PUBLIC INTEREST LAW FOUNDATION

v.

CENTRAL ENVIRONMENTAL AUTHORITY AND ANOTHER

COURT OF APPEAL
U. DE Z. GUNAWARDENA, J.
C.A. 981/99
NOVEMBER 15, 2000

Public Interest Litigation - Construction of an Urban Motor way - Southern Express Way - Quash decision approving Project - Central Environmental Authority - Judicial review?.

The Petitioner sought a Writ of Certiorari to quash the decision of the Central Environmental Authority (C.E.A) approving the construction of the Southern Expressway," on the basis that (i) there was a failure to analyse or consider reasonable and environmentally friendly alternatives. (ii) the Environmental Impact Assessment Report (EIA) does not provide proper intelligible and adequate reasons for the rejection of alternatives to the Project.

Held :

(i) By a grant of certiorari the Court does not and cannot impose its own decisions, it simply quashes the original decision.

(ii) The Court is ill equipped to form an opinion on environmental matters - they being best left to people who have specialised knowledge and skills in such affairs. Courts may decline to exercise review because it is felt that the matter is not justiciable.

(iii) Judicial review is concerned not with the decision but with the decision making process.

Per Gunawardena, J.

> "It is worth observing that the review procedure is not well suited to the determination of disputed facts. . ."

(iv) Court is not in a position to choose between competing schemes.

(v) Decision making is an important aspect of the work entrusted to the CEA. Any person endowed with decision making powers will appreciate that discretion is an aid to the exercise of these powers. The C.E.A. too is left free to make a choice among possible courses of action.

AN APPLICATION in the nature of a Writ of Certiorari.

Cases referred to :

1. *Chief Constable of North Wales Police v. Evans at* [1982] 1WLR 1155 at 1173.
2. *Dowty Boulton Paul Ltd. v. Wolverhampton Corporation* (No. 2) [1976] Ch. 13.

Lalanath de Silva with *Ms. U. Seneviratne* for Petitioner.

K. Sripavan D. S. G. with *Ms. Bimba Tilakaratne S. S. C.*, for 1st Respondent.

L. C. Seneviratne P. C., with *Ms. U. S. K. Wickramasinghe* for 2nd Respondent.

Cur. adv. vult.

February 16, 2001.

U. DE Z. GUNAWARDANA, J.

The Petitioner is styled the Public Interest Law Foundation, and one of the primary objects, inter alia, of the Petitioner is said to be the preservation, protection and promotion of public interest through the law. The Petitioner has filed this application seeking a writ of certiorari quashing the decision of the Central Environment Authority (1st Respondent) marked P12 approving the project depicted as the "Combined trace" in figure 3 -1 at page 2 of Chapter 3 of the EIA report of March 1999, the project being the construction of an access controlled "Southern Expressway" linking Colombo to Matara. It is worth noting that the idea of a such a venture was first raised for discussion as far back as the end of 1980's to meet the pressing need for better roads and ease the congestion on the existing ones. At the hearing of the application on 20. 11. 2000 the learned Counsel for the Petitioner impressed upon the Court that only two basic issues or points arise for consideration by the Court which issues or points, the learned Counsel, to use his own words, outlined as follows:

"(i) The failure to analyse or consider reasonable and environmentally friendly alternative to the proposed project;

(ii) E. I. A. does not provide proper intelligible and adequate reasons for the rejection of alternatives to this project."

To deal with the above two points in order: (i) it is not wholly correct to say that other possibilities or alternatives in place of the proposed project had not been considered, for under Chapter 8 of the Environmental Impact Assessment Report alternatives had been assessed or evaluated. The alternatives considered in report (which had been prepared by the University of Moratuwa at the request of the Road Development Authority) are:

(i) Original R. D. A. trace
(ii) Combined trace
(iii) Improvement of A2 highway
(iv) Improvement of railway
(v) No project - i.e. the project is altogether abandoned.

(ii) There is no merit in the second point abovementioned, in that the EIA report, in fact, gives reasons for rejecting the alternatives to the "Southern Expressway". I can do no better that quote from the report:

"(i) The no project alternative could be rejected as it does not produce any beneficial impacts and produces several highly adverse impacts.

(ii) The improvement of railway appears to be the alternative with the least amount of negative aspects. However, it does not produce sufficient social benefits to justify recommending as a reasonable alternative for achieving the objectives of the proposed project.

(iii) Improvement of A2 Highway would produce some social benefits, but this is the alternative that has the highest number of major environmental impacts. It would require relocation of a large number of people, destruction of houses and places of religions importance, as well as higher risks of accidents and accidental damage of life and property due to accidental spills of hazardous materials etc. The main reason for these impacts is the ribbon development that exists right along this road, due to highway being of uncontrolled access for

all vehicles at almost all points. Therefore, this alternative too cannot be recommended as a satisfactory option."

The relief sought by the Petitioner on this application is quashing the decision of the Central Environmental Authority (1st Respondent) approving the project, which contemplates the construction of an urban motor - way known as "Southern Expressway". Certiorari is mainly applied to the decisions of public bodies acting under statutory authority, as the Central Environment Authority (1st Respondent) is, and has the effect of quashing ultra vires decisions of the administrative body concerned. By a grant of certiorari the Court does not, and cannot impose its own decisions; it simply quashes the original decision. The Court is ill equipped, in any event, to form an opinion on environmental matters - they being best left to people who have specialised knowledge and skills in such spheres. Even if a matter may seem to be preeminently one of public law, the Courts may decline to exercise review because it is felt that the matter is not justiciable, i.e. not suitable to judicial determination. The reason for non - justiciability is that Judges are not expert enough deal with the matter.

But, as stated above, the learned Counsel for the Petitioner, in fact, did not invite the Court to consider the validity or the acceptability of the reasons given by the experts, if I may call them so, of the Moratuwa University. If I were to consider the validity of reasons or the feasibility of the project, I would be substituting my own views for those of the experts or of the decision maker which, in this instance, is the Central Environment Authority. Needless to say, under the judicial review procedure, it is not open to me to substitute my own views for that of the Central Environment Authority which had thought it fit to accept the recommendation of the experts who prepared the report after an evaluation of all relevant considerations, and recommended "Southern Expressway" which is depicted as the "combined trace" in figure 3 - 1 at page 2 of Chapter 3 of the EIA report - as the best of all options or schemes. The experts who prepared the report after an in-depth study thought or were of the opinion that the "Southern Expressway" as proposed or recommended by the experts was the best option out of several, and, I cannot quash such a decision by means of certiorari unless

it is characterised by an illegality or was a decision reached in breach if rules of natural justice etc. The fact that the decision of Central Environment Authority adopting the recommendation of the experts of the Moratuwa University that "Southern Expressway" i.e. the combined trace in the map, represented the most feasible of all options was not, sought to be quashed on any such ground, calls for remark. As remarked, at the very outset of this order, the aforesaid decision of the Central Environment Authority was sought to be challenged only on the two grounds viz. that alternative options were not considered and that no reasons were adduced for the rejection of other options.

There is a distinction between appeal and review. If one appeals against a decision, one is claiming that the decision is wrong and that appellate authority or court should change the decision. The Court of Appeal, if it is persuaded by the merits of the case (appeal), may allow the appeal and thereby substitute its view for that of that of the Court or tribunal of first instance. Under judicial review procedure, the Court of Appeal is not concerned with the merits of the case, that is, whether the decision was right or wrong, but whether the decision is lawful or not. In the words of Lord Brightman: "Judicial review is concerned, not with the decision but with the decision making process" (***Chief Constable of North Wales Police v. Evans***[1]) It is worth observing that the review procedure is not well suited to determination of disputed facts - factual issues arising in this case being imprecise and disputed.

Inasmuch as different views can be held, in regard to the question as to which one of the options or alternatives is the best - application for review ought to fail on that ground, as well, such options partaking of the character of factual issues. In ***Dowty Boulton Paul Ltd. v. Wolverhampton Corporation***[2] - the dispute concerned a land which was used as an aerodrome. Under legislation the local authority could re-appropriate the land if it was no longer required for the purpose for which it had been acquired. The Council wished to put the land to housing use and its exercise of the statutory re- appropriation

power was challenged on the basis that the land was still required for use as an aerodrome. The Court held that the Council's exercise of power in good faith could not be challenged, partially, because legislation envisaged choice between competing requirements and the Court was not as well placed as the local authority was, to make such a choice.

In the case in hand too, the Court is not in a position to choose between competing schemes because such an attempt on the part of the Court to make such a choice would involve consideration of facts and also because such an exercise on the part of the Court would fall outside the proper scope of judicial review procedure.

Decision making is an important aspect of the work entrusted to the Central Environment Authority. Any person endowed with decision making powers will appreciate that discretion is an aid to the exercise of these powers. The Central Environment Authority, too, is left free to make a choice among possible courses of action. Discretion allows for the shaping of the authority's power to the particular circumstances of the case. I cannot bring myself to hold that the discretion had been abused in any way, by the Central Environment Authority in accepting the recommendation embodied in EIA report submitted by the experts - the recommendation being that the express way (urban motor - way) project depicted in figure 3 - 1, referred to above, is the best of all options. It is to be observed that Petitioner had failed to suggest an alternative route or scheme to take the place of the "Southern Expressway" suggested or recommended by the experts in their report marked P7; nor has the Petitioner alleged lack of good faith on the part of the 1st Respondent.

For the aforesaid reasons the application is refused. The Petitioner is ordered to pay Rs. 50000/- (Fifty Thousand Rupees) as costs to the 1st Respondent.

Application dismissed.