

European Union Waste Directive 2000/76/EC

Royal Court Practice Direction No. 3 of 2004

De Smith's Judicial Review (7th Edition) 2.017, 16.058, 18.052

States Resolution of 29th September, 2011 (Billet d'Etat).

Background

1. This is an application for leave to apply for judicial review. At an earlier hearing it was decided to deal with this aspect *inter partes*, so a hearing took place with skeleton arguments submitted in advance and full oral submissions by the Advocates. At this hearing counsel for the Applicant (“A”) also sought to add a further (brief) affidavit and amend the original Cause dated 22nd November, 2013 to the extent shown on the marked up version in the papers. The applications for leave and to amend were both resisted by the Respondent (“R”).
2. The factual background is only set out in such detail as assists in the understanding of the present matter. A seeks judicial review of R’s decision of 7th December, 2012 to grant a licence to an adjacent company to store and burn waste wood to provide heating for their glasshouses. In 2011 the States of Guernsey had agreed to allow the company (who did not appear nor make any representations at the hearing) to apply for a licence; and resolved that in respect of the combustion of waste wood the European Union Waste Incineration Directive’s standards (2000/76/EC) could be adopted by the Regulator as a minimum standard. After a number of complaints by A, a report was commissioned by specialist engineers identifying various problems in respect of which it was said the licence did not impose the conditions necessary to comply with the EU Directive.
3. It should be noted that there is power under Section 17 of the Environmental Pollution (Guernsey) Law, 2004 (“the Law”) to vary the conditions of a licence, by imposing additional conditions, rescinding an existing condition, or altering the terms of an existing condition. As A’s Cause sets out, on 15th August 2013 A’s Advocate wrote to R enclosing a copy of her expert report and inviting R to add conditions to the licence to comply with the Directive.
4. On 24th September 2013, R advised Advocate Barnes that she had noted the report and said that the licence was granted on 7th December, 2012 and it was inappropriate for her now to purport to add to or to vary the reasons for that decision. On 28th October, 2013 Advocate Barnes told R that proceedings were intended and invited R to reconsider her decision. R replied on the 11th November, 2013 in negative terms. (The proposed amendment of the Cause is intended to reflect that exchange of correspondence). A now seeks leave to proceed to a review that will cancel or set aside the licence (WML17) and/or require R to reconsider, and, in summary, formulate appropriate additional conditions.

The Issues

5. R argued two main points and one subsidiary point, in essence:
 - (i) delay relating to the decision of 7th December, 2012;
 - (ii) the application secured no practical purpose as reconsideration had taken place in the letter of 11th November, 2013;
 - (iii) as a subsidiary point at this stage – sufficient interest of A, or locus.

R also argued against receiving the second affidavit and amending the Cause to include the matters referred to in paragraph 4 above.

6. It should be understood before proceeding further that judicial review is a relatively new feature of the Guernsey legal landscape. There is no statutory framework, nor the plethora of

cases reported in the courts of England and Wales. Practice Direction No. 3 of 2004 exists for those seeking the remedy. Of particular relevance in this application is paragraph 6, which reads:

“Claimants are reminded that they are under a duty to make full and frank disclosure of all material facts, that proceedings must be instituted promptly, and they must satisfy the court that they have sufficient interest in the subject matter complained of.”

Delay

7. R refers to the decision of 7th December, 2012 and submits that leave should be refused on the ground of delay. As the Practice Direction States *“proceedings must be instituted promptly”*. In the skeleton, at paragraph 9, R refers to *“inexcusable delay”*. There is no good reason for the effluxion of some 11 months from that decision. It is now too late, it is submitted, for A to adduce her second affidavit explaining the delay. R submitted further that rights of appeal were set out by e-mail to A on 7th December, 2012. A was clearly unhappy then and could have done something. R stressed that two expert reports were commissioned on behalf of A, but that the first did not contain the information needed. This was provided in April 2013 and the second, more relevant report, in August 2013. The reports were not necessary for A to bring proceedings as the prime issue in the case, namely whether the licence contains the totality of the directive, was known to A back in 2012.
8. R cited several cases in support of her proposition. The main one is the Guernsey decision of Day LB in Old Government House Hotel Limited and The President of the Island Development Committee and Mighty Mouse Limited (Royal Court Judgment 58/2003). This confirms delay can be a bar to leave being granted. A seeks to distinguish this case on the facts, as it was a planning matter with wholly different circumstances, including the important detail that the development had not yet been built and the interests of a third party Intervenor were at stake. R also relied upon an English decision, especially, R v London Borough of Bromley and Another ex parte Diane Barker (CO/4928/91), paragraphs 51-68. Again A sought to distinguish this case on the facts and it was submitted that no prejudice would be suffered in the present case - see paragraph 80(4) of the judgment. R suggests that there was nothing produced by way of evidence to justify the delay unless leave is given (which it should not) to include A's second affidavit dated 26th February, 2014. Even if it is included it is insufficient, given the delay.
9. The English cases, of course, need to be read in the context of the 3 month time limit for filing a claim under Section 31(6) of the Supreme Court Act, 1981 and CPR, r 54.5(1). The only requirement in Guernsey relating to time is that already mentioned in paragraph 6 above, namely the reference in the Practice Direction to *“must be instituted promptly”*. There is therefore no direct Guernsey equivalent to the reference in section 31(6) of the Act to substantial hardship, etc to the rights of any person *“or would be detrimental to good administration”*. So there is still a lot of scope for what is a developing remedy in Guernsey law. In the leading textbook *Judicial Review* (De Smith), 7th edition at 16-058, the following guidance is offered after the observation that: *“There is no general legislative formula to guide the court on issues of delay”*:

“The following have been held to be good reasons for delay: time taken to obtain legal aid, the importance of the point of law at stake; the pursuit of alternative legal remedies; or awaiting the outcome of consultation. The following have been held not to be good reasons: tardiness on the part of a claimant's non-legal advisor; time taken pursuing avenues of political redress such as organizing a lobby of Parliament before applying for permission.”

10. On behalf of A it was submitted that the surrounding circumstances of this matter plainly distinguish it from a normal review application. In particular there is an esoteric discipline involved with few experts around. Only in August, 2013 did A have the expert evidence that was needed. It is rare for an applicant to have to go off and obtain an expert opinion, the information is normally readily available; here the situation is akin to that obtaining when a medical negligence claim is launched. Nor is there any prejudice to persons waiting to see if they can go ahead with something, the money has already been spent. Advocate Barnes concluded this part of his argument by saying that it is difficult to obtain the requisite evidence in such a highly-technical area, anyone making this sort of application needs such evidence or would be laughed out of court.
11. The Bromley case relied upon by R can be understood as referring to situations where applications for permission are generally made on an ex parte basis (paragraph 52) and the “*long-established principle that there is a special need for expedition in respect of judicial review proceedings which challenge a planning decision*” (paragraph 80(2)). The Old Government House case is understandable in the context of the following paragraph from Day LB’s judgment:

“46. *There has, as a matter of fact, been delay in bringing these proceedings. Whether that was culpable delay on the part of the Applicant is largely immaterial. Far more important is that the greater the delay, the greater may be the inevitable detriment to a third party who has placed legitimate reliance upon the apparent validity of the impugned act.*”

The judgment then considered the position of the Intervenor, who would suffer “*very considerable*” loss in the case. This present matter is not a planning case.

12. The application to amend the Cause and put in A’s second affidavit is inextricably linked with this aspect of the case. Essentially the Cause would then include reference to A’s letter of 28th October, 2013, advising R that proceedings were contemplated and inviting reconsideration (page 216 of the blue court bundle) and R’s reply of 11th November 2013 (page 217). The new affidavit simply states that paragraphs 3 to 6 of A’s skeleton argument are “*true*”. These, in effect, relate to the history of the matter, including the problems in obtaining an expert report. A submits that there is no prejudice if these matters go in and it is a question of form not substance. R’s submissions were founded on paragraph 7 of the supplementary skeleton argument; essentially any amendment is opposed on the basis that this information was known to A at the time of issue of the proceedings. It is too late now for evidence, especially considering the observations at paragraphs 51-68 of the Bromley case.
13. The proposed amendment and the second affidavit do not move the goalposts in any drastic or spectacular manner. No startling new information is suddenly produced and the basis of the application remains essentially the same. Advocate Barnes is therefore, in my judgment correct, to say this is a matter of form rather than substance. The affidavit merely refers to a few paragraphs that were before R from A’s skeleton argument. It does not seem that R is prejudiced, has to obtain wholly new factual instructions, or meet new legal submissions.
14. R also dealt with the allied question of delay as a ground for refusal where it “*would be detrimental to good administration*” (Section 31(6) of the 1981 Act). Although care must always be taken in importing English statutes to Guernsey cases this is an encapsulation of principle which was alluded to by Day LB in the Old Government House case at paragraphs 29 and 49 of his judgment. In the present matter particular reliance was placed on the House of Lords decision in R v Dairy Produce Quota Tribunal Ex Parte Caswell [1990] 2 AC 138. In his speech Lord Goff observed (page 6 of the case report in the blue bundle):

“*The judge’s conclusion, on the evidence before him, that there was likely to be a very real problem in relation to a number of cases was a finding of fact with which I can*

see no reason to interfere. Once that conclusion was reached, it seems to me inevitable that to grant the relief sought in the present case would cause detriment to good administration.”

He added:

“I do not consider that it would be wise to attempt to formulate any precise definition or description of what constitutes detriment to good administration. this is because applications for judicial review may occasion many different situations, and the need for finality may be greater in one context than another.”

It is R’s case (paragraph 12 of the main skeleton argument) that it is contrary to good administration for the decision to be susceptible to review so long after the decision was made, and particularly where it would impact on those operating under the licence.

15. *De Smith’s Administrative Law* at paragraph 18-052 sums up the position neatly:

“Fortunately, however, Courts traditionally receive arguments based upon administrative impracticability with scepticism. Except where the difficulty caused to the decision-maker is more than inconvenience, and approaches impracticability or where there is an overriding need for finality and certainty, a remedy should not be refused solely upon this basis. Even if, contrary to Lord Atkin’s dictum, convenience and justice are on speaking terms, conversation between the two should be strictly limited.”

And as Lord Goff expressed it in the Caswell case: *“there is an interest in good administration independently of hardship, or prejudice to the rights of third parties”*.

16. In considering the overall question of delay it is necessary to have regard to the particular circumstances of this case, which, as has been stated, is not the same as a normal planning situation. It was alleged that there was no prior consultation before the granting of the licence, that persons affected, unlike in a planning application, did not have the opportunity to comment and that there was no public consultation. Advocate Barnes is also correct in referring to the specialized knowledge needed by A in rather a complex and unfamiliar area. It was not her fault that the first report she was able to commission and which appeared in April 2013 was inadequate. The second report emerged in August 2013 and did cover the points in issue. Advocate Barnes thereupon wrote to R on 15th August, 2013, there was no reply and he sent a reminder on 12th September, 2013. The response elicited (page 214 of the bundle) was terse, stating that as the licence had already been granted the conditions could not, allegedly be varied. Further correspondence then ensued which will be considered later. On the facts of this case it is very difficult to find delay as a ground for refusing permission to proceed. Any delay was understandable and rational. Nor is there any cogent material that could invoke the good administration point, which, in any event, is not free-standing. This is not a case with an overriding need for finality, nor replete with the prospects of large-scale administrative chaos. Hence R’s submissions in this aspect of the application are rejected.

No Practical Purpose

17. In summary, it is suggested on behalf of R that if successful in obtaining relief, that would be limited to requiring R to reconsider her letter of 24th September, 2013. As paragraph 16 of R’s main skeleton puts it – *“Events have overtaken”* and reconsideration has already taken place in the letter of 11th November, 2013. A counters this by saying this letter does not constitute any reconsideration, it simply declines to reconsider.

18. Under Section 31(5) of the 1981 Act, the English High Court has the power to remit a matter to the authority, etc concerned with a direction to reconsider it and reach a decision in

accordance with the findings of the High Court. Furthermore, there is the familiar and oft-cited general principle that a court dealing with a judicial review does not substitute its decision for that of the original decision-maker (subject to two exceptions that do not apply in the present matter). The Court is hardly well-placed to take this decision itself. With the repeated caveat that English statutes should not be grafted on to Guernsey law, these well-established principles are, with respect, rational and understandable and will be followed here. Accordingly, it is necessary to refer to the letter in question (page 217 of the blue bundle).

19. On 28th October, 2013 (page 215 of the bundle) Advocate Barnes, in his customary reasonable style, wrote to R giving her “*the opportunity to reconsider your decision*” prior to the institution of these proceedings. This time he did not have to chase up R for a response. On considering R’s letter one finds that the EU Directive was not implemented in Guernsey, but the standards therein were incorporated into the licence (WML 17). This is substantiated on the next page of the bundle, which is from the States of Guernsey official Billet d’État. This mentions that “*the standards set out in directive 2000/76/EC on the incineration of waste (the Waste Incineration Directive) can be adopted as a minimum standard*”. This was passed as a Proposition by the States, authorizing the occupier of the land to burn waste wood. R then refers to Section 17 of the Law of 2004 (see paragraph 3 above) and concludes:

“I have yet to be convinced that there is any reason for me to vary the conditions of the licence granted. In short nothing has changed since the issue of WML 17.”

This is after examining the powers R has under the Section, especially in the light of preventing pollution.

20. The letter, despite emanating from a person in an official capacity, must be given its ordinary natural meaning and any attempt to construe it as if it were a revenue statute must be avoided. A fair reading of it, in my judgment, shows that R applied her mind to the relevant considerations, took account of A’s report and was “*yet to be convinced*” of the need for varying the terms of the licence in question. It is not, looked at as a whole, a refusal to reconsider. The fact a decision-maker comes up in such circumstances with the same conclusion as was originally impugned does not equate to such a refusal. Advocate Hill-Tout is therefore correct in her submission that reconsideration has already taken place prior to the issue of these proceedings.

Standing/Locus

21. This was tentatively touched on by both Advocates, it being recognized that it was more a question for any substantive hearing; a tentative view will therefore be offered. R submitted that just because you are a neighbour in this set of circumstances, it does not give you a sufficiency of interest. A referred to the familiar observation that the threshold for standing at the permission stage should “*be set only at the height necessary to prevent abuse*”, i.e., to exclude “*cranks*”, “*meddlesome busybodies*” and “*troublemakers*”. As De Smith (2-017) puts it, after mentioning the list:

“Generally speaking, a person or body with a bona fide concern about the subject matter of the proceedings will not be regarded as a mere busybody.”

On this basis it is considered A meets the test, though this would be subject to further argument at any full hearing.

Conclusion

22. Although A succeeds on the delay point, she fails on the no practical purpose argument and therefore leave is refused. I would be grateful if counsel could draw up an appropriate order.

Costs

23. I will deal with these after considering any written submissions, which should be received within fourteen days of this judgment being handed down.

J R Finch, Judge of the Royal Court