Neutral Citation No: [2024] NICA 18 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **TRE12400** *ICOS No:* **22/110773/01/A01** *Delivered:* **04/03/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION (JUDICIAL REVIEW)

Between:

LONAN McLAUGHLIN

Applicant/Appellant

and

CAUSEWAY COAST AND GLENS BOROUGH COUNCIL

Respondent

and

SCOTTISH POWER RENEWABLES LIMITED

Notice Party

The Appellant appeared as a Litigant in Person
Conor Fegan (instructed by Legal Services Causeway Coast & Glens Borough Council) for the Respondent
Stuart Beattie KC with Simon Turbitt (instructed by A&L Goodbody Solicitors) for the Notice Party

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Before: Treacy LJ and Horner LJ

<u>TREACY LJ</u>

Introduction

[1] This is an appeal against the judgment of Kinney J by which he refused the applicant leave to judicially review the decision taken by Causeway Coast and Glens Borough Council to grant planning permission on 5 October 2022 for the replacement of an existing wind farm at Rigged Hill, near the village of Drumsurn. The question for this court is whether Kinney J erred in concluding that the grounds advanced were not arguable with a realistic prospect of success (*Ni Chuinneagain's Application for Judicial Review* [2022] NICA 56, at paragraph 42). The judgment of

Kinney J is reported as [2023] NIKB 88. At the conclusion of the hearing this Court dismissed the appeal as we considered the judge was right to refuse leave on the basis that the applicable threshold had not been surmounted.

Background

[2] The factual background is set out in the first affidavit of Mr Shane Mathers (Development Management and Enforcement Manager). A further affidavit from Mr Mathers was also sworn to clarify a discrete factual point.

[3] This is an appeal against the refusal of 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.

[4] 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.

[5] The appellant 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.

[6] 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 associated infrastructure work including new internal access tracks, hardstanding areas for each turbine, a substation control building and associated compound and ancillary storage units.

[7] 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.

Grounds of Appeal

[8] Whilst several versions of an amended notice of appeal were served the respondent and Notice party took the pragmatic view that the latest version served on 22 December 2023 was the final version now relied on by the appellant. The grounds of appeals therein identified are as follows.

> "(1) It is for the community located closest and therefore most impacted by the development to show (if

> they choose to), if there is going to be an unacceptable adverse impact on landscape character and visual amenity.
>
> (2) In light of the local community's involvement (even though it was at the latter stage of the planning process), the respondent should have determined that it is for the local community to have the priority judgement in regard the unacceptable adverse impact on visual amenity and landscape character. These essential judgements should take precedence over the judgement of the planning applicant."

[9] Whilst the skeleton argument filed by the appellant impermissibly strays beyond the pleaded grounds of appeal (and the Order 53 statement) we propose to focus on the identified grounds of appeal as set out above.

Applicable legal principles

[10] These applicable principles are clearly set out in paragraph [43] of *Re Bow Street Mall's and Others Application* [2006] NIQB 28:

> '[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 Article 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 decisions 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).'

[11] An application for judicial review is not an appeal against the merits of a planning decision. Matters of planning judgement are for the relevant planning authority. This is subject to the supervisory jurisdiction of the court applying well established public law principles.

Role of the planning officers' report

[12] The authorities have also considered the issue of the planning officers' report as part of the planning process. 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.'"

[13] We turn now to a consideration of the principal issues raised by the pleaded grounds of appeal.

Applicable policy context

[14] 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:
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> Public Safety, human health, or residential amenity;
>
> visual amenity and landscape character;
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> biodiversity, nature conservation or built heritage interests;
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> local natural resources, such as air quality, water quality or quantity; and,
>
> public access to the countryside."

[15] 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;

…"

[16] 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."

[17] From these policies Kinney J concluded that:

"(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."

Irrationality in the assessment of landscape and visual amenity impacts

[18] This issue was dealt with by Kinney J at paragraphs [28] to [31]. For the reasons he has given we are satisfied that on this aspect of the appeal an arguable challenge with a reasonable prospect has not been established. The judgement reached by the councillors was that the landscape and visual impacts of the proposal were not unacceptable in policy terms. The respondent, notice party and Kinney J considered that this was an unimpeachable exercise of planning judgement informed by the evidence. We agree.

[19] As the respondent pointed out the need for a proper assessment of landscape and visual impacts was recognised at the scoping stage. The Council, through its scoping opinion, ensured that an appropriate methodology for assessment was in place. At the scoping stage, it was agreed that a representative viewpoint at Drumsurn should be assessed. It was also agreed that Drumsurn should be scoped in as a visual receptor.

[20] Chapter 6 of the environmental statement assessed landscape and visual impacts.

[21] Armed with this information, as well as the objections raised by the local community most affected by the proposal, the planning officers set out their professional view of the landscape and visual impacts of the proposal in their report. Visual amenity and landscape was identified as a key issue in the report at paragraph 8.2. The policy question for officers and elected members was as set out in paragraph 6.224 of the Strategic Planning Policy Statement and policy RE 1(b) of Planning Policy Statement 18, namely whether the proposal would cause an "unacceptable adverse impact on [...] visual amenity and landscape character." This called for an exercise of evaluative planning judgement, focusing on the acceptability of any identified harm.

[22] Officers principally set out their views at paragraphs 8.24 to 8.31 and 8.52 to 8.53 of their report. Responses to specific concerns raised by objectors, including the appellant and other residents of Drumsurn, were dealt with at paragraphs 8.92 to 8.94 of the report; and in the various addenda, in particular but not limited to Addendum 4, Addendum 5, and Addendum 6.

[23] On the morning of the Planning Committee meeting held on 28 September 2022, members had before them the case officer report. Mr Mathers also gave an oral presentation to members. This included a PowerPoint that contained wireframe drawings showing the impact on Viewpoint 5 (Drumsurn). Members heard from the appellant on the morning. He raised concerns about landscape and visual impact and reiterated the objection of the Drumsurn community.

[24] The councillors did not dissent from the planning officers' judgement that whilst the proposal would have an adverse effect, that effect, viewed in the round and in light of the existing development, was not "unacceptable" in planning policy terms. The applicant has failed to demonstrate that this was an irrational exercise of planning judgment.

[25] The appellant also contends that it was irrational for the decision maker to have disagreed with the views of the Drumsurn community. However, the councillors were entitled to disagree with the views of the Drumsurn community on the basis of the evidence before them which included a detailed Landscape and Visual Impact Assessment undertaken by experts engaged by the notice party as well as the views of their professionally qualified planning officers on the matter. The decision-maker under section 45(1) of the Planning Act (Northern Ireland) 2011 is the Council as local planning authority. It is required to take account of the views expressed by the community in making a determination, but it is not obliged to agree with them (*R (Patel) v Dacorum Borough Council* [2019] EWHC 2992 (Admin), at paragraph 115). A further point advanced was that the planners report did not reference the 'Drumsern community' nor, what the appellant referred to as Drumserns "collective objections." We agree that though the report may not have used those terms but it is apparent from the addenda to the report that the nature and scale of objection by the local community was made clear. Further, these points were articulated by the appellant in the course of his oral submissions to the councillors just before they promulgated their decision.

[26] The appellant also contended that the elevation of the turbines was not known or taken into account in the assessment. As the respondent and the notice party point out this is incorrect. The height of the turbines was set out by officers in the report: paragraph 4.1 says that the tip height will be up to 137m and paragraph 2.1 sets out the topography of the site, including that it rises to a summit of 377m. Officers and members also had access to detailed plans of the proposal. The wireframes enabled an appreciation of the height of the turbines in the landscape. The appellant himself also made members aware of the overall height of the proposal just minutes before they made their decision in his oral presentation to the Planning Committee.

[27] The appellant asserts that there was a legitimate expectation that the Council would conclude that the effects of the proposal were unacceptable. However, such a legitimate expectation, if it was to arise, would be a substantive legitimate expectation. In order for a legitimate expectation to arise, a clear and unambiguous undertaking or settled practice from which such an expectation can be inferred must be identified (*In the matter of an application by Geraldine Finucane for Judicial Review* [2019] UKSC 7, at paragraphs 56 to 62). The evidence in this case falls far short of establishing such an expectation.

Failure to take account of the objections of the Drumsurn community

[28] This ground is unarguable as it is factually incorrect to say that the views of the Drumsurn community were not taken account of. The nature and scale of the objections is noted in the planners' report, the objections were loaded to the planning portal and the appellant himself drew attention to the scale of the objections of the local community in his oral submissions, on his own behalf and on their behalf, to the councillors.

[29] Objections were dealt with principally in the planning committee report and in the various addenda, in particular, in Addendum 6 which dealt with the template objection letter submitted by residents of Drumsurn. The appellant failed to identify any substantive point which was not addressed by officers.

[30] As for the fact that a large number of residents from Drumsurn objected, officers were well aware of this, having been in receipt of the template objections from residents. Officers expressly drew the attention of members in Addendum 6 to the large number of objections received by the Council in template form since the last meeting and addressed the substance of those objections therein.

[31] The appellant also took the opportunity to expressly inform elected members of the extent of the opposition from residents of Drumsurn during his oral presentation to the Planning Committee. The fact that he expressly informed members of this point just moments before they made their final decision is, the respondent contends, in itself, a complete answer to this ground of challenge. His comments were as follows.

> "L McLaughlin stated Drumsurn was the location closest, there were two hundred individual objections, 110 households, the majority of the community."

[32] The appellant asserted in his skeleton argument that documents showing the extent of the opposition from residents of Drumsurn were not made available. However the Council was aware and took account of the opposition from residents of Drumsurn. In so far as the complaint relates specifically to a failure to upload the list of addresses objecting we agree this point goes nowhere. As Mr Mathers explains, all of the signed individual template letters were uploaded with names and addresses so that it was possible to discern the level of objection from the community of Drumsurn.

[33] We agree that it is clear that officers and elected members were well aware of the views of the Drumsurn community; the template objections signed by individual members of the public were uploaded onto the planning portal; and the documents demonstrate that all of the substantive points raised in the objections were addressed. The appellant has failed to identify any substantive point that the Council overlooked.

Conclusion

[34] In light of the above we have concluded that the appellant has not demonstrated that his pleaded grounds are arguable with a realistic prospect of success; Kinney J was right to refuse the appellant leave to apply for judicial review and the appeal is dismissed.

[35] The parties are to submit written arguments on costs in accordance with the timetable laid down at the conclusion of the hearing.