Procedural complexities to consider before appeal of permit to conduct environmentally hazardous operations

What should be the extent of the hearing by the Environmental Court of Appeal when a business operator has alone appealed against a permit and requested the court to change a certain term which an Environmental Court imposed on the granting of the permit? The question is raised by the Supreme Court in Case no. 1115-09, the judgment of which was announced on 29 December 2010. The interesting aspect to this case is not, in fact, the judgment in itself but rather the reasons given by the Supreme Court for it.

Brief background

The Environmental Court granted a permit to a company to manufacture cement, to operate a harbour and to incinerate waste. The Environmental Court made the grant of the permit contingent upon certain conditions, including the restriction of noise emanating from the operations. The Environmental Court held that the restriction in noise levels should apply as a guideline until 31 December 2010 and then as a threshold level. The Environmental Court also ordered that a control program should be in place and delegated to a supervisory authority the task of imposing further conditions, inter alia in the matter of control. The guideline relates to a level which, if exceeded, will require the company to take measures to keep below the levels. The threshold level, on the other hand, relates to a level which may never be exceeded. The company appealed against the Environmental Court's judgment to the Environmental Court of Appeal and claimed that the restriction in noise levels should continue to apply as a guideline after 31 December 2010. The Environmental Court held that use of the terms threshold level and guideline should be replaced in conditions by restriction level and that the conditions should be made more precise by determining their control. The Environmental Court of Appeal thus amended the conditions pertaining to noise in such a way that since the end of 2010 it was not a matter of a threshold value but a restriction level. It is clear from the judgment that the "levels shall not be exceeded" and that the Environmental Court of Appeal stated that noise levels were to be controlled either through emission measurements or measurements and calculations made in the field.

Procedural rules

In cases commenced at an Environmental Court, the Environmental Court of Appeal must apply, in respect of procedure, The Swedish Code of Judicial Procedure's rules on disputes in general courts, if nothing else follows from the Environmental Code or other act. The Swedish Code of Judicial Procedure was applied in the case at hand. It follows from chapter 17, section 3 of The Swedish Code of Judicial Procedure that an appeal can restrict the hearing in a higher instance to part of the case and to certain questions upon which the Environmental Court were called to decide. Thus, the court may not hear matters other than those which a party has duly made a claim to have heard. However, in case number 1115-09, the Supreme Court stated that in determining that part which is attributable to the appealed part of the case may not be interpreted "overly restrictively",

in an Environmental law context. Against that background, the following should be noted:

The Environmental Code presupposes that a permit hearing is based upon a consideration of different interests and the procedural rules should be interpreted in the light thereof. It is also significant that final judgments in application cases are enforceable against each and all under chapter 24, section 1 of the Environmental Code. The substantive force of law is thus not limited to the parties to the case, which is why chapter 17, section 3 of The Swedish Code of Judicial Procedure was not deemed to be appropriate to hearing of the permit matter itself.

Scope of the hearing

The Supreme Court found, therefore, that there is scope for the Environmental Court of Appeal, within the framework of a complete or partial approval, to consider changes other than those which a party has, in strict terms, invoked, if needed for the approval to have what the Environmental Court of Appeal calls a "suitable content". The scope is, however, limited to amendments which have a legal or factual connection with the amendments claimed and can be said to pertain to the same part of the case and be considered as a consequence of the appeal. It follows from this that there is normally no scope for the Environmental Court of Appeal to reject the claim of an appellant and at the same time to make a change to the judgment of the Environmental Court. This applies even if the change can be attributed to the part of the case which has been appealed. Such an amendment presupposes – at least as a main rule – that there was some procedural error during the hearing at the Environmental Court or some circumstance which a higher instance can take under consideration, without such circumstance being invoked.

What was the outcome in the case at hand?

The company's appeal concerned the manner in which a condition attaching to restriction levels were formulated and their legal consequences. The Environmental Court of Appeal's amendment was not, however, targeted directly at the condition but instead pertained to the control of noise levels. This was a question which the Environmental Court had referred to the business operator's control program and was thus not determined in more detail by the judgment. The Supreme Court held that the Environmental Court of Appeal would have dismissed the company's appeal. On the other hand, the amendment of the control provisions was deemed to lie outside the limitations of the hearing which the appeal entailed. The Supreme Court explained, therefore, that the Environmental Court of Appeal's change to the condition on noise levels constituted a procedural error.

Irrespective of the outcome of the trial, it should be noted that the Supreme Court's judgment makes clear that the Environmental Court of Appeal is not strictly bound by the claims made in an appeal, even if only one party to the case has appealed. Thus, prior to any appeal, one should assess the opportunities the Environmental Court of Appeal has at its disposal to derogate from what has been claimed, within the scope of the appeal.

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