Neutral Citation No: [2023] NIKB 41	*Ref:*	**HUM12119**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**31/03/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY NO GAS CAVERNS LIMITED AND FRIENDS OF THE EARTH LIMITED FOR JUDICIAL REVIEW

_____

Gregory Jones KC & Conor Fegan (instructed by Tughans) for the Applicants
Tony McGleenan KC & Philip McAteer (instructed by the Departmental Solicitor's Office) for the Respondent

_____

HUMPHREYS J

Introduction

[1] In this application for judicial review, the applicants challenge the decision of the Minister for the Department of Agriculture, Environment and Rural Affairs ('DAERA') to grant a Marine Construction Licence, a Discharge Consent and an Abstraction Licence to Islandmagee Energy Limited. These permissions are associated with the development of a gas storage facility at Islandmagee.

[2] The first applicant is a company formed by a group of local residents opposed to the development whilst the second applicant is a well-known campaigner on environmental issues.

[3] The parties have now filed extensive affidavit evidence and the application will proceed to full hearing in May 2023. In advance of this hearing, the applicants have brought two interlocutory applications:

(i) To strike out parts of the respondent's evidence, pursuant to Order 41 rule 6 of the Rules of the Court of Judicature (NI) 1980 ('the Rules'); and

(ii) For production of an unredacted version of a ministerial submission dated 31 March 2021, pursuant to Order 24 rule 14 of the Rules.

The Strike Out Application

[4] Order 41 rule 6 states:

> "The court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive."

[5] In *R (UTAG) v Transport for London* [2021] EWCA Civ 1197, the Court of Appeal in England & Wales outlined some of the principles relating to the admissibility of evidence in judicial review applications:

> "The law governing the admissibility of "ex post facto" evidence in proceedings for judicial review is already mature. There is an ample body of authority to indicate the correct approach. Without seeking to be exhaustive, we can identify these seven points in the light of the relevant cases:
>
> (1) The court will always be cautious in exercising its discretion to admit evidence that has come into existence after the decision under review was made, as a means of elucidating, correcting or adding to the contemporaneous reasons for it (see the judgment of Hutchinson L.J., with whom Nourse and Thorpe L.JJ. agreed, in *R. v Westminster City Council, ex parte Ermakov [1996] 2 All E.R. 302, at pp. 315 and 316*). The basis for this principle is obvious. Documents or correspondence or other explanatory evidence generated after the event cannot have played any part in the making of the challenged decision (see the judgment of Coulson L.J., with whom Lewison and David Richards L.JJ. agreed, in *Kenyon v Secretary of State for Housing, Communities and Local Government [2020] EWCA Civ 302, at paragraphs 27 to 30*). The same may be said of the professional views of officers who were not involved in advising the decision-making body when it took its decision, or of those who were, but seek later to add to the advice they actually gave. The court must avoid being influenced by evidence that has emerged after the event, possibly when proceedings have been foreshadowed or issued. So, the need for caution is plain.
>
> (2) In the words of Green J., as he then was, in *Timmins v Gedling Borough Council* [2014] EWHC 654 (Admin), "[there] is no black and white rule which indicates whether a court should accept or reject all or

part of a witness statement in judicial review proceedings." Witness statements can serve different purposes – making admissions, commenting on documents disclosed, explaining why an authority acted as it did or failed to act, or seeking, as Green J. put it, "to plug gaps or [lacunae] in the reasons for the decision or elaborate upon reasons already given" (paragraph 109). A claim for judicial review must focus on the reasons given at the time of the decision. Subsequent second attempts at the reasoning are "inherently likely to be viewed as self-serving" (paragraph 110).

(3) Evidence directly in conflict with the contemporaneous record of the decision-making will not generally be admitted (see the judgment of Jackson L.J., with whom Rimer and Lewison L.JJ. agreed, in *R. v Cornwall Council, ex parte Lanner Parish Council [2013] EWCA Civ 1290, at paragraph 64*). But in the absence of such contradiction, there is no reason in principle to prevent "ex post facto" evidence being admitted if its function would be "elucidation not fundamental alteration, confirmation not contradiction" (see the judgment of Hutchinson L.J. in *Ermakov* , at p.315h-j). That is the touchstone. As Elias J., as he then was, said in *Hereford Waste Watchers Ltd. v Herefordshire Council [2005] Env. L.R. 29, at paragraph 46* , it is "proper to allow further explanation in an appropriate case", if the decision-maker's reasoning lacks the "clarity or detail which is desirable."

(4) Sometimes elucidatory evidence will be appropriate and necessary, sometimes not. But even where the evidence in question is merely explanatory, the court will have to ask itself whether it would be legitimate to admit the explanation given. Circumstances will vary. For example, as was emphasised by Singh L.J., with whom Andrews and Nugee L.JJ. agreed, in *Ikram v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 2, at paragraph 58* , when the court is dealing with a challenge to a planning inspector's decision it will have in mind that "there is an express statutory duty … for a planning inspector to give reasons for his decision." Thus, in *Ioannou v Secretary of State for Communities and Local Government [2013] EWHC 3945 (Admin)* Ouseley J. strongly discouraged the use of witness statements of inspectors to amplify or enhance

the reasons given in their decision letters. He stressed that "[the] statutory obligation to give a decision with reasons must be fulfilled by the decision letter, which then becomes the basis of challenge", that "[a] witness statement should not be a backdoor second decision letter" (paragraph 51), and that such a witness statement "would also create all the dangers of rationalisation after the event …" (paragraph 52). The Court of Appeal in the same case approved, obiter, Ouseley J.'s observation at paragraph 51 (*[2014] EWCA Civ 1432, at paragraph 41).*

(5) It is not likely to be appropriate for the court to admit evidence that would fill a vacuum or near-vacuum of explanatory reasoning in the decision-making process itself, expanding at length on the original reasons given. Such evidence may serve only to demonstrate the legal deficiencies for which the claimant contends (see *R. (on the application or Watermead Parish Council) v Aylesbury Vale District Council* [2017] EWCA Civ 152; [2018] PTSR 43, at paragraphs 35 and 36).

(6) When the admissibility of evidence is in dispute in a claim for judicial review, the court's approach should be realistic, and not overly exacting. Rarely will it be necessary for a judge to carry out a minute review of every paragraph and sentence of a witness statement, paring the statement down to an admissible minimum and formally excluding the rest, or admitting evidence for some grounds of the claim and ruling it out for others. The court should not be drawn too readily into an exercise of that kind. It finds no support in the case law. Excising passages of text from an otherwise admissible witness statement may be a somewhat artificial exercise to perform, and it may serve no useful purpose. It may make no difference to the judge's consideration of the issues in the claim. Or it may risk the loss of valuable context or clarification.

(7) Judges will usually be able to distinguish between genuine elucidation of a decision and impermissible justification or contradiction after the event, without having to rule on applications to exclude parts of the opposing party's written evidence or documents it seeks to adduce. It follows that the best way for the court to proceed may be to receive the contentious evidence "de bene esse", and, having heard argument on the issues in

> the claim, simply to disregard any of the evidence that is irrelevant or superfluous, rather than embarking on a painstaking assessment of strict admissibility."

[6] These principles allude to the important distinction drawn out in *Ermakov* between evidence adduced by a respondent for the purpose of elucidation or correction and that which fundamentally alters or contradicts the basis of a decision. The former species of evidence may be admitted, although the court should treat it with caution, whilst the latter ought not to be.

[7] The applicants say that, in three discrete instances, the respondent has adduced evidence which falls foul of the above principles and ought to be struck out on the ground of irrelevance.

(i) The CNCC Issue

[8] Claire Vincent, Principal Scientific Officer in DAERA, has sworn an affidavit, filed on 26 October 2022. It states that the Council for Nature Conservation and the Countryside ('CNCC') was consulted but, in error, its response did not reach the Marine Licensing Team responsible for giving advice to the Minister.

[9] This omission is candidly admitted but Ms Vincent goes on to say, in paragraphs 259 to 261 of her affidavit, that the issues raised by CNCC were raised by others and/or considered in any event as part of the determination process. It is these averments which the applicants seeks to strike out.

[10] I was referred to a first instance decision of Collins J in *R (Weir) v Camden LBC* [2005] EWHC 1875 (Admin) in which the court considered the consequences of a failure to take into account a material consideration:

> "The decision will normally have to be quashed if the defect, whatever it may be, may have affected the result. It is only if the court is satisfied that the result would not have been any different that normally it will be persuaded that no relief should be granted."

[11] It must therefore be permissible for a respondent to adduce evidence as to whether or not the proper consideration of a given representation would have made any difference to the outcome of a decision making process. The failure to take a material consideration into account does not automatically entitle an applicant to relief. A respondent may bear a heavy onus in convincing a court that such a procedural defect could not have influenced the outcome, but it is nonetheless entitled to make that case. I therefore refuse the application to strike out this part of the affidavit of Ms Vincent.

[12] The court will, of course, take all the evidence on this issue into account when making its determination at the substantive hearing.

(ii) The Scallop Issue

[13] At paragraph 265 of her affidavit, Ms Vincent deposes to her recollection of discussions between officials in relation to the impact of the project on scallop fishing. These discussions reached a conclusion that there would be no significant detrimental effect on the scallop population.

[14] The applicants contend that this is an example of an ex post facto comment being used to plug a vacuum in the evidence. This is, however, a mischaracterisation. Ms Vincent is giving evidence of her own recollection in relation to discussions, and this cannot be the subject of objection. The applicants can, of course, point to the lack of contemporaneous documentation to support the evidence and, indeed, to the lack of any evidence of advice being given to the Minister on the issue. Such criticisms may be valid, and the court will have to assess the weight to be given to the evidence in due course but this does not meet the threshold required to strike out the averments.

(iii) The Community Fund Issue

[15] One of the applicants' pleaded grounds is that the respondent took into account an irrelevant consideration, namely the provision of a 'community fund.' Ms Vincent claims that text relating to the community fund was inserted into the EIA decision when it ought not to have been. She explains that no weight was given to the fund in the EIA decision or the decision to grant the Marine Licence. She relies on the fact the creation of such a fund was not made a condition of the Marine Licence.

[16] The applicants say the evidence of Ms Vincent is flatly contradicted by the contemporaneous documentary evidence. The EIA decision states:

> "There are other important areas for which mitigation measures are required…As a compensatory measure, the Company proposed to set up a community benefit scheme as part of the overall proposal. A community fund of £1M has been created by Islandmagee Energy Limited with the aim of supporting local projects and initiatives over the life of the project."

[17] It is therefore argued that this falls foul of the *Lanner* principle referenced at paragraph [125] (3) of *UTAG*. There may well be considerable merit in this submission. It seems remarkable, at least at first blush, that an official document, the purpose of which is to record how environmental information was considered in the decision making process, would contain extraneous and inappropriate material.

[18] However, I propose to follow the guidance of the Court of Appeal at paragraph [125] (7) of *UTAG* and to admit this evidence de bene esse. Once I have had the opportunity to consider all the evidence in this case, and the parties' submissions, the relevance or otherwise of these paragraphs in Ms Vincent's affidavit (and the related paragraph in the evidence of Ms Smyth) will be much clearer. In the event that this evidence is indeed in breach of the *Lanner* principle, it will play no part in my determination of the application for judicial review.

[19] The applicants were unable to point to any case in this jurisdiction where the power under Order 41 rule 6 had been used in this manner to strike out parts of a party's evidence in a judicial review application. No doubt this reflects a preference on the part of both parties and the courts to avoid the "painstaking assessment of strict admissibility" cautioned against by the Court of Appeal. Any attempt to engage in a line by line parsing of evidence in complex public law proceedings is unlikely to prove a valuable use of court time.

[20] The applicants' strike out application is therefore dismissed.

The Discovery Application

[21] Order 24 rule 14 of the Rules gives the court a power to order production of any document in the custody, possession or control of a party which relates to any matter in question, to the court. By Order 24 rule 15, no such order shall be made unless the court is of the opinion that it is necessary for disposing fairly of the matter or to save costs.

[22] It is well established that the court may order production of a document to itself in order to adjudicate upon a claim of privilege.

[23] One of the applicants' grounds for judicial review entails a claim that the decisions under challenge ought to have been referred to the Executive Committee for determination on the basis that it was significant, controversial or cross-cutting.

[24] Ms Vincent deposes to advice given to the Minister in a submission dated 31 March 2021, a copy of which is exhibited in redacted form. She states, at paragraphs 402 and 403:

> "The decision does not cut across the statutory responsibility of another Department more than incidentally…Around whether the proposal is 'significant or controversial', the considerations were around the publicity and level of public debate, which was primary in the local area of Islandmagee."

[25] The applicants contend that these averments themselves constitute a waiver of privilege on the part of the respondent.

[26] Waksman J helpfully summarised the relevant principles recently in *PCP Capital Partners v Barclays Bank* [2020] EWHC 1393 (Comm). The starting point is:

> "Legal professional privilege is regarded as a fundamental right of the client whose privilege it is. The loss of that right through waiver is therefore to be carefully controlled." [para [47]]

[27] In order for waiver to have occurred, there must be reliance upon the advice as well as reference to it:

> "the party waiving must be relying on that reference in some way to support or advance his case on an issue that the court has to decide." [para [48]]

[28] The learned judge gave examples of situations where a waiver does not arise including "a purely narrative reference to the giving of legal advice does not constitute waiver."

[29] The affidavit of Ms Vincent refers to the advice given to the Minister by officials but does not reference legal advice at all let alone state that there was reliance upon that advice. In these circumstances, it cannot be said that the privilege attaching to certain parts of the submission has been waived.

[30] The alternative case put forward by the applicants is that privilege has been waived by virtue of the disclosure of a minute of a meeting which took place on 17 September 2020 between officials from DAERA, the Utility Regulator and Department for the Economy. It states:

> "Legal advice is that this is likely to be a cross-cutting issue."

[31] This minute was disclosed to a member of the public on foot of an Environmental Information Regulations request. The applicants say that having disclosed this advice, whether advertently or not, a claim of privilege cannot be sustained on legal advice relating to the question of referral to the Executive Committee.

[32] The respondent counters this by stressing that it has not placed any reliance upon this minute and, in fact, legal advice had not been obtained on the issue at the time the meeting took place. This advice has been furnished to me and it does post-date the meeting which is the subject of the minute.

[33] It is apparent that element of reliance required to sustain a claim of waiver of privilege is absent. The respondent has not placed the minute in evidence, let alone asserted any reliance upon its contents.

[34] In any event, I have determined that disclosure of the unredacted submission is not necessary for the fair disposal of these proceedings. The question of whether the issue ought to have been referred to the Executive Committee is one for the court to decide in line with recent jurisprudence.

[35] The applicants' application for disclosure of the unredacted submission and/or the legal advice provided is therefore dismissed.

Conclusion

[36] Both the applicants' applications are dismissed, and I will hear the parties on the question of costs.