Judicial Communications Office

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COURT ALLOWS APPEAL IN RELATION TO GAS CAVERN PROPOSAL AND REFERRAL TO THE EXECUTIVE

Summary of Judgment

The Court of Appeal[1] today found that the former Minister for Agriculture, Environment and Rural Affairs (Edwin Poots MLA) erred in not referring decisions relating to a proposal to create gas storage caverns under Larne Lough to the Executive Committee and in relation to consideration of a community fund.

Background

On 31 August 2023, Mr Justice Humphreys ("the judge") dismissed a challenge brought by No Gas Caverns and Friends of the Earth ("the appellants") to a decision of the then Minister for Agriculture, Environment and Rural Affairs ("the Minister") to grant a marine licence to Islandmagee Energy Ltd ("the notice party") for a proposed development of seven natural gas storage caverns to be located under Larne Lough off the coast of County Antrim. The gas caverns would have a total capacity of around 500 million cubic metres and be formed at a depth of some 1,350 metres below sea level by a process known as solution mining. The process will cause a discharge of waste brine into the North Channel. The project is expected to last around 40 years after which the gas caverns will be decommissioned. The notice party voluntarily offered a community fund of £1 million to support local projects themed around education, geology and the environment.

Planning permission for the terrestrial part of the project was sought in 2008. Ministerial approval of the marine construction licence, discharge consent and water abstraction licences in respect of the gas caverns was granted November 2021. The court noted the environmental backdrop to the case arising which came about following a commitment by the Northern Ireland Executive through the New Decade, New Approach agreement and an agreed metric of reducing fossil fuels.

This appeal focused on two grounds:

- The judge erred in concluding that the impugned decisions were not decisions which had to be referred to the Executive Committee, pursuant to sections 20 and 28A of the Northern Ireland Act 1998 ("the 1998 Act").
- The judge erred in concluding that the community fund was not taken into account by the Minister.

Ground 1 – Referral to the Executive Committee

Section 20 of the 1998 Act (as amended) requires a minister to bring to the attention of the Executive Committee any matter which affects the exercise of the statutory responsibilities of one of more other ministers other than incidentally ("cross-cutting") or which is significant or

[1] The panel was Keegan LCJ, Treacy LJ and Colton J. Keegan LCJ delivered the judgment of the court.

controversial. Section 28A provides that a minister has no ministerial authority to take any decision in contravention of the Ministerial Code.

The court examined the advice given by an official in the Department of Agriculture, Environment and Rural Affairs ("DAERA") to the Minister and what ensued in terms of his decision making. The official outlined four options and recommended that the Minister approve the issue of the licences and consents. The advice noted that "the project has attracted significant opposition from local residents, ENGOs and politicians" and reminded the Minister that he had previously answered a number of Assembly questions on the matter. Legal advice on the issues of whether the matter should be referred to the Executive or whether to hold a public inquiry was attached to the advice note but was redacted and the court was therefore unable to see it. The advice note made specific reference to the active opposition to the project by No Gas Caverns and the responses to a public consultation in 2019. The environmental impact consent decision of March 2021, which was annexed to the Ministerial submission, generated particular focus in the appeal as it referred to the creation of the community fund as a compensatory measure. In response to a question in the Assembly, the Minister said that he recognised that the proposed development was unpopular with some local residents but that "in itself does not mean that it is controversial under the legislation on Executive referral".

The court referenced correspondence with other Ministers who raised concerns but none of whom raised the specific issue of Executive referral. Minister Dodds, Stewart Dickson MLA and the First Minister at the time all wrote in relation to issues around the project but did not raise any concern that the Minister should be referring the matter to the Executive. Ministers Hargey and Swann received correspondence in relation to the project and provided it to DAERA for answer, again without raising the specific issue of Executive referral with the Minister. There was an exchange of correspondence between the Minister for the Economy and the Minister in August 2021 in which the Minister offered a meeting to discuss the matter, but the Economy Minister declined saying it was "not necessary at this stage".

In considering this ground of appeal, the court applied the language of section 20(4)(aa) of the 1998 Act to the facts of this case. This section refers to any significant or controversial matter. The court said that applying ordinary and natural meaning to this section makes it clear that a matter does not have to be both significant and controversial to require referral to the Executive Committee: "It can be significant or controversial or both". In addition, a matter must be referred if it is cross-cutting in the sense of affecting the exercise of the statutory responsibilities of more than one minister more than incidentally. In practice, a matter can simply be significant so as to require Executive decision making. The court said that the outcome on this issue, as far as significant and controversial goes, is informed by the context in which the issue arises:

Having established the form of the review which the court decided was a high intensity rationality review, the court then considered whether the facts of this case meant that the proposed project was significant or controversial. It said that how the words significant and controversial relate to a particular project is a matter of fact and degree, involving some element of judgement by the decision maker, within the context of what arises in a particular ministerial portfolio.

The court said outcome of such an approach is illustrated by the decision in *Safe Electricity* [2021] NIQB 93 where the court considered whether the approval of a cross-border electricity connector was significant or controversial. In that case the judge found that the Minister's decision should be considered to involve a controversial matter notwithstanding the absence of any significant

objection to it within the Executive Committee. This was in light of the sustained and widespread public campaign against the grant of permission.

The court agreed with this approach. It said that in this case there were factors that caused concern as to the correctness of the Minister's ultimate decision on whether the gas caverns project was significant or controversial. Firstly, there was no explanation from the Minister himself to the court as to why this project was not considered significant or controversial. This created a significant gap in the evidence which the court said clearly required extensive advice and consideration over a period of time and therefore limited it in the exercise of its supervisory jurisdiction. The affidavit evidence from the DAERA official did not deal with the significance of the project but was limited to the question of controversy which the court said begs the question whether the significance of the project was overlooked, implicitly accepted or implicitly rejected:

> "This is not a case where we are analysing a decision-making letter from local councillors or inspectors on appeal. This is a case involving ministerial decision making at a high level where we as a supervisory court expect to be able to glean the rationalisation for the decision on the core elements."

The court acknowledged that there was more to go on as to the question of controversy in the affidavit evidence. It pointed out that none of the other Executive Ministers required the issue of Executive Committee referral to be taken up by the Minister with the assertion being that: "the Minister was advised on the issue of Executive referral and in making the decision, he determined that the matter did not require Executive approval and that it was not significant, controversial or cross-cutting."

The court, found difficulty with this for the following reasons:

- The strategic and economic significance of the project. The strategic significance of the project for energy security and supply in Northern Ireland was advanced by the notice party, who is the successful developer, as part of the justification for the project. The court said that the phrase "strategic significance" was also found throughout the paperwork by those who wished to proceed with the project and the officials who promoted it during the application process. Furthermore, the project was of economic significance to Northern Ireland, and this too was evident from the papers.

- The impact of the project on current and emerging climate policy. The court noted that this issue was specifically referred to by the Minister in his correspondence with the Economy Minister. The approval of a large fossil fuel project for current and emerging climate change policy was also raised by many objectors including a statutory consultee. This was referenced extensively in the decision-making documents. The court commented that there was therefore sufficiently clear information available that approving the project had the effect of potentially locking in fossil fuel dependency for 40 years to come which was of obvious significance to a climate policy directed at net zero by 2050.

It stated:

> "Without any further explanation by the Minister, his decision that a strategic project of significance for all citizens in Northern Ireland in terms of security of energy was not significant is problematic. Without explanation from the Minister and a sparse

> explanation [by his official], we consider that the decision not to refer to the Executive Committee is open to challenge."

The court's concern was the lack of rationalisation for this decision by the Minister. In the context of this case, the court said that it was necessary for it to scrutinize even more closely the rationale for a decision which on the face of it conflicted with international and domestic standards on climate change without explanation given the clear expressions of intent found in the Northern Ireland strategy documents.

In this context, the court considered the decision not to classify this project as significant crossed the threshold of irrationality where it simply did not add up or, in other words, there was an error of reasoning which robbed the decision of logic in the Minister failing to refer to the Executive Committee.

The decision on significance was sufficient to deal with the judicial review but the court went on to consider the other elements of controversy and cross cutting which may also trigger the obligation to refer the matter to the Executive Committee. It said a matter is not just controversial if there have been objections, otherwise, lobby groups or others could stymie perfectly valid projects which could paralyse decision making in this area. Rather, a judgment call is required when projects get to the point of widespread concern and meet the threshold for controversy.

One indicator of controversy is public campaigning or analyses from bodies such as the Planning Appeals Commission as to concerns about a project. In this case, the court noted that legal advice was obtained regarding whether a public inquiry was necessary and that the objections are set out by a range of objectors.

The factor which troubled the court most was that the Minister's Executive colleagues, once engaged, did not insist on Executive referral. The court said this was difficult to rationalise. The papers showed that three political parties (Alliance, Sinn Fein, and Green Party), as well as an Ulster Unionist Party MLA clearly and publicly objected to the proposal. Further, numerous objections were made by a very wide range of respected and independent bodies. The court said there was an apparent disconnect between the objections of the parties and the fact that none of them triggered a referral:

> "However, ultimately it is the Minister's duty to properly determine the issue in the first instance. Put simply, we have concerns as to why this project was not deemed controversial within the meaning of the statute given the objections raised and so we also find for the appellants on this aspect."

The court then turned to the third argument which was in relation to "cross-cutting". It said it seemed odd that this project was not deemed to be a cross-cutting matter given that the Department for Economy has statutory and policy responsibility for gas supply and energy security. The court concluded that the judge was not correct to dismiss this case as one that did not involve the statutory responsibility of other departments: "If statutory responsibility is engaged as we find, it cannot be said that given the overall climate picture this was simply 'incidental'".

The appellants, therefore, succeeded on ground 1 of the appeal on the basis of the constitutional argument.

Ground 2: Consideration of the community fund

The court noted the Minister's response to an Assembly Question where he specifically referred to 'the community fund' and said this establishes the fact that it was in his consciousness. It also noted the affidavit of the DAERA official dealt with the issue of the community fund and stated that it "was not, however, given weight in the EIA decision or the decision to grant the marine licence" as it "simply forms a narrative of the company's intentions." The court said this reasoning was "spare and not particularly convincing". The rationale being put forward was that the Minister did not place a condition on the marine licence in relation to the community fund and so he must not have taken it into account.

The court again returned to the fact that it had no rationalisation by the Minister as to how he reached his decision and whether the community fund was something that he took into account. It referenced the Ministerial decision which was comprised in one line wherein he opted for the option "on the basis that appropriate controls are in place to mitigate environmental impacts." The Minister had not filed an affidavit which may have clarified his approach and assisted the court in exercising its supervisory function. The court concluded that questions therefore remain about whether the community fund was considered or not within the decision-making process:

> "To our mind it is a bridge too far to suggest that whenever this community fund was impermissibly part of the material that went before the Minister, that it can just simply be inferred that he did not take it into account. Thus, we cannot agree with [the judge] who was prepared to accept that the community fund although referenced was not treated as a material consideration. We are not so reassured on the basis of the evidence which we find to be insufficient in dealing with this issue. It follows that based on the Supreme Court decision in *Wright*[2], it is unlawful to take into account such a fund in a planning application. Hence, we are compelled to say that the evidential justification for this aspect of the decision making also fails to convince us. Although we understand that this was a sideline argument at first instance the appellants also succeed on ground 2 for the reasons we have given."

Overall conclusion

The court said it was conscious that there are different interests engaged with the subject matter of this case which span from those who have invested in the large-scale project to provide energy for householders and who stress the economic and other benefits to those concerned about climate effects of the ongoing use of fossil fuels in light of climate policy in Northern Ireland: "An obvious tension arises. In addition, a highly important issue of energy security requires decisions to be made."

The court stressed that it was not deciding on the merits of this issue as that is for policy makers. It stressed that it is a supervisory court and only concerned with the legality of the decision-making process. It therefore decided this case solely on that basis without determining the merits of the planning application in issue.

In reaching its decision, the court also considered the discretion afforded to a Minister in decision making but also that the Minister must act lawfully and rationally when deciding if a decision

[2] *R(Wright) v Resilient Energy Severndale Ltd* [2019] UKSC 53

should be referred to the Executive Committee. It said that this consideration will not arise in every case as it is fact specific but the facility for executive referral an important reassurance for the public when significant or controversial and or cross cutting projects are proposed which affect all of the citizens of Northern Ireland.

The court noted that an abundance of the material it examined referred to the strategic importance of this project for energy security across Northern Ireland. It said that approving the project had the effect of potentially locking in fossil fuel dependency for 40 years to come which potentially conflicts with a climate policy directed at net zero by 2050. However, the ministerial decision as it stands, effectively means that this gas storage proposal is not deemed a significant project which the court found to be irrational. It said this was enough to engage the obligation to refer to the Executive Committee who can then make a decision with all interests in mind. Referral to the Executive Committee is also triggered due to the cross-cutting nature of this project:

> "Our analysis leads us to the conclusion that there is an error in the ministerial decision making in relation to referral to the Executive Committee. Furthermore, in the absence of sufficient explanation from the Minister, we are satisfied that he cannot be said to have left out of account the community fund. Obviously, for any future decision making to be lawful it must clearly leave this issue out of account. Given the trajectory of decision making we do not consider that this is an inadvertent breach of the Ministerial Code. … Lest any uncertainty arises or lest there is any suggestion that by virtue of this ruling we are effectively creating a bright line rule in judicial review that ministers must depose to their decisions, we are not. The point clearly arises and is acute in this case for the reasons we have given. Specifically, it seems logical to us that given the climate commitments now enshrined in our law that decision makers on large scale projects such as this will have to consider and rationalise any convergence or divergence with those standards set in law."

The appeal therefore succeeded on both grounds. The court afforded the parties an opportunity to address it on remedy, costs and any other matters arising.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://www.judiciaryni.uk/).

ENDS

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