

The Queen on the application of Greenpeace Limited v. Secretary of State for Trade and Industry (15 February 2007)

In this important judicial review case won by Greenpeace, Mr Justice Sullivan ruled that the Secretary of State for Trade and Industry had failed to give “the fullest public consultation” as promised before deciding to announce in the July 2006 Energy Review as a foregone conclusion that government policy had changed and now favoured nuclear new build. As a result the Court declared that policy statement unlawful.

Comment

Government policy is probably the biggest “make or break” factor that stands between the last 20 years moratorium on new build and the power generators pressing the go button on site specific applications for new build. Greenpeace is a case on policy making procedure, but it carries deeper messages of fundamental importance on the emergence of that policy, with important implications for those intending to rely upon it.

The serious participants in new build already know that any application for consent they make, and the Environmental Assessment that will go with it, must have fully addressed local and regional planning policy, including any Strategic Environmental Assessment (SEA) that might back such policy. During the consenting process those policies themselves might be challenged in an attempt to show they are flawed. Decision makers should not rely on policy but refuse to hear objectors’ evidence seeking to prove that policy is flawed. Doing so creates a high risk of judicial review of those decisions.

In formulation and reliance upon its own, national policy, however, the government generally considers itself accountable only to Parliament.

Any indication of how the Courts might look behind government policy and support challenges to it is of importance to all participants in the new build process who will seek to use government policy as a major part of their cases either for or against consents.

So what does the *Greenpeace* case tell us about the implications for new build policy?

- Public participation in formulating environmental policy is not optional. The Aarhus Convention means that the public can demand the right to meaningful participation in the formulation of government policy.
- Precisely how the government chooses to consult with the public is not prescribed, but if it makes promises on consultation, the government will be kept to them.
- The Courts are willing to step in and enforce the public’s rights, including unpicking policy that falls short of Aarhus requirements and government promises on consultation.
- The Courts are well aware that a key objective of government policy is to limit the ability of objectors at public inquiries to argue issues of national need. Whilst acknowledging that well made policy will limit such debate, the Court in *Greenpeace* sounded a warning that need might legitimately be argued by objectors, despite government policy upon it.
- Separating out policy threads, like new build and waste management brings with it the need to re-unite them at the appropriate time and allow the public to comment on how one issue will affect the other.

Greenpeace is an illustration of a challenge to government policy at the time that policy is announced. One can also see how similar themes might also be argued when applicants for consent try to rely on such policy.

If we are entering a new era of judicial willingness to question government policy, an important lesson to learn will be avoiding over-reliance upon policy. The test adopted in *Greenpeace* that “Something has gone clearly and radically wrong...” in the making of policy, may prove to become a phrase often repeated by objectors.

Background to the case

In February 2003 the government published the Energy White Paper “*Our Energy Future – Creating a Low Carbon Economy*”. On nuclear power, the White Paper noted that although nuclear power produces no carbon dioxide, its current economics make nuclear new build an unattractive option and important issues of nuclear waste remained to be resolved. The White Paper noted:

“Against this background, we conclude that it is right to concentrate our efforts on energy efficiency and renewables. We do not, therefore, propose to support new nuclear build now. But we will keep the option open”.

Crucially, at paragraph 4.68, the White Paper stated that:

“This White Paper does not contain proposals for building new nuclear power stations. However, we do not rule out the possibility that at some point in the future new nuclear build might be necessary if we are to meet our carbon targets. **Before any decision to proceed with the building of new nuclear power stations, there would need to be the fullest public consultation and the publication of a White Paper setting out the government’s proposals**”. (emphasis added).

On 23 January 2006 the government issued the consultation document “*Our Energy Challenge – securing clean, affordable energy for the long term*”. This is the document at the centre of the Greenpeace challenge. It asks a number of fairly abbreviated questions on key issues such as “Question 1 – What more could the government do on the demand or supply side for energy to ensure that the UK’s long term goal of reducing carbon emissions is met?”.

However, when the government came to publish “*The Energy Challenge, Energy Review Report*” known as “*The Energy Review*” on 11 July 2006, the executive summary declared that “Nuclear power is currently an important source of low carbon electricity in the UK... We have concluded that new nuclear power stations would make a significant contribution to meeting our energy policy goals...” and that “The government believes that nuclear has a role to play in the future UK generating mix alongside other low carbon generation options”.

The Grounds of Challenge

Greenpeace challenged the validity of the consultation exercise carried out in the 23 January 2006 Consultation Document. They claimed that the 2003 White Paper had proposed the “fullest public consultation” before the government reached any decision to change its policy “not... to support nuclear build now”. They argued that the

government had failed to live up to that promise before deciding in the Energy Review that “nuclear has a role to play in the future UK generating mix”. This, they argued, denied their legitimate expectation that there would be such proper consultation. Greenpeace argued that the 2006 Consultation Document was merely an ‘Issues Paper’, seeking consultees’ views on which issue should be examined by government. If on the other hand it was supposed to be a proper consultation on the main issue of whether there should be nuclear new build, then Greenpeace claimed it was manifestly inadequate.

Judgment

In an important development with wide implications, Mr Justice Sullivan held that whatever the position may be in other policy areas, in the development of policy in the environmental field, consultation is no longer a privilege to be granted or withheld at will by the Executive. He quoted parts of the Aarhus Convention to that effect, noting that it said:

“To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment”.

The overriding requirement is that any consultation must be fair. What was fair depended on the particular circumstances of the case. As he said (paragraph 62):

“...a consultation exercise which is flawed in one, or even a number of respects, is not necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight will it almost invariably be possible to suggest ways in which a consultation exercise might have been improved upon. That is most emphatically not the test. It must also be recognised that it a decision maker will usually have a broad discussion as to how a consultation exercise should be carried out...”

On **economics** (para. 94) Mr Justice Sullivan stated that “in the 2006 Consultation Document, consultees were merely told that fossil fuel prices had risen sharply, that the review would examine the impact of recent price rises on the desirability or otherwise of new nuclear build...”. But he then added (para.97):

“It would be pointless to try and identify which reports might fairly have been withheld, since it is no exaggeration to say that, on the issue of economics, the 2006 Consultation Document presented consultees with little more than an empty husk. The kernel of the economics issue was contained in numerous reports which emerged in the after the consultation period had expired. That was manifestly unfair”.

On the issue of **waste**, Mr Justice Sullivan said (para.102):

“Consultees were told that the issue of waste “will be one of the important considerations relating to nuclear power in this review”, and that decommissioning and long term waste management were “also significant issues for the public”.

Consultees were further told that CoRWM had been set up to examine the options for the long- term storage of radioactive waste and that it was expected to report in July 2006. On this, the judge said that... “It is difficult to see what informed response consultees could reasonably have been expected to make to this exiguous information, other than: “wait and see what CoRWM recommends””.

Mr Justice Sullivan went on to say that the views of the Committee on Radioactive Waste Management were in fact misrepresented, as that committee had made it clear that it took no position on the desirability or otherwise of nuclear new build, so it was less than a fair representation to say that it had confirmed that waste from a new build programme could be technically accommodated by the options it was considering.

Conclusions

Mr Justice Sullivan took the view that “something has gone clearly and radically wrong”. The purpose of the 2006 Consultation Document as part of the process of “the fullest public consultation” was unclear. If it was an Issues Paper it was perfectly adequate. As a consultation paper on an issue of such importance and complexity it was manifestly inadequate. It contains no proposals as such, and even if it had, the information given to consultees was wholly insufficient to enable them to make a “intelligent response”. There was a breach of the Claimants’ legitimate expectation that there would be the fullest public consultation before a decision was made to support new nuclear build and hence that policy support was unlawful.

The Government’s Response

The Department of Trade and Industry issued a terse response to the judgment on 15 February 2007. It said that:

“This judgement is about the process of consultation, not the principle of nuclear power. We will of course consult further.

Tackling climate change takes leadership, taking on tough long term choices.

This is why we continue to believe nuclear power has a role to play in cutting emissions and helping to give this country the energy security it needs. This is why we will press on with publication of the Energy White Paper and

why we are confident in the strength of our arguments to engage in further consultation.”

A more measured response came a week later in the form of a parliamentary statement on energy policy and nuclear power by the Minister:

“I would like to make a statement about the White Paper on energy policy following the court judgement on 15 February about the consultation process on nuclear energy that preceded the Energy Review Report published on 11 July 2006.

The court ruled that the consultation exercise that preceded the publication of the Energy Review report had not been adequate. The Government accepts the court's judgment and will not appeal it.

We shall therefore conduct a new consultation endeavouring to meet the court’s requirements. It is now likely that the White Paper and the new consultation will be published in early May. However, if it can be published before Easter, I will do so.

We continue to believe, subject of course to consultation, there is a case for having new nuclear power stations as one of the options companies should consider because of their potentially significant contribution to security of supply and reducing carbon emissions. Last week’s court judgment does not undermine this view. The consultation document will bring together the evidence and analysis we have collected and published since the Energy Review began in November 2005, so that people can take an informed view on whether nuclear power should continue to be part of our energy mix. This will enable the government to make a decision on nuclear, and on certain other issues arising from the White Paper, in the Autumn”.

The judgment represents a judicial demolition job on the procedures adopted by the government to carry out its consultation. It carries a clear message that if it wishes to give encouragement to nuclear new build, the government will have to issue a valid public consultation that allows proper debate on all the aspects of nuclear power, the economics, the waste and all the other aspects referred to in this judgment. Attempting to curtail consultation on these issues has gone badly wrong for the government. It remains to be seen whether the responses by the Government so far preface a consultation process that will stand further challenge.

Greenpeace has shown that in attempting to cut corners, the government has struck the kerb. Those relying on government policy should be wise to the possibility of similar mishaps in the future.

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