



OUTER HOUSE, COURT OF SESSION

[2024] CSOH 77

P868/23

OPINION OF LORD FAIRLEY

In the Petition of

SIMON MCLEAN (FE/LA)

Petitioner

for

Judicial Review

Petitioner: M Dailly, (Sol Adv); Drummond Miller LLP
Respondent: N McLean, (Sol Adv); Brodies LLP

7 August 2024

Introduction

[1] The petitioner seeks to challenge a resolution of Aberdeen City Council dated 11 September 2023. He seeks declarator that the resolution was unlawful, reduction of the resolution and an order under section 45 of the Court of Session Act 1988.

[2] Permission was granted on two grounds, only one of which was ultimately insisted upon. The petitioner submits that in taking the decision of 11 September 2023, the Council failed to exercise its duties under section 149 of the Equality Act 2010 and, in particular, failed to carry out an equality impact assessment in terms of regulation 5 of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012.

Facts

[3] The resolution of 11 September 2023 related to the proposed future use of St Fittick's Park in the Torry area of Aberdeen. On 19 June 2023, the Council adopted a Local Development Plan ("LDP") which designated the park as an area which was suitable for development as part of an Energy Transition Zone. The decision to adopt the LDP was not the subject of any appeal or other challenge by the petitioner.

[4] The Chief Officer of the Council (also known as the Corporate Landlord) was asked to produce a paper identifying possible options for the future use of the park. The Chief Officer produced a report dated 23 August 2023 in which four such options were identified. These were: (1) do nothing; (2) development by Aberdeen City Council; (3) sale; and (4) development in partnership with Energy Transition Zone Limited and Port of Aberdeen.

[5] Energy Transition Zone Limited ("ETZ") is a company which was established in 2021 with the objective of establishing the north east of Scotland as a global leader in energy transition to net zero and as a net exporter of low-carbon products, services, technologies and skills. ETZ is funded by the United Kingdom and Scottish Governments and operates as a not-for-profit company.

[6] The options report went before a full meeting of the Council on 11 September 2023. On that date, the Council passed a number of resolutions including the resolution numbered 9.6 which the petitioner now seeks to challenge. Resolution 9.6 was in the following terms:

"The Council resolved:

- (i) to instruct the Chief Officer - Corporate Landlord, in Aberdeen City Council's capacity as landowner, that St Fittick's OP56 and Doonies OP61 sites were only to be made available for lease and must remain in Council ownership and that, furthermore, any such lease agreement was only to be entered into at the point where an end user was agreed by Aberdeen City Council and financial close was reached;

- (ii) to instruct the Chief Officer - Corporate Landlord to enter formal dialogue with ETZ Limited and PoA to discuss the optimum partnership arrangements to take forward the future development of the sites and ensure the delivery of the outcomes identified by ETZ Limited in their master plan and in the North East Regional Economic Strategy and in line with Best Value principles;
- (iii) to instruct the Chief Officer - Corporate Landlord, following consultation with the Chief Officer - Finance and Chief Officer - Governance, to consider as part of such potential partnership arrangements how a proportion of the lease income from the sites could be used for the benefit of the local community;
- (iv) to agree that approval of any leases was contingent on Council approval of the community benefit package, which was to progress, so far as was practical, parallel with the granting of leases;
- (v) to note that in a recent briefing to elected members of Aberdeen City Council, the Chief Executive of ETZ Limited wrote: '...we are in advanced discussions with a number of inward investors focused on cable manufacturing, moorings and anchorings, seeking to locate on the site (subject to planning) for these very reasons.';
- (vi) to instruct the Chief Officer - Corporate Landlord to engage with PoA ETZ Limited, and any other interested party, as to any proposals they had to develop the site, including full details of the development, the rationale for the location of their business and any mitigations proposed to minimise the impact on local residents;
- (vii) to note community amenity and wellbeing were key considerations for Aberdeen City Council as the landowner; and instruct the Chief Officer - Corporate Landlord that individual lease agreements must include details of the community impact remediation steps that would be implemented at the termination of the lease;
- (viii) to instruct the Chief Officer - Early Intervention and Community Empowerment and Chief Officer - Commercial and Procurement to report through a service update on how the local community may participate in any decision making process for the disbursement of funds that may be identified for the benefit of communities;
- (ix) to recommend to the Planning Development Management Committee that any future reports of the ETZ Masterplan be reported to the earliest appropriate meeting of Full Council; and
- (x) to instruct the Chief Officer - Corporate Landlord to report the outcome of discussions regarding St Fittick's OP56 and Doonies OP61 sites to the earliest appropriate meeting of Full Council"

[7] ETZ later put forward a Masterplan which was presented to the Council on 13 December 2013. The stated objective of the Masterplan was:

“to establish a framework for energy transition development that will positively enhance the allocated sites through design quality, job creation, active travel connections and integration and environmental investment”.

[8] Within this petition process, the respondent has produced an affidavit dated 5 March 2024 from the Chief Officer / Corporate Landlord, Mr Stephen Booth. The affidavit notes that whilst the options report of 23 August 2023 highlighted several options, further information was required before any decision could be made concerning the site at St Fittick’s Park. That included information about the potential for reinvestment of lease income in the local community. The affidavit also notes that the Council was not able to make a decision about the future of the park until the further investigations had been made.

At paragraph 9 of his affidavit, Mr Booth states:

“To my knowledge, the Council has not made a decision to lease and develop St Fittick’s Park. What the Council has done is to instruct me to enter into discussions with third parties to consider the following points: how St Fittick’s Park and the other sites could be developed; with whom it could be developed; how much such development could cost; who would pay these costs; what the returns from this would look like (with full development viability and understanding of the risks involved); how any returns would be utilised; what end users are or might be developed; what the benefits to the local community would be and how the sites would be managed in the future. Until such points become clear, I would be unable to make a recommendation on the future use of St Fittick’s Park and the other sites and the impact of any development to the Council and the wider community”

Summary of submissions

Petitioner

[9] On behalf of the petitioner, Mr Dailly referred me to section 149 of the Equality Act 2010 and the related regulation 5 of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. He submitted that resolution 9.6 of 11 September 2023 should not have

been passed without a full equality impact assessment having been carried out to identify the impact of any proposed development upon those with the protected characteristics of *inter alia* age and disability. The failure to carry out such an equality impact assessment rendered resolution 9.6 unlawful such that declarator to that effect and reduction were appropriate.

[10] The context of the resolution of 11 September 2023 was a potential lease for industrial purposes. There was no suggestion that the Council was interested in enhancing the park as green space. The task of carrying out an equality impact assessment ought to have been carried out in parallel with the Chief Officer's investigations.

[11] The intention of Parliament was that the Public Sector Equality Duty (PSED) should be placed at the centre of the formulation or development of policy by all public authorities. Consequently, advance consideration has to be given to equality issues, and they have to be an integral part of the mechanisms of government. The duty must be exercised with rigour and with an open mind (*R. (on the application of Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345; [2014] Eq. L.R. at paragraphs 59 and 60; *McHattie v South Ayrshire Council* 2020 SLT 399).

[12] The assessment cannot be retrospective or undertaken near the end of the process, but should instead be integral to the earliest stage of the development of proposed policies or practices, and in the revision of existing policies or practices (*Equality and Human Rights Commission Guidance: Assessing impact and the Public Sector Equality Duty*, section 7). The duty applies to all aspects of a local authority's functions and arises both when the local authority is drawing up policy and when it applies that policy (*Pieretti v Enfield LBC* [2010] EWCA Civ 1104; [2011] P.T.S.R 565; [2010] Eq. L.R. 312 at paragraphs 26 and 31).

[13] The second ground of challenge for which permission had been given - an issue of apparent bias - was not insisted upon.

Respondent

[14] For the respondent, Aberdeen City Council, Mr McLean submitted that it was necessary carefully to consider the nature of the decision under challenge. The resolution of 11 September 2023 did no more than give express authority to the Chief Officer to investigate what development of St Fittick's Park pursuant to option 4 might involve, and what the consequences of such development might be. That was a necessary preliminary step to assessing impact. Resolution 9.6 of 11 September 2023 was not, therefore, one which necessitated a prior equality impact assessment.

[15] The present challenge was, therefore, premature. Judicial review is concerned with actions or other events which have, or will have, substantive legal consequences: for example by conferring new legal rights or powers, or by restricting existing legal rights or interests whether conditionally or unconditionally. The grant of planning permission is an example of such an event (*R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148; [2008] 3 All E.R. 548; [2008] A.C.D 58 at paragraph 32). The resolution of 11 September 2023 was not such an event. It was neither a new or a revised policy (*cf For Women Scotland Limited v Lord Advocate* 2021 SLT 639 at page 664A-H). Rather, it was an instruction to the Chief Officer to carry out investigations and thereafter report back to the Council with fuller information.

Relevant statutory provisions

[16] Section 149 of the Equality Act 2010 states:

“149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

- (a) tackle prejudice, and
- (b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

- age;
- disability;
- gender reassignment;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—

- (a) a breach of an equality clause or rule;
- (b) a breach of a non-discrimination rule.”

[17] Regulation 5 of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012

states:

“Duty to assess and review policies and practices

5.—(1) A listed authority must, where and to the extent necessary to fulfil the equality duty, assess the impact of applying a proposed new or revised policy or practice against the needs mentioned in section 149(1) of the Act.

(2) In making the assessment, a listed authority must consider relevant evidence relating to persons who share a relevant protected characteristic (including any received from those persons).

(3) A listed authority must, in developing a policy or practice, take account of the results of any assessment made by it under paragraph (1) in respect of that policy or practice.

(4) A listed authority must publish, within a reasonable period, the results of any assessment made by it under paragraph (1) in respect of a policy or practice that it decides to apply.

(5) A listed authority must make such arrangements as it considers appropriate to review and, where necessary, revise any policy or practice that it applies in the exercise of its functions to ensure that, in exercising those functions, it complies with the equality duty.

(6) For the purposes of this regulation, any consideration by a listed authority as to whether or not it is necessary to assess the impact of applying a proposed new or revised policy or practice under paragraph (1) is not to be treated as an assessment of its impact.”

Decision and reasons

[18] It is important to recognise that this petition does not seek to challenge the respondent’s adoption of its Local Development Plan on 19 June 2023 or, more particularly, the part of that LDP which identifies St Fittick’s Park as suitable for industrial development. The sole focus of the petition is upon the Council’s resolution 9.6 of 11 September 2023.

[19] Statement 2 of the petition characterises resolution 9.6 as:

“...a policy decision to take forward negotiations to lease and develop [St Fittick’s park] for industrial purposes contingent on council approval for a community benefit package.”

[20] A more accurate summary of resolution 9.6, however, is that it ruled out the option of selling the park, and authorised the Chief Officer to enter into discussions with potential developers / tenants to examine what such development might entail. Thereafter, the Chief Officer was to report back to the full Council with the results of such investigations.

[21] It is not contentious that the respondent is subject to the duties in section 149 of the Equality Act 2010 and regulation 5 of the 2012 Regulations. The very narrow point raised by this petition is whether, prior to passing resolution 9.6 on 11 September 2023, the respondent was under a duty to carry out an equality impact assessment. If the petitioner’s argument about that issue was correct, it would necessarily imply that the respondent was under a duty to carry out an assessment of impact without knowing what proposals it was assessing.

[22] The clear purpose of the resolution of 11 September 2023 was to facilitate the collection of relevant information about what development of the park by ETZ, PoA or any other interested party might entail. Logically, the ingathering of such information needed to take place before any impact assessment could be carried out. I therefore agree with the respondent’s submission that, in passing resolution 9.6 of 11 September 2023, it did not breach any of the duties incumbent upon it under section 149 of the Equality Act 2010 or regulation 5 of the 2012 Regulations.

[23] I will therefore sustain the third, fourth and fifth pleas-in-law for the respondent and refuse the petition. All issues of expenses arising from the petition are reserved meantime.