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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY LONAN McLAUGHLIN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

IN THE MATTER OF A DECISION BY CAUSEWAY COAST AND GLENS BOROUGH COUNCIL TO APPROVE A PLANNING APPLICATION

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The applicant appeared and represented himself
Conor Fegan BL (instructed by Legal Services Causeway Coast and Glens Borough Council) for the Respondent
Stewart Beattie KC with Simon Turbitt BL (instructed by A&L Goodbody Solicitors) for the Notice Party

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KINNEY J

Introduction

[1] This is an application for leave to judicially review a decision of the Causeway Coast and Glens Borough Council (the respondent) to grant planning permission for the "repower" of an existing wind farm development at Rigged Hill, approximately 6km to the south-west of Limavady.

[2] The development involves the decommissioning of 10 existing wind turbines with associated infrastructure and the construction of seven new larger wind turbines with the associated infrastructure.

[3] The applicant is a resident of Drumsurn, a village located in close proximity to the proposed development. The notice party in this application is Scottish Power Renewables which is the entity with the benefit of the planning permission.

[4] Rigged Hill is a north – south running ridge on which there exists an operational wind farm of 10 turbines each standing some 57m in height. The

surrounding land is moorland and primarily used for agricultural grazing. Part of the Ulster Way walking route passes through the site utilising existing wind farm tracks. There are no dwellings in proximity to the site. The proposal is to replace the 10 existing turbines with seven new turbines having a maximum tip height of 137m each. There will also be the associated infrastructure work including new internal access tracks, hardstanding areas for each turbine, a substation control building and associated compound and ancillary storage units.

[5] The respondent treated the planning application as a major application, and it was therefore subject to the Proposal of Application Notice (PAN) process and as an EIA development there was a voluntary Environmental Statement provided.

Legal principles

[6] This is an application for leave. Leave should only be granted if the court is satisfied that there is an arguable case having a realistic prospect of success. This was made clear by the Court of Appeal recently in *An application by Caoimhe Ni Chuinneagain for Judicial Review* [2022] NICA 56. At para [42] of the judgment the court said:

> "While practitioners occasionally cite before the High Court formulations of the leave test suggestive of a bare arguability threshold they normally invoke certain first instance decisions in doing so. This practice is to be avoided. Since at the latest 2004, when *Re Omagh DC* was decided, the threshold has been that of an arguable case having a realistic prospect of success. This court takes the opportunity to make this clear beyond peradventure."

[7] The general principles applicable when a planning authority decision is challenged are well settled and clearly set out in the case of *Re Bow Street Mall's and Others Application* [2006] NIQB 28. At para [43] the court stated:

> "[43] A number of clearly established principles of central relevance in the case emerged from the authorities and can be stated briefly as follows:
>
> (a) The judicial review court is exercising a supervisory not an appellate jurisdiction. In the absence of a demonstratable error of law or irrationality the court cannot interfere. The court is concerned only with the legality of the decision making process. If the decision maker fails to take account of a material consideration or takes account of an irrelevant consideration the decision will be open to challenge. (per Lord Clyde in *City*

of Edinburgh Council v Secretary of State [1998] 1 All ER 174).

(b) It is settled principle that matters of planning judgment are within the exclusive province as the local planning authority or the relevant minister (per Lord Hoffmann in *Tesco Stores v Secretary of State* [1995] 2 All ER 636 at 657).

(c) The adoption of planning policy and its application to particular facts is quite different from the judicial function. It is for Parliament and ministers to decide what are the objectives of planning policy, objectives which may be of national, environmental, social or political significance and for those objectives to be set out in legislation, ministerial directions and in planning policy guidelines. The decision of ministers will often have acute social, economic and environmental implications. They involve the consideration of the general welfare matters such as the national and local economy, the preservation of the environmental, public safety and convenience of the road network and these transcend the interests of particular individuals (see *R (Alconbury Limited) v Secretary of State* [2003] 2 AC 327 per Lord Slynn, Lord Nolan and Lord Hoffmann).

(d) Policy decisions within the limits imposed by the principles of judicial review are a matter for democratically accountable institutions and not for the courts (per Lord Hoffmann in *Alconbury* at 327).

(e) In relation to statements of planning policy they are to be regarded as guidance on the general approach. They are not designed to provide a set of immutable rules. The task of formulating, co-ordinating and implementing policy for the orderly and consistent development of land may require the resolution of complex problems produced by competing policies and their conflicting interests. Planning policies are but some of the material considerations that must be taken into account by the planning authority in accordance with the 1991 Order (per Carswell LCJ

in *Re Lisburn Development Consortium Application* [2000] NI JB 91 at 95...), per Coghlin J in Re Belfast Chamber of Trade Application [2001] NICA 6.

(f) If a planning decision maker makes no inquiries its decision may in certain circumstances be illegal on the grounds of irrationality if it is made in the absence of information without which no reasonable planning authority would have granted permission (per Kerr LJ in *R v Westminster Council ex parte Monahan* [1990] 1 QB 87 at 118(b). The question for the court is whether the decision maker asked himself the right question and took reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly (per Lord Diplock in Tameside).

(g) Where the Department has issued an art. 31 notice indicating the Department's proposed decision the applicant is entitled to expect that it will be implemented in the absence of some good reason to the contrary. It is open to the Department to change its mind for sufficient reasons and give a different final decision on the application if it is desirable in the public interest to do so (per Carswell LCJ in *Re UK Waste Management Application* [1999] NI 183).

(h) In the context of planning decision the decision making process may take place in stages. Thus, for example, a resolution by a local authority proposing to permit or refuse a planning application may be later followed by a grant or refusal of planning permission. The decision of the planning authority passing the resolution does not grant the permission, but it is susceptible to review as will be the later decision to grant or refuse planning permission. An applicant will not be precluded from challenging the latter if he acts timeously after the grant or refusal on the ground that he should have challenged the earlier step *(R (Burkett) v Hammersmith & Fulham* [2002] 1 WLR 1593 (I).

(i) The planning decision-maker's powers include the determination of the weight to be given to any

> particular contention. He is entitled to attach what weight he pleases to the various arguments and contentions of the parties. The courts will not entertain a submission that he gave underweight to one argument or failed to give any weight at all to another (per Forbes in *Sedon Properties v Secretary of State for the Environment* [1978] JPL 835)."

[8] Thus an application for judicial review is not an appeal against the merits of a planning decision. Matters of planning judgment are for the relevant planning authority subject to the limited supervisory jurisdiction of the court. The exercise of evaluative planning judgement by a planning authority is to be considered on the grounds of irrationality, which is a high threshold to meet. In *In the matter of an Application by Colum Sands for Judicial Review* [2018] NIQB 80 the court said at para [125]:

> "Planning decisions are the product of the exercise of a relatively wide discretion which the legislature has conferred on democratically elected councillors. The planning and environmental compartment of public law is replete with the phenomenon of evaluative judgement and its corresponding standard of review, irrationality. This is an area where the Wednesbury principle imposes an unmistakably elevated threshold."

[9] The authorities have also considered the issue of the planning officers report as part of the planning process. In *McCann's Application for Judicial Review* [2022] NICA 60 the court said at para [17]:

> "It is convenient at this juncture to acknowledge another settled principle relating to an interrelated issue. In *Mansell v Tunbridge and Malling Borough Council* [2017] EWCA Civ 1314 the English Court of Appeal stated the following, at para [42](2):
>
> 'The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge: see the judgment of Baroness Hale of Richmond JSC in *R (Morge) v Hampshire County Council* [2011] PTSR 337, para 36 and the judgment of Sullivan J in *R v Mendip District Council, Ex p Fabre* [2017] PTSR 1112, 1120. Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed

> the officer's recommendation, they did so on the basis of the advice that he or she gave: see the judgment of Lewison LJ in *(Palmer) v Herefordshire Council* [2017] WLR 411, para 7. The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way—so that, but for the flawed advice it was given, the committee's decision would or might have been different—that the court will be able to conclude that the decision itself was rendered unlawful by that advice.'"

Applicant's challenge

[10] The applicant has set out his challenges to the impugned decision in an extensive fashion both in his Order 53 statement and in the skeleton argument he has furnished. I have taken the contents of these documents fully into account and I am satisfied that the applicant's arguments can fairly be summarised in an effective manner as follows. Indeed, this is the approach the applicant himself took in oral submissions.

[11] The first general ground on which the applicant based his objections is the impact on the community of the village of Drumsurn which is located close to the proposed development. The applicant asserted that the respondent had failed to acknowledge the concerns raised by the local community which had objected to what was described as a highly invasive development on their doorstep. The applicant argued that there were no discernible benefits to the new development and the respondent had not given due consideration to the level of public opposition. There was an insufficient public consultation and a failure to document or communicate the Drumsurn community's opposition to the application. The applicant contended that the respondent could not substantiate the benefit or indeed even the use of posters and leaflets in the Drumsurn area and they should be discounted. The advertisements placed in local papers did not include the height of the new turbines or the overall elevation of the proposed development and were therefore defective. Finally, there should have been a specific information event held in the village of Drumsurn.

[12] The second general ground contended by the applicant in his challenge is the impact on landscape character and visual amenity. The applicant referred to the officer's report prepared by the planning officials of the respondent. The report was presented to the planning committee. The report acknowledged that Rigged Hill forms part of a prominent ridgeline of mountains and hills and that the proposed

development would appear as a prominent and skyline feature. The officers report considered that the proposed development would have a significant visual impact. However, the increase in impact from the existing wind farm currently occupying a largely identical site was not of the scale to merit refusal. The applicant argued that the respondent placed too much weight on the existing wind turbine development. He argued that this was inappropriate as the area involved in the new development is more expansive and the turbines themselves would increase in height by almost 2.5 times. The applicant asserted that it was not reasonable to reach the conclusion that the visual impact of the proposed development is not at the scale to merit refusal. He referred to the Strategic Planning Policy Statement and in particular para 4.30 where it is stated that all proposals should be designed to integrate with their surroundings. He also referred to Planning Policy Statement 18 (PPS 18). He contends that the respondent has not adhered to the policy contained therein. In particular he referred to Policy RE1 which required that there should be no unacceptable adverse impact on visual amenity and landscape character.

[13] The applicant then raised a number of further discrete matters. These included that the respondent failed to comply with Part 1, and in particular, section 1 of the Planning Act (Northern Ireland) 2011 and that the decision made by the respondent was in breach of the Aarhus Convention in not taking into account or giving weight to the concerns raised by the residents of Drumsurn.

Lack of consultation

[14] Where an application is made for planning permission for a major development, section 27 of the Planning Act 2011 requires a PAN notice to be given by the applicant for planning permission to the respondent. The notice must contain, inter alia, the address of the site, an outline plan and a description in general terms of the development to be carried out. Section 50 of the 2011 Act provides that the council must decline to determine a development application if, in its opinion, there has not been compliance with section 27. The respondent determined, under its section 50 responsibility, that the notice party had complied with the requirements of section 27.

[15] Pre-application community consultation took place. Public information days were held on 24 August 2017 in Garvagh and 25 August 2017 at Limavady. The events were advertised in a number of local newspapers. Invitations to the events were issued to those in properties located within 5 km of the proposed development. Posters were displayed in local shops and community facilities.

[16] Further public information days were held on 6 June 2019 at Limavady and on 7 June 2019 at Garvagh. They were advertised in a similar way. A total of 21 people attended the public information days in 2017 and 13 people attended the stage II information days in 2019.

[17] A further public information day was held on 26 June 2019 in Limavady at the Roe Valley Arts and Cultural Centre. This again was advertised in the local press and no local residents attended this event.

[18] The notice party chose the venues for the public information meetings due to their familiarity to local people, proximity to the development site, the availability of car parking and space. None of the venues were more than a 15 minute drive from the village of Drumsurn.

[19] The applicant asserted that the respondent had failed to acknowledge the concerns raised by the local community who had objected to a highly invasive development on their doorstep. The respondent had not given due consideration to the level of public opposition. There was a lack of specific consultation with the residents of Drumsurn and there should have been a specific information event held in the village.

[20] I am satisfied that the community in Drumsurn and the surrounding area were notified of the planning proposals. The specific information events held in nearby locations were appropriately publicised. There is no requirement to hold an event in a settlement which may be closest to an application site. In this case there were at least five public opportunities for anyone who was interested in the application to obtain further information and appropriate opportunities to make any representations to the planning committee. There was a fair opportunity for anyone interested to learn about the proposed application and to object to it if desired.

[21] The applicant argued that the planning application was improperly advertised as it did not specify the height of the wind turbines. The newspaper advertisements did not all contain a reference to the height of the new wind turbines. However that information was available in the materials provided by the respondent. It was also known to the applicant in this case and referred to by him in his attendances before the planning committee. I am satisfied that the advertised material was sufficient to allow any interested individual to understand the nature of the development that was proposed and provide the opportunity for further detail to be obtained if the individuals so desired. Further information was available at the information days.

[22] The respondent considered the concerns of the local community and the specific concerns raised by the applicant in this case. The nature and extent of the opposition from residents of Drumsurn was made clear to the planning committee, including the number of objections received. The respondent was also provided with a letter from Drumsurn Community and a letter detailing the addresses of objectors. The applicant complains that neither of these letters were uploaded to the planning portal. They were however before the planning committee and considered by it. Their absence from the portal is not a matter to which significant weight can be attached. The applicant addressed his concerns with the planning committee when he made a presentation to them. These were all matters which were properly to be

considered by the respondent as part of its evaluative planning judgement. There is nothing in the materials before this court to suggest that the respondent's planning committee did not properly understand its role, understand the appropriate policy considerations and weigh all relevant considerations in applying its judgement to the application before it, including the objections and concerns raised by the applicant and other residents of Drumsurn. In those circumstances the only challenge that can be made to the decision made is one of irrationality. I consider that challenge is not an arguable challenge with a reasonable prospect of success.

Assessment of landscape character and visual amenity

[23] The second significant area in which the applicant has challenged the impugned decision is that the respondent failed to properly assess landscape character and visual amenity. He asserts that the new development would not integrate into its rural location. The turbines have not been sited and designed to integrate sympathetically with their surroundings. The development would have a significant effect on the character of Rigged Hill and a significant effect on the quality of the environment. The proposed development disregards the distinctive landscape of the area. The scale and size of the proposed development is inappropriate, and the decision taken by the respondent did not adequately address environmental, landscape, visual and amenity impacts that are associated with it. He further asserts that there was no environmental cumulative impact report as part of the planning process.

[24] The Strategic Planning Policy Statement (SPPS) is the principal statement governing planning policy in Northern Ireland. It includes a consideration of the role of renewable energy. It explains (para 6.218) that renewable energy generating facilities should be sited in appropriate locations within the built and natural environment to achieve renewable energy targets and to realise the benefits of renewable energy without compromising other environmental assets of acknowledged importance. The SPPS acknowledges the difficulty in accommodating renewable energy proposals in sensitive landscapes and cautions the care that must be taken in considering the potential impact on the landscape. Paragraph 6.224 states:

> "Development that generates energy from renewable resources will be permitted where the proposal and any associated buildings and infrastructure will not result in an unacceptable adverse impact on the following planning considerations:
>
> Public Safety, human health, or residential amenity;
>
> visual amenity and landscape character;

biodiversity, nature conservation or built heritage interests;

local natural resources, such as air quality, water quality or quantity; and,

public access to the countryside."

[25] Planning Policy Statement 18 (PPS 18) deals specifically with renewable energy. Policy RE1 states:

> "Applications for wind energy development will also be required to demonstrate all of the following:
>
> (i) that the development will not have an unacceptable impact on visual amenity or landscape character through: the number, scale, size and siting of turbines;
>
> (ii) that the development has taken into consideration the cumulative impact of existing wind turbines, those which have permissions and those that are currently the subject of valid but undetermined applications;
>
> (iii) that the development will not create a significant risk of landslide or bog burst;
>
> …"

[26] Para 4.1 of the Justification and Amplification text related to policy RE1 states:

> "Increased development of renewable energy resources is vital to facilitating the delivery of international and national commitments on both greenhouse gas emissions and renewable energy. It will also assist in greater diversity and security of energy supply. The Department will therefore support renewable energy proposals unless they would have unacceptable adverse effects which are not outweighed by the local and wider environmental, economic and social benefits of the development. This includes wider benefits arising from a clean, secure energy supply; reductions in greenhouse gases and other polluting emissions; and contributions towards meeting Northern Ireland's target for use of renewable energy sources."

[27] From these policies the following points are clear:

(1) It is for the planning applicant to show that the proposed development will not have an unacceptable impact on visual amenity or landscape character.

(2) If there is no unacceptable adverse impact then it can be permitted.

(3) If the proposal does have an unacceptable adverse impact, then the wider environmental, economic and social benefits of the proposal must be considered.

(4) It is only if the proposal has an unacceptable adverse impact that the environmental economic and social benefits must be considered.

[28] In this case the respondent determined that there was not an unacceptable adverse impact on visual amenity or landscape character. There was therefore no need to go on to consider the environmental, economic and social benefits of the proposal.

[29] The planning application submitted to the respondent by the notice party was accompanied by an environmental statement. Chapter 6 of that statement included a landscape and visual impact assessment of the proposal. The visual impact included viewpoints from Drumsurn. Viewpoint five was from the Drumsurn playing field and playpark. This was considered to be one of the most important viewpoints. Chapter 8 of the officer's report considered the issue of visual amenity and landscape character. At para 8.25 it confirmed that the environmental statement contained a series of photomontages showing the visual setting of the proposed development from a range of viewpoints. At para 8.29 the report considered that the proposed development would have a significant visual impact, but the increase in visual impact from the operational wind farm was not of the scale to merit refusal. The report also considered the ancillary works and concluded that these would not have any significant visual impact. The report acknowledged that it was difficult for wind turbine developments to integrate into the countryside but concluded at paragraph 8.12 that:

> "The proposal, including the turbines and the associated infrastructure, has been sensitively designed so as to respect rural character as much as it can and is therefore acceptable."

[30] The report sets out its conclusion on the issue of visual impact at paras 8.52–8.53.

> "8.52 It has been assessed at paragraphs 8.21 to 8.28 that the proposed development will have an increased visual impact by virtue of the significant increase in size of the

> proposed turbines. The proposed development will appear as a prominent and skyline feature in the landscape when viewed from key vantage points in relatively close proximity to the site. Critical views of the development diminish with distance from the site, and while still visible they are less obtrusive when viewed in the wider setting.
>
> 8.53 The development is not located on the most prominent landscape features within the Local Character Area and is not set within any other landscape character designations or will not significantly affect their setting. It is considered that the visual impact of the development is acceptable."

[31] This report was before the planning committee and considered by it in reaching its conclusion. It also considered the representations made by the applicant. I am satisfied that the decision reached by the respondent is a reasonable and proper exercise of planning judgement and cannot be described as Wednesbury unreasonable. The applicant's case on this aspect of his challenge is not an arguable case with a reasonable prospect of success.

[32] The applicant has also argued that the environmental, economic and social benefits of the proposed development was not considered by the respondent. As I have set out above these factors only need to be given weight where there are unacceptable adverse impacts. In this case the respondent concluded there were no unacceptable adverse impacts. In any event I am satisfied that general environmental, economic and social matters were considered by the respondent in reaching its conclusion on the application. For example, the minutes of the planning committee meeting on 28 September 2022 demonstrate it was addressed by, amongst others, the senior project manager from the notice party who set out environmental, economic and social benefits of the proposed development.

[33] A further argument made by the applicant is that there was not a cumulative impact assessment which included other wind energy developments in the locality. The issue of cumulative impact was considered in the environmental statement provided to the respondent. That environmental statement was in turn considered by the respondent's officers. This is specifically addressed in the officer's report at paras 8.54 to 8.56. Para 8.56 states:

> "As discussed above the increase in visual impact is considered to be acceptable in terms of the scale and massing of the turbines. Given that the proposed windfarm occupies generally the same lands as the operational wind farm, the increase in cumulative impact is also considered to be acceptable."

[34] I am satisfied that the question of cumulative impact was considered by the respondent in reaching its overall decision.

Other grounds

[35] The applicant contends that the respondent failed to properly consider the impact of the destruction of active peatland in reaching the impugned decision. The issue of active peatland is addressed in the officer's report at paras 8.66 to 8.69. The report in turn refers to the environmental statement. It confirmed that an active peat assessment was carried out to determine any areas of active peat within the site. There were small, localised pockets of active peat but the officers report concluded that there would be only negligible loss of active peat resulting from the upgrade works. Para 8.68 of the report states:

> "DAERA Natural Environment Division were consulted on the issue and having considered the relevant content of the Environment Statement advised that NED is content with the assessment of habitats on the site including active peat. Impacts to active peatland have been demonstrated to be low overall and appropriate mitigation has been proposed to compensate for the small amount of residual, unavoidable loss."

[36] The applicant has argued that the respondent is in breach of Part 1 of the Planning Act (Northern Ireland) 2011. That aspect of the legislation concerns functions of the Department for Infrastructure and is not relevant to the issues in this leave application.

[37] The applicant has referred to the Aarhus Convention and Maastricht recommendations. Only very limited aspects of Aarhus have been implemented into domestic law. The arguments raised in the applicant's skeleton argument are effectively the same as those raised in the general ground of impact on the community of Drumsurn. The applicant makes reference to Articles 7 and 8 of the Convention which relate to effective public participation and the provision of necessary information to the public. He also refers to Article 6, para 8 which states:

> "Each party shall ensure that in the decision, due account is taken of the outcome of the public participation."

[38] Notwithstanding the fact that these provisions have no direct implementation they are largely replicated in the statutory framework for planning matters. I have already determined that the necessary information regarding the proposed development was provided to the public, that there was effective public participation, and that due account was taken of that participation. I am satisfied

that there is not an arguable case on this ground with a reasonable prospect of success.

[39] I am therefore satisfied that there is not an arguable case with a reasonable prospect of success in any of the grounds raised by the applicant. I refuse leave and dismiss the application.