IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2018] EWHC 3775 (Admin)

CO/3256/2018

Royal Courts of Justice

Monday, 5 November 2018

Before:

MR JUSTICE HOLGATE

B E T W E E N :

THE QUEEN

ON THE APPLICATION OF

PAUL JOHN ANDREWS

Claimant

- and -

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Defendants

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J U D G M E N T

A P P E A R A N C E S

MR M WILLERS QC (instructed by Town Legal) appeared on behalf of the Claimant.

MR R WARREN QC and MISS H SARGENT (instructed by Government Legal Department) appeared on behalf of the Defendants.

MR JUSTICE HOLGATE:

1 The claimant Mr Andrews seeks to challenge by way of judicial review the joint decision of both defendants dated 17 May 2018 to issue a Written Ministerial Statement (WMS"). He is the Mayor of Malton and chair of the Habton Parish Council. The WMS is concerned with on-shore gas resources. Mr Andrews also seeks an order staying the policy. It was for that reason that on 11 October I adjourned the application for permission and for a stay into court for an oral hearing.

2 North Yorkshire County Council, the City of York and North York Moors National Park Authority have produced a draft North Yorkshire Minerals and Waste Joint Plan ("the draft plan"). It has been submitted for examination by an independent planning inspector under the Planning and Compulsory Purchase Act 2004. The claimant has actively participated in the examination of that document. He is particularly concerned about the impact that the 2018 WMS will have on the formulation and eventual adoption of the draft plan's policies as regards hydraulic fracturing, commonly referred to as fracking.

3 The draft plan was published in November 2016 and it contained Policies M16, M17 and M18 dealing with hydrocarbons. Amendments were published by the three authorities in July 2017. The Explanatory Memorandum of the text contains a number of definitions. Paragraph 5.119(f), as submitted, read:

> "For the purpose of the plan, hydraulic fracturing includes the fracturing of rock under hydraulic pressure regardless of the volume of fracture fluid used."

4 I understand from Mr Willers QC, who appears on behalf of the claimant, that it is proposed by the planning authorities to amend that definition through a modification which omits the reference to volume, but it might be said the practical effect of this version, to all intents and purposes, remains the same.

5 The Explanatory Memorandum also set outs in some detail the reasons why the authorities have proposed the definition set out in the draft plan. For example, reference is made to the definition of "associated hydraulic fracturing" contained in s.4B of the Petroleum Act 1998 and inserted in the Infrastructure Act 2015. The draft plan explains in particular why they consider that that more limited definition of a particular type of fracturing, limited by reference to the volume of fluid either injected at each stage or in total, is inappropriate for the planning policies to be applied within the authorities' area. That is a matter which has given rise, as I understand it, to objection and is being considered by the inspector in the examination process. The court has been told that the inspector has issued a report which upholds the approach taken by the planning authorities. It was shortly after that report was issued that the defendants issued or published their Ministerial Statement.

6 The proposed challenge relates to one passage only of the WMS. It is accepted by Mr Willers that in other respects the document essentially repeats pre-existing central government policy. The passage to which objection is taken appears under the heading "Planning Policy and Guidance". It begins by stating:

> "This statement is a material consideration in planning-making and decision-taking, alongside relevant policies of the existing National Planning Policy Framework 2012 ... "

7 After a section setting out the national importance attached by government to shale gas development, the passage sought to be challenged reads:

> "We expect mineral planning authorities to recognise the fact that Parliament has set out in statute the relevant definitions of hydrocarbon, natural gas and associated hydraulic fracturing. In addition, these matters are described in planning practice guidance which plans must have due regard to. Consistent with this planning practice guidance, policies should avoid undue sterilisation of mineral resources (including shale gas)."

8 No objection is taken by the claimant to the cross-referencing in this WMS to the NPPG. The objection is to the cross-referencing to the definition of "associated hydraulic fracturing" in the 1998 Act to which I have referred, essentially because that definition is narrower in ambit than the definition proposed in the draft plan. In particular there is no volumetric threshold defining when the subject of fracking engages the policies in that plan. Mr Willers accepts that the reference in the WMS to a statutory definition of associated hydraulic fracturing is not objectionable in itself in so far as it simply refers to something which is relevant as a planning consideration.

9 Before coming to the proposed three grounds of challenge, it is useful just to dwell for a moment on the effect of the WMS. Section 19 of the 2004 Act states that when a development plan document is prepared the planning authority must have regard (inter alia) to national policies and guidance issued by the Secretary of State. It is well established in a number of authorities that national policy is a matter to which planning authorities are directed to have regard. They are not bound by national policy. National policy is not mandatory in the sense that its contents must be adhered to in the formulation of local policies. I understand it not to be disputed by the defendants that national policy, for example in this case, would not mandate the individual planning authorities up and down the country to formulate their policies by reference to any particular definition, including the one contained in the 1998 statute.

10 Because planning authorities are not bound by national policy (see, e.g., *Hopkins* in the Supreme Court and *West Berkshire District Council* in the Court of Appeal), it is legally permissible for a planning authority promoting a development plan to justify taking a different approach, for example, for reasons which they consider are applicable within their administrative area. It may be that that view is shared by other authorities but that is an entirely separate matter. The important point is that if they take that stance then the policies and justification they rely upon can be scrutinised by the independent planning inspector through the statutory process of examination. The stance they take can be tested. For these reasons the passage in the WMS the subject of this claim cannot be construed as mandating that the planning authorities in North Yorkshire must apply, for example, the definition of "associated hydraulic fracturing" in the 1998 Act or the definition of fracking contained in the NPPG, when they formulate their local planning policies and the developments to which they apply. All the WMS does is to say that those are matters to which it is expected that mineral planning authorities will have due regard.

11 Nonetheless, Mr Willers submits that there are arguable grounds of challenge in this case because, in relation to grounds 1 and 2, the SEA Directive is engaged. In his helpful submissions he summarised the legal position by taking the court to the decision of the Supreme Court in *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] 1 WLR 324, in particular paras.35-38 of the judgment of Lord Carnwath and to paras.122-124 and para.126 of the judgment of Lord Sumption.

12 For the purposes of this case, he accepts that those judgments neatly encapsulate the current legal position on when the SEA Directive is engaged, applying EU jurisprudence, and,

therefore, it is unnecessary in this judgment to delve further into the case law. In para.36 Lord Carnwath said that for the SEA to be engaged -

> "36 … One is looking for something which does not simply define the project, or describe its merits, but which sets the criteria by which it is to be determined by the authority responsible for approving it. The purpose is to ensure that the decision on development consent is not constrained by earlier plans which have not themselves been assessed for likely significant environmental effects."

13 The same approach was expressed by Lord Sumption. He said:

> "122 ... The effect of the SEA Directive is that where the grant or refusal of development consent for a specific project is governed by a policy framework ... [that] framework must itself be subject to an environmental assessment ... "

if the framework is regulated by legislative, regulatory or administrative provisions.

14 Lord Sumption also stated that the object is to deal with cases where the EIA, prepared under the EIA Directive at the stage when relevant consent is granted, could otherwise be wholly or partly pre-empted because some relevant factor was governed by a planning policy framework adopted at an earlier stage. He went on to say that in order for the SEA Directive to be engaged it is not necessary that the policy framework be determinative of an application for consent. It suffices that such a framework operates as a constraint on the discretion of the decision-making authority dealing with the application for that consent. That may arise where the plan merely requires the authority to have regard to a matter.

15 As Mr Willers frankly and properly accepted, that last statement does not itself provide a test for deciding whether the SEA Directive applies. That would depend on the nature and content of the policy statement under consideration. He accepted in his submissions that the litmus test here is whether the policy statement to which his client objects is one which sets the framework of granting further consents subsequently because it answers to the characteristics defined in *Buckinghamshire* to which I have referred.

16 In my judgment the policy statement in question simply refers to two definitions of fracking-type development which should be considered by planning authorities when drawing up their development plans without, as I have indicated already, requiring adherence to either one or indeed both of those definitions. Planning authorities drawing up relevant plans are entitled as a matter of law to disagree with the advice of central government on this point, for example, as regards the use of the definitions in the 2015 Act or the 1998 Act. The question of what appropriate definition should be applied within a particular planning-making authority's area is a matter to be considered on the merits through the process under the 2004 Act, having regard to all material considerations. That being the position, I cannot see how it is arguable in any way at all that the passage to which objection is taken gives rise to any grounds of challenge based on the SEA Directive, applying the test I have set out. On that basis ground 1 is unarguable.

17 Ground 2 seeks to challenge the WMS through the failure to undertake a consultation exercise. As originally presented, it was based upon the application of Art.6 in the SEA Directive. To that extent ground 2 is also unarguable given the conclusion I have reached on ground 1.

18 As pleaded in the alternative, the claimant also contended that a common law obligation to consult arose in this case. But faced with the decision of Dove J in *R (Richborough Estates Ltd) v Secretary of State for Communities and Local Government* [2018] PTSR 1168. Mr Willers did not pursue the point. In any event, I have no hesitation in concluding that there is no arguable basis at common law for saying that there was an obligation to consult on the WMS, and in particular the passage to which objection is taken, before the WMS was adopted. There was no legitimate expectation based upon any promise or practice. The residual category of legitimate expectation or obligation to consult in *Bhatt v Murphy* based upon unconscionability could not arise. The court has to bear in mind that it is dealing here with the high-level central government function of formulating policy at a national level.

19 That leaves ground 3. As I understand the way in which the argument has helpfully been clarified this afternoon, the irrationality challenge really depends upon the court being willing to interpret the WMS as if it encourages local planning authorities to adopt both of the definitions referred to. I say that because the complaint is that there is an internal inconsistency in the policy because, as is common ground, the two definitions are mutually incompatible: one is general in nature, the other uses a volumetric threshold. But on any fair reading of the WMS, I do not consider it arguable that the authors committed that sort of error. Accordingly, ground 3 is unarguable.

20 Because it follows that permission to apply for judicial review cannot be granted, there is no basis for granting a stay either. I would add, however, that if it had been necessary to express a view on that, applying the criteria summarised in *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1425 (Admin) para.7 et seq., I do not consider that the threshold of a real prospect of success would have been reached in this case. Additionally, even if I had reached the balance of convenience, I am satisfied that there is a very considerable public interest in the formulation of this planning policy for the guidance of local planning authorities and that the claimant has not demonstrated sufficient justification for the court to intervene on an interim basis outweighing those public interest considerations.

21 For all those reasons, the court's decision is that permission to apply for judicial review is refused and the application for a stay is refused.

MR JUSTICE HOLGATE: I am very grateful to Mr Willers for his helpful and clear submissions.

MR WILLERS: Thank you. I am very grateful for your Lordship giving judgment this afternoon.

MR JUSTICE HOLGATE: I think it is important that everyone knows where they stand.

MR WILLERS: Exactly.

MR JUSTICE HOLGATE: I am bound to say that I was only able to do that because of the care which both sides have taken in presenting their arguments. It meant that I was able to make good use of pre-reading time; that is not pre-judgment time.

MR WILLERS: Pre-reading time is somewhat different. I am sure there is an application from my friend, but there is certainly an application for costs-capping *Aarhus* protection.

MR JUSTICE HOLGATE: You are entitled to that.

MR WILLERS: Yes. There is nothing in the acknowledgement of----

MR WARREN: All I was going to say was in addition to *Mount Cook*, which would be under the *Aarhus* costs protection cap, there is the balance of today.

MR JUSTICE HOLGATE: Up to 5,000.

MR WARREN: Exactly.

MR JUSTICE HOLGATE: Let us be clear about this. What is the basis upon which you would ask for any costs in relation to the oral hearing? Take it in stages.

MR WARREN: Absolutely.

MR JUSTICE HOLGATE: The acknowledgement of service costs you are entitled to as a matter of principle; the issue might be quantum. Can you remind me of the quantum?

MR WARREN: At the end of the summary grounds----

MR JUSTICE HOLGATE: Yes. I have it. There is the usual schedule. There has been plenty of opportunity for that to be considered on both sides.

MR WARREN: Yes, p.588 of the bundle.

MR JUSTICE HOLGATE: It comes to -- actually, it is not 588 in my bundle. It is at 227; it comes to £3947.

MR WARREN: That is correct.

MR JUSTICE HOLGATE: Mr Willers, as far as that is concerned, no objection?

MR WILLERS: No objection.

MR JUSTICE HOLGATE: What about the quantum?

MR WILLERS: No objection.

MR JUSTICE HOLGATE: We move to the second stage; normally, exception----

MR WARREN: They are. Two points on that: first, the subject matter we are dealing with, in particular the potential stay affecting----

MR JUSTICE HOLGATE: The mere fact that something is ordered into court for permission would not normally justify costs.

MR WARREN: No, not if it were a normal s.288 or something of that kind. It is the subject matter that----

MR JUSTICE HOLGATE: It is the fact that a stay has been asked for.

MR WARREN: In relation to a national policy.

MR JUSTICE HOLGATE: Ordinarily this would necessitate an inter partes hearing.

MR WARREN: Yes. A stay normally would do but in this case it is a combination of that and the subject matter.

MR JUSTICE HOLGATE: When dealing with subject matter. That is the way you put it.

MR WARREN: Yes. My instructions were to appear not just by invitation, as it were, but because of the subject matter.

MR JUSTICE HOLGATE: You were going to be injuncted.

MR WARREN: Exactly.

MR JUSTICE HOLGATE: You are entitled to be heard.

MR WARREN: Indeed.

MR JUSTICE HOLGATE: The alternative argument would be to say, well, the only way you are entitled to defend your position is on paper.

MR WARREN: Yes.

MR JUSTICE HOLGATE: And some might say that is unreasonable.

MR WARREN: Then that just goes back to the first point about the subject matter.

MR JUSTICE HOLGATE: Exactly. That is the argument.

MR WILLERS: Is this exceptional? Is it sufficiently exceptional? I think that is a matter for your Lordship.

MR JUSTICE HOLGATE: In *Mount Cook* terms I think that ordinarily I would be with you. But when you are seeking an injunction it is different, a fortiori against government ministers. There are wider public interest considerations and they are entitled to be heard. Your alternative argument would be that the application for a stay should be dealt with on paper. Well, that would not be very satisfactory, wouldn't it, partly because if a judge were to refuse you on paper you would probably renew anyway?

MR WILLERS: Possibly. Who can say? You know me too well.

MR JUSTICE HOLGATE: That would be presumptuous.

MR WILLERS: I think the point is if, as it were, the necessity to defend an application for an injunction puts a case like this into an exceptional category then----

MR JUSTICE HOLGATE: I think there is considerable force in the argument that because a staying injunction has been sought that -- but is there anything further you want to----

MR WILLERS: No.

MR JUSTICE HOLGATE: I think the order should be that the claimant pay the defendant's costs summarily assessed at £5,000 because that equates to the cap. Costs are greater than that but that gives you your *Aarhus* protection.

MR WILLERS: Thank you, my Lord.

MR JUSTICE HOLGATE: Is that everything?

MR WARREN: Yes.

MR WILLERS: Yes.

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This transcript has been approved by the Judge.