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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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2016 No. 031479/01

IN THE MATTER OF AN APPLICATION BY MR RICHARD IRWIN FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE DECISIONS OF MID AND EAST ANTRIM BOROUGH COUNCIL ON PROSPECTING FOR HYDROCARBONS AT LAND AT WOODBURN FOREST, NEAR CARRICKFERGUS, COUNTY ANTRIM

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COLTON J

Background

[1] The applicant is Mr Richard Irwin of 56 Paisley Road, Carrickfergus. The notice party in this matter, namely InfraStrata, notified the Department of the Environment of its intention to drill an exploratory borehole at a site within Woodburn Forest which is approximately 0.8 miles from the applicant's home.

[2] On 19 December 2013, the Department advised InfraStrata that the proposed borehole development and associated infrastructure constituted "permitted development", subject to the conditions set out in Schedule 1, Part 16, Class A of the Planning (General Development) Order (NI) 1993 (hereinafter referred to as the "GDO").

[3] Article 3(8) of the GDO prohibits the operation of permitted development rights for proposed development that is "EIA Development", that is development which his likely to have significant environment effects. As part of its determination the Department made an EIA screening decision. It concluded that the proposed

borehole was not likely to give rise to significant environmental effects and therefore did not constitute EIA development. Receipt of this negative screening decision by InfraStrata crystallised the existence of permitted development rights by granting planning permission by operation of law at the date of receipt.

[4] On 1 April 2015 as part of the reform of public administration in Northern Ireland, the vast majority of planning functions transferred from the Department to the newly formed Councils including Mid and East Antrim Borough Council (hereinafter referred to as "the respondent"). This transfer included decisions and determinations previously taken and made by the Department.

[5] As part of these reforms, a raft of new planning legislation was implemented to reflect the changes. The Planning (General Development) Order (Northern Ireland) 2015 (hereinafter referred to as the "GPDO") came into force on 1 April 2015. Article 8 of the GPDO provides for transitional provisions as between the GDO up until 1 April 2015, and the GPDO from 1 April 2015. Pursuant to Article 8(2):

> "Anything done by, to or in relation to the Department in connection with its functions under Schedule 1 to the Planning (General Development) Order (NI) 1993 shall be treated as it had been done by, to or in relation to the appropriate Council under the Schedule to this Order."

[6] On 22 January 2016 the notice party's agents RPS, wrote to the respondent to advise that InfraStrata had the benefit of permitted development rights relating to exploratory drilling at Woodburn Forest and that the anticipated activities would begin during the week beginning 15 February 2016.

[7] The Department wrote to the respondent on 2 February 2016 to advise that the Department was of the view that prior to drilling commencing, InfraStrata should first have a waste management plan approved by the respondent. On 7 March the respondent approved the waste management plan submitted on behalf of the notice party at a full Council meeting.

[8] On 10 March 2016 RPS wrote to the respondent to confirm that activities had commenced on site on that date.

[9] In accordance with the conditions in Part 16 concerning permitted development, all drilling at the site was required to be completed within four months and the land must, so far as practical, be returned to the condition it was in before the development took place within a period of 28 days from the cessation of operations (that is 28 days from the end of the four month development period).

[10] The applicant issued these proceedings seeking to challenge the lawfulness of the notice party's operations at the site. He challenged the respondent's acceptance that the operation had the benefit of planning permission by way of permitted development, the refusal and/or failure of the respondent to review whether the development required environmental impact assessment and the omission and failure of the respondent to take enforcement action against the development.

[11] The applicant was granted leave to bring this challenge on 6 May 2016. In the period since the grant of leave InfraStrata announced that it had ceased its operations at the site on 16 June 2016 and would be restoring the site. By Monday 12 September 2016 the site, so far as was practical, had been restored to its condition before the development took place to the satisfaction of the respondent.

The issue for the court

[12] This matter was heard before me on 24 May 2017. The sole issue to be determined was whether or not the applicant's challenge is now academic and whether the court should exercise its discretion to hear the application for judicial review.

[13] I am obliged to counsel for their helpful written and oral submissions in relation to this issue. Mr Gregory Jones QC appeared with Mr Mark McEvoy for the applicant. Mr William Orbinson QC appeared with Mr Simon Turbitt for the respondent.

[14] There was some debate between the parties concerning the implications of the progress of the proceedings on this issue. I therefore propose to set out a short chronology.

[15]

- 8 April 2016 - Papers and Order 53 statement lodged. In summary the applicant sought a declaration to the effect that the development in question was not permitted development and also sought an interim order or injunction prohibiting further works at the site and an interim order of mandamus compelling the Council to consider enforcement action.

- 6 May - Leave hearing. Leave granted but court allows affidavits from notice party and respondent on the question of interim relief.

- 12 May - Mention. Counsel for respondent undertook to provide statement addressing all issues in the Order 53 statement

by 17 May on the understanding that the application for interim relief would not proceed.

- 17 May - Respondent's statement received by applicant's solicitor.

- 19 May - Applicant seeks leave to submit amended Order 53 in response to Respondent's statement. Counsel for respondent opposes this and claims that a fresh application is required. Case listed for mention on 25 May to address issue of fresh application.

- 24 May - Applicant lodges skeleton to deal with issue of fresh application.

- 25 May - Mention hearing – adjourn for mention on 1 June.

- 1 June - Respondent objected to amended Order 53. Adjourned to 6 June to allow application to amend Order 53.

- 6 June - There was some dispute about what took place at this hearing. The respondent suggests that the court was hostile to the application to amend. The applicant says that it has agreed not to proceed with the application to amend on the basis that the parties progress the substantive hearing as expeditiously as possible. The applicant says that due to a combination of the unavailability of counsel for the respondent and notice party and the court calendar the first available date for hearing was 22-23 September.

- 7 September - Court office advises the hearing dates 22 and 23 September no longer available.

[16] The relevance of the chronology is that the applicant says it sought to press the matter to an expeditious conclusion whilst works were ongoing. It is argued that the respondent should not "benefit" from the combination of factors which led to the matter not being heard during this period. It is argued that such a conclusion would result in unfairness and irrevocable prejudice to the applicant. In particular the applicant points out that when the respondent agreed to a hearing date on 22-23 September it would have known that by that stage the "long stop" date for ending drilling operations under permitted development and the restoration of the site would have passed.

[17] The respondent contends that the issue of whether or not the matter was academic only crystallised on 16 June 2016 when the notice party indicated to the

respondent that no oil had been discovered and that it was ceasing operations at the site. The respondent challenged the suggestion that the applicant sought to press the matter to an expeditious conclusion whilst works were ongoing. In particular it is pointed out that the applicant did not pursue an application for an interim injunction and did not press the issue of amending the Order 53 statement.

[18] In relation to this issue I have sympathy for the applicant. Had the matter been heard as initially agreed on 22-23 September 2016 it seems inevitable that this issue would have arisen and that is something that might have been anticipated when the date was agreed. Indeed this is evident from the applicant's Order 53 statement. In the statement in relation to injunctive relief the applicant states:

> "Unless urgent relief is granted either by interim or full injunction there is a real prospect that this claim would become academic."

[19] It seems to me however that absent an express undertaking that this issue would not be raised by the respondent and the agreement of the court I should look at this matter objectively on the basis of the facts that exist as of 24 May 2017 when this matter came before me.

The legal principles

[20] There is no dispute between the parties as to the applicable law. The leading authority on the approach of the courts to the consideration of disputes or challenges which have allegedly become academic is the judgment of the House of Lords in **R v Secretary of State for the Home Department** ***ex parte Salem*** **[1999] 2 All ER 42**, in which Lord Slynn of Hadley said:

> "My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, Your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se….
>
> The discretion to hear disputes, even in the area of public law, must, however be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large

> number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

Is the issue academic?

[21] In considering this matter the onus of establishing whether the issue is academic must rest with a party who asserts it.

[22] Returning to **Salem** it seems to me self-evident that there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. The applicant brings this challenge in his personal capacity because of the potential implications for the drilling operation on him. In his affidavit supporting the application he says:

> "I live on Paisley Road, 0.8 miles from the site of the intended oil drilling operation ("the Site") and will be directly affected by heavy vehicle traffic along Paisley Road. I regularly enjoy a right of passage through Woodburn Forest with my family. I have an open well and fresh spring in the field at the front of my house where my livestock graze. The site lies about 350 metres from the north Woodburn reservoir which is designated as an area of special scientific interest."

[23] The factual position now is that there is no development taking place at this site. It has been fully restored to its pre-development condition. As such he is therefore no longer potentially affected or impacted by a development near his home. The development he challenged no longer exists. I agree with Mr Orbinson's submission that it follows that in these circumstances the proceedings will have no practical utility, effect or consequence for the applicant. Furthermore no new development by InfraStrata or any other company with a petroleum licence can take place at the site again without it having to engage in a new legal planning process. I have therefore come to the conclusion that the dispute is indeed academic between the parties.

[24] However the matter does not end there and the court must consider whether to exercise its discretion to hear the matter having regard to the fact that leave was granted. As per **Salem** in my view this application should not be heard unless there is a good reason in the public interest for doing so and a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.

Is there a good reason in the public interest for determining this dispute?

[25] In the course of the hearing I was referred to a number of authorities in which this issue was considered. A consideration of these cases demonstrates that the courts apply the principles set out in Lord Slynn's judgment in **Salem** and that the decisions were clearly fact specific. Thus in **Re C's Application [2009] NICA 23** Girvan LJ found that although the appeal was of academic interest, it satisfied "… the **Salem** test as it raises an important jurisdictional point which will arise in other cases." This is unsurprising in view of the fact as per paragraph [14] of the judgment:

> *"When the matter was mentioned on 20 March 2009 counsel for the Trust indicated that the case was not fact specific, the judgment at first instance had opened up an entire front of litigation in cases where children are voluntarily accommodated and on a practical level difficulties had arisen. He indicated that there were many cases in the lower courts which were adjourned awaiting the decision of this court. In the circumstances we consider that this appeal does satisfy the Salem test as it raises an important jurisdictional point which will arise in other cases."*

[26] In **Re E's Application [2007] NIQB 58** (which concerned the Children (Northern Ireland) Order 1995 and its compatibility with the ECHR) Gillen J agreed with the reasoning of Weatherup J at the leave stage, by concluding that "… *the matter was of sufficient public interest to merit continuing."* Further, whilst the dispute was of academic importance "… *inevitably the issues now raised will trouble magistrates in the future … a determination is now required."* The court was not required to perform a detailed consideration of the facts of the case.

[27] In **Re E's Application [2003] NIQB 39** regarding the Holy Cross Primary School dispute Kerr J was considering whether the policing of the protest there was amenable to judicial review. He rejected the suggestion that the matter was of public interest simply because it generated huge media interest or controversy but decided that the matter should be determined by the courts:

> *"…not because of the wide coverage that the episode received in the media or because of the intense controversy that it generated but because the reviewability of police actions in these circumstances and the propriety of such actions are matters in which the public has a legitimate interest."*

At paragraph [10] of the judgment he states:

> *"On the available evidence I have concluded that the possibility of a further flare-up of the protest is by no means remote. In that event, the debate about the manner in which a full-blooded protest is policed would once again become pertinent."*

[28] In **Deuss v Attorney General for Bermuda [2009] UKPC 38** the court entertained an issue which was one of "general importance". In that case I note that the court did express its surprise that the respondent did not resist the appellant's application for judicial review on the ground that the issues that he sought to raise were academic. The issue before the court was one of statutory construction involving the interpretation of the Extradition Act 1870 as modified by the 1989 Extradition Act. The issue was purely a legal one and did not involve a detailed consideration of the facts.

[29] In **Bowman v Fels (Bar Council and Others Intervening)** the court agreed to hear a matter which was an academic point of law notwithstanding the fact that the parties had settled private law litigation before the appeal hearing. The court agreed to hear the appeal and said at paragraph [7]:

> *"The issue at the heart of the appeal is, however, an issue of public law of very great importance which is causing very great difficulties in solicitors' offices and barristers' chambers and in the orderly conduct of contested litigation through the country. The language of s328 has caused great uncertainty within the legal profession, particularly because Parliament has given a much wider meaning to the phrases 'criminal conduct' and 'criminal property' than was required by the relevant EU directive."*

[30] In **R (On the Application of Max Huni) v The Commissioner for Local Administration for England [2003] EWCA Civ. 973A** the court heard an issue concerning statutory construction which had the potential to be of relevance to thousands of investigations instigated each year and in circumstances where the facts were "wholly immaterial". Even though the matter became academic it was heard as it was "… nonetheless of very considerable general importance".

[31] In **Re McMullan's Application for Judicial Review [2015] NIQB 98** the court was considering hearing an application for judicial review concerning the issue of victim input into periods of temporary release which had been applied for by a prisoner. The prisoner in question would in fact be released prior to the hearing of the application. Refusing to hear the matter the court took into consideration that:

(a) There was no discrete point of statutory construction.

(b) The case was one which would involve the consideration of detailed facts which at least to some extent appeared to be in dispute as between parties.

(c) This was not a case where there are a large number of similar cases.

[32] In **Re McConnell's Application for Judicial Review [2000] NIJB 116** the Court of Appeal declined to hear an appeal in which the appellant sought a declaration in relation to the Parades Commission's decision to impose conditions on participants in public procession. The issue was whether or not the relief sought was appropriate where the court's ruling was no longer capable of effecting the organisation of the procession which was the subject matter of the conditions. In the judgment of the court Lord Justice Carswell said:

> "*It is not the function of the courts to give advisory opinions to public bodies, but if it appeared that the same situation was likely to recur frequently and the body concerned had acted incorrectly they might be prepared to make a declaration, to give guidance which would prevent the body from acting unlawfully and avoid the need for further litigation in the future.*"

[33] In **Re Nicholson's Application for Judicial Review [2003] NIQB 30** a prisoner sought to challenge a penalty of cellular confinement. He was released on licence before the penalty was served. The court was satisfied that the issues arising in the judicial review application were academic. In deciding whether the case should be allowed to proceed the court considered the matter in accordance with the principles outlined in **Salem**. The court did not permit the matter to proceed. It was clearly influenced by the fact that the case would require a detailed examination of disputed facts and it was felt that the case was not one which should proceed because it was highly fact specific. It also came to the view that the resolution of the issues that arose would be unlikely to provide guidance to the Prison Service in future cases. Even if it was felt that such cases were likely to arise in the future the court came to the view that it was by no means probable that authoritative guidance could be derived from the present case.

How should these principles be applied to the facts of this case?

[34] It seems to me from the above that the principles are fairly clear.

[35] At the outset it is important to understand that this is not a dispute about whether in law permitted development rights are provided for certain types of development. The issue is whether or not in the specific circumstances of this case the temporary development carried out by InfraStrata at the site came within the permitted development regime and whether it ought to have been the subject of planning enforcement action.

[36] It seems to me that this challenge is heavily fact specific. When one examines the affidavit evidence in the case, together with the Order 53 statement of facts and grounds, the resolution of the dispute will involve a consideration of factual matters which are in dispute.

[37] The starting point for the applicant is that the development is not permitted because it involves the "construction, formation, laying out or alteration" of a means of access on to a classified road. The court has been provided with a series of plans and photographs which purport to demonstrate that in fact the work carried out by the notice party involve such an alteration. Thus there was a dispute about whether or not the works constituted an alteration of the site access, there was a dispute about the height of security fencing, a dispute about the extent of consent to the removal or lopping of trees, the placement of security lighting, the erection of CCTV apparatus and the nature of drilling fluids being used.

[38] All of these matters were in dispute.

[39] In response to the complaints made by the applicant the respondent opened a number of "enforcement cases" and inspected the site on a number of occasions having considered the evidence submitted on behalf of the applicant.

[40] A flavour of this dispute is evident from paragraphs 59 to 65 of the first affidavit sworn by Mr Paul Duffy who is the Head of Planning at Mid and East Antrim Borough Council. I propose to set this out in full:

> "59. Sandra Adams and Andrew Craig (Planning Enforcement Officers of the respondent) inspected the site on 24 March 2016, and Sandra Adams and myself inspected the site on 10 May 2016. From the site visits conducted by the respondent's officers, consideration of the evidence submitted by the applicant in this matter, the evidence submitted by InfraStrata in this matter and from an interview conducted with Richard Elliott, the respondent noted, amongst other things, as follows:
>
> (a) No works have been carried out to the 'mouth' of the private track where it meets Paisley Road to widen it or create sight lines.
>
> (b) The 'mouth' of the private track has not been widened by InfraStrata. As such, no works have been carried out to widen the entrance to the private track to accommodate machinery required by InfraStrata.

(c) Save in two respects (as described in the decision letter at 17(c) and (d)), the grass banks at either side of the 'mouth' of the private track remain undisturbed and intact as compared to how they were before InfraStrata's activities began.

(d) Behind the 'mouth' of the private track, a gate has been removed and an area cleared to accommodate a portacabin, chemical toilet, generator, and fuel bowser.

(e) Vegetation and associated soil which had encroached onto the stoned track has been scraped back and new stones have been added to the southerly section of the track. No new stones have been added to the remainder of the track.

(f) No stones have been laid outside the width of the original private track, established by reference to the Ordnance Survey map appended to the decision.

(g) No stones have been laid where the private track meets Paisley Road.

(h) In addition, temporary concert style matting has been placed on top of the private track.

60. The respondent considers that no works have been undertaken to widen or create sight lines at the mouth of the private track and Paisley Road, or otherwise to create an access. As such, there is no unauthorised development in that regard.

61. As for the works undertaken on the private track itself, being the scraping back of vegetation and associated soil, the laying of additional stones, and the subsequent placing of 'concert matting' on top, the respondent considers that only the laying of additional stones constitutes development, and that it is authorised pursuant to Part 10 of the Schedule to the GPDO (concerning 'repairs to unadopted streets and private ways', being 'the carrying out on land within the boundaries of an unadopted street or

private way of works required for the maintenance or improvement of the street or way').

62. Even if the scraping back of vegetation and associated soil were to be considered development, those works would also be authorised pursuant to Part 10 of the Schedule. Even if the placing of matting were considered to be development, that placing would also be authorised pursuant to Parts 5 and 10 of the Schedule. The respondent considers that Part 5 is applicable because the matting constitutes a moveable structure, or plant.

63. The respondent considers that the private track falls within the scope of Part 10 as it is unadopted and on private land, and that therefore Part 10 rights to maintain or improve the track were available to InfraStrata when the works in question were done to the track. Those Part 10 rights would, of course, be excluded by Article 3(5) if the works amounted to an alteration of the track. Having visited the area on several occasions and reviewed the works carried out to the private track, it is the respondent's opinion that these works were works of improvement and/or maintenance to the private track and therefore fall squarely within the scope of Part 10 permitted development. The respondent does not consider that the works, as a matter of fact and degree, amount to an alteration of the track, and does not therefore consider that the Part 10 rights are excluded by the operation of Article 3(5).

64. It is clear therefore that whether works to a private way fall within Part 10 of the GPDO is a matter of fact and degree and fundamentally involves the exercise of planning judgment in deciding whether what has been done has so changed the character of the private way that they fall beyond the scope of an improvement. Before InfraStrata commenced any activities at the site the private track was a stoned track which served to accommodate heavy machinery as part of the maintenance and working of the commercial forest within which the drilling site sits. As such, the private track was

> originally put in place to accommodate commercial forestry machinery.
>
> 65. The works carried out by InfraStrata to the private track have clearly been an improvement to the track, but originally the track was a stoned, hard-surfaced track which accommodated heavy machinery, and it remains a stoned hard-surfaced track which is accommodating heavy machinery. Its character remains as it was before InfraStrata commenced its activities. It remains a stoned hard-surfaced track accommodating heavy machinery, albeit an improved one. That being so, the respondent considers as a matter of fact and degree that insofar as they represent development the works that have been carried out to the private track are permitted development pursuant to Part 5 and/or Part 10 of the Schedule to the GPDO and consequently do not amount to unauthorised development."

[41] The affidavit continues in similar vein in respect of allegations concerning importation of stone, unauthorised portacabin, unauthorised lopping of branches and trees, unauthorised fencing, CCTV, omission of sand layer and security lights.

[42] I have set out paragraphs 59 to 65 in full because at the hearing the applicant placed considerable emphasis on the respondent's reliance on Parts 5 and 10 of the Schedule to support the submission that this did concern important issues of law in how the Council exercises its planning powers. Mr Jones strongly argued on behalf of the applicant that the Council's reliance on the exceptions permitted by Article 3(5) of the GPDO as permitted by Parts 5 and 10 of the Schedule raises a legal issue as to how the respondents seek to defend the matter. This did not form part of the Order 53 statement but I accept that the applicant is entitled to raise these issues since they have been relied on by the respondent.

[43] However I have come to the firm conclusion that any resolution of the issue will involve detailed consideration of highly specific factual matters. The dispute may fairly be characterised as one of mixed law and fact. The key issue however would be the determination of the factual dispute pertaining to "on the ground" activities at the site, many of which are disputed.

[44] Returning to **Salem** this is not a case in which a discrete point of statutory construction arises which does not involve detailed consideration of facts.

[45] As to the public importance of the issues raised it is significant that the Department for Infrastructure has consulted on proposals to remove permitted

development rights for mineral exploration development which would include the type of development under challenge in this case in the future. The result of these proposals, if accepted, would be that future exploration of the type involved in this case would require the submission of a full planning application. This consultation is doubtless a response to the controversy surrounding developments of the type under challenge in this case which is the subject matter of considerable protest and debate.

[46] In my view a determination in this case will not affect the principle of whether or not such permitted development should be available to such development. The outcome of the consultation is not yet published and the timescale for any final decision remains unknown. The applicant argues that the outcome of these proceedings "may influence" the outcome of the consultation. Given the fact specific nature of this application I am not persuaded that this is so. Indeed if the public issue concerns what approach should be taken to temporary mineral exploration in planning terms in the future then the consultation process is the best forum for consideration of that issue and not the highly specific fact enquiry which will be required to determine this case.

[47] The applicant also argues that this matter should be heard because of three ongoing criminal cases with regard to alleged incidents involving protestors at the Woodburn site.

[48] The applicant exhibits correspondence from the solicitors acting for these persons. The height of the correspondence is a letter from solicitors acting for two of the protestors dated 30 March 2017 in the following terms:

> "We act on behalf of the above named parties who currently have criminal cases before Belfast Magistrates' Court. These cases relate to a dispute at Woodburn Forest.
>
> These matters were listed for contest previously by the court. However, following an application made by ourselves, all these cases have been adjourned pending the outcome of the judicial review proceedings. There were two reasons proffered to the court for this. If it subsequently transpires that this was a legal protest, then this would have a large impact upon whether the PPS would consider it to be in the public interest to continue to prosecute the above defendants. In addition a number of the offences are alleged against police officers acting in the execution of their duty. If it subsequently transpires that the drilling was unlawful an argument

> can be made that the police officers were not acting lawfully in enforcing this.
>
> The merits of this position has yet to be decided by the Magistrates' Court. However, in both instances, the PPS consented to the adjournment application …."

[49] The applicant submits that it is in the interests of the good administration of justice that the public law issues arising in this matter should be decided in this court rather than as a collateral issue in the criminal courts.

[50] I am not persuaded that this issue is sufficient to persuade the court to hear this matter.

[51] None of the defendants are notice parties to this application nor have they sought to intervene. They have not sought to challenge the legality of the actions of either the notice party or the respondent by way of judicial review.

[52] The court does not know the detail of the offences with which they are charged. I make the obvious observation that members of the public are entitled to engage in lawful protest and can only be subject to criminal sanctions if they actually act unlawfully for example by way of assault or criminal damage. I simply do not have the material before me which would justify a conclusion that this matter ought to be heard for the purposes of determining any issue in relation to the criminal proceedings to which I have been referred. Whether or not the charges should proceed is a matter for the PPS and whether, if they do proceed, they are made out is a matter for the relevant Magistrates' Court. I simply do not know how a finding that the respondent may have acted unlawfully would provide a defence for unidentified charges. I have no idea what is alleged against the defendants as part of the protest and how the respondent's decision was relevant to that conduct. I simply do not know whether or not the prosecution has been premised on the validity of any alleged decision by the respondent.

[53] Returning again to **Salem** is this a situation "where a large number of similar cases exist or are anticipated"?

[54] There is no real evidence before me on this point. So far as the courts are concerned certainly there are no large number of cases before it. As to whether such a number can be anticipated I am told by Mr Orbinson from the Bar that this is the only case of its type which has resulted in a legal challenge. The only other case involving a permitted development concerned a situation where the Minister actually removed such a right. As far as the courts are concerned therefore any legal challenges are extremely rare. Mr Jones points out that there is no actual **evidence** on this point. He refers me to the responses to the public consultation which

suggests that exploration for non-energy minerals is on a much smaller scale than that carried out for petroleum exploration which might suggest that it is on a large scale. However there is nothing in the consultation documentation that assists the court in coming to a conclusion on the extent or number of any such developments. The significance of the consultation is a recognition of the public concern about the potential impacts of petroleum exploration and whether they should have permitted development rights. Having considered all the material before me I am not persuaded that there is a large number of similar cases either in existence or which are anticipated which will require the court to resolve the issues in the near future. In this regard I emphasise that the issue that requires resolution in this case is a highly fact specific one and will not decide the bigger public issue as to whether or not exploration of this type should benefit from permitted development. That issue is not before this court and in any event the proper forum it seems to me for that issue is the public consultation exercise currently under way.

Conclusion

[55] The court therefore concludes:

(a) That the proceedings are effectively academic as regards the parties inter se.

(b) That this is not a case in which the court should exercise its discretion to hear the application because of a good reason in the public interest for doing so.

[56] Accordingly the application for judicial review is dismissed.