



**In the High Court of Justice
Queen's Bench Division
Planning Court**

CO/2428/2021

In the matter of an application for judicial review

THE QUEEN

on the application of

WILD JUSTICE

Claimant

-and-

**SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL
AFFAIRS and others**

Defendant

**Notification of the Judge's decision on the application for permission to
apply for judicial review (CPR 54.11, 54.12)**

Following consideration of the documents lodged by the Claimant and the Acknowledgements of Service filed by the Defendant and Interested Parties

ORDER by the Honourable Mr Justice Dove

1. The application for permission to apply for judicial review is refused.
2. This claim is categorised as a significant planning claim for the purposes of Practice Direction 54E.
3. The claim is an Aarhus claim and the amount of costs recoverable from the Claimant shall be capped in the sum of £10,000 and the amount of costs that the Claimant shall in aggregate recover from the Defendant and any other party shall be capped in the sum of £35,000.
4. The costs of preparing the Acknowledgement of Service are to be paid by the Claimant to the Defendant, summarily assessed in the sum of £8,900.00 and by the Claimant to the Interested Party summarily assessed in the sum of £1,100.00.
5. Paragraph 4 above is a final costs order unless within 14 days of the date of this Order the Claimant files with the Court and serves on the Defendant and/or Interested Party a notice of objection setting out the reasons why he should not be required to pay costs (either as required by the costs order, or at all). If the Claimant files and serves notice of objection, the Defendant and/or Interested Party may, within 14 days of the date it is served, file and serve submissions in response. The Claimant may, within 7 days of the date on which the Defendant and/or Interested Party's response is served, file and serve submissions in reply.

6. The directions at paragraph 5 apply whether or not the Claimant seeks reconsideration of the decision to refuse permission to apply for judicial review.
 - (a) If an application for reconsideration is made, the Judge who hears that application will consider the written representations filed pursuant to paragraph 4 above together with such further oral submissions as may be permitted, and decide what costs order if any, should be made.
 - (b) If no application for reconsideration is made or if an application is made but withdrawn, the written representations filed pursuant to paragraph 4 above will be referred to a Judge and what order for costs if any, should be made will be decided without further hearing.

Reasons

1. For convenience where there is reference below to the Interested Party this is a reference to the Second to Fifth Interested Parties who have been joined to the claim.
2. In Ground 1 the Claimant contends that in the absence of a map of the areas of land which are protected by the Heather and Grass etc Burning (England) Regulations 2021 (“the Burning Regulations”) they cannot be enforced and therefore will not achieve their objectives. I do not accept that it is arguable that without a map the Burning Regulations cannot be enforced. The definitions contained within Regulations 2 and 3 of the Burning Regulations clearly specify the characteristics of areas protected from burning without a licence so as to enable it to be known when a licence is required. These parameters are identifiable without the need for the production of a document mapping the land concerned. I do not consider that Ground 1 is properly arguable.
3. The contention in Ground 2 is that there is a legal error in the reasoning leading to the making of the Burning Regulations, in particular in relation to the choice of the locational and depth limitations adopted to identify areas of land which are protected by them. The first point to observe is that the selection of the areas for protection was a matter for the Defendant in drawing up the Burning Regulations, and the purpose of the Regulations clearly identifies that they are designed to prevent further damage to a specific area of protected blanket bog. The Defendant could have chosen to identify a wider area, but it is not arguable that in not doing so he acted irrationally. The purpose of the Burning Regulations to protect c.142,000 ha within designated sites is clearly capable of being a rational focus or purpose for them in both legal and scientific terms. The Claimant contends that there may be burning of blanket bog within SSSI’s but outside SACs or SPAs which could have adverse effects upon areas of blanket bog within SACs and SPAs. This is disputed by the Defendant, and it is contended that there is no evidence to support the Claimant’s contentions. This is the kind of dispute which the court in judicial review is ill-equipped to resolve, and where on the authorities (see *Mott*) an enhanced margin of appreciation has to be afforded to the decision-maker. I am

unconvinced that this point is arguable. Similar considerations arise in relation to the Claimant's arguments in relation to the adoption of the 40cm depth criterion in the Burning Regulations. The Claimant disputes that this parameter is appropriate; the Defendant points to public sources from regulators and the Wildlife Trusts as part of the justification for the selection of this depth. Bearing in mind the margin of appreciation to be afforded to the decision-maker in evaluating these technical questions I do not consider that the Claimant's complaints are legally arguable.

4. Ground 3 raises similar points related to the selection of the 40cm depth to Ground 2, but in the context of the requirements of the Habitats Regulations. For the reasons set out in relation to Ground 2 I do not consider that these points are arguable.
5. Ground 4 is the submission that in making the Burning Regulations the Defendant failed to have regard to material considerations related to climate change, and in particular the advice of the Committee on Climate Change and the need for urgency in respect of action on climate change. In relation to this issue it is clear that the relationship between the Burning Regulations and action in relation to climate change was acknowledged in paragraph 7.2 of the Explanatory Memorandum. As the Defendant points out, whilst the CCC in their report in June 2021 recommended that the Burning Regulations be extended, this advice emerged after the Burning Regulations were made and will have to be considered as part of the Defendant's response to this recent CCC report. It does not provide an arguable basis on which to contend that the Burning Regulations when they were made failed to have regard to climate change and the associated need to take action.
6. It follows that permission to apply for judicial review must be refused. In the light of this I have, subject to summary assessment, awarded the Defendant, as decision-maker, the costs of preparing their acknowledgement of service. This is a claim to which the Aarhus costs cap applies, and therefore the costs to be awarded to the Interested Party is necessarily limited by the need to observe the cap.

Signed Ian Dove

Dated 6th October 2021

The date of service of this order is calculated from the date in the section below

For completion by the Administrative Court Office

Sent / Handed to

either the Claimant, and the Defendant [and the Interested Party]
or the Claimant's, and the Defendant's [and the Interested Party's] solicitors

Date: 15/10/2021

Solicitors: LEIGH DAY SOLICITORS
Ref No: TGY/CNH/00191552/15

Notes for the Claimant

If you request the decision to be reconsidered at a hearing in open court under CPR 54.12, you must complete and serve the enclosed Form 86B within 7 days of the service of this order.

A fee is payable on submission of Form 86B. **For details of the current fee please refer to the Administrative Court fees table at <https://www.gov.uk/court-fees-what-they-are>.**

Failure to pay the fee or submit a certified application for fee remission may result in the claim being struck out.

The form to make an application for remission of a court fee can be obtained from the gov.uk website at <https://www.gov.uk/get-help-with-court-fees>