OUTER HOUSE, COURT OF SESSION

[2018] CSOH 15

P1318/17

OPINION OF LORD PENTLAND

In the Petition of

(First) INEOS UPSTREAM LIMITED
(Second) REACH COAL SEAM GAS LIMITED

Petitioners

for

Judicial review of acts and decisions of the Scottish Government in relation to unconventional oil and gas in Scotland

Petitioners: Burnet; DLA Piper Scotland LLP
Respondent: Mure QC; SGLD

23 February 2018

Introduction

[1] In this petition for judicial review the petitioners aver that on 3 October 2017 the Scottish Government made a decision that it would not support the development of unconventional oil and gas ("UOG") in Scotland; this decision extends to the process often referred to as "fracking", whereby liquid is injected at high pressure into subterranean rock and boreholes so as to force open existing fissures and extract oil or gas. The petitioners are each companies whose businesses include oil and gas exploration and development, including UOG. They aver that their business interests are adversely affected by certain decisions and acts of the Scottish Government which they seek to challenge in the present

petition. A number of the impugned decisions were taken by the Scottish Government in 2015; others (with which this Opinion is not directly concerned) were made in 2017. In terms of Rule of Court 58.7, I appointed an oral hearing for the purpose of considering whether to allow the petitioners' challenges, insofar as they relate to the decisions made in 2015, to proceed. The respondent, the Lord Advocate on behalf of the Scottish Ministers, submitted that insofar as the petition sought to challenge those decisions it was time-barred because it had been brought long after the expiry of the relevant three-month time limits.

The 2015 decisions

[2] The decisions and measures taken in 2015, to which I will refer in this Opinion, as simply "the 2015 decisions", comprised: (a) a decision by the Scottish Government intimated by way of statement to the Scottish Parliament on 28 January 2015 that there was to be a moratorium on the granting of consents for all UOG developments ("the 2015 decision"); (b) the Town and Country Planning (Notification of Applications) (UOG) (Scotland) (Number 2) Direction 2015 made by the Scottish Ministers on 8 October 2015 and directed to planning authorities ("the 2015 planning direction"); (c) the Water Environment (Controlled Activities) (Unconventional Oil and Gas Development) (Scotland) (No 2) Direction 2015 made by the Scottish Ministers on 8 October 2015 and directed to the Scottish Environmental Protection Agency ("SEPA") ("the 2015 SEPA direction") and (d) a letter from the Scottish Government to Heads of Planning within local authorities dated 28 January 2015 intimating the terms of the 2015 Planning Direction, its coming into force and its intention ("the 2015 letter").

The 2017 decisions

[3] According to the averments in the petition, the decisions made in 2017 comprised: (a) the Scottish Government's decision made on 3 October 2017 that it would not support the development of UOG in Scotland; that it would continue indefinitely in force the earlier directions creating the moratorium; and that it would use planning powers to ensure that UOG applications were considered in line with the position of not supporting UOG development – all this amounting to an indefinite ban on UOG extraction in Scotland and (b) a letter of the same date from the Scottish Government to Heads of Planning within local authorities communicating the 2017 decision ("the 2017 letter").

The statutory time-limits

[4] The three-month time limit for bringing judicial review proceedings was introduced by section 89 of the Courts Reform (Scotland) Act 2014, which amended the Court of Session Act 1988 by inserting therein section 27A(1) in the following terms:

> "An application to the supervisory jurisdiction of the Court must be made before the end of (a) the period of 3 months beginning with the date on which the grounds giving rise to the application first arise, or (b) such longer period as the Court considers equitable having regard to all the circumstances."

[5] In terms of the Courts Reform (Scotland) Act 2014 (Commencement No 3, Transitional and Saving Provisions) Order 2015 (SSI 2015 No 247), the new section 27A came into force on 22 September 2015. Article 4 of that Order provides as follows:

> "(1) Paragraph (2) applies where the grounds giving rise to an application to the supervisory jurisdiction of the Court of Session first arose before 22nd September 2015.
>
> (2) Section 27A of the 1988 Act (time limits) has effect as if the reference to the date on which the grounds giving rise to the application to the supervisory jurisdiction of the Court of Session first arise were a reference to 22nd September 2015."

[6] The respondent submits that the effect of these provisions, in the circumstances of the present case, is that so far as the 2015 decision and the 2015 letter are concerned (both being dated 28 January 2015), the petitioners required to make an application to the court's supervisory jurisdiction within three months of 22 September 2015. So far as the 2015 planning direction and the 2015 SEPA direction are concerned (both being dated 8 October 2015), the petitioners, or so the respondent submits, required to make an application to the court's supervisory jurisdiction within three months of 8 October 2015. Since no application for judicial review was made within the applicable time limit, the challenges now brought against the decisions taken in 2015 are, according to the respondent, time-barred and should not be allowed to proceed.

[7] The petitioners' principal contention is that it is not necessary to extend the time limit under section 27A of the Court of Session Act 1988 because the petition has been brought within three months of the 2017 decision and the 2017 letter. The petitioners say that although the petition also challenges the 2015 decisions, it is necessary for them to do this because the effect of the 2017 decision and 2017 letter was to continue in force the 2015 planning direction and the 2015 SEPA direction and the effect of the earlier temporary moratorium on the granting of planning and other required consents. The petitioners aver that it is accordingly necessary for them also to challenge what was done in 2015 in order for the petition to have practical effect. The respondent, for his part, submits that this argument is misconceived.

[8] Alternatively, the petitioners argue that if the petition has not been brought timeously in so far as it relates to the decisions taken in 2015 it would nonetheless be equitable for the time limit to be extended so as to overcome this difficulty.

The parties' submissions

Petitioners

[9] For the purposes of this Opinion, I need only give a brief summary of the arguments advanced at the oral hearing. The petitioners lodged a detailed note of arguments; an equally detailed speaking note was tendered on behalf of the respondent.

[10] On behalf of the petitioners, Mr Burnet argued that the 2015 and 2017 decisions were closely inter-related and could not properly be separated from each other in the way contended for by the respondent. Counsel observed that the respondent accepted that the 2015 decisions were part of the relevant history leading to the ban and would therefore have to be considered and taken into account by the court at a substantive hearing; moreover, the respondent conceded that it would be open to the court to grant a remedy which required the Scottish Ministers to rescind the 2015 decisions. Mr Burnet submitted that the decisions taken in 2015 were at that time stated to be in the nature of temporary and interim measures. They were made so that the Scottish Government could provide a framework for carrying out a public consultation exercise and for commissioning various studies and reports. It was this work which led in due course to the 2017 decisions. The Scottish Government's decisions taken in 2017 introduced a new policy of opposition to UOG development. The mechanism by which the 2017 prohibition on UOG development was imposed – which could not have been foreseen at any earlier stage - was to keep alive the 2015 decisions so that they continued in force. That amounted to a substantial change of front on the part of the Scottish Government. An attempt to challenge the 2015 decisions at the time they were made would have been liable to be defeated by a defence of prematurity or by an objection that there was an alternative remedy available in the form of participation in the

consultation process. The correct analysis was that the 2015 decisions remained in force with continuing effect. Accordingly, the grounds giving rise to the present petition only arose at the point when the Scottish Government made the 2017 decisions; it was those decisions which brought about the ban on UOG development by the mechanism of continuing in force the 2015 decisions, in particular the 2015 planning direction and the 2015 SEPA direction. The 2015 decisions, in any event, remained open to challenge until the infringement of the petitioners' rights to which they gave rise came to an end: reference was made to *Somerville* v *Scottish Ministers* 2008 SC (HL) 45, per Lord Hope at para [51]; *A* v *Essex County Council* [2011] 1 AC 280 per Lady Hale at para 113; and *O'Connor* v *Bar Standards Board* [2017] 1 WLR 4833 per Lord Lloyd-Jones at para 30).

[11] As to the equitable considerations, again it was said to be important that the 2015 and 2017 decisions were inter-linked and had continuing effect. It would be artificial to restrict consideration to only part of the overall picture. The costs of the present proceedings would be unlikely to be materially greater if the 2015 decisions were allowed to be challenged. The court would, in any event, have to look at what happened in 2015. Moreover, the respondent had suffered no prejudice flowing from the time which had elapsed since the 2015 decisions. The consultation process, commissioning of reports and decision-making had not been interrupted by judicial review proceedings. Orderly public administration had been promoted by allowing all that to take place. The six grounds of challenge relied on in the petition were said to be strongly arguable. The petitioners had acted reasonably in participating in the consultation process, rather than rushing into court. They had acted in good faith throughout. The petitioners could not reasonably have anticipated that the interim and temporary measures of 2015 would be converted into permanent ones. To give an effective remedy to the petitioners, it would be necessary to

reduce the 2015 decisions. The present case was important for the petitioners in view of their multimillion pound investments in Scotland. The challenged acts and decisions, including those made in 2015, were said to have far-reaching consequences for Scotland. It was therefore in the public interest that the totality of the challenges advanced in the petition, including those directed at the 2015 decisions, should be allowed to proceed.

Respondent

[12] For the respondent, Mr Mure QC observed that the petitioners had accepted in their note of arguments that there had been no decision to ban UOG development in 2015 and that the grounds giving rise to the present proceedings only arose when the Scottish Government made its decisions in 2017 that it would effectively ban UOG development and would do so by the mechanism of continuing in force the 2015 decisions. If the grounds only arose in 2017, then the petitioners should not be granted permission to proceed with the petition so far as it challenges the lawfulness of the 2015 decisions when they were made. In so far as any of the 2015 decisions could be said to have had an impact on the petitioners, such impact would have been felt in 2015. They could and should have challenged the decisions at that time. The petitioners' case, properly understood, was that the 2015 decisions were unlawful at the time they were made; any challenge to their legality should, therefore, have been brought then. If, contrary to this understanding, the petitioners' case was that only the 2017 decisions were unlawful and that insofar as the 2015 decisions were concerned they should now be set aside in order to give effect to a successful challenge to the 2017 decisions, that could be dealt with by the court devising an appropriate form of remedy. Such a remedy might comprise a declarator that, in light of the consultation process, the Scottish Ministers should rescind the 2015 decisions and/or

otherwise bring the moratorium to an end. It would be contrary to the public interest to open up the legality of the 2015 decisions so long after those decisions had been made. In particular, it would be contrary to the interests of good public administration to permit the petitioners' claim for just satisfaction damages to proceed in respect of decisions taken as long ago as 2015. The petitioners' grounds of challenge to what happened in 2015 all arose at the time when the 2015 decisions were made. It was not, therefore, appropriate to regard those decisions as being in the nature of continuing acts. The true position was that the petitioners had made a conscious choice to engage in the process set in train by the Scottish Ministers in 2015; they had acquiesced in that process.

Decision

[13] The respondent accepts that the petitioners have a sufficient interest in the whole subject matter of the present application for judicial review, including the challenge to the 2015 decisions, and that they have a real prospect of success insofar as the petition challenges the 2017 decisions. The only question raised before me at the permission stage was whether the petitioners have a real prospect of success insofar as the petition relates to challenging the 2015 decisions. The respondent maintains that on that branch of the case the time-bar defence is unanswerable and must prevail.

[14] In approaching this question, it seems to me to be of the utmost importance to recall that the only focus of the court at this early stage of the proceedings is on whether the petitioners' case has a real prospect of success. This is not an exacting test. Indeed it has recently been described as being "a low hurdle for an applicant to overcome" (*Wightman* v *Secretary of State for Exiting the European Union* [2018] CSOH 8 per Lord Doherty at para [9]). In *O* v *Secretary of State for the Home Department* 2016 SLT 545 Lady Wolffe, having

considered certain authorities, said at para [37] that in this context "real" may be understood as being the opposite of "fanciful". In C*F (China), Petitioner* [2016] CSOH 28 Lord Boyd of Duncansby concluded at para [17] that the word "real" simply meant genuine rather than fanciful or speculative. It was not a high standard, but the court must be satisfied that there is *some* prospects of success. I agree that in order to show that he or she has a real prospect of success the applicant for judicial review need only demonstrate that he or she has a case which enjoys a realistic chance of succeeding in the sense that the applicant's contentions are not fanciful or unrealistic. Perhaps another way to put the issue would be to ask if the petitioner's case is manifestly devoid of merit.

[15] In my opinion, the court should be careful at the permission stage to resist the temptation to be drawn into a substantive evaluation of the parties' competing contentions on the merits of the application for judicial review (or some particular aspect of it). The temptation to embark on that type of exercise may be all the more powerful where, as in the present case, detailed and elaborate written submissions are put before the court. But such an exercise would be misguided. In this connection the observations of Lord Drummond Young on the meaning of "no real prospect of success" in the context of protective expenses orders in *Carroll* v *Scottish Borders Council* 2014 SLT 659 at paragraphs [14] and [26] are, in my respectful view, apposite in the circumstances of the present case. His Lordship said this:

> "In my opinion it is important that this requirement should not result in a stringent and detailed examination of the applicant's case. Otherwise there is a danger that hearings … will develop into something akin to full hearings on the merits of the case …
>
> In the application … it should not be necessary to consider the merits of the … decision in any detail; the test that must be satisfied is that there is a 'real prospect of success', which is a fairly low hurdle. Consequently if one or more of the standard grounds of judicial review appear *prima facie* to be stateable, that should suffice. …"

[16] I acknowledge that there may prove to be force in the respondent's arguments on time-bar when the issues are comprehensively explored at a substantive hearing, with the advantage of full and developed legal argument on both sides. For the present, I must ask myself simply whether the petitioners' position on the time-bar aspect of the case is fanciful, speculative or unrealistic. Seen through that lens, the answer to the question that arises at this stage is, in my view, clear. I do not consider that it can be said that the petitioners' arguments on the time-bar point are fanciful or unrealistic. On a provisional view, there may be some possible merit in the proposition that the 2015 and 2017 decisions are closely inter-linked and that this is significant in the wider context of the issues that arise in the case. Beyond saying that, it would not be appropriate for me to attempt any evaluation of the parties' competing arguments at this preliminary stage. Accordingly, I shall grant permission to proceed on the totality of the petitioners' case as set out in the petition.

[17] At the oral hearing there was some brief discussion as to whether the petitioners' claims for damages by way of just satisfaction for the alleged violation of their rights under Article 1 of Protocol 1 to the European Convention on Human Rights should be allowed to proceed. Mr Burnet acknowledged that the averments on that issue in statement 34 of the petition were sparse and, as I understood him, offered to amplify them by adjustment of the petition in due course. This is an issue that I would wish to hear parties on at the continued oral hearing on 23 February 2018 when consideration can be given to the timetable for the further stages of these proceedings.