Case No: AC-2024-LON-002851

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Neutral Citation Number: [2024] EWHC 3553 (Admin)

The Royal Courts of Justice
Strand
London, WC2A 2LL

Monday, 2 December 2024

BEFORE:
MR JUSTICE MOULD

BETWEEN:

THE KING
(on the application of **EDMUND JOHN FORDHAM**)

Claimant

-and-

SECRETARY OF STATE FOR ENERGY AND NET ZERO

Defendant

-and-

(1) SUNNICA LIMITED

(2) HEALTH AND SAFETY EXECUTIVE

(3) ENVIRONMENT AGENCY

Interested Parties

MR S BELL (by Direct Access) appeared on behalf of the Claimant.

MISS R GROGAN (instructed by Government Legal Department) appeared on behalf of the Defendant.

MR R TURNEY KC and **MR N GRANT** appeared on behalf of the First Interested Party.

JUDGMENT

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(Official Shorthand Writers to the Court)

MR JUSTICE MOULD:

1. This is the renewal of an application for permission to apply for judicial review, permission having been refused on the papers by Lang J by an order sealed 3 October 2024.

2. The challenge is to the making of the Sunnica Energy Farm Order 2024. The Secretary of State's decision to make the order was given by letter dated 12 July 2024. The claim for judicial review was made under section 118 of the Planning Act 2008.

3. The order scheme is described briefly in the decision letter at paragraph 1.3:

> "The Order, as applied for, would grant development consent for the construction, operation, maintenance and decommissioning of a generating station with a gross electrical output capacity of over 50MW, comprising ground mounted solar photovoltaic ('PV') panel arrays; one or more battery energy storage systems ('BESS') with a gross storage capacity of over 50MW; connection to the UK electricity transmission system and other associated and ancillary development".

4. The Examining Authority examined the application over a fairly prolonged period and, ultimately, reported its conclusions and recommendations to the Secretary of State in a report submitted to him on 28 June 2023. The recommendation of the Examining Authority was that the order should not be approved, essentially, as I understand it, on the grounds that a compelling case for compulsory purchase of the Order Lands had not been made out.

5. The Secretary of State did not accept that recommendation. In very simple terms, he concluded that the benefits of the proposed scheme outweighed its adverse impacts and he decided that development consent should be granted.

6. One of the adverse impacts of the proposed scheme raised by those opposing the grant of development consent was the safety of the proposed battery energy storage system (or BESS) with a gross storage capacity of over 50MW. The claimant is a physicist and an engineer with over 40 years' experience in the energy industry. He was a registered interested party during the examination procedure. One of his particular grounds of objection was his concerns over the safety of the BESS to be constructed as

part of the scheme. His professional opinion was that the BESS would be a very large installation, probably the largest yet built in the United Kingdom, and amongst the largest in the world in terms of aggregate energy storage. Proper scrutiny and regulation of that hazardous installation under the applicable statutory regime was, he argued, required before the question of development consent was itself resolved.

7. The Examining Authority considered the safety issues raised in relation to the BESS in paragraphs 4.7.83 to 4.7.152 of its report. It summarised its conclusions in paragraph 4.7.152:

> "In summary,
>
> - Following consideration of the application documents and representations, responses to written questions, comments on those responses, discussions between the parties and submissions made into the Examination, including revisions to the outline [Framework Construction Environment Management Plan] (CEMP), [Operation Environmental Management Plan] (OEMP) and [Decommissioning Management Plan] (DEMP), Appendix 16D and the outline Battery Fire Safety Management Plan, the ExA is in broad agreement with both the methodology and assessment of air quality and human health impacts, and concludes that adverse construction impacts are mainly capable of satisfactory mitigation".

8. The Examining Authority then went on to draw their conclusions in relation to operational impact due to glint and glare and continued as follows:

> "The ExA is also persuaded that BESS is a rapidly evolving area of technology, that safety and performance will improve in the coming years, and that the [Battery Fire Safety Management Plan] now secured in … the recommended [Development Consent] Order provides a satisfactory mechanism capable of addressing and mitigating all adverse impacts satisfactorily at the detailed design stage".

9. They qualified that conclusion as follows:

> "However, the ExA is not persuaded that detailed consequence modelling undertaken post consent would necessarily ensure that unplanned emission levels would not be exceeded …"

The Examining Authority also concluded that

> "the adverse impacts of unplanned atmospheric emissions at any of the BESS sites could result in adverse air quality and human health impacts, particularly to receptors close to the Order Limits … The ExA concludes that cumulative impacts have been satisfactorily addressed and that there are no significant cumulative residual effects".

Drawing these findings together, the Examining Authority concluded that

> "the Proposed Development may have adverse impacts, particularly during operation in respect of the proposed BESS and the possible impacts of glint and glare which have not been assessed; these operational impacts may cause harm and therefore carry moderately negative weight in the planning balance".

10. The defendant addressed these issues under the heading, "Major Accidents and Disasters and Consideration of the BESS" in paragraphs 4.48 to 4.62 of the decision letter. His overall conclusions are stated at paragraph 7.10 to 7.11:

> "With regard to air quality and human health (including battery storage), the ExA concludes that the potential adverse impacts would generally be mitigated through the measures in the Order via the CEMP and CTMP, and hence weigh only slightly against the Proposed Development [ER 6.3.1]. The Secretary of State is satisfied that adequate mitigation has been secured for the air quality impacts and ascribes this matter limited negative weight in the planning balance (see paragraph 4.30).
>
> 7.11 The ExA notes that technology and safety in the performance of BESS is likely to evolve and improve in the future, and it is satisfied that the fire safety management plan secured in the [draft development consent order] dDCO would be capable of satisfactorily addressing and mitigating all adverse impacts at the detailed design stage. The ExA concludes that this leaves a small residual risk which is adverse and therefore weighs slightly against the Proposed Development [ER 6.3.3]. The Secretary of State disagrees with the ExA's conclusion, noting that the Applicant has evidenced appropriate mitigation and preventative measures during the construction phase and will be updating the Battery Fire Safety Management Plan at each stage of the project lifecycle, and the Secretary of State therefore ascribes this matter limited negative weight in the planning balance (see paragraph 4.59)".

11. Article 3(1) of the Development Consent Order provides:

> "Subject to the provisions of this Order and the requirements, the undertaker is granted development consent for the authorised development to be carried out within the Order limits".

Article 3(2) refers to a series of numbered works. The numbered works are themselves identified in schedule 1 to the order. Work No 2, which is broken down into a series of sub-works, numbered 2(a) to 2(c), is a work for the provision of an energy storage facility of up to 500MW of power at the point of grid connection, including, in the case of each sub-work, a battery energy storage compound with battery energy storage cells and other related equipment.

12. Schedule 2 to the order sets out the requirements to which reference is made in article 3(1) of the Order. Schedule 2 includes requirement 6 under the heading, "Detailed design approval". Requirement 6(4) states:

> "(4) The details for Work No. 2 must accord with the approved battery fire safety management plan under requirement 7 and appendix 16D of the environmental statement".

13. Requirement 7, headed "Fire safety management" reads as follows:

> "(1) Work No. 2 must not commence until a battery fire safety management plan ('BFSMP') has been submitted to and approved by both relevant county authorities.
>
> (2) The BFSMP must prescribe measures to facilitate safety during the construction, operation and decommissioning of Work No. 2 including the transportation of new, used and replacement battery cells both to and from the authorised development.
>
> (3) The BFSMP submitted under sub-paragraph (1) must be substantially in accordance with the outline battery fire safety management plan.
>
> (4) Both relevant county authorities must consult with the Cambridgeshire Fire and Rescue Service, the Suffolk Fire and Rescue Service and the Environment Agency before determining an application for approval of the BFSMP.
>
> (5) The BFSMP must be implemented as approved and maintained throughout the construction and operation of the authorised development".

14. The claim originally founded on four grounds of challenge, each of which was refused permission by Lang J. The claimant now renews on ground 1. That ground contends

that, in reaching his decision to grant development consent, the defendant failed to have regard to two sets of regulations and a statement of national policy, the regulations being Controlled Major Accident and Hazards Regulations 2015 (the COMAH Regulations) and the Planning Hazardous Substances Regulations 2015 ((P)HS Regulations); and the policy being National Policy Statement EN-1, entitled "Overarching National Policy Statement for Energy", in the edition published in July 2011.

15. Mr Simon Bell, who appeared on behalf of the claimant, drew my attention to paragraph 23 of the claimant's reply (on which I gave permission to him rely) as encapsulating the ground of challenge for which he renews his application today. In that paragraph, the claimant's position is stated as follows:

> "… what the Claimant contends is that the SoS had no basis for proceeding on an assumption that the COMAH Regulations did not apply, without compelling reasons, given that technically compelling reasons had been adduced by the Claimant in the Examination and that no countervailing technical input whatsoever had been provided by the regulators (HSE and/or COMAH CA). The complaint is that the Decision is unlawful, having failed to determine, one way or another, with reasons, whether the requirements of Regulation 26 of the P(HS) Regulations did, or did not, apply to the whole Examination and Decision process. Specifically, whether the SoS was required to take account of consultation with the COMAH CA, and a public comment thereon, pursuant to Regulation 26 (2)(e) [of the] P(HS) Regulations. Taking account of consultations and/or commentary that did not exist is clearly impossible".

16. In considering that ground of challenge, it is necessary to begin with the Secretary of State's stated policy in sections 4.11 and 4.12 of the NPS. Section 4.11 was headed "Safety". Paragraph 4.11.1 states the overarching position that,

> "HSE is responsible for enforcing a range of occupational health and safety legislation some of which is relevant to the construction, operation and decommissioning of energy infrastructure. Applicants should consult with the Health and Safety Executive (HSE) on matters relating to safety".

Paragraph 4.11.3 states:

> "Some energy infrastructure will be subject to the Control Major Accidents and Hazards (COMAH Regulations 1999). These regulations aim to prevent major accidents involving dangerous substances and limit the consequences to people and the environment of any that do occur. COMAH Regulations apply throughout the life cycle of the facility, that is from design and build stage through to decommissioning. They are enforced by the Competent Authority comprising HSE and the [Environment Agency] acting jointly in England and Wales … The same principles apply here as for those set out in the previous section on pollution control and other environmental permitting regimes."

Paragraph 4.11.4 states:

> "Applicants seeking to develop infrastructure subject to the COMAH regulations should make early contact with the Competent Authority. If a safety report is required it is important to discuss with the Competent Authority the type of information that should be provided at the design and development stage, and what form this should take. This will enable the Competent Authority to review as much information as possible before construction begins, in order to assess whether the inherent features of the design are sufficient to prevent, control and mitigate major accidents. The IPC should be satisfied that an assessment has been done where required and that the Competent Authority has assessed that it meets the safety objectives described above".

17. Section 4.12 is headed "Hazardous Substances". Paragraph 4.12.1 states,

> "All establishments wishing to hold stocks of certain hazardous substances above a threshold need Hazardous Substances consent. Applicants should consult the HSE at pre-application stage if the project is likely to need hazardous substances consent. Where hazardous substances consent is applied for, the IPC will consider whether to make an order directing that hazardous substances consent shall be deemed to be granted alongside making an order granting development consent. The IPC should consult HSE about this".

Footnote 94 states:

> "Hazardous substances consent can also be applied for subsequent to a DCO application. However, the guidance in 4.12.1 still applies ie the application *(sic)* should consult with HSE at the pre-application stage and include details in their DCO".

18. There is no doubt that the Secretary of State's clear policy is that any application for a scheme of energy infrastructure falling within the scope of the NPS, that also fell

within the scope of the COMAH Regulations, should be dealt with in accordance with the procedures in paragraphs 4.11.3 and 4.11.4 to which I have referred. There is, however, no indication in paragraph 4.11.3 or, indeed, within sections 4.11 and 4.12 as a whole, that the Secretary of State, in determining an application for development consent, will necessarily resolve a prior question which may arise as to whether any particular energy infrastructure scheme is, or is not, subject to COMAH; or requires, or does not require, hazardous substances consent.

19. In this case, the claimant is strongly of the opinion that the scheme is a scheme that falls both within the scope of the COMAH regime and also requires hazardous substances consent. He has explained very clearly and cogently in his witness statement why he is of that view. However, that is not the view of the promoter (the first interested party) nor, as I understand the position, was it the view of the competent authority for the purposes of the COMAH regime, the Health and Safety Executive and the Environment Agency. Nor, indeed, was it the position of the Health and Safety Executive that hazardous substances consent was required in relation to the scheme. The position of the applicant, with which, as I understand it, the Health and Safety Executive did not quarrel, was that whilst the scheme may in due course come within the scope of the COMAH regime and may require hazardous substances consent, it was not possible to make a judgment on that question at the moment. The principal reason for that position was that this was an area of technological innovation. Although, on any view, the scheme was going to be a large-scale energy-generating project which might have the propensity to fall within the scope of one or other of those two other regulatory regimes, it was too early to say whether that was so. In particular, it was too early to say precisely what the scale of the relevant elements of the scheme might be. In my view, that is of significance, because as is made clear in paragraph 4.11.4 of the NPS, a principal purpose of involving the competent authority in relation to a scheme of energy infrastructure, which is subject to COMAH at the time when the application for development consent is being considered, is so that the Secretary of State can understand precisely, or as precisely as possible, what mitigation measures are likely to be required in order to ensure that the COMAH Regulations are complied with and fulfilled in relation to that scheme. The same point, no doubt, applies in relation to hazardous substances consent and the P(HS) Regulation.

20. The position here was that there was a clear dispute between, on the one hand, the applicant for consent and the competent authority, and, on the other hand, the objectors, including the claimant with the benefit of his very great technical and professional experience, as to whether this was or was not a scheme that fell within the scope of both regulatory regimes. What is absolutely clear, to my mind, is that is not a matter that ordinarily would be for the Secretary of State to resolve, as the planning authority responsible for determining a development consent application. That is not to say, as Miss Grogan pointed out, that it is beyond his legal competence to resolve it, but it is very much a matter of judgment for him to decide whether or not it is a matter that he should resolve when it is in issue before him.

21. That brings me to the issue raised in the present case which is whether it was rational for the Secretary of State to make the judgment here that he would not resolve that issue. In other words, was it rational for him to adopt the position taken by the applicant and by the Health and Safety Executive, the logic being that the question whether the scheme fell within the scope of COMAH, and required consent under the hazardous substances regime, were matters better left over for decision on the basis of the fuller and more reliable information which would emerge during the course of the detailed design stage.

22. The question is whether that was a rational position for the Secretary of State. I have no doubt that it was indeed rational, essentially, for the following reasons. Firstly, the COMAH Regulations and the P(HS) Regulations are freestanding regulatory schemes operated by bodies who are competent and have the technical knowhow to be able to ensure they are applied in cases where they should be; and, when they are applied, that they are applied in a competent manner. Secondly, requirements 6 and 7 imposed on the grant of development consent were clearly designed to enable the process of detailed design to be exposed to regulation when more was known by those two regulatory bodies in the context of those two regulatory regimes. Those regimes were in no way disabled in their application by the decision to grant development consent, given that consent was granted subject to requirements 6 and 7. Thirdly, that approach is consistent with the established principles which one finds in the decision of the Court of Appeal in *Gateshead Metropolitan Borough Council v Secretary of State for the Environment* [1995] Env LR 37, to which reference is made in the context of the

Planning Act 2008 by Patterson J in *R (An Taisce (the National Trust for Ireland)) v Secretary of State for Energy and Climate Change* [2013] EWHC 4161 (Admin).

23. Under the heading "The Relevance of the Regulatory Regime" in that case, at [179] Patterson J cited the following passage from the judgment of Glidewell LJ in *Gateshead*:

> "The decision which was to be made on the appeal to the Secretary of State lay in the area in which the regimes of control under the Planning Act and the Environmental Pollution Act overlapped. If it had become clear at the inquiry that some of the discharges were bound to be unacceptable so that a refusal by HMIP to grant an authorisation would be the only proper course, the Secretary of State following his own express policy should have refused planning permission. But that was not the situation… Once the information about air quality at both of those locations was obtained, it was a matter for informed judgment, i) what, if any, increases in polluting discharges of varying elements into the air were acceptable, and ii) whether the best available techniques etc would ensure those discharges were kept within acceptable limits. Those issues are clearly within the competence and jurisdiction of HMIP. If in the end the Inspectorate conclude that the best available techniques etc would not achieve the results required by section 7(2) and 7(4) it may well be that the proper course would be for them to refuse an authorisation… The Secretary of State was, therefore, justified in concluding that the areas of concern which led to the Inspector and the assessor recommending refusal were matters which could properly be decided by EPA, and that their powers were adequate to deal with those concerns."

24. In my judgment, essentially, the same analysis applies in the present case. I respectfully adopt the analysis of Patterson J in [180], [182] and [193] in *An Taisce* in which she applied those principles to the approval of nationally significant infrastructure projects in context of the Planning Act 2008. Her decision was upheld in the Court of Appeal: see *R (An Taisce (the National Trust for Ireland)) v Secretary of State for Energy and Climate Change* [2015] PTSR 189. My attention was drawn to [48] and [51] in the judgment of the Court of Appeal. One of the points made by one of the most authoritative judges in this field, Sullivan LJ, was that one should not undervalue the experience which promoters of projects of this kind are able to bring to bear. In particular, it is necessary to ensure that the opportunity to rely on developments in technology and the economic and environmental advances they bring is not lost by imposing too inflexible a regulatory regime at an early stage in a project, which

disables the developer from taking advantage of those advances in technology during the detailed design stage.

25. Returning to this case, the Secretary of State's position was reasonable, having regard to the availability of the regulatory regimes under the COMAH regulations and the hazardous substances consent regime, if engaged later during the detailed design stage; to the position of the competent authority that they were content for that course to be taken; and, thirdly, to the fact that it was consistent with established authority.

26. I turn against that background and that analysis to the Secretary of State's decision itself. During the course of argument reference has been made to paragraphs 4.56 to 4.59 of the decision letter. Those paragraphs provide a detailed analysis of and justification for the Secretary of State's position in not acceding to the invitation to resolve for himself whether this case should now be subject to an application for hazardous substances consent. By the same reasoning, they explain why he was content to make the decision on the basis of the stated position of the applicant and the competent authority in relation to the question of the COMAH regulations. In the light of that reasoning, I am driven to the conclusion that this claim is not arguable.

27. I should also just briefly mention regulation 26 of the P(HS) Regulations, because Mr Bell had a further point in relation to that provision. That regulation requires a competent authority -- which, for these purposes, is the Secretary of State -- before deciding to give any consent for, permission for or otherwise to authorise a relevant project to take such measures as he considers appropriate to ensure that the public are informed and certain other matters are fulfilled. A relevant project includes an application for development consent. Mr Bell focused particularly on regulation 26(2)(b); that is to say, such measures as the Secretary of State considered appropriate to ensure that the COMAH competent authority is consulted about the project. In my view, that argument adds nothing of substance to the principal argument which I have addressed. If it is right, as I consider it to be, that the Secretary of State did not act irrationally in deciding the matter in the way in which he did, it seems to me that it cannot be said that he acted otherwise than in accordance with regulation 26(2)(b) in not seeking further information from the Health and Safety Executive in addition to that provided by that body during the course of the examination before the Examining

Authority. That argument is subsidiary to the claimant's overarching complaint that the Secretary of State ought to and had no rational basis for declining to decide whether this was a project that fell within the COMAH regulations; and/or a project for which an application for hazardous substances consent needed to be made.

28. For the reasons I have given, I am satisfied that the Secretary of State was entitled rationally to take the position that he did and that, notwithstanding the able and persuasive submissions advanced by Mr Bell, this claim not reasonably arguable. For those reasons, I must refuse this application.

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