Law Reports

Planning authority obliged to provide reasons for decision

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Court of Appeal

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Regina (Jedwell) v Denbighshire County Council and Others

Before Lord Justice Moore-Bick, Lord Justice Lewison and Lord Justice Kitchin

Judgment: December 2, 2015

A local planning authority when it decided not to request an environmental impact assessment was obliged to supply contemporaneous reasons for its decision within a reasonable time of a request by a party considering legal proceedings. However, even if a reasonable time had elapsed the authority might still cure the deficiency by supplying reasons before a claimant actually made an application for judicial review.

The Court of Appeal so stated when allowing the appeal of the claimant, Andrew Jedwell, against a refusal by Mr Justice Foskett ([2014] EWHC 1633 (Admin)) of judicial review of a decision of Denbighshire County Council to grant conditional planning permission for the erection of two wind turbines with a control box and access track at Syrior Farm on the outskirts of Llandrillo, Denbighshire.

Before granting that permission in July 2013 the council, through one of its planning officers, adopted a screening opinion stating that no environmental impact assessment was required. The claimant, a local resident opposed to the scheme, challenged the reasoning in the screening opinion as inadequate; contended that the inadequacy was not cured by subsequent events and that in consequence the grant of planning permission was itself invalid.

Ms Annabel Graham Paul for the claimant; **Mr Jonathan Easton** for the council; **Mr John Hunter** for the landowner.

LORD JUSTICE LEWISON said that in Wales the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations (SI 1999 No 293) still applied. The Regulations themselves did not require reasons to be given if the decision was that the proposal was not environmental impact assessment development.

However, an obligation to give reasons for a negative screening opinion existed as a matter of European Union law: see *R (Mellor) v Secretary of State for Communities and Local Government* (Case C-75/08) ([2010] PTSR 880).

The claimant had made a valid request for further information and asked for contemporaneous reasoning (not simply contemporaneous documents) to explain the council's decision It was plainly the kind of request that *Mellor* contemplated.

At the date when the claim form was issued the council had been in breach of its legal duty to give adequate reasons for its decision. The question was whether the planning officer's evidence given in the course of the judicial review proceedings was capable of curing that deficiency.

In *Mellor* the court considered that the purpose of requiring the competent authority to give reasons for a negative screening opinion was to enable an interested person to decide whether to challenge it by proceedings. Those passages contemplated that the reasons, if asked for, had to be given before the proceedings were begun.

In *Mellor* the court had not expressly considered the questions (a) whether a competent authority faced with a request for reasons could have multiple attempts to supply the reasons or whether there was only one chance to make up the deficiency; or (b) whether there was any applicable timescale within which the reasons had to be given in order to comply with the duty under EU law.

Once a *Mellor* request for reasons had been made, a competent authority had to supply those reasons within a reasonable time; and a breach of the legal obligation to supply reasons could not arise until a reasonable time had elapsed.

A competent authority was not limited to one further statement of reasons. Since the purpose (or one of the purposes) of supplying reasons on request was to enable a potential challenger to decide whether to apply to court for legal redress, his Lordship was also inclined to think that even if a reasonable time had elapsed for the provision of reasons the competent authority might still cure the deficiency by supplying reasons or further reasons before the application to the court was actually made.

The claimant had issued an application notice asking for permission to call and cross-examine the planning officer on her witness statement. It was perfectly true that cross-examination was rarely permitted in cases of judicial review. But there was no doubt that, in an appropriate case, the court might require a witness to attend for cross-examination. Whether cross-examination was necessary would, of course, depend on what the issue was.

Whether to permit cross-examination was a discretionary decision for the judge which the appeal court should be very slow to overset. The council rightly cautioned against the possibility that cross-examination would become routine in judicial review cases.

In the present case the question of fact was whether the planning officer's evidence was an ex post facto justification of the decision to issue the negative screening opinion, or was an account of her actual reasoning process at the time. That was not an issue for the local planning authority to determine: it was a question for the court. The judge had not asked himself the critical question: what did justice require?

The case was one of those admittedly rare cases in which cross-examination was necessary in order for justice both to be done and to be seen to be done. The case would be remitted to the Administrative Court for determination.

Lord Justice Kitchin and Lord Justice Moore-Bick agreed.

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