paragraph 1 of the petition includes the following statement, “The petitioner brings this petition for judicial review in accordance with regulation 16 of the .....Regulations 1999.... as a person aggrieved by the grant of consent.” In paragraph 37 the petitioner states that as a result of the failure to transpose the EIA Directive it was denied the opportunity under Regulation 16 to challenge the decision by the OGA to grant the consent.

[11] Despite these averments the petitioner has in fact brought a challenge under Regulation 16. The respondents and interested parties accordingly challenge the competency of this process on the basis that there is a statutory appeal mechanism, which the petitioner is in fact using.

[12] Two issues arise from this. First the petitioner says that the Regulations fail to properly transpose the EIA Directive. As there is no mention of the Directive in Regulation 16 the court would be confined to considering the petitioner’s application in terms of the Regulations, to the prejudice of the petitioner, which wishes to rely on the Directive.

[13] I do not accept this proposition. Insofar as the Regulations fail to implement the Directive the Directive has direct effect. There is nothing to prevent the petitioner submitting in the course of the Regulation 16 proceedings that the court should apply the terms of the Directive where these conflict with the Regulations. As I noted above the Secretary of State accepts that the Regulations do not fully transpose the Directive.

[14] The second issue is whether an appeal under Regulation 16 is confined to the grant of consent by the OGA and does not encompass the agreement of the Secretary of State. In the Regulation 16 appeal the petitioner seeks to challenge both the grant of consent and the Secretary of State’s agreement to the OGA’s consent. I understand however that the position of the respondents in that process is that the court is confined to looking at the consent itself

and cannot look at the agreement. Ms Crawford took me to the interpretation of “consent” in Regulation 3 and pointed out that it does not include the agreement of the Secretary of State. That might support the position of the respondents in the Regulation 16 appeal.

[15] If that is right it seems to me to be a serious *lacuna*. It means that environmental issues which are of fundamental importance to the granting of a consent for the drilling of oil could not be the subject of an appeal under Regulation 16. The only issues that could be addressed are those for which the OGA has responsibility. The environmental issues could only be addressed in a judicial review. Moreover according to the Secretary of State the petition for judicial review must be brought within three months of the Secretary of State’s agreement, which may well expire before consent has been granted. In my opinion, if that were correct it is a most unsatisfactory state of affairs. I also question whether such an interpretation would be consistent with the state’s obligations under article 9 (Access to Justice) of the Aarhus Convention.

[16] In any event I do not think such an interpretation is correct. Although Ms Crawford described the process of granting consent as a two stage process it is I think more appropriate to see the Secretary of State’s agreement as an integral part of the consenting process. It is a condition precedent to the OGA granting consent.

[17] Regulation 16 applies to a “grant of consent in respect of a relevant project in relation to which an environmental statement was required to be submitted by virtue of regulation 5(1)”. The court may quash the consent where it is satisfied that the consent was granted in contravention of Regulation 5(4) or Regulation 5A(1)(a). Regulation 5(4) provides:

“(4) Where an application for consent in respect of a relevant project is accompanied by an environmental statement, the Secretary of State shall not make the decision referred to in regulation 5A(1)(c) in respect of that project unless the Secretary of

State is satisfied that the requirements of regulations 9 and 10 have been substantially met, and that, where necessary, advice has been obtained from persons with appropriate expert knowledge who have examined the statement.”

[18] The headnote to Regulation 9 states, “Procedure on receipt of application for consent in respect of which environmental statement prepared; publicity requirements; provision of environmental statements to public”. Regulation 10 is concerned with “Provision to Secretary of State of further information and evidence respecting environmental statements.”

[19] Regulation 5A(1) is in the following terms:

“(1) When making a decision as to whether to agree to the grant of a consent in respect of a relevant project for which an environmental statement has been submitted, the Secretary of State shall —

(a) examine the environmental statement, including any information provided under regulation 10, any representations made by any person required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the project;

(b) reach a reasoned conclusion on the significant effects of the relevant project on the environment, taking into account the examination referred to in sub-paragraph (a); and

(c) integrate that conclusion into the decision as to whether agreement to the grant of consent is to be given.”

[20] Accordingly what the Secretary of State is required to do is to reach a reasoned conclusion on the significant effects of the project on the environment and integrate that conclusion into his decision on whether he agrees to the grant of consent.

[21] The reference in Regulation 16 to the aforementioned Regulations, which concern the Secretary of State’s consideration of the environmental aspects of the application, puts it beyond doubt that the Secretary of State’s agreement as a condition precedent to the grant of consent can be examined in a Regulation 16 challenge. Any argument to the contrary is in my opinion bound to fail.

[22] In passing I note that in the English proceedings the Secretary of State accepted that publication in the Gazette would trigger the right of appeal against the “environmental decision”.

[23] For these reasons I hold that the petition is incompetent insofar as it seeks to challenge both the grant of consent and the agreement of the Secretary of State to the consent. There is another process in which the challenge can and is being made. There is no requirement to invoke the supervisory jurisdiction of this court (R.C 58.3(1)).

[24] For the avoidance of doubt had I held that the petitioner would be unable to review the Secretary of State’s agreement I would not have found the challenge in the petition to his agreement to be incompetent. To have done so would have denied the petitioner a remedy, though the issue of time bar and whether there was a reasonable prospect of success would still require to be addressed.

[25] So far as the remedy sought at paragraph 4(a) is concerned there was some discussion as to whether or not this was *res judicata* given the terms of the consent order and statement of reasons at 6/12 of process. It was suggested by Ms Crawford that the judicial determination only related to the requirement to publish the OGA’s consent in the Gazette, which publication would “trigger the 6 week right of appeal against the (Secretary of State’s) environmental decision.” That being the case the petitioner submitted that the issue of whether the Regulations properly or fully transposed the Directive had not been judicially decided.

[26] It matters not whether the issue is *res judicata*. The Secretary of State has publically accepted that the Regulations are defective and is consulting on a comprehensive review. I do not consider that it is an appropriate use of the supervisory jurisdiction of this court to pronounce on matters which are in effect moot, given the Secretary of State’s acceptance of

the non-compliance of the Regulations with the Directive. Ms Crawford suggested that the proposed changes may not be to the petitioner's liking. That may be so but the resolution of that issue is for the democratic process, subject to any requirement to comply with EU law, if still relevant.

[27] For these reasons I shall refuse permission to proceed. I have not examined whether the substantive arguments contained in the petition would have met the test in section 27B(1)(b) of having real prospects of success. It may be that some, if not all, of these matters will be considered in the Regulation 16 proceedings and it would be better for me to make no comment at this stage. Nor have I considered the issue of time bar raised by the respondents in respect of the challenge to the Secretary of State's agreement.