SC/CIV/02/23

JUDGMENT

The King (on the application of) Unity Marine Limited

Applicant

v

(1) The Director of Natural Resources of the Falkland Islands Government
(2) The Governor of the Falkland Islands
(3) The Executive Council of the Government of the Falkland Islands

Respondents

before
The Honourable James Lewis KC
Chief Justice of the Falkland Islands

JUDGMENT GIVEN ON

3rd August 2023

Heard on 28th July 2023

Representation	
Mr David Pievsky KC	*Applicant*
Mr Jonathan Auburn KC	*Respondents*

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Case Ref: SC/CIV/02/23

IN THE SUPREME COURT

OF THE FALKLAND ISLANDS

Courts and Tribunal Service
Stanley
Falkland Islands

Date: August 2023

Before:

THE HONOURABLE JAMES LEWIS KC
(CHIEF JUSTICE OF THE FALKLAND ISLANDS)

- -

BETWEEN:

THE KING (ON THE APPLICATION OF) UNITY MARINE LIMITED

Applicant

v

(1) THE DIRECTOR OF NATURAL RESOURCES OF THE FALKLAND ISLANDS GOVERNMENT

(2) THE GOVERNOR OF THE FALKLAND ISLANDS

(3) THE EXECUTIVE COMMITTEE OF THE GOVERNMENT OF THE FALKLAND ISLANDS

Respondents

Mr DAVID PIEVSKY KC for the Applicant instructed by Waverley Law.

Mr JONATHAN AUBURN KC for the Respondents instructed by the Attorney General.

LEWIS, C.J.

1. This is an application by the Respondents to set aside the leave to move for judicial review granted by this court *ex parte* on 20 April 2023.

Background

2. In 2017, the Falkland Island Government ("FIG") was considering the viability of commercial fish farming in the Falkland Islands. In 2018 FIG entered into a letter of intent with F-Land ApS ("F Land") concerning the feasibility of such an endeavour and in 2019 the applicant company ("Unity Marine") was created as a joint venture between Fortuna and F Land with a view to continuing the work with FIG exploring the feasibility of establishing a salmon farming industry.

3. On 27 November 2019, the FIG's Executive Council ("ExCo") considered a report and agreed that a budget (£193,000) be established to investigate policy, regulatory and technical requirements to support the creation of a successful and well-managed aquaculture industry in the Falkland Islands. It referred to an expectation that public consultations would be necessary over the next year.

4. FIG commissioned MacAlister-Elliott & Partners ("MEP") to carry out a number of tasks, including (1) a review of international best practice, (2) a review of regulatory frameworks in other jurisdictions, and (3) an island-wide consultation.

5. In September 2021 ExCo considered and approved the Falkland Islands Environment Strategy, with an agreed action within this strategy document being to: "conclude investigations of potential environmental impacts of aquaculture, including large scale aquaculture".

6. The issue of commercial and large scale salmon fishing was an issue in the November 2021 general election. Varying statements were made in the election manifestos of the candidates broadly against fish farming in the Falkland Islands. The newly elected members of the legislative assembly ("MLAs") made up ExCo in 2022.

7. In a report prepared for an ExCo meeting of 29 March 2022 the government officials noted the work done thus far, including MEP's analysis. The Report made a number of

recommendations, including that the outstanding "island-wide consultation process" and policy framework development work, previously identified as necessary, should now be completed; that a robust legislative framework should be developed and implemented; that an interim cap on annual aquaculture production (pending the completion of other work) should be imposed; and that a ban on aquaculture should not be imposed.

8. However, ExCo did not follow the advice or recommendations set out in the Report. It declared that it was not minded to agree to any large-scale fish-farming in the Falkland Islands and not minded to approve any fish-farming that involved the introduction of new species. Officers would be asked to come back with options that implemented those policy decisions. Any licences issued under the Fish Farming Ordinance 2006 would be subject to a condition limiting the maximum production to 50 Metric Tonnes. Whilst not going as far as imposing a formal and express ban on all aquaculture, ExCo refused to approve the completion of the outstanding consulting and policy development exercise.

9. The ExCo's decision was made known on or about the 29 March 2022 to Unity Marine by the Director for Natural Resources who called Michael Poole of Unity Marine, to inform him of the discontinuation decision.

10. At Unity Marine's suggestion, the Governor and the Attorney General met with representatives of Unity Marine on 11 May 2022 to discuss the discontinuation decision.

11. At the meeting, Unity Marine made a PowerPoint presentation outlining its concerns with the discontinuation decision. The Governor and the AG said that they were sympathetic to the Applicant's concerns. They commented that there was little in the presentation with which they would argue. They accepted that the applicant had acted in good faith, and had committed substantial resources to a project whilst FIG had then unilaterally curtailed.

12. The applicant alleges that AG stated, however, that FIG would in due course be providing a formal written response and advised UML to "wait" for that written response. This is not accepted by the AG, but it is common ground that a letter was expected and chased by the Applicant on a number of occasions.

13. A formal letter was sent on 9 January 2023 which is described by the Applicant as the 'decision letter' and by the Respondents as a mere recitation of the oral reasons given immediately after the ExCo meeting on 29 March 2022.

14. The reasons in the 9 January 2023 letter indicate that the decision was taken on the basis of an electoral mandate against large scale salmon farming although Mr Auburn KC argues that properly construed the MEP report is incorporated into those reasons.

The approach on a set aside application

15. The test for leave to apply for judicial review is well known. The 1999 Edition of the White Book which applied the RSC as applicable in the Falkland islands said at O.53/1-14/8:

> "The purpose of the requirement of leave is:
>
> (a) to eliminate frivolous, vexatious or hopeless applications for judicial review without the need for a substantive inter partes judicial review hearing;and
>
> (b) to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further investigation at a full inter parties hearing."

16. This application is made pursuant to O.32 r.6 which allows a court to set aside any order made *ex parte.*

17. The Board of the Judicial Committee of the Privy Council in *Sookhan v Children's Authority of Trinidad and Tobago* [2021] UKPC 29 observed that:

> 5. It is clear that if leave to apply for judicial review is granted ex parte that it should not subsequently be set aside unless the court is satisfied on inter partes argument that the leave should plainly not have been granted; see *R v Secretary of State for the Home Department, Ex p Chinoy* (1991) 4 Admin LR 457 and *Sharma v Brown-Antoine*, para 22. In *Chinoy* Bingham LJ said:
>
> "I would, however, wish to emphasise that the procedure to set aside is one that should be invoked very sparingly. It would be an entirely unfortunate development if the grant of leave ex parte were to be followed by applications to set aside inter partes which would then be followed, if the leave were not set aside, by a full hearing. The only purpose of such a procedure would be to increase costs and lengthen delays, both of which would be regrettable results. I stress therefore that the procedure is one to be invoked *very sparingly* and it is

> an order which the court will only grant in a very plain case." (Emphasis in original)
>
> Simon Brown J. followed this statement in *R v Secretary of State for the Home Department, Ex p Sholola* [1992] Imm AR 135, in which he said (at 138):
>
> "It is not sufficient to show merely that the judicial review application is distinctly unpromising and most likely to fail. It is not sufficient merely to persuade the judge hearing the setting aside application that he personally would not have been disposed to grant leave and certainly would not have been disposed to do so had he heard the respondent's argument and perhaps had the advantage of seeing their evidence. Rather it is necessary to deliver some clean knockout blow to justify invoking this procedure."

18. Mr Auburn KC points out that the Board said at §4:

> "The threshold for the grant of leave to apply for judicial review is low. The Board is concerned only to examine whether the respondent has an arguable ground for judicial review that has a realistic prospect of success and is not subject to a discretionary bar such as delay or an alternative remedy."

19. Whilst he agrees such approach applies to his arguability challenge, he submits in this case the discretionary time bar and the statutory imperative in section 31(3D) of the Senior Courts Act 1981 ("SCA") should simply be considered as if this was an original inter partes grant of leave rather than a set aside of previously granted leave. While there is force in his point on section 31(3D) of the SCA as I set out below, the consideration of time, absent a material non-disclosure, will in my judgment fall within the same general approach the Board outlined in *Sookhan.*

20. This chimes with the approach previously taken in this court *R (SGF Ltd) v The Director of Fisheries of the Government of South Georgia* SC/CIV/03/18 where I agreed with the position set out in *R v Secretary of State for the Home Department ex p Begum* [1990] COD 107 that it was a jurisdiction very sparingly exercised and the legal profession should pause long and hard before making such applications.

21. In practical terms this means the court should approach an application as this that absent a 'knock out blow' which was not considered, or properly considered, at the initial stage an application to set aside leave will normally fail.

22. Finally, I should add that Mr Pievsky KC took the technical point that section 31(3D) of the SCA only applies to the decision to grant leave and not on an application to discharge such leave. He makes this argument on the basis that section 31(3D) of the SCA makes a fundamental change to the common law position on materiality in public law and should be strictly construed.

23. Section 31 of the Senior Courts Act 1981 provides in part:

> (3C) When considering whether to grant leave to make an application for judicial review, the High Court—
>
> (a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and
>
> (b) must consider that question if the defendant asks it to do so.
>
> (3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave. [Emphasis added]

24. Ingenious as such argument is I cannot accept it. Although there is not a good fit between section 31(3C)(b) of the SCA and the RSC which are in force in the Falklands, unlike the CPR which envisages an acknowledgment of service when granting leave, the provision requires the court to consider it, if the defendant asks the court to do so. The initial grant of leave was made *ex parte* and unless the court has considered the point pursuant to section 31(3C)(a) of the SCA the Respondent has a statutory right for it to be considered. It cannot be that there is some superimposed threshold in line with the Board's guidance set out above for the Respondent raising the issue for decision under section 31(3D) if, as is permissible, the court has not considered the subsection of its own motion. It follows I will consider section 31(3D) of the SCA position afresh.

Grounds for set aside

25. Mr Auburn KC says that his application should be granted for any of three reasons.

    (1) the claim was brought significantly out of time;

    (2) in any event, the underlying grounds lack merit; or

(3) it is highly likely that the outcome would not have been substantially different had the conduct complained of not occurred: Senior Courts Act 1981, s.31(3D).

26. In oral argument he stated his primary ground was time/delay and relied essentially on his written argument to support his application on the other two reasons.

Time limit and delay

27. Section 31(6) of the SCA (as extended to the Falkland Islands by the Law Revision and Publication Ordinance 2017, section 21, Part 4 and Schedule 1) provides:

> "Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—
>
> (a) leave for the making of the application; or
>
> (b) any relief sought on the application,if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

28. Order 53, r.4 of the RSC supplements this provision:

> "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

29. The starting point for the dispute between the parties is whether the time runs from the date of the decision or from the date of the written reasons or 'decision letter' – 29 March 2022 or 9 January 2023 respectively.

30. The Applicant's position is that the time does not start until the 'decision letter' was sent on 9 January 2023 while the Respondent's position is that the decision was made and orally communicated to the Applicant on the 29 March 2022.

31. It is difficult to see how the decision was not made on the 29 March 2022 and that grounds arose at that time. However, the real point is whether there was undue delay or whether there is good reason to extend time. The Applicant say that it was reasonable waiting for

promised reasons in writing from the Respondent and only when those written reasons were received could it sensibly have applied for leave to apply for judicial review.

32. By analogy in *McDonald v Rose* [2019] EWCA Civ 4, Underhill LJ said where a judge gives a decision with reasons to follow, then although time may have started running from the decision it should be standard practice unless there are very unusual circumstances for the court to extend time for appealing from the date when the reasons are given.

33. In *R v University College London, ex p Ursula Riniker* [1995] ELR 213, 215 the court said:

> "..the discretion to enlarge time … will be sympathetically approached by the court where the [claimant] in the meantime has not been sleeping on her rights but has been attempting to canvass them by other legitimate means"

34. In *R (Young) v Oxford City Council* [2002] EWCA Civ 990 [2002] 3 PLR 86 at [33] it was held that the claimant "acted reasonably in the circumstances in seeking by his letters … further information before commencing proceedings". And at [43]:

> " it is undesirable for a litigant to proceed blindly towards challenge of a decision in relation to which he suspects a fault or omission susceptible of review in a case where, for the purposes of clarification, he reasonably requires further information from the decision-making body so that he can consider in an informed manner whether proceedings are justified or worthwhile"

35. In *R v Commissioner for Local Administration, ex p Croydon London Borough Council* [1989] 1 All ER 1033, 1046g Woolf LJ, as he then was, said:

> "While in the public law field, it is essential that the courts should scrutinise with care any delay in making an application and a litigant who does delay in making an application is always at risk, the [rules] are not intended to be applied in a technical manner. As long as no prejudice is caused … the courts will not rely on those provisions to deprive a litigant who has behaved sensibly and reasonably."

36. The Respondent has not alleged any specific prejudice and did not advance any prejudice other than the normal due administration of justice consideration for delay in challenging public decisions.

37. What can be distilled from these authorities is that in this case the court must determine if the applicant has acted sensibly and reasonably in waiting for the promised reasons letter. If the applicant has done so there will not have been undue delay and there will be good reason in extending time.

The evidence on timing and delay

38. On 30 March 2022, the Director of Natural Resources telephoned Mr Michael Poole, General Manager of Fortuna Limited, to let him know the outcome of the decision. The reasons say the Respondents were the same as given in the 9 January 2023 letter.

39. As I have found it is arguable that the reasons in the 9 January 2023 letter were legally inadequate it follows the oral reasons were likewise arguably legally inadequate.

40. On 11 May 2022 a meeting was held between representatives of Unity Marine, the Governor of the Falkland Islands at the time, Nigel Philips CBE, and the AG, Simon Young. Recollections of that meeting differ. However, it is common ground that at that meeting it was agreed that the Respondent would send a letter to the Applicant setting out the decision.

41. Mr James Wallace said in his First Affidavit:

> "The Attorney General stated, however, that FIG would in due course be providing a formal written response and advised Unity Marine to "wait"" for that written response."

42. In contrast Mr Simon Young, AG, said in his First Affidavit that he did not suggest a judicial review should wait for a letter to be sent.

43. The note of the meeting and the contemporaneous emails suggest that the Applicant was indeed waiting for a written response.

44. Michael Poole's internal email of 11 May 2022 said:

> - Nigel and Simon in attendance, with Darren, James and I for UM. Darren delivered his presentation for about 15 to 20 minutes and we then discussed.

- They were both sympathetic as we expected, both stated there was very little in the presentation they would argue with.
- Nigel started the response stating the ExCo meeting was an odd and unusual one where he called a break for MLA's to form a position....
- …Simon noted he and Andrea was still working on formally writing to unity to close off the LOI and to inform us of the ExCo decision... [Emphasis added]

45. After that a number of chasing emails were sent by the Applicants to the Respondents asking when the letter would be available. It took 7 months for the letter to be sent, which is somewhat extraordinary as it is said to be identical to the oral reasons given on 29 March 2022. No explanation for the 7 month delay has been given.

46. In his Second Affidavit Mr Wallace said:

> "2.4 As stated at paragraph 41 of the AG Affidavit, the Falkland Islands Government agreed, having listened (through its Governor and Attorney General) to our detailed concerns about what had happened, to write to Unity Marine Limited about the decision taken by the Executive Council and outlined in the summary published on 30 March 2022 (see exhibit JW22). This was so that we could understand the details of the decision taken by Executive Council relating to salmon farming, any potential revisions to that decision in light of our concerns about it, and - in any event - the detailed reasons for what had been decided, and so that we would then be able to take appropriate action. I clearly recall that the Attorney General suggested that the Applicant should "wait" for the letter before assessing the next steps.
>
> 2.5 It was my understanding that, while the letter would inevitably be helpful in assessing any potential claim for compensation, the Applicant was being advised that it should wait for the letter in order to fundamentally understand the Executive Council decision, and the concluded position of the FIG overall."

47. In my judgment it was sensible and reasonable for the Applicant to wait for the promised reasons letter. It would be unjust to shut them out of a judicial review challenge, where no prejudice is alleged, because the Respondent took 7 months to write a promised reasons letter. It was reasonable to await that letter to finally determine if grounds for judicial review existed. I accordingly confirm the decision taken at the *ex parte* hearing to extend time.

Arguability

48. This court had previously held on the *ex parte* application that the grounds of review were arguable.

49. The Grounds 1 and 2 essentially cover the same ground in that it is alleged that legally inadequate reasons were given. Ground 3 alleges a procedural legitimate expectation that there would be a consultation and/or an adequate substantive analysis of the project, allowing a serious and objective exploration of the proposal, which would be completed by FIG before any final decision on the merits of the issue would be taken. Ground 4 argues that relevant considerations, material to the decision that needed to be taken into account were not. Ground 5 submits that Roger Spink MLA had a conflict of interest, which on its face was not disclosed, in that he was chairman of Falklands Conservation who are publicly against development of industrial salmon farming in the Falkland Islands.

50. The Respondents on this application submit these grounds are unarguable and leave should be set aside on that point. This was not the primary ground for set aside put forward by Mr Auburn KC. Suffice it to say at this stage the submissions and evidence put forward by the Respondents do not alter my view and I remain of the opinion the grounds are arguable.

51. In those circumstances, given that for the reasons set out above and below I am also not persuaded by the Respondents that the Applicant is out of time to bring judicial review proceedings or that any errors would make no substantial difference to the outcome, it would not be useful to expand upon the reasoning that the grounds remain arguable. To do so may give the appearance of pre-judgment and it suffices to say that although I have held the grounds are arguable, I am open minded as to whether or not they will eventtually succeed at the substantive hearing of the motion. That hearing will have the benefit of full evidence and any appropriate disclosure to inform the court's judgment.

No difference

52. Section 31 of the Senior Courts Act 1981 is set out at §23 above. A helpful guide to the correct approach to the test was recently set out by Linden J. in *R (ASLEF) v Secretary of State for Business and Trade* [2023] EWHC 1781 (Admin) at §193:

> (i) The burden of proof is on the defendant.
>
> (ii) The "highly likely" standard of proof sets a high hurdle. Although s31(2A) has lowered the threshold for refusal of relief where there has been unlawful conduct by a public authority below the previous strict test set out in authorities such as Simplex GE (Holdings) Ltd v Secretary of State for the Environment (1988) 57 P & CR 306, the threshold remains a high one…:
>
> …
>
> (x) The Court can, with due caution, take account of evidence as to how the decision-making process would have been approached if the identified errors had not occurred …although the court should approach with a degree of scepticism self-interested speculations by an official of the public authority which is found to have acted unlawfully about how things might have worked out if no unlawfulness had occurred…
>
> (xi) Importantly, the court must not cast itself in the role of the decision-maker…While much will depend on the particular facts of the case before the court, 'nevertheless the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law.': *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 at [273].

53. The AG, Mr Young makes the following points at §§45-46 of his affidavit:

    (1) The decision was made by Elected Members in pursuance of the electoral mandate they had very recently received from the electorate. "*Given that,*

there is little realistic possibility that the Elected Members will now reverse that decision, and go against the clear will of the electorate".

(2) That is more than conjecture or estimation. Mr Young has spoken to the Elected Members (who are small in number) and so speaks with direct knowledge when he says there is "*little realistic possibility*" of a change, "*because I have asked Elected members this very question. Their view is that this issue of whether to promote large-scale fish farming was before the electorate, and the electorate made its views clear. Thus it is very unlikely that, if required to retake the decision during this Parliament, Elected Members would reverse their policy decision*".

(3) The only remedies this Court could give are quashing decisions and directing the matter be decided again. "*Given the firm view of Elected Members, it is difficult to see how, even following a new decision, a different policy position would be arrived at. The issue is one for the electorate*".

54. Mr Pievsky KC makes the point that "The logic of the FIG respondents' position - which cannot be correct – appears to be that a decision to reverse an important policy directly involving and affecting the Claimant which is accompanied by no adequate reasons and which is infected by bias, is no longer sufficient in law to justify JR-leave being granted".

55. For a court to be satisfied that it is highly likely the outcome would not have been substantially different in this case is very difficult. If there had been a proper decision following a proper consultation it is nothing other than a form of speculation to now determine the result. There was no clear mandate as some candidates put forward positions that included seeking a decision only after further consultation. Even if there was a clear mandate it is only a relevant consideration not a dispositive consideration. To say otherwise is an unlawful fetter on the decision-making process.

56. An MLA who sees his role as akin to being a "mere delegate" of the electorate, is likely to be acting unlawfully as Stoker LJ said in *Regina v Waltham Forest London Borough Council, Ex parte Baxter and Others* [1988] QB 419 at p.428A-B.

57. I agree with Mr Pievsky KC who submits that a basic constitutional principle in a representative democracy is it is arguably unlawful for elected officials to treat their manifesto as requiring them to adopt a particular approach, or for their manifesto commitments to be given disproportionate or undue weight. The House of Lords so held in *Bromley LBC v GLC* [1983] 1 AC 768 per Lord Diplock at pp.830G-831A and Lord Brandon at p.853A who said:

> "The first reason is that, if and in so far as they exercised their discretion at all, they considered themselves bound to exercise it in the way they did because they had promised to do so in their election manifesto. It is, of course, entirely appropriate for a council, the majority of whose members have been elected after setting out a particular policy in their election manifesto, to take into account, and give considerable weight to, that circumstance when exercising their discretion in relation to that policy after they have been elected and come to power. It is, however, entirely wrong for such a majority to regard themselves as bound to exercise their discretion in relation to that policy in accordance with their election promises, whatever the cost and other countervailing considerations may turn out to be." [Emphasis added]

58. It follows I cannot say that the outcome for the Applicant, if the alleged errors of law were to be made out, would not have been substantially different.

59. Accordingly, the application to set aside the grant of leave is dismissed.