Neutral Citation no. [2007] NIQB 103 | *Ref:* **WEAH4808.T**

Judgment: approved by the Court for handing down | *Delivered:* **13/11/07**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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(1) SEAPORT INVESTMENTS LTD and
(2) MAGHERAFELT DISTRICT COUNCIL & ORS

APPLICATIONS FOR JUDICIAL REVIEW (REMEDIES)

WEATHERUP J

[1] This judgment relates to the remedies to be ordered further to the substantive judgment of the Court on 7 September 2007 reported by neutral citation [2007] NIQB 62. In essence the judgment related to two applications for judicial review concerning environmental assessments carried out under the Environmental Assessment of Plans and Programmes Regulations (NI) 2004 transposing Directive 201/42/EC on the assessment of the effects of certain plans and programmes on the environment.

[2] The findings in the judgment were fourfold and were summarised in paragraph 56 as follows. First, the designation of the Department of the Environment as the consultation body under Regulation 4 of the 2004 Regulations does not transpose properly Article 6.3 of the Directive. Secondly, that the absence of appropriate timeframes in Regulation 12 does not transpose properly Article 6.2 of the Directive. Thirdly, that the environmental reports prepared for the Draft Northern Area Plan and the Draft Magherafelt Plan are not in substantial compliance with Schedule 2 of the Regulations and Article 5 and Annex 1 of the Directive. Fourthly, that the sequencing of the environmental reports and the draft plans were not in compliance with Regulations 11 and 12 and Articles 4 and 16 of the Directive.

[3] In effect there are two instances of non-transposition of the Directive into the Regulations, namely the absence of a consultation body when the Department of the Environment is the responsible body for the development plan or programme and the absence of time limits for the referral to consultation and for receipt of responses in relation to development plans and environmental reports. In addition there are

two instances of non-compliance with the Regulations and the Directive, namely the information in the environmental reports was not in accordance with the requirements and the environmental reports did not emerge at appropriate times in order to influence the development plans in an appropriate manner.

[4] The applicants seek declarations and orders quashing the Regulations in the two instances of non-transposition of the Directive and declarations and orders quashing the development plans and the environmental reports in the two instances of non-compliance with the Regulations and the Directive.

[5] Since judgment was given on 7 September 2007 the respondent Department on 7 November 2007 issued non-feasibility notices under Regulation 6(2) of the Regulations. Regulation 6 specifies that the Regulations apply where a plan or programme has a first formal preparatory act occurring before 21 July 2004 and that plan or programme has not been adopted before 22 July 2006. Regulation 6(2) provides the Regulations do not require an environmental assessment of a particular plan or programme if the responsible authority decides (a) that the assessment is not feasible and (b) informs the public of its decision. The Department, as the responsible authority for the two draft plans, has now purported to exercise this power by the notices of 7 November 2007. The applicants have indicated that they intend to apply for judicial review of the Department's decision to issue the non feasibility notices and exempt themselves from the requirements of the Regulations to undertake environmental assessments in relation to the two plans.

[6] As to the impact of the non-feasibility notices on the proposed orders relating to the non-compliance, the applicants contend that the notices should be disregarded by the Court as the judgment was based on the respondent's activities prior to the issue of the notices at a time when the Department was arguing that they had complied with the requirements of the Regulations and the Directive. On the other hand the respondent contends that the notices of non-feasibility remain valid, unless and until they are set aside by the Court. Accordingly, as the notices amount to a valid derogation from the Regulations and the Directive, the respondent contends that no order should be made by the Court in relation to the findings of non compliance.

[7] In relation to the non transposition grounds the respondent contends that quashing Regulations 4 and 12 would have an adverse effect on environmental protection. This, it is said, would arise because it would remove such environmental protection as is provided by the Regulations and would not thereby correct the omission that has been found to have occurred in the present Regulations. Accordingly, the respondent contends that Regulations 4 and 12 should not be quashed, but should be retained to continue the limited amount of environmental protection that they accord. In any event the respondent contends that no further order is required in the proceedings in relation to either the non transposition grounds or the non compliance grounds as the judgment sets out the four findings of the Court and that is sufficient.

[8] A number of propositions should be stated. First of all, Member States, including the courts, must take appropriate measures to ensure fulfilment of Treaty obligations. Article 10 of the Treaty of the European Community provides that Member States shall take all appropriate measures, whether general or particular, "to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."

[9] Secondly, the Court has minimal discretion not to quash decisions that fail to comply with Community law. The applicants refer to the decision of the House of Lords in Berkeley v The Secretary of State, 81 P & CR 492. The decision-maker had not considered whether a project involved an urban development project for the purposes of the relevant Regulations and the Directive. The Court considered the position in relation to the quashing of the decision and Lord Bingham stated –

> "Even in a purely domestic context, the discretion of the court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow. In the Community context, unless a violation is so negligible as to be truly de minimis and the prescribed procedure has in all essentials been followed, the discretion (if any exists) is narrower still: the duty laid on member states by article 10 of the E.C. Treaty, the obligation of national courts to ensure that Community rights are fully and effectively enforced, the strict conditions attached by article 2(3) of the Directive to exercise of the power to exempt any and the absence of any power on the Secretary of State to waive compliance (otherwise than by way of exemption) with the requirements of the Regulations in the case of any urban development project which in his opinion would be likely to have significant effects on the environment by virtue of the factors mentioned, all point towards an order to quash as the proper response to a contravention such as admittedly occurred in this case."

[10] Thirdly, domestic difficulties do not excuse inaction by a Member State where there has been non-compliance with obligations under EC law. A member State may not plead provisions, practices or circumstances in its internal system in order to justify a failure to comply with obligations or time limits imposed by Directives. The applicants referred to a considerable number of cases to that effect and I refer to some of them to illustrate the point. Commission of the European Community v The French Republic, case 232/78, [1979] ECR 2729 involving the control of mutton and lamb. At paragraph 6 of the judgment it is noted that the French Government did not dispute that the domestic system was incompatible with EC law but sought to

excuse that on a number of grounds which were all rejected by the Court. The grounds relied on were, first, that the French Government emphasised the serious, social and economic effects on the economy if they were required to take compatibility action; secondly, they drew attention to the progress that had been made in carrying out the setting up of a common organisation of the market in mutton and lamb; thirdly, they pointed out the inequality that would arise, in the field of competition, if they had to abolish their own organisation of the market. Commission of the European Community v The United Kingdom, case 337/89 [1992] ECR 1-1613 concerned the absence of appropriate measures in relation to the quality of water for the purposes of human consumption. The Court found at paragraph 25 that the Member State's claim that it had taken all practical steps to secure compliance could not justify, except within the limits of derogations expressly laid down, the failure to comply with the requirement to ensure that water intended for human consumption met the requirements of the Directive. Commission of the European Commission v The French Republic, case C-197/96 [1997] ECR 1-1489 was concerned with measures to secure equal treatment on gender grounds for night-time workers. The Court at paragraphs 14 and 15 rejected the domestic difficulties that the Member State as an excuse for non-compliance.

[11] Fourthly, the obligation is on the Court to nullify the unlawful consequences of a breach of Community law. In Wells v The Secretary of State for Transport, a decision of the European Court of Justice, an Environmental Impact Assessment for a particular quarry development was found to be contrary to the Regulations and the Directive. In considering the nature of the obligation to remedy the failure to carry out an Environmental Impact Assessment the ECJ addressed the UK Government's contention that in the circumstances of the case there was no obligation on the competent authority to revoke or modify the permission issued for the working of the quarry or to order the discontinuance of the quarry. The ECJ stated that it was clear from settled case law and under the principle of co-operation and good faith laid down by Article 10 of the Treaty that the Member States are "required to nullify the unlawful consequences of a breach of Community law." The ECJ referred to the decision of Humblet v Belgium [1960] ECR 559 and Francovich v Italy [1991] ACR 153 57 and stated that "Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned" and to that effect referred to Germany v The Commission [1990] ECR 1-2321. Thus the obligation to nullify would extend to this Court.

[12] Next, I consider whether the non-feasibility notices, if they are valid, have the effect that environmental assessments are not required in relation to the draft plans. In other words, do the notices amount to permitted derogations under the Directive and the Regulations? The applicants contend that the notices can have no retrospective effect. I am unable to accept this contention. The derogation is capable of applying on the date of commencement of the Regulations. There is no requirement in the Directive or the Regulations that the non-feasibility notice be issued on a specified date or within a specified period from commencement of the Regulations. There may be a period from the commencement of the Regulations to

the date of the issue of the notice where the need for an environmental assessment will arise on commencement and will be disapplied at the later date of issue of the notice. To that extent there would be inevitable retrospective effect. It cannot be the case that all such notices had to be issued on the date of commencement of the Regulations. There may be a different argument as to whether the notices in the present cases were issued within proper timescales. I find that the notices are capable of having retrospective effect.

[13] Further, the applicants contend that the facts must be taken as they were during the hearing of the applications for judicial review and therefore the Court should disregard the notices that have been issued. Again, I am unable to accept this contention. The Court has a discretion as to the remedies that should be ordered and it must have regard to all the circumstances. I am not prepared to disregard the notices. One outcome of the proposed challenge to the notices may be that they will be upheld so that the environmental assessment arrangements would not apply to these plans. Another outcome may be that the notices will be struck down and the requirements for environmental assessments will apply to these plans. In that event there has already been a finding that there has been non-compliance with the requirements for environmental assessments in the respects identified.

[14] I propose to make a declaration that the draft plans and the environmental reports are not in compliance with the Regulations and the Directive. I am not prepared to make an order quashing the draft plans and the environmental reports at this stage. I would reserve the position in relation to the plans and the reports pending the outcome of the judicial review of the non-feasibility notices. The quashing of the draft plans and reports may be an aspect of the judicial review challenge to the notices.

[15] The first provision that has not been transposed is Article 6.3 of the Directive which provides that Member States shall designate the authorities that are to be consulted about draft reports and environmental assessments. Regulation 4 provides, first of all, that the Department of the Environment shall be the consultation body and secondly that where the Department of the Environment is the responsible authority for the plan or programme it shall not at that time exercise the functions of a consultation body. The non-transposition in this particular instance is that there is no consultation body provided for in domestic law when the Department of the Environment is responsible for the development plan. This is a non-transposition by omission of one aspect of the requirements of the Directive.

[16] To quash Regulation 4 would remove that aspect of the Directive that has been transposed and would not relieve the omission or the incomplete transposition. I am mindful of all the propositions set out above. The appropriate measure to be ordered by the Court to ensure fulfilment of the obligation to transpose the requirement for a consultation body when the Department of the Environment is the responsible body is a declaration to that effect rather than an order quashing

Regulation 4 which would have the effect of removing the limited protection that is provided. I refuse an order quashing Regulation 4 of the Regulations.

[17] The second provision that has not been transposed is Article 6.2 of the Directive which provides for time limits within which the requisite bodies should receive papers and express opinions and be given an early and effective opportunity to do so. Regulation 12 contains three unspecified times for action. The structure of Regulation 12 is to make provision for consultation with the consultation body in paragraph 2 and then to make provision for consultation with the public in paragraph 3. As far as the first matter is concerned it is provided that the consultation should take place "as soon as reasonably practicable". The Regulation does not specify a time limit. Further the Regulation provides that the consultation body shall express its opinion "within a specified period" but does not specify the period. As far as public consultation is concerned the Regulation provides that the documents must issue within fourteen days, but in relation to the responses it provides that the papers that are issued will specify a period within which the opinions should be returned. It is provided in the Regulations that the above periods shall be of such length as will ensure that those to whom invitations are extended are given an opportunity to express their opinion on the relevant documents. The Regulations do not state the time limits as required by the Directive.

[18] The non-transposition is again a case of omission and incomplete transposition and to quash Regulation 12 removes that aspect of the Directive that has been transposed. I consider, as in the other instance of non-transposition, that the appropriate remedy, in order to ensure fulfilment of the obligations to transpose the requirement for time limits, is a declaration to that effect. I refuse an order quashing Regulation 12 as it would have the effect of removing protective measures without addressing the omissions in the Regulation.

[19] The applicants have submitted draft Orders. I refuse the declarations and the orders for certiorari specified in paragraphs 1 and 2 which relate to decisions of the Department of the Environment of 16 December 2004 refusing to withdraw the draft plans and environmental reports as such orders are unnecessary. I refuse certiorari as sought under paragraphs 4, 6 and 8 of the draft Order. I grant declarations as sought under paragraphs 3, 5, 7 and 9 of the draft Order, with the following modification. To declaration 3 will be added the words "…. where the Department of the Environment is also the responsible body for the proposed plan or programme." I order that the applicants in each case have their costs against the respondent.