# Judicial Communications Office

## 31 August 2023

## COURT DISMISSES GAS CAVERN CHALLENGE

### Summary of Judgment

Mr Justice Humphreys, sitting today in the High Court in Belfast, dismissed an application for judicial review of decisions taken by the Department for Agriculture, Environment and Rural Affairs to grant licences for a proposed development of seven natural gas storage caverns to be located under Larne Lough.

**Background**

In 2012, an application was made for a marine construction licence, water abstraction licence and discharge consent by Islandmagee Energy Limited ("IMEL") for a proposed development of seven natural gas storage caverns to be located under Larne Lough off the coast of Co Antrim. The gas caverns are proposed to have a total capacity of around 500 million cubic metres and be formed at a depth of some 1,350 metres below sea level by a process known as solution mining which entails the creation of cavities in the salt layer by pumping in seawater and causing it to dissolve. The process will cause a discharge of waste brine into the North Channel. The project is expected to last around 40 years at which stage the sea caverns will require to be decommissioned. The proposed development is located within special areas of conservation and special protection areas.

Following a process of engagement between IMEL and the Department for Agriculture, Environment and Rural Affairs ("DAERA") a public consultation commenced on 20 December 2019. Objections were received from No Gas Caverns Ltd and Friends of the Earth Ltd ("the applicants") as well as various political parties and representatives and from the Northern Ireland Marine Taskforce, a grouping of environmental organisations.

On 31 March 2021, a submission was sent from DAERA officials to the then Minister, Edwin Poots MLA, with four options:

- Approve the application, which was the recommended option;
- Agree to refer the Environmental Impact Assessment ("EIA") consent decision and draft marine licence to the Executive;
- Agree to hold a public inquiry on the application for the marine licence or explore options for a wider joined up public inquiry with the Utility Regulator; or
- Agree to delay the decision until further information was available from the outcome of the Department for Environment Energy Strategy which may be more definitive on the role of gar or storage caverns on the NI path to net zero emissions.

On 27 September 2021, an email indicated that the Minister had decided to approve the project as follows: "Option 1 on the basis that appropriate controls are in place to mitigate environmental impacts." The final consents followed on 5 November 2021.

**The Grounds of Challenge**

The applicants challenged the Minister's decision on the following- grounds.

1. The failure to refer to the Executive Committee

The applicants contended that the project was cross-cutting, significant and/or controversial and ought therefore to have been referred to the Executive Committee pursuant to sections 20 and 28A of the Northern Ireland Act 1998 ("the NIA"). This area has been the subject of recent consideration by the courts in Northern Ireland. The issue arises as to the scope of the supervisory jurisdiction in relation to challenges to Ministerial decisions and whether these are questions of fact or law. The words "significant" and "controversial" are not legal concepts and bear ordinary meanings in the English language. The judge, therefore, considered that the decision in this case was one of fact and therefore only open to judicial scrutiny to the extent that the decision maker had acted irrationally.

The court said the Minister had correctly recognised the importance of the project and the scope of the opposition to it:

> "However, his decision not to refer on the basis that the decision was not significant or controversial cannot be impugned on the grounds of irrationality. It was classically an exercise of evaluative judgement with which the courts will be slow to intervene. In this case, the Minister was entitled to hold that, measured against the full gamut of Departmental responsibilities, the project was not significant and in light of the nature and extent of the opposition, it was not properly to be regard as controversial. The views of other Executive Minsters and elected representatives on these questions are important and no-one contended that the question was properly one for the Executive."

The question of cross-cutting, however, has a statutory definition[1] and can therefore be properly recognised as a matter of law, amenable to judicial review on a legality basis. The relevant test for cross-cutting is whether the matter "affects the exercise of the statutory responsibilities of one or more other Ministers more than incidentally." The court said:

> "It has to be recognised that the statutory test speaks of cutting across the exercise of statutory responsibilities on the part of another Minister. Very many decisions made by Ministers will have social and economic impacts beyond the ambit of their particular Department. All decisions around infrastructure will have implications for finance, the economy, the environment and communities and some will impact on health and education. That cannot mean that all such decisions require Executive approval. In order to challenge a decision that a decision is not cross-cutting, the statutory responsibility in question must be identified and then one must show how the decision cuts across the exercise of this responsibility. Identifying relevant subject matter is not enough, nor is the identification of statutory consents required from other agencies."

The court said the applicants had failed to identify the statutory responsibilities in question, or the manner in which it was said that their exercise had been cut across. It said that for these reasons, this ground of challenge must fail. The court added that there was no evidence that the Minister

[1] Section 20(8) and (9) of the NIA as introduced by the Executive Committee (Functions) Act (Northern Ireland) 2020

had embarked on the kind of "solo run" which was the mischief aimed at by the legislation. It said the fact that no other Ministers objected to the course of action was also indicative of this approach:

> "Had I found, for instance, that the Minister had acted unreasonably in deciding the decision was not controversial, I would not have found that there was a "conscious act of opposition or violation" as required by [case law]."

2. The taking into account of an irrelevant consideration, namely the Community Fund

In its environmental statement in 2010, IMEL said it would like to set up a Trust that would include representatives from the local area who with representatives from the company would support local projects and ideas themed around its main aims and objectives which would be education, geology and the environment. It proposed an initial investment of £1 million on a range of projects within the first three years, following full funding of the gas storage project, with another £50,000 each year afterwards for a minimum of six years.

The community fund was referenced in DAERA's submission to the Minister and the applicants say this must have been a consideration taken into account by him in arriving at his decision. Reference to the fund was also made in a written answer to an Assembly question in March 2020. The court received evidence from a senior DAERA official to the effect that the community fund was not a matter taken into account, but there was no evidence from the Minister. The court, however, said it had a copy of the Minister's email which only referred to the environmental mitigation measures and the fact that the requirement for a community fund was not made a condition of the marine licence:

> "If the community fund were a feature of Ministerial decision making, one would have expected a means of enforcement of the funding obligation to have appeared in the suite of documents. … All of the mitigation measures identified in [the EIA consent] decision resulted in informatives and/or conditions being recited or imposed in the licences issued by DAERA with the exception of the community fund. I am satisfied, therefore, that whilst reference to the proposal ought not to have featured in the submission, it was not treated as a material consideration."

The court was not persuaded that the applicants had established on the balance of probabilities that an irrelevant consideration was taken into account and said this ground of challenge therefore failed.

3. The failure to comply with section 58 of the Marine and Coastal Access Act 2009

The applicants contended that DAERA had taken account of irrelevant considerations, namely the potential for the caverns to be repurposed for hydrogen storage and an assessment of climate change impact and had failed to take into account a material consideration, namely the energy use of the project. The court said that none of the aspects of this ground of challenge were arguable.

4. The failure to take into account material considerations, namely the response from CNCC and the impact on scallops and skate

The CNCC has a statutory role to provide advice to DAERA on nature conservation and environmental issues. DAERA was therefore obliged as a matter of law to take into account any

representation made by the CNCC. In an affidavit submitted by a Principal Scientific Officer in DAERA, it was admitted that, by reason of a misunderstanding, the CCNC's response relating to this project was not considered by the marine licensing team. It was submitted, however, that if the CNCC representation had been considered it would have made no difference to the outcome of the decision-making process.

This ground was sought to be added at the start of the substantive hearing and the court noted it would have expected a detailed affidavit explaining the reasons for the delay in pursuing this. None was forthcoming. The court said that the ground, whilst arguable, was out of time and declined to exercise its discretion to extend time on the basis that no good reason had been established. The court added that the grounds of objection put forward by CNCC were, in any event, set out with detail and force by other objectors and consultees and said it was satisfied that the outcome of the application would have been the same if the CNCC representation had been properly considered.

5. Breach of regulation 43 of the Conservation (Natural Habitats etc) Regulations (Northern Ireland) 1995

The Habitats Regulations Assessment ("HRA") in this case concluded that there would be loss of seabed or benthic habitat as a result of the development but that this would not be significant in light of the characteristics of the species concerned and the proposed mitigation. With the adoption of all the required control measures, DAERA determined that there would be no adverse effect on the integrity of any relevant site. The applicants, however, contended that the HRA was flawed in the calculation of the footprint of the brine outfall pipe and the quality of the data provided by bird surveys.

The court heard that IMEL accepted that an error was made in the calculation of the total footprint of the area impacted by the discharge of brine. The DAERA Principal Scientific Officer, however, gave evidence that even on this increased figure there was no significant loss to benthic habitat and the error would not have caused any other outcome to the assessment. The court accepted that the applicants had failed to demonstrate that there was a real risk caused by the incorrect figure being cited.

On the claim relating to the data provided by bird surveys, the court said it was for DAERA to determine the adequacy of the information provided. In this case it decided that it had sufficient information on the risks posed to birds by the project and the measures proposed to mitigate these. The court said that further and better information could, of course, have been forthcoming but ultimately a decision was made on foot of the available evidence and expert advice.

6. The failure to assess the environmental impact of decommissioning

The applicants said that DAERA engaged in unlawful "project splitting" by divorcing the construction and operation of the project from its decommissioning.

The court, however, noted that the evidence furnished by IMEL specifically referenced the question of decommissioning and potential means by which this may be achieved through a process of cavern sealing and abandonment. It also stressed that this would have to be done in accordance with the prevailing legislation and standards at the time when the caverns have reached the end of their life span. DAERA formed the view that it had sufficient information to determine the

potential effects of decommissioning and to conclude, on the basis of this, that such works would not present significant risk to the environment.

The court said it would itself be irrational to seek to prescribe a detailed method by which the caverns ought to be decommissioned decades before the work would be carried out. It noted that as matters stand, DAERA had determined that there is no significant risk associated with decommissioning but has deferred further consideration pursuant to the marine licence conditions. This will ensure that an updated assessment is required, and the future works carried out in accordance with the best practice standards prevailing at that time. The court said that accords both with common sense and the goal of ensuring environmental protection. It added that the contention that the decommissioning element of the works had not been subject to assessment was not supported by the evidence and there was nothing to suggest that the approach of the DAERA had been irrational. This ground of challenge therefore failed.

7. <u>The failure to comply with Schedule 5 of the Marine Works (Environmental Impact Assessment) Regulations 2007</u>

Regulation 21 of the EIA Regulations provides that the decision maker must apply the provisions of Schedule 5 to the Regulations in relation to each representation it receives. This provides that if the appropriate authority concludes that the representation gives rise to a dispute that calls for resolution of a question of fact in order to enable it to make its EIA consent decision it may, if it considers that it is appropriate to do so, instigate a local inquiry or appoint a person whom it considers expert in the subject-matter of the dispute to report to it on the question of fact.

The applicants contended that DAERA failed to address representations in the manner prescribed by Schedule 5 and that a number of issues of disputed fact were raised in representations, including the adequacy of bird surveys, noise impact and the impact of the project on protected species. The applicants said the obligation to consider whether to trigger a public inquiry or appoint a suitably qualified expert was therefore in play.

The court noted, however, that DAERA had produced a detailed Q&A document addressing many of the issues raised in representations during the consultation process. In order to answer many of the specific points raised, DAERA had recourse to both its own and external expertise and the court said it was therefore aware of, and turned its mind to, the provisions of Schedule 5. In relation to the specific examples relied upon by the applicants, the court said that DAERA had satisfied itself, on the basis of the available evidence, that the bird surveys were adequate, the noise impacts were negligible, and the project would have no significant effect on protected species. These were all matters of evaluative judgement for DAERA to undertake.

The court concluded that the applicants had not therefore identified an issue of disputed fact which ought to have triggered the duty to consider whether to instigate a public inquiry or appoint an expert and, in the absence of this, the ground of challenge did not get off the ground. The court added that the submission made to the Minister raised, as one of the options, the holding of a public inquiry. This was rejected by him. There was also no evidence to suggest that any different decision would have been made had the matter been analysed through the lens of an issue of disputed fact and Schedule 5 of the Regulations. This ground of challenge therefore failed.

**Conclusion**

For the reasons set out, none of the grounds were made out and the application for judicial review was dismissed.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://www.judiciaryni.uk/).

**ENDS**

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