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25/10/2013

Comments to DEFRA on the Aarhus National Implementation Report by Sustainable Shetland principally in relation to Article 9(4) and paragraphs 106-117 of the Draft Report

Introduction

These comments are submitted in the context of a petition for judicial review raised in the Outer House of the Court of Session in Edinburgh in 2012 by a local NGO, Sustainable Shetland, relating to a challenge of consent granted by Scottish Ministers under section 36 of the Electricity Act 1989 to an onshore windfarm of some 103 turbines on Shetland.

Sustainable Shetland was successful in its petition, and the decision of Scottish Ministers quashed by the Lord Ordinary in October 2013. Sustainable Shetland was awarded expenses up to £60,000 in line with a protective expenses order.

The hearing was scheduled to last some 4 days, but increased to 14 days. Legal costs and court dues of Sustainable Shetland have amounted to some £92,000 notwithstanding their Counsel and instructing solicitors charging restricted fees. Scottish Ministers have now appealed the Lord Ordinary's decision, which result in a reclaiming motion extending to some 6 – 8 days. Because of the reclaiming motion, recovery of expenses is on hold, and consequently Sustainable Shetland cannot fund full participation in the appeal.

Key concerns and observations

With particular reference to Article 9(4) of the Convention and paragraphs 106 – 117 of the Draft Implementation Report, Sustainable Shetland is concerned that:

- a) A hearing scheduled for 4 days can be extended to 14 days;
- b) An NGO with limited funding should be expected to meet court dues of some £9,500 (to date).
- c) An appeal in the Inner House of the Court of Session should extend for up to a further 8 days;
- d) Successful NGO petitioners should not be able to recover expenses from the unsuccessful party pending an appeal creating major cash flow pressure for NGOs with limited funding;
- e) As such, full participation by the NGO cannot take place in the appeal;
- f) A challenge by an NGO on certain grounds can be extended in part by a novel aspect not raised in the petition being introduced to the court process resulting in unforeseen additional costs and time;



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g) Taking the above into consideration, notwithstanding the granting of a protective expenses order, a successful challenge by an NGO with environmental interests is in this instance prohibitively expensive and an obstacle to access to environmental justice;

Consideration should be given by UNECE as to how such situations can be avoided to enable greater fairness in the justice system and public participation to protect the environment.

Detailed commentary and references

In 2012 Sustainable Shetland (<http://www.sustainableschetland.org/>) petitioned the Scottish Court of Session for judicial review of the Scottish Ministers' ("SM") decision of 4th April 2012 to give consent to the Viking Windfarm in Shetland (<http://www.vikingenergy.co.uk/>). Scottish Ministers were the respondents, and the developer, Viking Energy Partnership ("VEP"), joined as an interested party.

A four day hearing was allocated for the end of January 2013, and Sustainable Shetland ("SuS") was awarded a Protected Expenses Order, limiting its liability if unsuccessful to £5,000 of SM's legal costs, and SMs to £30,000 of SuS's costs if successful.

On the second day of the hearing, following submission from SuS's Counsel on the EU Wild Birds Directive, Counsel for SMs claimed a 'Devolution Issue' had arisen, thus the hearing was adjourned to allow for participation of the Advocate General for Scotland if he so wished.

A further 4 days' hearing was allocated for the end of April 2013. On day 3 (the first day of the recommenced hearing) SuS's Counsel finished making his submission. On day 4 SM's Counsel began by discussing the Electricity Act 1989, at which point it came to light that VEP did not have a licence to generate electricity. This led to delay as SM's Counsel tried to establish whether the Ministers were competent to grant consent if the applicant did not have a licence. The hearing was adjourned effectively for two days until Day 6, albeit there were intermittent updates provided to the Lord Ordinary in court as to progress and when matters could recommence. On day 6, SM's Counsel stated that the issue had still not been resolved but that he would continue his submission and deal with the electricity licence matter later. The Lord Ordinary tried to establish what further time would be needed to complete the case. SM's Counsel requested 6 days. The Lord Ordinary observed that this was too long and said that SM's and VEP's Counsel should focus their submissions to fit with the time frame allocated. The Lord Ordinary directed that there would be a further 4 days from 11th – 14th June 2013 for the case, and then an extra 2 days on 20th and 21st June 2013 to deal with the competency issue relating to an electricity licence.



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SM's counsel took all 4 days (11-14 June), plus 1 ½ days from the previous hearing in April/May, to state his case.

VEP, as interested party, was then granted an extra day to present its case on 18th June.

On 19th June SuS was granted a variation on its PEO arrangement, whereby the Scottish Ministers' liability, should SuS win the case, was now £60,000 of its legal costs. SuS's liability, should it lose, remained at £5,000 of Ministers' costs.

In effect, however, the case had extended from 4 to 14 days in court, resulting in legal fees to SuS of an estimated total of £92,000.

On 24th September 2013 the Lord Ordinary issued her opinion:

<http://www.scotcourts.gov.uk/opinions/2013CSOH158.html>

The Lord Ordinary's ruling was published the following week:

<http://www.shetnews.co.uk/news/7416-viking-wind-farm-consent-withdrawn>

The following article provides further commentary on the matter and the approach of Scottish Ministers in terms of their decision to appeal the judgement:

<http://www.telegraph.co.uk/news/uknews/scotland/10384059/SNP-ministers-ignore-court-ruling-on-large-wind-farms.html>

An appeal hearing has been set for between 25th February and 7th March 2014 (please see attached minute of proceedings (9C0) for reference). Also please note therein that SuS's Counsel advised the Inner House of the Court of Session that SuS has limited funds and will restrict its arguments only to the EU Birds Directive, thereby not fully participating in the appeal.

The competency issue, which arose during submissions by SM's Counsel, has significantly prolonged this case both in terms of actual court time and adjournments, and has implications not only for SuS in terms of potential extra costs due to the necessity of maintaining a watching brief, but also other NGOs or individuals contesting renewable energy developments in Scotland (and the UK as a whole).

25 October 2013