22 June 2023

R (Together against Sizewell C Limited) v Secretary of State for Energy Security and Net Zero [2023] EWHC 1526 (Admin)

Mr Justice Holgate in the Planning Court of the High Court

Summary

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are publicly available. A copy of the judgment as handed down can be obtained after 10 am on Thursday, 22 June from the following websites:

- https://www.judiciary.uk/judgments/
- https://caselaw.nationalarchives.gov.uk/

Introduction

The claimant, the campaign group Together Against Sizewell C Limited ("TASC"), sought to challenge the decision of the defendant, the Secretary of State for Business, Energy and Industrial Strategy ("SSBEIS") on 20 July 2022 to grant development consent to NNC Generation Company (SZC) Limited for a new nuclear power station. In February 2023 the Department for Business, Energy and Industrial Strategy ("BEIS") was split into three different departments. In May 2023 the powers and responsibilities of SSBEIS were transferred to the Secretary of State for Energy Security and Net Zero. The title of the claim has been altered to reflect this change.

The Panel of five Planning Inspectors who conducted the Examination of the proposal produced a report to the SSBEIS in February 2022. They would have recommended in favour of granting consent but for one issue: the source of a permanent supply of potable water for the power station had not yet been identified and the cumulative environmental impacts of Sizewell C and that supply should be assessed before determining the application for consent.

Following the Examination, SSBEIS asked for more information on solutions for the water supply issue. SZC explained that (1) the supplier, Northumbrian Water Limited ("NWL"), had accepted that under its statutory Water Resources Management Plan ("WRMP24") it would have to identify and arrange new water supplies to meet future needs of its area, including Sizewell C, and (2) there was no reason why a suitable supply would not be available before 2033 when the first reactor is due to start operation. SSBEIS was satisfied by that explanation.

Judicial review is a means of ensuring that public bodies act within the limits of their legal powers and satisfy procedural requirements. It is not the role of the Court to adjudicate on the merits of the decision being challenged.

Grounds of challenge

TASC advanced seven grounds of challenge:

(1) The defendant breached the Habitats Regulations by failing to carry out a habitats assessment which treated the permanent potable water supply as forming part of the power station project.
(2) Alternatively, even if that water supply formed a separate project, the defendant breached the Habitats Regulations by failing to assess the cumulative environmental impacts of both the power station and the water supply.
(3) The defendant failed to give reasons for disagreeing with Natural England's view that the water supply should be treated as part of the power station project.
(4) The defendant breached the Habitats Regulations by failing to consider non-nuclear forms of generation as "alternative solutions" for meeting the Government's objectives.
(5) The defendant was not entitled to take into account the contribution Sizewell C would make to reducing greenhouse gas ("GHG") emissions by 2035 because of a lack of evidence to show that a permanent water supply would be available to enable the operation of the power station to begin in time.
(6) When dealing with the risks of the sea flooding the site after 2140, the defendant acted irrationally by assuming that all spent nuclear fuel would be removed from the site by 2140.
(7) There was no evidential basis upon which the defendant could conclude that GHG emissions from the operation of Sizewell C will not significantly affect the UK's ability to meet its climate change targets and obligations.

The Court decided that all of the grounds of challenge are unarguable and dismissed the application.

Water supply (Grounds 1 to 3 and 5)

Under ground 1 the Court found that the SSBEIS did not take into account irrelevant factors when deciding that NWL's provision of a permanent water supply under its WRMP24 for the region did not form part of the Sizewell C project. The permanent water supply was not part of the application for development consent for Sizewell C, it was incapable of being assessed at this stage and would instead be dealt with under a subsequent, separate process which included an integrated environmental assessment. The SSBEIS's judgment cannot be said to have been irrational. The effect of the claimant's argument would be that whenever a project depends upon a utility company providing infrastructure for a new supply which has yet to be identified, that project could not be approved until that supply is identified and assessed with each of those projects. The statutory scheme seeks to avoid sclerosis in the planning system.

In relation to ground 2, case law allows a planning authority to decide to defer the assessment of cumulative effects to a later stage. The Court decided that there was nothing irrational about SSBEIS's decision to do that here because (1) the future water supplies had yet to be identified and their cumulative effects could not be assessed at this stage and (2) those effects will be assessed as part of the integrated environmental assessment of WRMP24. If that assessment shows that the water supply option chosen would adversely affect the integrity of a European site, whether by itself or in combination with Sizewell C, approval of that supply will depend

upon there being 'imperative reasons of overriding public interest' ("IROPI"). The IROPI test would not be biased or watered down because Sizewell C had previously been approved.

Under ground 3 the Court rejected the argument that SSBEIS had failed to give legally adequate reasons for disagreeing with Natural England. Although that body would have been expected to provide some justification for its view on the scope of the project, its advice had simply amounted to 'assertions without any reasoning or supporting evidence'.

Under ground 5 the Court concluded that there was evidence before the SSBEIS to show reasonable confidence that the permanent water supply would be provided in time for the power station to be operating and helping to reduce GHG by 2035.

'Alternative solutions' (Ground 4)

The claimant submitted that, in breach of the Habitats Regulations, the SSBEIS failed to consider a legally adequate range of 'alternative solutions' to the power station, before going on to conclude that the project's adverse environmental effect was justified under the IROPI test. According to the claimant, the 'core policy objective' of Government policy is to produce clean energy, and so clean alternatives to nuclear power should have been considered.

The Court rejected this ground of challenge. It is a matter for the decision-maker to determine what relevant objectives need to be met and what alternative solutions would or would not meet that need, unless an error of public law is made. The claimant's ground was simply an 'attempt to rewrite the Government's policy aims by pretending that the central policy objective is at a higher level of abstraction', without any regard to its requirements to achieve diversity of energy sources and security of supply. There was 'nothing artificial or unlawfully limiting' about a Government policy which identifies energy security and a diverse mix of electricity technologies as core objectives. The claimant's argument would produce the absurd result that a decision-maker dealing with a proposal for a solar or wind farm would have to consider nuclear power as an alternative solution.

Storage of nuclear fuel and defences against flooding (Ground 6)

The modelling of future sea levels, storms and the effectiveness of coastal defences ran as far as 2140. TASC argued that the defendant failed to deal with (1) information that the UK's Geological Disposal Facility for radioactive waste would not be available to take spent fuel from the site until 2145 and (2) TASC's estimate that spent fuel would need to be kept at Sizewell C until 2164. The claimant submitted that it was irrational for SSBEIS to proceed on the basis that the power station would be free of nuclear material by 2140.

In rejecting this ground, the Court referred to the greater margin of appreciation allowed in judicial review to decision-makers relying on technical, scientific and predictive assessments. Here, the uncertainty about just how long spent fuel will need to remain at Sizewell C was one uncertainty about the future among several. Estimates and projections were being made an unusually long way into the future. This uncertainty was properly recognised in the Panel's Report and SSBEIS's decision letter. The submission by TASC was based upon a narrow and selective reading of the decision letter. The defendant did address risks beyond 2140. He relied, as he was entitled to do, upon the future protection provided by the nuclear site licensing regime under the Office for Nuclear Regulation, the adaptive nature of the coastal defences, the controls to which those defences are subject, and ongoing monitoring of sea levels through the Coastal Processes Monitoring and Management Plan.

Greenhouse Gas emissions (Ground 7)

TASC argued that there was no evidence to support the SSBEIS's conclusion that GHG emissions from the operation of Sizewell C would not have a significant effect on the UK's ability to meet its carbon budget commitments or its obligations under the Paris Agreement. However, the Court found that there was in fact ample quantitative material to support the conclusions of the Panel and the SSBEIS.

The claimant also contended that there was no evidence that the SSBEIS considered personally the quantitative assessment of GHG emissions carried out for the developer and instead relied upon summaries produced by civil servants. The Court found that the minister was entitled to rely upon those summaries, which, as a matter of law, were entirely adequate.

Conclusion

After rejecting all the claimant's grounds of challenge, the Court decided that each of the grounds is unarguable and therefore refused the claimant's application for permission to apply for judicial review.