

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY THE NORTHERN IRELAND
ENVIRONMENT AGENCY FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION OF THE PLANNING APPEALS
COMMISSION MADE ON 7 JUNE 2012

TREACY J

Introduction

[1] The applicant in this judicial review application, the Northern Ireland Environment Agency ("the NIEA"), challenges a decision of the Planning Appeals Commission ("the PAC") dated 7 June 2012 allowing an appeal brought by Ace Bates Skip Hire Limited ("Ace Bates") against a decision of the NIEA to refuse it a licence ("a PPC licence") under the Pollution Prevention and Control Regulations (Northern Ireland) 2003 ("the 2003 Regulations") to operate a landfill site on lands adjacent to No 51 Ballyutoag Road Belfast.

[2] At the conclusion of the hearing I allowed the judicial review and quashed the impugned decision and said I would give more detailed reasons at a later date.

Background

[3] Ace Bates had been refused a licence by the NIEA because its activities on the site had demonstrated serious breaches of environmental protection legislation, serious disregard for basic environmental protection requirements, disregard of environmental restrictions in place and a lack of basic technical competence. Accordingly the NIEA had no confidence that Ace Bates would comply with the obligations which would be imposed on the licence and it therefore concluded that Ace Bates was not a fit and proper person ("FPP") to hold the licence.

[4] The central issue on the appeal brought before the PAC was whether Ace Bates was a FPP. It is common case that the burden was on Ace Bates to demonstrate that it was a FPP. NIEA presented very substantial evidence in its Statement of Case which it submitted, if left un rebutted, plainly demonstrated that Ace Bates was not a FPP to hold a licence.

[5] In short compass NIEA submits that Ace Bates presented no evidence to rebut the NIEA's case and its Statement of Case contained a bare denial of the allegations; that prior to and at the hearing there was no attempt to respond to the substance of the NIEA's case. Notwithstanding this the PAC held that it could not determine the substance of the NIEA's allegations which, it felt, should be determined in a criminal court. The NIEA submits that the PAC relied on the bare denial of the NIEA's allegations to conclude, on a balance of probabilities, that Ace Bates was a FPP.

[6] The NIEA submitted that the PAC thereby misdirected itself in law as to its role, failed to address the substance of the matter before it and reached a conclusion on the FPP question which was irrational in the light of the unchallenged evidence of the NIEA.

Grounds

[7] The applicant submitted that the PAC erred in law in that:

- (i) it failed to examine the allegations directly relevant to the FPP test and to reach conclusions on them as it was required to do in order to answer the FPP question;
- (ii) it erroneously proceeded on the basis that unless and until the validity of those allegations were determined in a "court of law", it could and should rely on a bare denial;
- (iii) it failed to comply with its statutory role which was to determine on the evidence before it whether Ace Bates was a FPP;
- (iv) it granted a licence without validly determining first the statutory question;
- (v) it reached a conclusion which was irrational; and
- (vi) it breached the rules of natural justice in deciding the case on a basis which was not raised in the hearing.

Statutory Framework

[8] The rules for the granting of a licence are contained in the 2003 Regulations. In particular Regulations 10(3) and (4)(a) provide:

"(3) A permit shall not be granted if the enforcing authority considers that the applicant will not be the person who will have control over the operation of the installation or mobile plant.... or will not ensure that the installation ...is operated so as to comply with

the conditions which would be included in the permit.

(4) In the case of an application for a permit which will authorise the carrying out of a specified waste management activity at an installation... *the permit shall not be granted unless:*

(a) the chief inspector is satisfied that the applicant is a fit and proper person to carry out that activity..."

[9] Neither the chief inspector of the NIEA nor, on appeal, the PAC can grant a permit unless satisfied that the applicant is a FPP to carry out that activity.

[10] Regulation 4 provides so far as is relevant as follows:

"(1) This regulation applies for the purpose of the discharge of any function under these Regulations which requires the chief inspector to determine whether a person is or is not a fit and proper person to carry out a specified waste management activity.

(2) *Whether a person is or is not a fit and proper person to carry out a specified waste management activity shall be determined by reference to the fulfilment of the conditions of the permit which apply or will apply to the carrying out of that activity.*

(3) Subject to paragraph (4), a person *shall* be treated as not being a fit and proper person if it appears to the chief inspector that

- (a) he or another relevant person has been convicted of a relevant offence;
- (b) the management of the specified waste management activity which is or is to be carried out is not or will not be in the hands of a technically competent person;
- (c) the person who holds or is to hold the permit has not made and either has no intention of making or is in no position to make financial provision adequate to discharge the obligations arising from

the permit in relation to the specified waste management activity.”

[11] Regulation 4(4) provides that the chief inspector can, if he considers it appropriate to do so, treat a person as a fit and proper person notwithstanding Regulation 4(3)(a). Regulation 4(5) defines relevant offences. Regulation 4(3) sets out (subject to Regulation 4(4)) absolute bars to granting a licence. There is no power to grant a licence if Regulation 4(3) applies.

[12] Thus under the statutory scheme the chief inspector cannot grant a permit to a person who is by virtue of Regulation 4(3) deemed not to be a FPP (subject to Regulation 4(4)). Even if not subject to mandatory refusal under this provision, the chief inspector is obliged to determine whether the person is, on the facts, a FPP under Regulation 10(4)(a). That is an overarching requirement of which the chief inspector must be satisfied. If not so satisfied the permit must be refused.

[13] As Regulation 4(2) makes plain, whether a person is a FPP must be determined “by reference to the fulfilment of the conditions of the permit...”. I agree with counsel for the NIEA that put shortly this resolves to the question, ‘is the chief inspector satisfied that the applicant is a FPP to carry out the permitted activity in accordance with the conditions?’ In R Crown Court at Warrington ex parte RBMB [2002] UKHL 24 [2002] 1 WLR 1954 Lord Bingham said:

“[FPP] is a portmanteau expression, widely used in many contexts. It does not lend itself to semantic exegesis or paraphrase and takes its colour from the context in which it is used. It is an expression directed to ensuring that an applicant for permission to do something has the personal qualities and professional qualifications reasonably required of a person doing whatever it is that the applicant seeks permission to do”.

[14] I agree that it is no doubt right to regard an applicant as a FPP *if* adequate evidence of good character and record is adduced *and* there is no reason to question or doubt it [see McCool v Rushcliffe BC [1998] 3 All ER 889]. But the NIEA submits with some force that there was no evidence of good character presented and every reason to doubt the assertion that Ace Bates was a FPP.

[15] The assessment of fitness will necessarily be context, fact and applicant specific. A wide ambit of considerations may be taken into account in answering the FPP test including, but by no means limited, to actual convictions.

[16] The evidence upon which the chief inspector reached his view that Ace Bates was not a FPP was set out in the Statement of Case of the NIEA for the PAC hearing. This included detailed evidence as to relevant activities on land adjoining the site.

[17] The chief inspector concluded that:

- (a) there was overwhelming evidence that Ace Bates had imported or permitted to be imported very large quantities of non-inert waste at the site and had carried out unauthorised infilling of the site and extensive areas of adjoining land including with non-inert waste. The presence of huge volumes of (unauthorised) waste on land adjoining the site was confirmed by Ace Bates' own documentation in support of its application for the permit;
- (b) the importation of and depositing of waste was not authorised (by any previous permit or exemption certificates) and was unlawful under articles 4 and 5 of the Waste Contaminated Land (Northern Ireland) Order 1997 (as amended);
- (c) the activities on and around the site were serious breaches of environmental protection legislation (the huge quantum of waste, the large area covered, the nature of the waste, the disregard of restrictions in place, the lack of control on landfill gases and/or leachate; the burning on site, the burying of ash and the disposal of vehicles); and
- (d) the carrying out of those activities demonstrated a serious disregard for basic environmental protection requirements and a lack of basic technical competence.

[18] In the light of those conclusions from the evidence he stated:

“The system of permitting primarily relies on the expertise and conduct of the permit holder to protect the environment. The proposed permit is for a strictly controlled environment with the maintenance of high (sic) standard of control on the waste deposits and monitoring. The chief inspector has no confidence that the applicant will comply with the obligations which would be imposed on the permit.

The chief inspector recognises that the applicant has not been convicted of offences (and that therefore the mandatory requirements of Regulation 4 are not applicable here) but the chief inspector concludes that the applicant is not a fit and proper person under Regulation 10(4)(a).”

[19] This conclusion necessarily resulted in the refusal of the permit sought.

[20] Ace Bates appealed the decision contending that the NIEA had proceeded on the basis of a “fundamental misunderstanding of the legislation” because the operative provision was Regulation 4 and that the NIEA:

“... does not have the discretion to determine that an individual or company is not a Fit and Proper Person where the relevant person does not have a relevant conviction, is a technically competent person and is able to make financial provision adequate for discharging the obligations that might arise from the permit [the Regulation 4(3) requirements]. If the relevant person or persons are able to meet all of these criteria they are deemed a fit and proper person”.

[21] The PAC was correct to dismiss this argument and no party to the judicial review submitted otherwise.

[22] As to the substance of the factual allegations of overwhelming evidence of unauthorised activity and serious disregard for basic environmental protection requirements, Ace Bates’ Statement of Case merely asserted that the allegations were “generalised” and “unsubstantiated by any evidence, which have not been the subject of any summons, charge or prosecution. These allegations are strenuously denied....”. In other words a bare denial.

[23] The detailed evidence on which these conclusions had been reached was provided with the NIEA’s Statement of Case. There was no attempt to rebut the allegations and no evidence was offered to contradict them. Nor was there any request to cross examine NIEA witnesses and the PAC did not ask NIEA witnesses any question going to the substance of the allegations.

[24] The Commissioner correctly concluded, *inter alia*, that where there were unchallenged allegations of illegal environmental activity it would be *absurd* to grant a permit even in the absence of a conviction (paragraph 7); that in answering the FPP question the statutory purpose and objectives must be taken into account and that a judgment had to be made on the balance of probabilities; and that the evidence of the NIEA constituted what were considered to be serious crimes.

[25] The NIEA submitted that those conclusions should have inexorably led, on the basis of the *evidence*, to the conclusion that Ace Bates was not a FPP. However, the Commissioner went on to record Ace Bates’ “strenuous denial” (paragraph 9) of the allegations and to rely on the statement of those advising Ace Bates as to how the conditions *could* be complied with (paragraph 10). But as the applicant points out the “strenuous denial” was an *assertion* in the Statement of Case prepared by its solicitors. There was no *evidence* to rebut the allegations.

[26] I agree with the applicant that the fact that the conditions could be appropriate properly to regulate the landfill *if* it was run by a FPP who could be trusted to comply with them was no answer to the statutory question – namely whether the PAC could be satisfied on the balance of probabilities in the light of the evidence that the applicant was a FPP. As NIEA pointed out the theoretical ability to comply with the conditions so as adequately to protect the environment (as put forward by experts) tells one nothing about whether Ace Bates can be trusted to comply with the conditions. There was no factual evidence from Ace Bates itself that it and its directors would in fact comply with such conditions and the court was told that had there been any such evidence it would have been rigorously contested in the light of the history.

[27] At paragraph 10 the PAC stated:

“The Department’s case relies on evidence that may be presented in criminal proceedings, and which the appellant company has denied. It is not appropriate for the PAC to make a judgment based on allegations that should properly be tested in a court of law. Effectively the Department is requesting that the Commission prejudge the outcome of possible criminal proceedings by finding the appellant guilty of criminal activities on the balance of probabilities.”

[28] I agree with the applicant that this paragraph contains a clear misdirection of law. The evidence presented by NIEA focussed on the principal issue of whether Ace Bates was a FPP, not the separate question whether Ace Bates was guilty of a criminal offence. The question of their fitness *had* to be answered in these proceedings. It was their appeal. The burden of proof to the civil standard lay upon the appellant to establish affirmatively that it was a FPP. This was particularly so in light of the substantial body of adverse and wholly unrebutted evidence directly relevant to their (un)fitness. The approach of the PAC that until there was a decision in a criminal case it was bound to accept the bare denial or disregard the NIEA evidence or attribute less weight to it is unsound in law and unsupported by authority.

[29] The PAC also concluded that “*I cannot give determining weight to the evidence against the appellant company*” (paragraph 11). This appears to have been on the basis of the bare denial. But there was a wealth of evidence produced by the NIEA which was not *factually* or *evidentially* challenged. Its witnesses were available to be cross-examined as to their investigations and results but this opportunity was not availed of. Not only was no challenge made as to the facts but no evidence was called to rebut the serious allegations. Save for the untested, evidentially unsupported, bare denial by the solicitors the allegations *were* unchallenged. As the PAC itself said at paragraph 7, where there were unchallenged allegations of illegal environmental activity it would be “absurd” to grant a permit even in the absence of a conviction. I

accept the applicant's submission that was in fact the position the PAC were in at the end of the case.

Conclusion

[30] For the above reasons the application for judicial review is allowed.