OUTER HOUSE, COURT OF SESSION

[2020] CSOH 37

P1176/19

OPINION OF LORD TYRE

in the petition of

ENERGIEKONTOR UK LIMITED

Petitioner

for

Judicial Review of (i) the policy of the Ministry of Defence in connection with safeguarding the Eskdalemuir Seismic Array, and (ii) the noise budget allocation table prepared and applied by the Ministry of Defence in that regard

Petitioner: Mure QC; Wright Johnston & Mackenzie LLP
Respondent (Advocate General for Scotland): Crawford QC; Morton Fraser LLP

17 April 2020

Introduction

[1] The petitioner is a developer of commercial wind farms. The respondent is the Advocate General for Scotland, representing the Ministry of Defence ("MOD"). The petitioner has applied for planning permission for a wind farm development within the consultation zone surrounding the Eskdalemuir Seismic Array ("the Array"). That application has been objected to by the MOD in accordance with a policy which finds its practical expression in a table referred to as the noise budget allocation table. In this petition for judicial review, the petitioner seeks (i) declarator that the policy of the MOD in relation

to the allocation of noise budget to wind farm developments within the consultation zone is unreasonable, *ultra vires*, and unlawful; and (ii) reduction of the noise budget allocation table.

[2] The petition came before me for a decision, in terms of section 27B of the Court of Session Act 1988, as to whether permission should be granted for the application to proceed. I indicated to parties that I wished to be addressed at an oral hearing on whether the petition was time-barred in terms of section 27A(1)(a) of the 1988 Act and, if so, whether it was equitable to extend the three-month time limit. For the purposes of the hearing, it was accepted by senior counsel for the petitioner that the application was *prima facie* time-barred in terms of section 27A(1)(a), and so the only question for determination at the hearing was whether it was equitable in all the circumstances to extend the period for commencement of proceedings to 31 December 2019, being the date when the present application was made.

[3] The relevant rule of court (RCS 58.9(1)) and practice note (No.3 of 2017) envisage that oral permission hearings will not normally last more than 30 minutes. The hearing in the present application took longer in order that the somewhat complex facts and chronology, relevant to the exercise of the Court's discretion, could be properly explored. As this opinion is concerned only with the granting of permission to proceed and not with the substantive issues, and in order to provide my decision expeditiously, I have not attempted to include in it either a comprehensive exposition of the facts or a narrative of the whole of the chronology placed before me.

The planning background

[4] The Array comprises an array of seismometers capable of detecting vibrations caused by nuclear tests. It is part of the verification regime provided for in the Comprehensive

Nuclear Test Ban Treaty and operated under the surveillance of the Preparatory Commission for the Comprehensive Nuclear Test Ban Treaty Organisation. The UK Government's policy is to protect the Array for the purposes of the Treaty; the practical responsibility for this rests with the MOD. That protection includes protection from seismic vibrations from other sources that could interfere with the Array's detection capabilities.

[5] The forces acting on wind turbines cause vibrations in their structure, some of which are transferred to the ground and can travel for many kilometres. A report commissioned in 2005 (the Styles Report) made recommendations regarding the siting of wind farms in the vicinity of the Array. The authors of the report recommended a seismic ground vibration threshold for wind farms of 0.335 nanometres of ground displacement. This is known as the noise budget. In the light of the Styles Report, the MOD established two zones around the Array: (i) an exclusion zone of 10 km within which the MOD would object to any wind farm development, and (ii) a consultation zone of 50 km within which the MOD would require to be notified of relevant applications. Paragraph 3 of the Ministry of Defence (Eskdalemuir Seismic Recording Station) Technical Site Direction 2005 requires a planning authority to consult the MOD before granting any application for wind farm development within the 50 km zone.

[6] The Eskdalemuir Working Group ("EWG") was established in 2004 to consider the potential impact of wind farms in the vicinity of the Array. It is funded by *inter alia* the MOD and Renewable UK (formerly the British Wind Energy Association) and is convened by the Scottish Ministers. Its members include a number of commercial wind farm operators including (since about 2015) the petitioner. The EWG was responsible for commissioning the Styles Report and, in 2014, it commissioned a further report (the Xi Report) to re-examine the Styles methodology. The Xi Report concluded that the 2005 methodology

should be replaced by a physics-based algorithm and that, if this was done, there was "headroom" for additional wind farm developments within the 0.335 nm noise budget threshold.

[7] MOD policy is to allocate noise budget on a first come first served basis. The basis upon which the MOD decides whether or not to object to a wind farm development application is whether the granting of the application would or would not cause the noise budget threshold to be exceeded. In order to assess whether this would be so, the MOD has produced a noise budget allocation table. This is a spreadsheet listing all existing and proposed wind farm developments within the consultation zone, together with *inter alia* their capacity, mean distance from the Array, calculated amplitude (in nm), and status (eg "constructed" or "granted"). There is also a column entitled "cumulative amplitude" which, as the title indicates, shows the cumulative amplitude in nm of the development in question together with all of those appearing above it in the table. By use of this table the MOD assesses whether the amplitude of a further proposed development would cause the cumulative total to exceed the noise budget; if so, an objection will be lodged. It is very unlikely that a development objected to by the MOD on this ground would receive planning permission.

[8] The statutory procedure for obtaining planning permission for a wind farm development differs according to whether or not the capacity of the proposed development exceeds 50 megawatts. For a development exceeding that capacity, consent must be given by the Scottish Ministers under section 36 of the Electricity Act 1989 (an application requiring such consent is referred to as a section 36 application). The local planning authority is a statutory consultee. In terms of the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017, certain (but not all) section 36 applications must be

accompanied by an environmental impact assessment ("EIA") report. In terms of regulation 12(1) of the 2017 Regulations, a developer may (but is not obliged to) ask the Scottish Ministers to adopt a scoping opinion, which advises on what should be included in any EIA report accompanying a section 36 application. Where a scoping opinion is requested, the Scottish Ministers consult the MOD on the proposal.

[9] For a development with a capacity not exceeding 50MW, there is no requirement for a section 36 consent, and the application for planning permission is made to the local planning authority under the Town and Country Planning (Scotland) Act 1997. Again, certain applications must be accompanied by an EIA report, and the developer may (but need not) ask the planning authority to adopt a scoping opinion which advises on what should be included in such an EIA report.

[10] The issue in the present petition arises out of a distinction drawn in the policy of the MOD, as regards the allocation of noise budget, between the treatment of applications for developments with capacity greater than 50MW and of those with capacity not exceeding 50MW. In relation to a proposed development whose capacity does *not* exceed 50MW, noise budget is allocated to the development when the MOD is notified by the local planning authority of the developer's planning application. However, in relation to a proposed development whose capacity exceeds 50MW, noise budget is allocated to the development when the MOD is notified by the Scottish Ministers of a scoping request by the developer in relation to an EIA report. The petitioner's argument is that this difference in treatment creates a preference in favour of larger (capacity >50MW) proposed developments, which will be allocated noise budget at an earlier stage of the planning process than smaller proposed developments. The petitioner submits that the MOD's policy is thereby rendered unreasonable, *ultra vires* and unlawful.

The petitioner's planning application

[11] From about 2015 the petitioner became interested in carrying out wind farm developments with capacities of less than 50MW at locations within the consultation zone of the Array. In relation to one of those sites, Little Hartfell, it applied to the local planning authority for a scoping opinion. The planning authority consulted the MOD who advised that the noise budget would be "allocated to planning application" [*sic*] on a first come first served basis, and that if the budget had been fully allocated at the time of submission of the application, the MOD might object. In 2018 the petitioner applied to the local planning authority for planning permission for a wind farm at Little Hartfell. On 13 April 2018, the MOD submitted an objection to the application "due to the potential unacceptable impact of the wind farm on the [Array]", on the ground that the limit of the noise budget had already been reached.

[12] Prior to the submission of the MOD's formal objection, the petitioner had learned that objection was likely because all of the available noise budget had been allocated to a scoping application submitted in respect of a section 36 application for a development at Faw Side with capacity exceeding 50MW. The petitioner took the matter up with the Scottish Government *qua* convener of the EWG. The petitioner also obtained from the MOD, by means of a freedom of information request, a copy of the noise budget allocation table. The MOD's accompanying letter confirmed that "only full applications… submitted via the Town and Country Planning process and consultations received as part of the progression of schemes submitted under section 36" were allocated noise budget. A further MOD response dated 3 May 2018 stated that scoping consultations were allocated noise budget without any limit of time. For the purposes of the present proceedings it is accepted by the petitioner

that by that date at the latest, it was aware of all material details of the MOD policy now under challenge.

[13] When the petitioner took the matter up with them, the Scottish Government appeared to be unaware of this aspect of the MOD policy. Discussion of it in the EWG was deferred pending receipt of the conclusions of further work by the authors of the Xi report. In the meantime, the petitioner's legal agents had written to the MOD on 29 May 2018, drawing attention to what they described as an inconsistency in the way in which the MOD allocated the noise budget, describing the MOD's approach as unreasonable and irrational. That letter included the following request:

> "Mindful of the three month time limit for raising judicial review proceedings should a satisfactory response not be received, we would ask that you respond substantively to the matters raised within this letter within 14 days."

[14] The MOD's response in a letter dated 28 June 2018 formally confirmed its policy in the following terms:

> "I confirm that wind turbine developments are added to the allocation database in chronological order based on:
>
> - when consulted by the consenting authority for developments under 50MW at planning application submission and therefore being determined under the relevant Town and Country Planning Act;
>
> - and at scoping stage for those over 50MW which satisfy the criteria to be considered section 36 developments under the Electricity Act in Scotland and over 50MW for those in England which therefore follow the Nationally Significant Infrastructure Project (NSIP) consent route.
>
> The MOD has consistently applied this criteria to developments since c.2005."

The letter went on to make clear that the MOD did not accept that its practice was irrational, unreasonable or inconsistent.

[15] The petitioner did not then proceed to apply for judicial review. Instead, it entered into discussions with MOD representatives, which included a meeting in July 2018 with the responsible UK Government minister. Nothing of substance came from these meetings, and the petitioner confirmed that it would urge the EWG to make a policy recommendation to the MOD.

[16] The working group met on 16 January 2019. For this meeting its terms of reference included:

> "1. To establish the detail of the policy which is currently being applied to the allocation of budget.
> …
>
> 3. To consider a new policy in relation to the allocation of budget, and establish the effects, intended or otherwise, of such a policy alteration. To thereafter secure the implementation of this policy."

In advance of the meeting, the Scottish Government circulated an options paper containing five policy options, including maintenance of the *status quo*. Option 3(a) involved the MOD altering its approach and ensuring that noise budget for *new* applications was only allocated at full planning application stage. Option 3(b) required the same alteration of approach, but differed in that it would apply to all section 36 scoping proposals, ie it would apply also to developments currently listed in the spreadsheet, including the Faw Side development that had been allocated noise budget. The Scottish Government expressed a preference for option 3(b), and at the meeting on 16 January 2019, the members of the working group (with the exception of the representative of the Faw Side developer) agreed. A recommendation to that effect was sent to the MOD on 14 February 2019.

[17] On 26 April 2019, the MOD responded, expressing a provisional preference for Option 3(a), stating that this would allow a line to be drawn following many years of applying the current approach without penalising schemes that had already been allocated

noise budget in good faith. The majority of the working group members considered that implementing Option 3(a) would not accord with the group's remit and would continue to sterilise the consultation zone for the foreseeable future. No further progress has been made between the MOD and the working group.

[18] During the period from April to December 2019, the petitioner explored with the MOD the possibility of a "commercial solution". One suggestion made was removal of some turbines from applications by the petitioner that had already received planning permission. It did not, however, prove possible to identify a solution that released sufficient noise budget to enable the MOD to withdraw its objection. Another suggestion which did not find favour with the MOD was the imposition of a suspensive planning condition. On 23 October 2019, the petitioner wrote to the MOD, in the light of the terms of an MOD response to a different planning application, inquiring whether there had been a change of policy. The MOD confirmed that there had not. Nothing further of substance happened before the lodging of the present petition.

Argument for the petitioner

[19] On behalf of the petitioner it was submitted that it would be equitable to allow the petition to proceed, having regard to all the circumstances. Those circumstances were as follows:

(i) Where a public authority's policy was unlawful, it was proper for the court to permit an application for judicial review to proceed in the interests of the rule of law and to prevent the continuation of the public wrong.

(ii) The court should have regard to whether the applicant has pursued alternative remedies, including engagement with the authority concerned, or awaiting the

outcome of a consultation. In the present case, the petitioner and other interested parties had attempted to persuade the MOD to reconsider its policy by means of discussion in the EWG and liaison with the Scottish Government, but the MOD had declined to do so. The petitioner had also sought to explore other means by which the development could proceed within the total noise budget already allocated to it, but to no avail.

(iii) The petitioner had a continuing interest in bringing this challenge, as it was developing further windfarm projects in respect of which the MOD would be a statutory consultee.

(iv) Although other developers had a similar continuing interest, it was unclear that the public wrong would be brought to the court's attention by another petitioner.

(v) No issue of hardship or prejudice to the MOD arose.

(vi) Good administration would be promoted by having the matter determined by the court. There was a public interest in bringing bad administration to an end: *R (Burkett)* v *Hammersmith and Fulham LBC* [2001] Env LR 684 (CA). The court may have to weigh in the balance the interests of good administration, eg certainty and reliance, and the need to correct wrongs where they occur.

(vii) The court should have regard to the importance of the issue both for the lawful protection of the Array and for the pursuit of UK and Scottish Government policies on renewable energy. Where the substantive issue is an important one, it should not be left unresolved: see eg *R* v *Secretary of State for the Home Department, ex p Ruddock* [1987] 1 WLR 1482.

(viii) The court should have regard to the strength of the petitioner's case and the lack of a coherent explanation in the MOD's answers for the current policy.

(ix) The petitioner only became aware in spring 2018 of the difference in treatment applied by the MOD. Successive versions of the noise budget allocation table have not been published but have been used by the MOD for internal purposes.

Argument for the respondent

[20] On behalf of the respondent it was submitted that permission to proceed should be refused, for the following reasons:

(i) No circumstances had been pled or raised in submissions that was sufficient to justify allowing the application to proceed out of time.

(ii) The petitioner had not struck at the earliest reasonable moment in the process (cf *R(Burkett)* v *Hammersmith and Fulham LBC,* above, at paragraph 11). It had not been reasonable or appropriate to wait for some 21 months after spring 2018 when the petitioner admittedly became aware of the detail of the MOD policy now under challenge. At no time was the petitioner denied the opportunity of making a challenge; nor was there ever any basis for the petitioner apprehending that the MOD would amend its policy in the manner requested.

(iii) The principle of good public administration required legal certainty, which would be damaged if this petition were allowed to proceed. In the balancing exercise there would be no net detriment if permission to proceed were to be refused, even if the petitioner could show a good *prima facie* case.

[21] For the purposes of the time-limit, the clock had started ticking in 2005 when the MOD policy was instituted in the light of the Styles Report, although it was accepted that actual knowledge on the part of the applicant was relevant to the exercise of the court's discretion. The petitioner had been fully aware of all relevant matters by May 2018.

Thereafter it must have been clear that the petitioner's arguments were falling on deaf ears so far as the MOD was concerned. Judicial review had been in the petitioner's contemplation since at least May 2018. It had been inappropriate and unreasonable, having regard to the principle of good administration, to wait until the end of 2019 before raising proceedings. In the meantime the MOD had allocated noise budget according to a policy that had been in operation since 2005. Developers and relevant statutory authorities had proceeded on the basis that the policy and the table were valid. In any event there was no consensus within the wind farm industry regarding the correct approach.

Decision

[22] As both parties recognised, the decision whether to extend the three-month period during which judicial review proceedings must be commenced is a matter of discretion for the court, having regard to all circumstances. In exercising the discretion, it seems to me to be appropriate to consider three periods separately.

[23] The first period consists of the time between the formulation of the policy, said by the respondent to have been in about 2005, and the time when the petitioner became aware of it, which occurred in either April or May 2018. During the whole of that period the petitioner was, in my opinion, excusably ignorant of the policy. Before 2015 it had no interest in the area within the consultation zone. Thereafter, although the existence of the MOD's first come first served practice must have been within its knowledge, the distinction with which this application was concerned was not. As Richards J observed in *R (Gavin)* v *Haringey LBC* [2004] 1 PLR 61 at paragraph 45, a claimant cannot fairly be criticised for failing to take action before he knew that there was anything to take action about.

[24] In this regard it is relevant to consider the terms of a report dated 11 November 2013, lodged by the respondent, by a Reporter appointed by the Scottish Ministers in relation to an entirely different application for section 36 consent for a wind farm within the consultation zone. Senior counsel for the respondent founded upon the terms of the report as demonstrating that by 2013 the first come first served approach had already been challenged three times by developers, on the ground that it was preventing desirable wind farm development. But that is not the argument relied upon by the petitioner, which does not challenge a first come first served approach in principle. For its part, the petitioner drew attention to a passage in the Reporter's narration of MOD's argument which appeared to suggest that the MOD was not aware of its own policy, as the description of it referred to priority according to the date of notification of an *application* (as opposed to a scoping request) to the MOD. The noise budget allocation table was not – and still is not – routinely published. I conclude that if, on a proper construction of section 27A(1)(a), the period of three months began to run when the policy was formulated in 2005, it is equitable to extend it until at least the time in early 2018 when the petitioner became aware of it.

[25] The second identifiable period is the period from spring 2018, when the petitioner became aware of the policy, until 26 April 2019, when the MOD intimated its preference for option 3(a) in the Scottish Government options paper, rather than option 3(b), which was the preferred choice of most of the EWG members and which would have resolved the issue raised by the petitioner in its favour by removing the priority that had been accorded to the Faw Side application when its scoping request was notified to the MOD. During that period the petitioner, although clearly having judicial review in mind as a possible course of action, instead sought to achieve a resolution of the matter through the medium of the EWG. In my

opinion this was a reasonable and appropriate course of action to take. In *R (Burkett)* v *Hammersmith and Fulham LBC* above, the Court of Appeal stated (paragraph 14):

> "Judicial review is in principle a remedy of last resort. It follows, as it always does when a potential applicant for judicial review expeditiously seems a reasonable way of resolving the issue without litigation, that the court will lean against penalising him for the passage of time and will where appropriate enlarge time if the alternative expedient fails."

The EWG was the natural forum in which to take up the petitioner's grievance. No criticism can be made of the petitioner regarding the delay in convening the working group while the outcome of further work by the authors of the Xi report, which might have rendered the issue academic so far as the petitioner was concerned, was awaited. When the working group did meet, the petitioner received support from all of its members with the unsurprising exception of the Faw Side developer. The MOD's response to the EWG's conclusion could be interpreted as an acknowledgment that the policy was anomalous and ought to be revised. The only point of disagreement, albeit an extremely important one, appeared to be whether that revision ought to operate retrospectively as regards the Faw Side scoping request. On the basis of all of this activity I conclude that it is equitable to extend the three-month time limit until at least April 2019.

[24] The third identifiable period is the period from 26 April 2019 until 31 December 2019, when proceedings were commenced. Despite the volume of email correspondence produced showing continuing discussion between the petitioner and the MOD, very little of substance was happening. In particular, there is little or no indication that the petitioner was given any reason to think that a solution satisfactory to it was imminent. To that extent, I accept the respondent's submission that it has not been demonstrated that the present proceedings could not have been begun earlier than they were.

[25] That does not, however, decide the matter in the respondent's favour. I do not accept that the formula used in the *Burkett* case of "striking at the earliest reasonable moment" can be adopted as an appropriate test for exercise of the discretion in section 27A(1)(b). In the first place, that phrase appears in a part of the judgment of the Court of Appeal concerned with identifying the starting point of the period within which proceedings must be brought; that is not a matter of direct relevance in the present case. In the second place, exercise of the discretion must, according to the authorities and the wording of section 27A(1)(b) itself, take account of the whole circumstances and not merely the earliest date when the petitioner could, if it had chosen to do so, reasonably have begun its litigation.

[26] I have reached the conclusion that it is, in the whole circumstances, equitable to extend the three month period to the date when the petition was lodged. I do so for the following reasons. First, I consider that the issue is an important one that ought to be determined one way or the other. A consequence of the current MOD policy is that a single large project which has not reached the stage of submission of an application can more than exhaust the available noise budget and thus, in effect, operate as a block on wind farm development throughout a very large area and for an indefinite period. I should emphasise that I express no view on the substantive merits of the petition, beyond stating that I am satisfied that the statutory threshold of real prospect of success is met. However it seems to me that the argument ought to receive judicial consideration, and I see no advantage in refusing to allow the present petition to proceed because of the possibility that another petition raising the same issue may be brought in the future.

[27] Secondly, I am not persuaded that the principle of good administration requires refusal of permission for this particular application to proceed. In my opinion, an argument

by the respondent based upon the principle of good administration would be better canvassed, at least in the circumstances of this case, at the substantive hearing rather than at permission stage. The mere fact of permission being granted will not, so far as I am aware, have any immediate practical consequences: the current situation is that due to its proposed capacity, the Faw Side proposal not only exhausts but greatly exceeds the currently available noise budget, so there does not appear to be any question of interference with progress with a development that would otherwise be under construction. Nor would the remedies sought affect any wind farm development which has already received the relevant planning approval.

[28] Thirdly, I do not consider that any prejudice to the MOD has been identified. The petitioner does not dispute that the MOD is entitled to devise and enforce a policy to protect the Array from interference with its detection capabilities. The petition does not, and does not seek to, threaten the system adopted by the MOD to safeguard the Array. Nor does it take issue in principle with a first come first served approach to the allocation of noise budget. The challenge is concerned rather with allocation of priority as between proposed developments, which should be a matter of indifference to the MOD so long as there is noise budget available for allocation.

Disposal

[29] For these reasons I shall extend the period for making the present application until 31 December 2019, and grant permission for the petition to proceed.