Neutral Citation Number: [2024] EWCA Civ 168

CA-2023-001199

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT IN WALES
THE HONOURABLE MRS JUSTICE STEYN DBE
[2023] EWHC 1194 (Admin)

Cardiff Civil Justice Centre
Cardiff

Date: 23 February 2024

Before:

SIR KEITH LINDBLOM (SENIOR PRESIDENT OF TRIBUNALS)
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE LEWIS

- -

Between:

THE KING (on the application of COAL ACTION NETWORK)	**Appellant**
- and -	
(1) WELSH MINISTERS **(2) COAL AUTHORITY** **(3) ENERGYBUILD MINING LIMITED**	**Respondent**

- -
- -

Estelle Dehon KC and Asitha Ranatunga (instructed by **Richard Buxton Solicitors**) for the **Appellant**
Gregory Jones KC (instructed by **Welsh Government Legal Services**) for the **First Respondent**
The **Second** and **Third Respondents** did not appear and were not represented.

Hearing date: 6 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 23 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. This appeal concerns the proper interpretation of section 26A of the Coal Industry Act 1994 ("the 1994 Act"). That Act prohibits a person from carrying out coal-mining operations except under a licence granted by the Coal Authority. A licence may authorise the carrying on of coal-mining operations but provide that that authorisation shall not come into force until certain conditions are met. Section 26A of the 1994 Act came into force on 1 April 2018. It provides that a licence shall only take effect if the Welsh Ministers approve the authorisation of coal-mining operations. The question that arises in this case is whether the need to obtain the approval of the Welsh Ministers applies when a licence had been granted before the coming into force of section 26A of the 1994 Act but where the authorisation of the coal-mining operations did not come into force until certain specified conditions were met and that occurred after section 26A came into force.

2. In the present case, the third respondent, Energybuild Mining Ltd. ("Energybuild") held a licence granted by the second respondent, the Coal Authority, in 1996 and which was subsequently varied in 2013 in respect of an area of land at Aberpergwm in the Vale of Neath in South Wales. The authorisation contained in the licence did not come into force until certain conditions were met. On 16 September 2020, Energybuild made an application in effect for a determination that the conditions had been met. The question arose as to whether the Welsh Ministers had to approve the authorisation pursuant to section 26A of the 1994 Act. By a decision dated 7 February 2022, the Welsh Ministers decided that section 26A did not apply and they were not required to approve the authorisation as the licence had been granted before 1 April 2018. By order dated 19 May 2023, Steyn J. ("the judge") dismissed a claim for judicial review of that decision.

3. The appellant, Coal Action Network ("Coal Action"), appealed against that order. It submitted that the judge was right to regard the authorisation of the coal-mining operations as separate from the licence and to conclude that the language of section 26A of the 1994 Act favoured an interpretation whereby an authorisation which did not take effect until after the section came into force required the approval of the Welsh Ministers. The appellant submitted, however, that the judge was wrong to conclude that the presumption against legislation operating retrospectively applied in such cases or, alternatively, in concluding that there was such unfairness in the operation of the legislation as justified interpreting section 26A as not applying to such situations. Further, Coal Action submitted that the judge was wrong to regard an authorisation as a possession within the meaning of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and treating that as a factor favouring a more restrictive interpretation of section 26A. Alternatively, the judge erred in failing to consider whether section 26A involved only a control of use of possessions, not a deprivation, and whether any such control was justified as it was a proportionate means of achieving a legitimate aim. The Welsh Ministers submitted that the judge was correct to dismiss the claim for judicial review.

4. Logically, the first question is whether section 26A of the 1994 Act, properly interpreted, applies to situations where a licence was granted before 1 April 2018 but

the authorisation of the works only came into force after that date. If section 26A does not apply to such situations, then the question of whether the legislation, if it were interpreted in that way, was retrospective or interfered with rights guaranteed by Article 1 of the First Protocol to the Convention does not arise. Only if the legislation, interpreted in accordance with the usual principles of statutory interpretation, appeared to have that result would it be necessary to consider questions of retrospectivity and compatibility with Article 1 of the First Protocol to the Convention.

THE LEGISLATIVE FRAMEWORK

5. The 1994 Act provides a comprehensive statutory scheme for the licensing and management of coal-mining operations in the United Kingdom. Section 1 establishes a body corporate known as the Coal Authority and referred to in the Act as the "Authority". Its functions include "carrying out functions with respect to the licensing of coal-mining operations (section 1(1)(b) of the 1994 Act). Sections 2 to 4 set out duties on the Coal Authority. Part II deals with the licensing of coal-mining operations.

6. Section 25 of the 1994 Act requires coal-mining operations to be licensed. Section 25(1) provides that:

> "**25. Coal-mining operations to be licensed.**
>
> (1) Subject to subsection (3) below, coal-mining operations to which this section applies shall not, at any time on or after the restructuring date, be carried on by any person except under and in accordance with a licence under this Part."

7. Section 26 of the 1994 Act deals with the grant of licences. The body responsible for granting licences is the Coal Authority (referred to in the 1994 Act as the Authority) subject to one exception, contained in section 26(6), which is not material to this appeal. Section 26(1) provides that:

> "**26. Grant of Licences**
>
> (1) Subject to subsection (6) below, it shall be the Authority which shall have the power to grant a licence under this Part."

8. Section 26A was inserted into the 1994 Act, with effect from 1 April 2018, by section 67 of the Wales Act 2017 ("the 2017 Act"). Section 26A provides:

> "**26A. Licences for coal-mining operations in Wales: approval by Welsh Ministers.**
>
> (1) If or to the extent that a licence under this Part authorises coal-mining operations in relation to coal in Wales, it shall have effect only if the Welsh Ministers notify the Authority that they approve the authorisation.

(2) In this section *"Wales"* has the meaning given in section 158(1) of the Government of Wales Act 2006."

9. Section 27 of the 1994 Act deals with the authorisation of coal-mining operations. It provides:

"**27. Authorisation contained in licence.**

(1) The provisions of a licence under this Part shall specify or describe the coal-mining operations which, subject to its conditions, are authorised by the licence.

(2) The provisions included in a licence in pursuance of subsection (1) above—

(a) shall identify the area of Great Britain, of the territorial sea adjacent to Great Britain or of the continental shelf where the operations are to be carried on; and

(b) may restrict the authorisation contained in the licence to operations carried on within such period as may be specified in the licence or as may be determined in a manner so specified;

and provision made by virtue of paragraph (a) above may include restrictions as to the depth at which any operations are to be carried on.

(3) Without prejudice to the generality of subsection (2)(b) above, a licence under this Part may provide—

(a) for the coming into force of the authorisation contained in the licence, or of any conditions or other provisions of the licence, to be postponed until after the acquisition by the holder of the licence of any interest or right in or in relation to any land or other property or until after such other requirements as may be specified or described in the licence have been satisfied; and

(b) for the licence to lapse if the interest or right is not acquired, or the other requirements are not satisfied, within such period as may be so specified.

(4) Without prejudice to subsection (5) below, the persons who, so long as the authorisation remains in force, are authorised to carry on the operations to which a licence under this Part relates are the holder of the licence and such other persons as may be authorised by the licence or, without any contravention of the conditions of the licence, by the holder of the licence to carry on those operations on his behalf.

(5) A licence under this Part may contain provision which, in such cases, in such manner and subject to such conditions or consents as may be specified in or required by the provisions of the licence, authorises the transfer of any person's rights and obligations as holder of the licence to another person.

(6) Without prejudice to any provision made by virtue of section 28(7) below, the conditions and other provisions of a licence under this Part may be modified by the Authority with the agreement of the holder of the licence.

10. Section 28 of the 1994 Act deals with the conditions of a licence. It provides:

"**28. Conditions of licence: general.**

(1) A licence under this Part may include such conditions as the Authority, subject to its having regard to its duties under sections 2 to 4 above and to the following provisions of this Act, may think fit.

(2) The conditions that may be included in a licence under this Part with respect to the carrying on of the coal-mining operations authorised by the licence shall include conditions having effect in relation to the carrying on, in association with those operations, of—

(a) coal-mining operations for which no authorisation is required by virtue of this Act;

(b) coal-mining operations the authorisation for which is contained in another licence under this Part or is conferred by virtue of section 25(3) above; or

(c) any activities carried on for purposes connected with any coal-mining operations to which the conditions relate.

(3) Conditions included in a licence under this Part may contain provision requiring the holder of the licence to render to the Authority either or both of the following in respect of the exercise of its functions in connection with, or in consequence of, the grant of the licence, that is to say—

(a) payments on the grant or coming into force of the licence of such amount as may be determined by or under the conditions; and

(b) payments, at times while the licence is in force for any of the purposes of this Act, of such amounts as may be so determined.

(4) Conditions included in a licence under this Part may contain provision requiring the holder of the licence to secure that—

(a) agreements for such purposes as may be specified in the conditions are entered into between the holder of the licence and such other persons as may be specified or described in the licence; and

(b) that the terms of those agreements satisfy such requirements as may be so specified or described.

(5) Conditions included in a licence under this Part may contain provision requiring the holder of the licence to comply with any direction given by the Authority as to such matters as are specified in the licence or are of a description so specified.

(6) Conditions included in a licence under this Part may contain provision for disputes between the Authority and the holder of the licence as to any matter to which the licence relates to be referred to the determination of such person or persons as may be specified in, or appointed in accordance with, the conditions; and any dispute to which any such provision applies shall be determined accordingly.

(7) Conditions included in a licence under this Part may contain provision for any of the following, that is to say—

(a) the authorisation contained in the licence, and

(b) any of the conditions of the licence, apart from any included by virtue of this subsection,

to cease to have effect, or to be revoked or otherwise modified, at such times, in such manner and in such circumstances as may be specified in or determined under the conditions.

(8) Conditions included in a licence under this Part may provide for—

(a) obligations imposed on any person by the conditions of the licence, and

(b) liabilities arising in respect of contraventions by any person of the conditions so included,

to continue in accordance with the provisions of that licence, and to be capable of arising, after the authorisation contained in the licence has been revoked or is otherwise no longer in force or, where they have already arisen, to continue after the rights and obligations of the holder of the licence have been transferred to another person.

(9) Subsections (2) to (8) above and section 29 below shall be without prejudice to the generality of subsection (1) above.

11. For completeness, paragraph 6 of Schedule 7 to the 2017 Act provides:

> "(1) Nothing in a provision of this Act affects the validity of anything done by or in relation to a Minister of the Crown or other public authority before the provision comes into force.
>
> (2) Anything (including legal proceedings) that is in the process of being done by or in relation to a Minister of the Crown or other public authority at the time when a provision of this Act comes into force may, so far as it relates to a function transferred to the Welsh Ministers by virtue of that provision, be continued by or in relation to the Welsh Ministers."

THE FACTUAL BACKGROUND

12. On 29 March 1996, the Coal Authority granted a licence under Part II of the 1994 Act to a company called Signalfirm Ltd ("the licence"). Clause 1 set out various definitions, including a definition of "licensed area" and a definition of "maximum licensed area". Clause 2 dealt with interpretation. Clause 3.1 was in the following terms:

> "3. PERMISSION TO CARRY OUT COAL-MINING OPERATIONS
>
> 3.1 The Authority, in exercise of the powers conferred on it by Part II of the 1994 Act and subject to the terms of this Licence, permits the Operator for the period of 99 years beginning and on the first date on which licence become unconditional in whole or in part in accordance with clause 17.1 to carry out Coal Mining Operations within the Licensed Area subject to and upon the restrictions and conditions mentioned in the Third Schedule (but limited to underground methods and any operations ancillary thereto)."

13. Clause 27 provides:

"27. CONDITIONALITY

> "27.1 Subject to Clauses 27.2 and 27.3 this Licence (apart from Clauses 1, 2, 9, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26 and this Clause 27) shall not take effect in relation to any part of the Maximum Licensed Area, unless and until such time as all the conditions mentioned in Part I and Part II of the Fourth Schedule shall in relation to such part and in the reasonable opinion of the Authority have been fulfilled.
>
> 27.2 If all the conditions mentioned in Part 1 of the Fourth Schedule have not been fulfilled by 1.30 p.m. on the date specified in Part III of the Fourth Schedule this Licence shall thenceforth cease to have any further effect in respect of that part, (save any right or remedy of the Authority granted against

> the Operator for any antecedent breach of the terms of this Licence).
>
> 27.3 If the provisions of this Licence (apart from those referred to in Clause 27.1) have not taken effect in relation to part (including the whole) of the Maximum Licensed Area by 1.30 p m on the date specified in Part IV of the Fourth Schedule this Licence shall thenceforth cease to have any further effect in respect of that part, (save for any right or remedy of the Authority against the Operator for any antecedent breach of the terms of this Licence.)"

14. The fourth schedule set out various conditions.

15. On 7 January 1997, the Coal Authority determined that the conditions in the licence had been satisfied for part of the maximum licensed area with the effect that coal-mining operations could be carried out in that part of the area.

16. The licence was varied by a supplemental agreement in 2013 ("the supplemental agreement"). We were provided with an unsigned copy of that agreement which we were told was the relevant agreement, no signed copy being available. Clauses 1 and part 1 of schedule 1 of the supplemental agreement defines the "licensed area". Clause 3 and schedules 1 and 2 of the supplement agreement describe the "maximum licensed area". The licensed area includes certain roads and "the part or parts (if any) of the Maximum Licensed Area in respect of which the provisions of this Licence are fully in effect in accordance with Clause 27". The maximum licensed area was extended to include an area of 1,460 hectares. Clause 3.1.5 substitutes a new schedule 4 containing conditions. Schedule 4 provides that the conditions are to be satisfied no later than 31 December 2020. The conditions included a requirement to obtain planning permission, and all other rights and permissions necessary to carry out coal-mining operations in the maximum licensed area. Schedule 4 as varied provides so far as material that:

> "**Part 1**
>
> **Date by which Conditions Precedent are to be satisfied**
>
> 1. The Conditions Precedent are to be satisfied no later than 31 December 2020…..
>
> **Part 2**
>
> **Conditions Precedent**
>
> 1. The Licensee has served a valid notice pursuant to the Option Agreement in relation to the relevant part of the Maximum Licensed Area so as to entitle the Licensee, subject to the provisions of paragraph 3.2 of the Third Schedule to the Option Agreement, to be granted a lease of the Coal in the relevant part of the Maximum Licensed Area.

2. The Planning Condition Precedent as described in Paragraph 2.3 of Schedule 2 to the Option Agreement has been satisfied.

3. The Licensee has secured all other rights and permissions necessary to carry out Coal-Mining Operations in the relevant parts of the Maximum Licensed Area.

4. The Licensee has supplied all information requested by the Authority for the purpose of the performance of its duties under sections 2(1)(b) and 2(2)(a) of the 1994 Act .

5. The Licensee has become a party to the Interaction Agreement.

6. Where:

(a) all the above Conditions Precedent are fulfilled in respect of the relevant part of the Maximum Licensed Area; and

(b) the Authority has not, within one calendar month of receipt of the Licensee's notice pursuant to paragraph 4.1 of the Option Agreement, notified the Licensee that:

(i) it requires further information to be supplied for the purpose aforesaid, or

(ii) it has decided, in the performance of its duties under sections 2(1)(b) and 2(2)(a) of the 1994 Act, that the Licence should not become unconditional in relation to such parts of the Maximum Licensed Area; and

(c) the Licensee has given notice to the Authority referring to this Condition 6;

this Condition 6 shall be construed as if the Licensee had at the expiry of the said period of one calendar month served the Licensee with a notice that the Licence had become unconditional in relation to such part."

17. On 27 November 2018 planning permission was granted by the local planning authority. Although the licence expired on 7 January 2096, the planning permission states that coal mining must cease no later than 31 December 2039.

18. On 16 September 2020, Energybuild (the successor to the original licensee) made an application to the Coal Authority. The application was made on a form headed "Application for an Underground Mining Operating Licence". The form described the type of application as an application to "de-conditionalise existing conditional licence" rather than a new operating licence or a variation to an existing operating licence. The application related to 1,131 hectares of the 1,460 hectares by which the

maximum licensed area had been extended by the 2013 supplemental agreement. Energybuild confirmed that they had no interest in carrying out coal-mining operations in the remaining 329 hectares.

19. There was correspondence between the Coal Authority and the Welsh Ministers between 26 May 2021 and 24 August 2021 on the question of whether the Welsh Ministers were required to approve the authorisation of the works. On 11 October 2021, the Coal Authority wrote to the Welsh Government indicating that it had completed its determination on the application. It indicated that it had determined that the operator had met the relevant criteria and what was called a full licence would be granted. The letter indicated that the Coal Authority wished to have clarity on the position of the Welsh Government and indicated its view that the Welsh Ministers could make a determination under section 26A of the 1994 Act.

20. The legal documentation that the Coal Authority proposed to issue consists of, it seems, the following. First, it will issue a notice to the operator that the licence has become unconditional. Secondly, it proposed to issue a supplemental agreement. That would vary clause 3.1 of the licence to reduce the operating period so that it would end on 31 December 2039 (reflecting the terms of the planning permission) rather than a period of 99 years from the date on which the licence became unconditional, and for a variation in schedule 2 which would, in effect, remove 329 hectares from the definition of the maximum licensed area (to reflect the fact that Energybuild was no longer interested in carrying out coal-mining operations in that area). Thirdly, a deed of variation supplemental to an underground lease would also be entered into. Consequently, the proposed documentation would reduce the area in which coal-mining operations were authorised and those operations would be authorised for a shorter period than originally envisaged by the licence. The arrangements did not extend the area, or the period, in which coal-mining operations were authorised.

21. On 27 October 2021, advice was given to Welsh Ministers to the effect that section 26A applied to "operations under new licences and to variations to existing licences where the degree of authorisation for mining operation changes (i.e. if the licence authorises new coal extraction)". The recommendation made included a recommendation that officials write to the Coal Authority stating that it would not be appropriate for the Welsh Ministers to give an opinion on this application. That recommendation was accepted by the Minister on 28 October 2021. There was correspondence between the Welsh Government and the United Kingdom Government on whether section 26A of the 1994 Act achieved the policy aims of the United Kingdom and Welsh Governments.

22. By letter dated 7 January 2022, although sent, it seems on 10 January 2022, the Welsh Ministers conveyed their decision that they did not have functions under section 26A in relation to this application. The letter said:

> "The Welsh Government considers that section 26A of the Coal Industry Act 1994 is triggered if the Coal Authority issues, on or after the date section 26A came into force (i e 1 April 2018), a licence authorising mining in relation to coal in Wales. The 1996 Aberpergwm licence (as amended by the deed of variation in 2013) granted the authorisation for certain coal mining operations, but suspended the effect of the authorisation

> until certain condition precedents had been discharged. The application to de-condition the Aberpergwm licence seeks to give effect to the authorisation already granted by the Coal Authority in 1996 (and varied in 2013). The Welsh Ministers' function under section 26A only applies to new or extended licences (such as where the degree of authorisation for mining operations changes to allow new coal extraction), and does not therefore allow Welsh Ministers to refuse or approve a licence in these circumstances. Therefore, the Welsh Ministers will not be making a determination in this case. Officials have also written to Energybuild formally confirming this position."

23. On 25 January 2022, the Coal Authority approved Energybuild's application.

THE JUDGMENT BELOW

24. The appellant was granted permission to apply for judicial review of the decision of the Welsh Ministers dated 7 January 2022. The judge, however, dismissed the claim and held that section 26A did not apply to the situation in the present case.

25. The judge considered that the phrases "licence" and "authorisation" when used in the 1994 Act had different meanings. At paragraphs 85 and 86, the judge said this:

> "85. The power given to the Welsh Ministers by section 26A is to approve (or not) an authorisation of coal-mining operations in relation to coal in Wales which is contained in a Part II licence. Unless and until the Welsh Ministers notify the Coal Authority that they approve the authorisation, it has no effect. This effectively defers the coming into force of the authorisation until such time, if ever, as the Welsh Ministers' approval is given.
>
> 86. It is implicit in the words "it shall have effect only if" that the power does not apply to an authorisation which already had effect before section 26A was brought into force on 1 April 2018. Section 26A falls to be construed in a way that, to that extent at least, does not have retrospective effect. Moreover, if that were not plain on the face of section 26A, it is also clear that paragraph 6(1) of Schedule 7 to the Wales Act 2017 would prevent section 26A operating in a way which rendered ineffective an authorisation that was in force before that provision came into force. The Welsh Ministers' contention that the logic of the claimant's argument is that they would have the power to revoke *any* authorisation no matter how long ago it was granted does not stand up to scrutiny. On any view, an authorisation which was in force before 1 April 2018 (such as that contained in the Licence in respect of the 1,312 hectare area) did not cease to have effect that day, pending the approval of the Welsh Ministers".

26. The judge then identified the key issue at paragraph 88 in the following terms:

> "88. In ascertaining the meaning, the central question is whether the words "authorises coal-mining operations" encompass an authorisation which has not come into force, having been "postponed" pursuant to conditions imposed in accordance with section 27(3) which have not yet been satisfied. On balance, I am of the view that the *language* of the provision favours the claimant's interpretation." (Emphasis in the original).

27. The judge identified three points as to which the language, in her judgment, supported the interpretation favoured by the appellant, noted that the issue was not clear-cut and then identified two further factors that, in her view, supported the appellant's interpretation of section 26A. Those matters are referred to in paragraphs 89 to 94 where the judge said this:

> "89. First, a postponed authorisation does not in fact permit the licensee to undertake any coal-mining operations. It would be natural to interpret the words "authorises coal-mining operations", and the term "authorisation" in section 26A, as referring only to those authorisations which are in force and, subject to the Welsh Ministers' approval, which currently authorise coal-mining operations. Moreover, I agree with the claimant's submissions as summarised in paras 57–58 and 60 above.
>
> 90. Secondly, it would be natural to infer that the words "it shall have effect only if" mean that upon the Welsh Ministers notifying their approval, the authorisation takes effect. But if section 26A encompasses postponed authorisations then the Welsh Ministers could approve a postponed authorisation before any of the conditions have been satisfied; and so it would continue not to be in force until such time as the Coal Authority gives notice that the conditions are satisfied.
>
> 91. Thirdly, a related point is that if the Welsh Ministers were to approve a postponed authorisation, the effect may be that many years later, at the point when the conditions are satisfied and coal-mining operations are set to begin for the first time, the Welsh Ministers who are then in post would have no power to prevent such operations. As a matter of policy, the Coal Authority normally specifies a maximum of eight years for conditions to be satisfied, but nothing in the 1994 Act prevents the period being much longer.
>
> 92. However, this interpretation is not clear-cut. The language of section 27(3)(a) uses the term "the authorisation contained in the licence" to describe a postponed authorisation. This provides some support for the Welsh Ministers' interpretation of the term "authorisation" in section 26A as wide enough to include a postponed authorisation. I note that section 27(1) uses the present tense when referring to coal-mining operations

> which "are authorised", subject to conditions; and I accept that provision clearly applies to a licence which contains a postponed authorisation. However, it does not seem to me that undermines the point made in para 89 above, given the express words "subject to its conditions" which find no likeness in section 26A.
>
> 93. In my view, there are two further factors that provide some support for the claimant's interpretation. First, the purpose of section 26A was to strengthen the powers of the devolved government of Wales. Although, on any interpretation, it does so, the claimant's interpretation gives the Welsh Ministers power to address whether coal-mining operations which have not yet begun should be permitted. Whereas, on the Welsh Ministers' interpretation, in the circumstances of this case they are left asking the UK Government to exercise its powers to intervene in Wales.
>
> 94. Secondly, section 26A was enacted against the background of national and international recognition of the vital importance of urgent efforts to combat climate change. It may be thought surprising if, in this context, Parliament had intended that the Welsh Government should have no power to determine whether, in a case such as this one, coal-mining operations that have not yet been permitted, should be allowed to begin and continue for nearly two decades. An interpretation that empowers the Welsh Government in the present is, in my view, more consistent with the context in which section 26A was brought into force."

28. The judge considered however that:

> "95. Pulling strongly in the opposite direction, however, is the fact that interpreting section 26A as applying in a case such as this, where the licence containing the postponed authorisation was granted before section 26A came into force, gives the provision a degree of retrospective force."

29. The judge accepted that where a licence was granted subject to condition precedents, ordinarily the licence holder is entitled to expect that if it satisfies the conditions, the licence will take effect. She accepted that the lack of approval did not result in the revocation of the licence but operated by preventing the authorisation from having effect. Nevertheless, the judge considered that it was unrealistic to take the view that section 26A had no retrospective effect. The judge concluded that:

> "100. As the passage from *Bennion* cited above indicates, retrospectivity is a question of degree. The claimant's interpretation is not retrospective to a degree that would be caught by paragraph 6 of Schedule 7 to the Wales Act 2017. But as stated in the passage from *Craies* cited by the Welsh Ministers (see para 76 above), the instant case can be seen to be

> an example of a statute which, on the claimant's interpretation, "attaches a new disability in respect to transactions or considerations already past". On the claimant's interpretation, the law is changed for the future in relation to existing rights. Although Energybuild's authorisation was postponed, and so not in force, when section 26A came into effect, the licence was undoubtedly a valuable commercial asset. If section 26A applies in this case, the prospect of the authorisation being available to use to extract and sell coal will inevitably markedly reduce, if not disappear, and with it the value of the licence is bound to diminish greatly, if not vanish: the licensee would effectively be deprived of a valuable asset. I agree with the Welsh Minister's submissions as summarised in paras 76–78 above.
>
> 101. Given that the language of section 26A is reasonably open to both interpretations, the unfairness of the retrospective effect of the claimant's interpretation that I have identified—in the absence of any scheme for, or even consideration of, compensation or appeal—renders it highly unlikely to be the effect Parliament intended. In my view, the likelihood is that the applicability, or otherwise, of section 26A to *suspended* authorisations was not considered when the Wales Act 2017 was enacted. In these circumstances, the presumption against retrospectivity prevails."

30. The judge referred to accepting the submissions made on behalf of the Welsh Ministers set out at paragraphs 76 to 78. The bulk of those submissions relate to the operation of the presumption against retrospectivity as part of the principles of statutory interpretation forming part of the law of England and Wales. The last part of paragraph 78 also refers to the need when ensuring fairness to have regard "to the nature of the authorisation as a possession for the purposes of Article 1 of the First Protocol" to the Convention "which should not be revoked without compensation or a right of appeal".

31. For completeness, the appellant also sought judicial review of the decision of the Coal Authority to approve Engergybuild's application. The judge dismissed the claim for judicial review of that decision and permission to appeal to this Court against that decision of the judge was refused.

THE GROUNDS OF APPEAL

32. There are three grounds of appeal. All three grounds of appeal proceed on the assumption that the judge was correct to conclude that the language of section 26A of the 1994 Act favoured the interpretation advanced by the appellant's i.e that section 26A required the approval of an authorisation which had not come into effect before 1 April 2018 because the relevant conditions had not been met. The grounds therefore address the question of the presumption against retrospectivity and the scope of the rights under Article 1 of the First Protocol to the Convention. The grounds are as follows:

> "(1) The judge erred in law in finding that the [appellant's] interpretation is not retrospective to a degree that would be caught by paragraph 6 of Schedule 7 to the Wales Act 2017, but was nonetheless retrospective because it attached a new disability to existing rights:"
>
> (2) The judge erred in law when treating a coal mining licence, with an authorisation which was not in effect, as a possession within the meaning of Article 1 of Protocol 1 [to the Convention] ("A1P1").
>
> (3) In the alternative, the Judge erred in law in:
>
> > (i) assuming when considering the degree of unfairness that there would necessarily be a deprivation and, if there were, that the deprivation would necessarily be unfair; and
> >
> > (ii) failing to address proportionality when considering potential application of A1P1 and/or the need to strike a balance when applying the common law principle of fairness to statutory provisions with potential retrospective effect."

33. As indicated at paragraph 4 above, the logical first question is whether section 26A of the 1994 Act, properly interpreted, applies to situations where a licence was granted before 1 April 2018, but the authorisation of the works only came into force after that date. Only if that question is answered in the affirmative is it necessary to consider giving section 26A a different meaning because of the presumption against retrospective effect, or because the interpretation of section 26A in accordance with the usual principles of statutory interpretation would lead to a breach of a person's rights under Article 1 of the First Protocol such that the court is required by section 3 of the Human Rights Act 1998 to interpret section 26A so far as possible in a way which is compatible with Convention rights. It is sensible therefore to consider that issue first.

THE FIRST ISSUE – THE PROPER INTERPRETATION OF SECTION 26A OF THE 1994 ACT

Submissions

34. Ms Dehon KC, with Mr Ranatunga, for the appellant, submitted that the authorisation was different from the licence. Two different words were used in the 1994 Act and the presumption was that Parliament used different words to mean different things. It was the authorisation which permitted the carrying out of coal-mining operations. The authorisation, however, was postponed (not suspended) until the conditions were met. The authorisation did not have effect until that date. Other obligations in the licence had effect. But so far as the authorisation was concerned, the most that existed prior to the conditions being met was a description of the coal-mining operations that might be authorised at a later date. In this case, the conditions were met and the authorisation had effect after the coming into force of section 26A on 1 April 2018. Section 26A therefore applied and the approval of the Welsh Ministers for the authorisation was required. Ms Dehon further submitted that the way in which the

process of what she described as "deconditionalising" the licence (i.e. the meeting of the conditions) was achieved was by a variation of the licence. That variation took place after 1 April 2018 and section 26A applied to the variation. Ms Dehon relied on the reasons given by the judge at paragraphs 89 to 91 of her judgment. She said that she relied heavily on the two matters referred to by the judge at paragraphs 93 and 94, that is the purpose of the 2017 Act being to strengthen the powers of the devolved government in Wales and the background of national and internal recognition of the importance of urgent efforts to combat climate change.

35. Mr Jones KC for the Welsh Ministers submitted that the question in this case was a simple one of statutory interpretation. Coal mining-operations had to be licensed by reason of section 25 of the 1994 Act. The licence had to specify the coal-mining operations that were authorised and could include conditions. When a licence is granted authorising coal-mining operations, that is when the authorisation comes into existence although it may be subject to restrictions. The authorisation was granted, however, when the licence was granted. In this case, the licence had been granted in 1996 (and varied in 2013) and it had come into existence, and had effect before 1 April 2018. Section 26A only applied to new licences, i.e. ones that would come into existence after 1 April 2018. Mr Jones confirmed that if changes were made to extend the area within which coal-mining operations could be carried out or to extend the length of time for which coal-mining operations were extracted, section 26A would apply to those changes and they would require approval by the Welsh Ministers.

Discussion and Conclusion

36. The first issue in this case concerns the proper interpretation of section 26A of the 1994 Act which, in turn, involves considering the words of the statutory provision, read in its statutory context and having regard to the purpose underlying the statute, and bearing in mind any legitimate aids to statutory interpretation. Here, section 26A needs to be read in the context of the wider group of sections comprising Part II of 1994 Act dealing with the licensing of coal-mining operations, as that provides the immediately relevant statutory context for ascertaining, objectively, what meaning the legislature was seeking to convey by section 26A. See generally, *R (O) v Secretary of State for the Home Department, R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at paragraphs 29 to 31.

37. First, it is important to consider the provisions in Part II of the 1994 Act dealing with the licensing of coal-mining operations. Section 25 provides that coal-mining operations cannot be carried out "except under and in accordance with a licence". Section 26 provides that it is the Coal Authority which has the power to grant a licence. Section 27 is headed "Authorisations contained in a licence". Section 27(1) provides that the "provisions of a licence under this Part shall specify or describe the coal-mining operations which, subject to its conditions, are authorised by the licence". Section 27(2)(b) provides that a licence "may restrict the authorisation contained in the licence to operations carried on within such period as may be specified". Section 27(3)(a) and (b) provide that "a licence may provide":

> "(a) for the coming into force of the authorisation contained in the licence, or any conditions or provisions of the licence to be postponed until after the acquisition by the holder of the licence

> of any interest or right in or in relation to any land or other property or until after such other requirements as may be specified or described in the licence have been satisfied; and
>
> (b) for the licence to lapse if the interest or right is not acquired or the other requirements are not satisfied, within such period as may be specified."

38. Finally, in this context, section 28 is headed "Conditions of licence: general". Section 28(1) provides that a "licence" may include conditions. Section 28(2) refers to conditions that may be included in a licence with respect to the coal-mining operations "authorised by the licence".

39. It is clear from those provisions that it is the licence which authorises the carrying out of coal-mining operations. The authorisation is not a separate legal instrument from the licence and does not separately authorise the carrying out of coal-mining operations. The authorisation is part of, or contained within, the licence. The concept is, perhaps, best understood by reference to the provisions of section 27 of the 1994 Act. Section 27(1) provides that the provisions of the licence must specify the coal mining operations authorised by the licence. It is those provisions of the licence which describe the works that are authorised that constitutes the authorisation. That is reflected in other provisions of the 1994 Act such as section 27(2)(b) which refers to the "authorisation contained in the licence". The provisions in a licence may restrict the authorisation contained in a licence. That is what section 27(3)(b) does – it does so by providing that the "coming into force of the authorisation contained in the licence" is to be postponed until certain conditions are satisfied. If those conditions are not satisfied, the licence (not the authorisation) lapses: see section 27(3)(b).

40. The position is, therefore, that Part II of the 1994 Act does not provide for two separate legal instruments: a licence and an authorisation. It provides for one legal instrument, the licence, which authorises persons to carry out coal-mining operations but that authorisation may be subject to restrictions and conditions. The licence comes into existence and has effect from the time it is granted. Restrictions contained in the licence may postpone the coming into force of those provisions in the licence which authorise the works until certain conditions are satisfied. But the licence has effect from the time it is granted. The licence has described the operations that are to be carried out. It has described when the authorised works may begin, i.e. when the specified conditions are met. Further, contrary to the submissions of Ms Dehon, there is no statutory requirement that a variation of the licence needs to be effected before the conditions are recognised as being satisfied.

41. Secondly, viewed in that statutory context, the question then is the proper interpretation of section 26A of the 1994. The wording of that section is important. Section 26A(1) provides that:

> "(1) If or to the extent that a licence under this Part authorises coal-mining operations in relation to Wales, it shall have effect only if the Welsh Ministers notify the Authority that they approve the authorisation".

42. The section is concerned with the need to obtain approval before a licence shall have effect. The reference to "it" shall have effect can only be a reference back to the "licence". It is not grammatically possible, as Ms Dehon submits, to read "it" as referring to "authorises coal-mining-operations" nor to treat the word "it" as referring to "the authorisation". The section would have been worded differently if that were the case and would have said "the authorisation shall have effect only if the Welsh Ministers notify the Authority that they have approved it". Furthermore, once the statutory framework is understood, it is clear why section 26A is dealing with licences (not some separate "authorisation"). It is the licence which authorises the coal-mining operations, and the authorisation is part of, or contained in, the licence.

43. Once that is appreciated, it is clear that section 26A is conferring functions on the Welsh Ministers in respect of licences granted after the coming into force of section 26A and does not apply to licences that have already taken effect before that date. The provision that a licence "shall have effect only if" the Welsh Ministers approve the authorisation is simply not apt to cover a situation where the licence has already taken effect (even where some provisions of the licence restrict the coming into force of other provisions such as those authorising the carrying out of coal-mining operations, until certain conditions are met).

44. The judge recognised in paragraph 86 of her judgment that it is implicit in the words "it shall have effect only if" that the power conferred by section 26A did not apply to something that had already had effect before section 26A came into force. The error in her reasoning was to treat "it" as referring to an authorisation which was separate from the licence itself rather than referring to the licence. Once it is realised that "it" refers to (and can only refer to) the licence, and applying the reasoning of the judge, a licence granted before section 26A has taken effect once granted and section 26A does not apply to that licence. Such a licence may have prescribed that certain clauses (including the clause specifying the coal-mining operations that were authorised) would not come into force until certain conditions were met. The licence would have specified when and how those conditions would be met. Thereafter, the fulfilment of the conditions, and the ability of the licence-holder to undertake operations, was determined in accordance with the terms of the licence that had been granted. But the licence had taken effect when granted. The Welsh Ministers had no functions in relation to the approval of coal-mining operations in respect of licences granted before 1 April 2018.

45. I do not consider that the two additional factors relied upon by Ms Dehon assist in the interpretation of section 26A. First, it is correct that the Wales Act 2017 is a statute which has major constitutional significance. That Act, together with the Government of Wales Act 2006, contains the constitutional settlement governing the powers of the Senedd, or Welsh Parliament, to enact primary legislation and establishing the Welsh Government. The 2017 Act establishes what is known as a reserved powers model, whereby the Senedd has powers to enact primary legislation save in areas that are reserved to the United Kingdom Parliament and subject to certain other limits (see section 108A(2) of the 2017 Act). The 2017 Act also conferred additional powers or functions on the executive, that is the Welsh Government. The constitutional settlement represented by those Acts may provide an important context in appropriate circumstances for considering questions concerning the legislative powers of the Senedd or the scope of the powers of the Welsh Government.

46. In the present case, however, the issue concerns the interpretation of section 67 of the 2017 Act which inserted section 26A into the 1994 Act. That section was concerned with conferring certain powers on the Welsh Ministers in relation to coal-mining operations in Wales. True it is that that will involve an extension of the powers of the Welsh Ministers and, to that extent, can be described as the judge did as a "strengthening of the devolution settlement" (see paragraph 82 of her judgment). The question in this case, however, is a different and narrower question. It is whether those powers were to apply only to licences granted by the Coal Authority after section 26A came into force or whether it applied to licences granted prior to that date. That is a question of statutory interpretation which, in this case, is answered by a consideration of the natural and ordinary meaning of the words of section 26A of the 1994 Act.

47. Secondly, I do not see any proper basis for inferring that the meaning of the words in section 26A is affected by what is described as the background against which the 2017 Act was enacted of increased national and international recognition of the importance of efforts to address climate change. It may well be that the Welsh Minsters may choose to exercise any functions they have to address those issues. The question in the present case, however, is whether the functions conferred on them by section 26A do apply to licences which took effect before the Welsh Ministers acquired the powers conferred by section 26A. That is a question of interpreting the words of section 26A as enacted by Parliament. Ms Dehon was unable to refer to any legitimate aid to statutory interpretation which indicated that the extent of the powers conferred by section 26A were to be judged by reference to the national or international context against which, it is said, the section was enacted.

48. The parties referred to other statements of policy on the part of the Welsh Government, or the Coal Authority, or correspondence between the Welsh Ministers and ministers in the United Kingdom government. None of those matters assist on the issue of interpretation and they are not legitimate aids to the interpretation of section 26A. Similarly, reliance on particular ministerial statements in Hansard do not assist and do not satisfy the requirements for admission as aids to statutory interpretation.

49. In those circumstances, the power conferred by section 26A does not apply to a licence granted before that section came into force on 1 April 2018. That results from the natural and ordinary meaning of the words, which is reinforced when considered against the statutory context of Part II of the 1994 Act. It is not necessary therefore to consider the matters raised in the three grounds of appeal which concern the presumption against retrospective effect and whether an interpretation which permitted the application of section 26A to licences granted prior to it coming into force would be incompatible with Article 1 of the First Protocol to the Convention. It is not appropriate to consider these issues in this case as they do not arise and would be assessed on a hypothetical basis.

50. In terms of the application of section 26A to the facts of this case, the judge was correct to dismiss the claim for judicial review of the Welsh Ministers' decision that they did not have the function of approving the authorisation of coal-mining operations in this case. The licence authorising the carrying out of works at Aberpergwm Colliery was granted in 1996 and varied in 2013. That licence had effect from 1996 (or from 2013 in respect of the variations). Clause 3 of the licence described the authorised works. Clause 27 of the licence restricted the operation of

clause 3 and provided that it, amongst other provisions, was not to take effect unless certain conditions were met. It was clause 27 and schedule 4 which prescribed which conditions had to be met. It was schedule 2 which prescribed how notice was to be given that the conditions had been met. There was no need under the 1994 Act, and no requirement under the licence itself, for any decision that the conditions had been met to be effected by a variation of the licence. The Welsh Ministers correctly concluded that the 1996 licence granted the authorisation for the coal-mining operations and that licence postponed (the decision letter uses the word "suspended") the effect of the authorisation until certain conditions had been discharged. As the licence had taken effect before section 26A came into force, the Welsh Ministers had no function in relation to that licence.

CONCLUSION

51. Section 26A of the 1994 Act does not confer functions on the Welsh Ministers in relation to licences authorising the carrying out of coal-mining operations which were granted under Part II by the Coal Authority prior to the coming into force of section on 1 April 2018. The judge was right to dismiss the claim for judicial review of the decision of the Welsh Ministers that they did not have any function of approving the authorisation of coal-mining operations contained in the licence granted in 1996 (and varied in 2013) for the carrying out of coal-mining works at Aberpergwm Colliery even though the operations could not be carried out until certain conditions were met. I reach that conclusion for different reasons from those given by the judge. I would dismiss this appeal.

LADY JUSTICE NICOLA DAVIES

52. I agree.

THE SENIOR PRESIDENT OF TRIBUNALS

53. I agree with Lewis L.J. that the appeal must be dismissed, for the reasons he gives.

54. This case can be approached quite simply, and it should be. It calls for the straightforward application of the principles of statutory interpretation to a small number of provisions in the legislative scheme, in particular section 26A(1) of the 1994 Act.

55. As Lord Briggs and Lord Burrows said in their judgment in *Rakusen v Jepsen* [2023] UKSC 9 (at paragraph 34), "[the] objective of interpreting statute is to identify the meaning of words used by Parliament in the light of their context and the purpose of the provision …". To the same effect, in *R. (on the application of O) v Secretary of State for the Home Department* Lord Hodge said (in paragraph 29 of his judgment) that "[the] courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid". Lord Hodge also referred (in the same paragraph) to the speech of Lord Nicholls of Birkenhead in *R. v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd.* [2001] A.C. 349 (at p.396), where he said that "[statutory] interpretation is

an exercise which requires the court to identify the meaning borne by the words in question in the particular context". Lord Hodge went on to say this:

> "Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. …".

56. When those principles are applied here it is plain that the interpretation of the relevant statutory provisions favoured by Lewis L.J. is correct. Essential in that interpretation, as Lewis L.J. has shown, is a reading of section 26A(1) in which it is recognised that the noun to which the pronoun "it" must relate is "a licence". This gives the words used by Parliament their natural meaning. It is, I think, the only reading that makes grammatical sense. It is reinforced by the other provisions in Part II of the 1994 Act forming the relevant statutory context. It cannot be reconciled with the interpretation urged upon us on behalf of Coal Action Network. And it undoes the argument on which the claim is based.