

THE SUPREME ADMINISTRATIVE COURT'S DECISION

Case No
4840-18

pronounced in Stockholm 21 December 2018

APPELLANT

Fundacja ClientEarth Prawnicy dla Ziemi

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APPEALED DECISION

The Government (Ministry of Enterprise and Innovation) decision of 7 June 2018, N2016/05812/FÖF regarding a permit application pursuant to Section 15a of the Act (1966:314) on the Continental Shelf to lay two pipelines for the transport of natural gas on the continental shelf within the Swedish Exclusive Economic Zone of the Baltic Sea.

MATTER

Judicial review

THE SUPREME ADMINISTRATIVE COURT'S DECISION

The Supreme Administrative Court refuses the petition to obtain a preliminary ruling from the European Court of Justice.

The Supreme Administrative Court rejects the application for judicial review.

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DECISION

Case no.
4840-18

BACKGROUND

Private and legal persons are entitled to seek judicial review of government decisions that relate to their civil rights or obligations in the sense referred to in Article 6 of the European Convention on Human Rights (ECHR). In addition, an environmental organisation is in some cases entitled to seek judicial review of a permit decision. This requires the organisation to have at least 100 members or other proof of public support.

The Appellant, the foundation Fundacja ClientEarth Prawnicy dla Ziemi (ClientEarth), is a Polish environmental organisation based in Warsaw. ClientEarth is seeking a judicial review of the Government's decision to grant Nordstream 2 AG permission to lay two pipelines for the transportation of natural gas along the continental shelf within the Swedish Exclusive Economic Zone of the Baltic Sea.

CLAIMS, ETC.

ClientEarth is presenting a claim for the Government's decision to be revoked. ClientEarth is also presenting a claim for the Supreme Administrative Court to obtain a preliminary ruling from the European Court of Justice, both in regard to the matter at hand and to the right to seek judicial review.

In support of ClientEarth's right to seek judicial review, the foundation has stated the following. The Government's decision concerns the foundation's civil rights pursuant to Article 6 of ECHR and the foundation is thereby primarily entitled to bring action pursuant to Section 1 of the Act (2006:304) on Judicial Review of Certain Government Decisions. They are secondarily entitled to bring action pursuant to Section 2 of the same Act, as ClientEarth is such an environmental organisation as is referred to in Chapter 16, Section 13 of the Environmental Code. The foundation has a tertiary right of action directly pursuant to EU law and the Convention on access to information, public participation in decision-making and access to justice in environmental matters (the Aarhus Convention).

DECISION

Case no.
4840-18

GROUNDS FOR THE DECISION

Legal regulation

In accordance with Section 1 of the Judicial Review Act, a private individual is permitted to seek judicial review of Government decisions that involve a review of the individual's civil rights or obligations in the sense referred to in Article 6(1) of ECHR.

Article 9(2) of the Aarhus Convention states that members of the public concerned, having a sufficient interest or maintaining impairment of a right, and where domestic legislation requires this as a precondition, shall have access to a review procedure before a court of law to challenge the substantive and procedural legality of certain decisions relating to the environment. Article 2(5) specifies that "members of the public concerned" includes environmental organisations.

Section 2 of the Judicial Review Act states that an environmental organisation as referred to in Chapter 16, Section 13 of the Environmental Code may apply for judicial review of such permit decisions by the Government as are covered by Article 9(2) of the Aarhus Convention.

The organisations referred to in Chapter 16, Section 13 of the Environmental Code are non-profit associations or other legal persons whose primary purpose is to safeguard nature conservation or environmental protection interests (1), are not run for profit (2), have conducted activities in Sweden for at least three (3) years, and which have at least 100 members, or by some other means shows that its activities are supported by the public (4).

The provisions of Chapter 16, Section 13 of the Environmental Code have been designed considering that both Sweden and the EU are parties to the Aarhus Convention. The provisions of the Convention regarding the right to judicial review of environmental matters have been introduced into EU law, for example through amendments to the directive on the assessment of the effects of certain public and private projects on the environment (originally Council Directive 85/337/EEC, amended through Directive 2003/35/EC, inter alia, and codified through Directive 2011/92/EU, the EIA Directive).

DECISION

Case no.
4840-18

The European Court of Justice has expressly stated that the national regulations intended to implement the EIA Directive must ensure that environmental organisations have wide access to justice and render effective the provisions of the Directive (Djurgården-Lilla Värtans Miljöskyddsförening, C-263/08, EU:C:2009:631, p. 45).

The Supreme Administrative Court's assessment

The Supreme Administrative Court initially notes that it is the responsibility of the party claiming the right of action before the Court to prove that the conditions for such a right of action exist.

In regard to the right for ClientEarth to seek judicial review of the Government's decision, the Supreme Administrative Court furthermore notes the following.

The contested decision can be considered such a government permit decision as is covered by Article 9(2) of the Aarhus Convention. However, it does not entail any review of ClientEarth's civil rights or obligations in the sense referred to in Article 6(1) of ECHR. ClientEarth can consequently not be granted right of action pursuant to Section 1 of the Judicial Review Act.

An environmental organisation that fulfils the criteria set out in Chapter 16, Section 13 of the Environmental Code has right of action pursuant to Section 2 of the Judicial Review Act. According to its statutes, the primary purpose of ClientEarth is to safeguard nature conservation and environmental protection interests, and it is a not for profit organisation. The foundation thus meets the two first criteria set out in the Environmental Code.

In addition, the organisation must have at least 100 members or otherwise show that its activities have public support. ClientEarth has not referred to any membership. ClientEarth must therefore otherwise show that its activities are supported by the public.

The possibility of organisations without a minimum of 100 members to gain access to judicial review was primarily introduced to give smaller, local associations the opportunity to appeal

Översättning
ref.nr:72008337

Stockholm
2020-06-11

Semantix

DECISION

Case no.
4840-18

environmental decisions (Govt. Bill. 2009/10:184 p. 64). The preparatory work indicates that in regard to organisations that do not have members in the same way as non-profit associations, a clear and stable connection to the public should be required. The example given is that the organisation should be able to show that it has established support within the local population concerned with the activity or initiative in question, or that it has actively participated in the decision-making process, for example in the consultation procedure, in a role representing the public in various ways. Other circumstances include that the organisation has a large number of donors or support members (same Govt. Bill p. 65 f).

ClientEarth has cited two documents to prove that the foundation enjoys public support. One is a Polish petition called “Stop the Nord Stream 2 gas pipeline”, which has received approx. 2,500 signatures. The other is a letter from Greenpeace Nordic.

The petition – with the express aim of having the permit for the Swedish section of the Nord Stream 2 gas pipeline withdrawn – is made to the Supreme Administrative Court in Sweden, and concerns security aspects relating to the decommissioning of the pipeline on the one hand, and the environmental impact of the project on the other. However, the petition does not relate to the activities of ClientEarth in any other way than specifying that the foundation has lodged an appeal against the permit decision issued in Finland.

However, for the review that has been requested, the public support for the organisation’s activities as such must be proven, not – as in the presented petition – the public support for an application in an individual case (see NJA 2012 p. 921:18). In other words, the petition does not prove that the activities of ClientEarth enjoy public support in the sense required in this case.

The letter from Greenpeace Nordic expresses Greenpeace’s support for the application for judicial review. ClientEarth argues that because Greenpeace is such an environmental organisation as referred to in Chapter 16, Section 13 of the Environmental Code and operates with the support of more than 160,000 people, it must be considered proven that the activities of ClientEarth enjoy the same public support.

DECISION

Case no.
4840-18

However, the Supreme Administrative Court notes that what is required is proof that ClientEarth's activities enjoy direct support. The existence of such support is not evidenced by the letter from Greenpeace.

ClientEarth has thus failed to show that the foundation has such a clear and stable connection to the public as is required for its activities to be considered to enjoy public support as referred to in Section 16, Section 13 of the Environmental Code. ClientEarth is therefore not entitled to seek judicial review pursuant to Section 2 of the Judicial Review Act. Nor can ClientEarth provide grounds for the right to apply for judicial review directly based on EU law or the Aarhus Convention (see Djurgården-Lilla Värtans Miljöskyddsförening p. 43–45, and the Slovakian brown bear, C-240/09, EU:C:2011:125, p. 44 and 45).

ClientEarth's application for judicial review must therefore be rejected.

In view of the above, there is no issue of interpretation warranting a preliminary ruling from the European Court of Justice. The claim in this regard is therefore refused.

Participating in making this decision were Justices of the Supreme Administrative Court Henrik Jermsten, Per Classon, Mari Andersson, Kristina Svahn Starrsjö and Ulrik von Essen.

The reporting clerk was Judge Referee Daniel Wållander..

Översättning
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