



Grounds to build on

Martin V An Bord Pleanála [2018] JLC 1104

Timely reminder of the burden of proof and the need to establish substantial grounds in an application for judicial review.

Facts

The proceedings comprised a “telescoped” application for leave to bring, and for substantive relief by way of, judicial review of a decision of An Bord Pleanála (“the Board”) made on 19 December 2016, to grant planning approval to EirGrid plc under s.182B of the Planning and Development Act 2000, as amended (the “Act of 2000”), for the proposed North-South 400kV Interconnector Development.

The applicant also sought an order quashing the decision of the Board of a grant of permission to Eirgrid Plc. The applicant contended that the decision was in breach of various European Regulations and Directives.

Mr. Justice Max Barrett, in an extensive judgment, refused to grant leave to apply for judicial review under s. 50 of the Act of 2000. Further, though the point was, as a consequence of the Court’s refusal of leave, entirely academic, the Court noted that had it granted leave to apply for judicial review it would have refused to quash the planning approval unless it had been satisfied that there were ‘substantial grounds’ for contending that the decision or act concerned was invalid or ought to have been quashed.

Evidence before the Court

A central focus of the Court was EirGrid’s Grid25 Implementation Programme 2011-2016. The Court stated that while the proceedings involved, ostensibly, a challenge to a decision of the Board, they in fact comprised a collateral attack on the NREAP, the Grid25 Strategy and the Grid 25 Implementation Programme.

In rejecting the applicant’s contention that there was a lack of information presented in the Strategic Environmental Assessment (SEA) undertaken by EirGrid, the Court went on to state there was an effective exercise in consultation. The Court accepted that specific information was provided in the Implementation Programme in relation to the North South Interconnector project, but also noted that the North South Interconnector project is but one project among many considered in the Implementation Programme, a factor which naturally has implications for the amount of text that can specifically be devoted to each such project.

Applicable Legal Principles reiterated

Mr. Justice Max Barrett held there was clearly material before the Board to support the conclusions it reached and therefore the burden had not been discharged in the within application.

As this was a telescoped hearing, the applicant had to advance grounds of challenge which were 'substantial grounds' within the meaning of s.50A of the Act of 2000, ie. grounds that are 'reasonable', 'arguable' and 'weighty'. The Court concluded in its judgment that none of the grounds upon which leave was sought in Mr Martin's statement of grounds constituted substantial grounds for contending that the decision of An Bord Pleanála was 'invalid or ought to be quashed', to borrow from s.50A(3) of the Act of 2000, or offered a basis on which substantive relief by way of judicial review could be granted.

The Court also invoked the "rule" against collateral attack in this case due to the need to maintain (a) the integrity of the system of administration of justice and (b) the rule of law more generally. Though a collateral attack may constitute an abuse of process, the latter concept is typically applied to proceedings lacking in bona fides and which are frivolous, vexatious or oppressive. The rule against collateral attack, the Court held, can also apply in instances where challenges are made, it seems in good faith, but where the form of attack (on prior plans and policies via an ostensible attack on a later planning decision) cannot be allowed to proceed when one has regard to the policy considerations that inform the so-called "rule" against collateral attack. In the within proceedings, the form of collateral attack on the prior plans and policies is not permissible under s.50(2) of the Act of 2000 (to the extent that that provision is relevant (and it is not relevant in the An Bord Pleanála-SEA context)) or under the general law relating to judicial review.

Conclusion

This decision is to be welcomed by developers and those involved in the renewable energy sector as it shows the Court applying a practical analysis of the facts and application of the key principles governing judicial review. It also shows the judiciary showing a willingness to rely on a variety of case law outside of the traditional judicial review domain in reaching a decision.

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