[2019] IEHC 865

THE HIGH COURT

JUDICIAL REVIEW

[2014/286 J.R.]

IN THE MATTER OF SECTION 50 & SECTION 261A OF THE PLANNING AND DEVELOPMENT ACTS 2000-2010

BETWEEN

ANGELA PEARSE

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

WESTMEATH COUNTY COUNCIL, ANGELA BOYHAN (IN HER CAPACITY AS LEGAL PERSONAL REPRESENTATIVE OF SHAY BOYHAN DECEASED), AN TAISCE AND THE MINISTER FOR ARTS, HERITAGE AND THE GAELTACHT

NOTICE PARTIES

JUDGMENT of Ms. Justice O'Regan delivered on the 18th day of December, 2019

Issues

1. The applicant was afforded leave on the 19th of May, 2014, by Mr. Justice Peart to maintain the within judicial review proceedings which are brought by way of statement of grounds of the 14th of May, 2014, which in turn is grounded on the verifying affidavit of the applicant of the 19th of May, 2014.

2. The applicant seeks to quash the decision of the respondent of the 23rd of March, 2014, on the basis that An Bord Pleanála (ABP) in arriving at its decision failed:

   (a) to review all issues in accordance with law;

   (b) to give reasons in respect of its assumed confirmation of Westmeath County Council's (WCC) decision of the 5th of June, 2013, in respect of a purported valid Environmental Impact Assessment (EIA);

   (c) in relying upon an Environmental Impact Statement (EIS) of June, 2006 which was invalid;

   (d) to carry out a screening for an Appropriate Assessment (AA);

   (e) to make an assessment of future development; and,

   (f) to make an assessment of the enforcement file,

   all of which undermine the effectiveness of EU Directives.

3. Although a claim is also incorporated to the effect that the decision was irrational in respect of failing to determine that there was no quarrying on site pre-1964, this claim was not pursued during the course of the hearing. Insofar as the enforcement issue is concerned Mrs. Boyhan in her affidavit of the 12th of November, 2019, exhibits a letter from WCC of the 12th of February, 2014, to the effect that there was then no current

enforcement notice (an enforcement notice had been served on the 14th of December, 2005).

4. The decision of WCC of the 5th of June, 2013, and the subsequent decision of the respondent of the 23rd of March, 2014, were made pursuant to the provisions of s.261A of the Planning and Development Act 2000 (as amended) (PDA).

5. The core issues between the parties are:

   (a) the extent of the jurisdiction and obligation of WCC, and on a review ABP, required by virtue of the provisions of s.261A;

   (b) whether or not the said section requires the local authority (and on review ABP) to undertake a review of the lawfulness of any EIS previously submitted in relation to a quarry;

   (c) the adequacy of any prior EIA or AA undertaken in respect of such quarry; and,

   (d) the extent or limit of the review vested in ABP by virtue of the section.

Background

6. The applicant is a housewife and resides at Fearbranagh, Multyfarnham, Co. Westmeath. Her family home is situated approximately 300 metres from the entrance to the instant quarry. The applicant and her family have resided in this property since 2002.

7. This is the sixth judicial review application brought by the applicant in respect of the quarry. In a prior judicial review application of the 2nd of September, 2009, the applicant sought to judicially review ABP's decision of the 15th of July, 2009, to grant the quarry planning subject to the conditions attached. Ultimately such judicial review proceedings were struck out due to an error in notifying all relevant parties.

8. The instant quarry was registered under the provisions of s.261 of the PDA on the 21st (or 25th) of April, 2005. Thereafter, WCC pursuant to the provisions of s.261(7) by a decision of the 19th of April, 2006, requested that the quarry would apply for planning permission with an EIS to be submitted. The planning application together with the EIS were lodged on the 20th of July, 2006, and WCC granted permission on the 5th of February, 2007. The applicant appealed the decision to ABP on the 1st of March, 2007, but ultimately ABP granted permission on the 15th of July, 2009.

9. Following the introduction of s.261A of the PDA, WCC ultimately made a determination on the 6th of June, 2013, to the effect that development was carried out post the 1st of February, 1990, which required an EIA and that such EIA was submitted, and development was carried out after the 26th of February, 1997, which required an AA but was not carried out. As a consequence thereof, WCC directed the owner to apply to ABP for substitute consent (S.C.) with a remedial Natura Impact Statement (rNIS) pursuant to s.177E of the PDA.

10. The applicant by a submission of the 25th of June, 2013, sought a review of the determination and/or decision of WCC insofar as WCC had determined that an EIA was carried out. In a subsequent submission of the applicant of the 17th of July, 2013, following a review sought by the owner in respect of the requirement to apply for S.C. with an rNIS attached, the applicant submitted that a full AA was required together with a full EIA.

11. On the 26th of March, 2014, ABP issued the decision now challenged. In its decision ABP decided to set aside WCC's determination in respect of the need for applying for planning permission with a rNIS, under s.261A(2)(a)(ii). This decision was in accordance with the recommendation made in the inspector's report of the 23rd of December, 2013, and accordingly that inspector's report can be read with ABP's decision.

12. It is noteworthy that the decision is silent on the EIA and is further silent on a number of other issues raised by the applicant in her submission of the 25th of June, 2013, namely:

    (a) the validity of the planning permission granted in 2009;

    (b) the validity of the EIS relied upon in 2009;

    (c) the finding that an EIA was carried out in 2009;

    (d) the assertion that the quarry was not operated prior to the 1st of October, 1964; and,

    (e) the intensification which occurred in or about 2005.

Section 261A

13. In Council Directive 85/337/EEC of the 27th of June, 1985, it was required that member states adopt all measures necessary to ensure that before consent is given, projects likely to have significant effects on the environment *inter alia*, their nature, size or location are made subject to a requirement for development consent, and an assessment with regard to their effect.

14. In Council Directive 92/43/EEC of the 21st of May, 1992, Article 6(3) thereof provides that any plan or project not directly connected with or necessary to the management of *inter alia*, sites comprising special areas of conservation, likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site, in view of the site's conservation objective … Subject to the provisions of para. 4, the competent national authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned, and, if appropriate after having obtained the opinion of the general public.

15. In case C-215/06, *Commission of the European Communities v. Ireland*, the CJEU *inter alia*, in a consideration of the implementation of Article 2 of Council Directive 85/337/EEC, held that by failing to take all measures necessary to ensure that the grant of amending

consents and consents relating to the third phase of construction was preceded by such an assessment, and by merely attaching to the applications for consent, an EIS which did not satisfy those requirements, Ireland has failed to fulfil its obligation under Directive 85/337/EEC, as amended. In essence the granting of retention consent without a full EIA was condemned, save in exceptional circumstances.

16. In case C-50/09, *Commission of the European Communities v. Ireland*, the CJEU held that according to settled case law the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty relevant to Article 3 of Council Directive 85/337/EEC. This article in turn provides that the EIA shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on:

    (a) human beings, fauna and flora;

    (b) soil, water, air, climate and the landscape;

    (c) the interaction between the factors referred to in points a & b; and,

    (d) material assets and the cultural heritage.

17. Section 261A was introduced against the backdrop of the decisions of the CJEU aforesaid. The section provides that every planning authority shall, within four weeks of coming into operation of the section, publish a notice of its intention to examine every quarry in its administrative area to determine whether having regard to the EIA Directive and the Habitats Directive, one or more of the three enumerated matters were required but not carried out, namely an EIA, a screening for an EIA and an AA. Where the authority determines that one of the three matters were required but not carried out, and the quarry commenced operations prior to the 1st of October, 1964, or planning permission was granted and the requirement of registration was fulfilled, the planning authority will issue a notice requiring the owner or operator to submit an application to ABP for S.C. accompanied by a remedial EIS or a rNIS, or both as appropriate.

18. In this regard, under subs. (2)(a), the authority within a specified period is to examine every quarry and make a determination as to whether or not a development was carried out after the 1st of February, 1990, that would have required an EIA or screening for such, but such assessment or determination was not carried out, or developments were carried out after the 26th of February, 1997, which would have required an AA under the Habitats Directive but was not carried out.

19. Under subs. (3) it is provided that where the authority makes a determination under subs. (2)(a) above and the authority also decides that either works commence prior to the 1st of October, 1964, or planning permission was granted thereafter and the registration requirements under s.261 were fulfilled, a notice shall issue to the owner or operator of the quarry. Such notice shall inform the owner of:

(a) the determination under subs. (2)(a) and the reasons therefor;

(b) the decision of the authority under para. (3)(a) and the reasons therefor;

(c) that the owner or occupier is to apply to ABP for substituted consent in respect of the quarry under s.177E; and,

(d) a review of the authority's determination can be made to ABP within a certain timeframe.

20. Under subs. (6)(a) review to ABP lies in respect of a number of matters including:

1. a determination under subs. (2)(a); and,

2. a decision of the authority under subs. (3)(a).

Under subs. (6)(e) ABP is to make a decision as soon as may be whether to confirm or set aside the determination or decision of the authority.

21. It is clear from the wording of s.261A(2)(a) that the determination of the authority under subs. (1) or subs. (2), is effectively a negative determination, namely, one or other of the assessments mentioned were necessary but not carried out. Under s.261A(1), it is clear that the relevant notice to be published on the authority's website indicates that the relevant examination will be having regard to the two directives made, whether one of the three enumerated assessments was required but not carried out. Furthermore, the wording of this section is such that steps are mandated under the section where a failure to carry out an assessment which was required occurred but no steps are mandated under the section where assessments were carried out when required.

22. Section 261 of the PDA came into force on the 28th of April, 2004. Section 261A of the PDA came into force on the 15th of November, 2011 (S.I. 582/2011).

23. Under s.261(7) following the registration of a quarry (the within quarry having registered on the 21st (or 25th) of April, 2005) the local authority could, notwithstanding that the quarry had commenced its user/development prior to the 1st of October, 1964, require a planning application with an EIS to be submitted if the extracted area of the quarry was greater than five hectares or the continued operation of the quarry would be likely to have a significant effect on the environment.

24. Following a notification under s.261(7) of the PDA by WCC on the 19th of April, 2006, a planning application on behalf of the owner of the instant quarry was made and, as aforesaid, permission was ultimately granted to the quarry by ABP on the 15th of July, 2009.

25. The applicant's claim is to the effect that an EIA, or a screening for an EIA, or an AA is reference to a valid assessment as opposed to an assessment which upon a review might be considered deficient or otherwise invalid. This argument is to the effect that, even

with a quarry which at all material times secured planning permission, and where the relevant assessments anticipated under the EIA Directive and the Habitats Directive were carried out, it is nevertheless the obligation of the authority to review such assessments and all documents relied upon in or about the making of such assessments with a view to ascertaining whether or not the authority is now satisfied that such assessments could now be considered valid.

26. The applicant urges for a purposeful approach to the scope and interpretation of s.261A as this is a remedial section to the legislation. In this regard in *An Taisce/ The National Trust for Ireland v. McTigue Quarries Ltd. & Ors*. [2018] IESC 54, Mr. Justice MacMenamin, although dealing with s.177O of the PDA, which was adopted to give effect or further effect, to eleven different categories of EU legislative instruments including the two directives above mentioned, held that the Court must proceed on the basis that the intent behind the statute was to give effect to the EIA Directive. The interpretative questions in this case must be seen from this starting point.

27. The respondent doesn't disagree with the applicant's assertion, but states that there is a limit to the exercise in that it is not possible to re-write the section.

28. The provision was introduced following the two CJEU judgments aforesaid where essentially the EU Court criticised Ireland for allowing retention permission on an unrestricted basis without an EIA (the Court being satisfied that retention permission might be afforded on an exceptional basis) and further felt that the language in the legislation was not sufficiently clear and precise (although as pointed out by the respondent, no flawed assessments are identified) to ensure compliance with the directives.

29. In presenting her argument the applicant states that ABP erred because:

    (a) there was no look at future developments in its assessment;

    (b) ABP did not examine or review, and if necessary set aside, the 2009 EIA;

    (c) a purposeful approach would yield an assessment of all quarries including review of any EIA or AA undertaken in the process of granting planning permission to ascertain whether or not such EIAs and AAs can be considered lawful;

    (d) by adopting the approach it did, ABP undermined the two relevant directives herein before mentioned;

    (e) because of the history of the development and user of the quarry, the 2009 permission should have been at least, in part, retention permission (the applicant's argument based upon a continued assertion that the quarry did not operate prior to the 1st of October, 1964, notwithstanding the judgment of Hanna J.); and,

(f) the EIS submitted by the quarry owner in securing the July, 2009 planning permission was defective and therefore unlawful and this in turn contaminated the EIA conducted by ABP inspectors and the July, 2009 planning permission.

30. The applicant accepts that the approach urged by the applicant as aforesaid would involve a result whereby the July, 2009 planning permission would (on foot of the faulty EIS as alleged) or might (on foot of the other arguments presented) result in a finding that the July, 2009 planning permission was unlawful.

31. In *Goonery v. Meath County Council & Ors.* [1999] IEHC 15, a judgment of Mr. Justice Kelly, the applicant's grounds for judicial review incorporated a declaration, that the first named respondent did not properly determine the application for planning permission because it failed to have adequate regard to the EIS as submitted together with a declaration that the first named respondent could not have made a valid decision. In submissions before the Court the applicant argued that nowhere in the reliefs sought did he question the validity of the planning permission. Mr. Justice Kelly did not agree on the basis that, if the reliefs were granted they would undoubtedly mean in practical terms that the decision of the local authority was invalid. It was held that the mere fact that an order was not sought quashing the permission in question does not mean that the validity of the permission was not being questioned.

32. In para. 6.3 of *Sweetman v. An Bord Pleanála & Ors.* [2018] IESC 1, (a judgment of Clarke C.J.) reference is made to the substance over form approach set out by Kelly J. in *Goonery* aforesaid. The Court also referred to the judgment in *Nawaz v. Minister for Justice, Equality and Law Reform & Ors*. [2012] IESC 58, where it was held that the question to be asked is, whether if the relief is granted it would amount to a determination to the effect that a particular type of measure specified in the section is invalid. At para. 7 the rationale behind the collateral attacks jurisprudence was said to be clear.

> "A party who has the benefit of an administrative decision which is not challenged within any legally mandated timeframe should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings which seek to quash the validity of a subsequent decision on the basis that the earlier decision was invalid … the requirement of legal certainty makes clear that a person who has the benefit of a decision which is not challenged within whatever time limit may be appropriate, is entitled to act on the assurance that the decision concerned is now immune from challenge subject to very limited exceptions such as fraud and the like."

33. In addition to the foregoing case law, the respondent argues that it is restrained by the wording of the section and if one admitted the approach urged by the applicant then this would render s.261A(2)(a) redundant. Furthermore, the terms of the section are clear in their requirements to look back as opposed to forward – subs. (1) and (2) are phrased in the past tense and there is nothing in the entirety of the section to suggest an assessment of future potential development.

34. Section 3.2.3 of the Department's Guidelines on s.261A of January, 2012, provide:

> "Any quarry which applied for and obtained planning permission under s.261(7) will not be caught by this subsection, in respect of the EIA requirement, unless there has been recent further development in the quarry, which was not authorised by the permission granted under s.261(7) and which would require EIA or AA."

35. In s.3.2 of the supplementary section 261A Guidelines of July, 2012 it is stated:

> "Therefore a view could be taken that until the 13th of December, 2007, at least, provided that an EIA was carried out and provided that it considered all relevant environmental effects, which of course include direct and indirect effects on flora and fauna, then the AA requirements could be deemed to be adequately addressed."

36. The respondent also argues that even on the assumption that the EIS lodged in July, 2006 was defective, (the ABP inspector's report at the time states that the EIS was deficient) nevertheless, there was sufficient evidence before the inspector at the time to reach a decision (as is acknowledged by the inspector in relevant report of the 5th of October, 2007) so that any deficit in the EIS did not feed into the EIA or the subsequent planning permission of July, 2009.

37. The argument as to retention permission in 2006 has already been determined by Hanna J. in the judgment perfected on the 2nd of March, 2009, being judicial review proceedings brought by the instant applicant asserting that the direction of WCC of the 19th of April, 2006, was unlawful as it was premised on an acceptance of pre-1964 user/development of the quarry. Mr. Justice Hanna accepted that there was sufficient information before the WCC to make such a determination and although this order was subsequently appealed by the applicant the appeal was in due course withdrawn.

38. There is no suggestion of fraud or the like as identified in Sweetman to potentially bring the within matter outside the scope of the normal rules as to legal certainty and precluding collateral attacks.

39. Applying a fair, large and liberal interpretation in the context of the background or history leading to the adoption of the relevant section, it appears to me that the approach urged by the applicant cannot be supported. Such an approach would be inconsistent with the relevant guidelines, the requirement for legal certainty, with the jurisprudence in respect of collateral attacks, with the wording of the totality of the section and would not only require deletion of a portion of the section (subs. (2)(a)) but would also require an effective overruling of a prior High Court decision. Furthermore, the argument would fail to respect the margin of appreciation afforded to the professionals involved in the 2007-2009 process.

Appropriate Assessment

40. The applicant complains that there was no screening for an AA conducted by ABP, that there was no assessment for future development and there was no objective evidence to reach a conclusion that a full AA was not required.

41. In the decision of the CJEU in *Waddenzee*, case C-127/02 at para. 56 it was stated that planning permission should only be granted if the authority is convinced that it will not adversely affect the EU protected site. Where doubt exists about the risk of a significant effect, an AA must be carried out. The Court also stated at para. 45 that relative to an appropriate assessment of a development, not directly connected with an EU site, same should be subject to an AA of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.

42. In a judgment of Ms. Justice Finlay Geoghegan of the 25th of July, 2013, in *Kelly v. An Bord Pleanála & Ors*. [2014] IEHC 400, the Court quoted from Advocate General Sharpston in *Sweetman* C-258/11, to the effect that, the possibility of their being a significant effect on the site would generate the need for an AA. At para. 48 of the opinion aforesaid, it is stated that the requirements that the effect in question be 'significant' exists in order to lay down a *de minimis* threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If a plan capable of having any effect by activities on or near the site, be caught by Article 6(3) of the Habitats Directive this would render impossible any development by reason of legislative overkill. Ms. Justice Finlay Geoghegan at para. 28 of her judgment quoted from s.177U of the PDA which requires a screening for an AA in view of best scientific knowledge as to whether individually or in combination with another plan or project it is likely to have a significant effect on the European site.

43. The respondent argues that ABP's screening for AA was valid, effective and in keeping with the provisions of s.261A, as it was looking back at development, as opposed to looking at future development. The difference between the WCC AA screening and the ABP screening within the inspector's report is that the WCC screening (6 pages) was general, whereas, the ABP screening was specific.

44. I am satisfied that a screening for an AA was undertaken prior to the ABP decision now impugned within the inspector's report of the 4th of December, 2013. In this regard, having referred to the habitats regulations within this jurisdiction, para. 9 is an assessment commenced at pg.15 of the report which then sets out and considers the various arguments put forward by virtue of the submissions by the applicant and by the quarry owner to ABP. Paragraph 9.15 is headed "appropriate assessment screening". The screening considers the nearby European sites, the quarry assessment of WCC, the relevant guidelines and the determination of WCC of the 5th of June, 2013, to the effect that an AA was required. In combination impacts are considered and ultimately the conclusion as to the requirement for an AA is set out in para. 9.17. The factors influencing

the decision to recommend that the issue of an AA is not warranted are set out in the final paragraph of para. 19.17.

45. In the circumstances therefore, I am satisfied that the applicant has failed to establish any misunderstanding on the part of the inspector in conducting the test which was undertaken by the requirements of s.177U of the PDA, which section mirrors Article 6(3) of the Habitats Directive and the conclusion reached is fully reasoned.

46. Insofar as the applicant places substantial reliance on the affidavits of Stephen Dowds, Town Planning Consultant, I accept the argument put forward by the respondent that this is not appropriate given that his affidavit is dated the 28th of November, 2014, and the matters therein contained were not put before ABP prior to making its decision of the 30th of March, 2014. I am happy to adopt the views expressed by Ms. Justice Faherty in *Redrock Developments Limited v. An Bord Pleanála* [2019] IEHC 792 in a judgment of the 21st of October, 2019, where at para. 187 the Court indicated that the applicant's reliance on an affidavit of a third party is to invite the Court to substitute the third party opinion for that of the board and this is not the function of the court in judicial review. The conclusion of the board fell within its particular expertise. The argumentative submissions by Mr. Dodds on the merits of the board's decision and submissions which were not before the board, are inappropriate in the context of a judicial review application.

EIA and other matters

47. The applicant complains that the submissions she made in respect of the EIA and other matters were not in fact considered by the board and if they were considered, no reasons were given for their conclusion.

48. The respondent indicates that only such matters as ABP had jurisdiction to deal with under subs. (6) of s.261A were dealt with.

49. Section 261A(6)(a) provides that a person may not, later than 21 days after the date of *inter alia* a notice under subs. (3)(a) being issued, apply to the board for a review of one or more of the matters referred to in the notice. Following in the subsection and for the purposes of the current exercise one of such matters is:

> "(i) a determination under subsection (2)(a)"

50. Subsection (2)(a) in turn has two further subsections setting out the potential determinations which might be made by a planning authority under subs. (2)(a), the first relating to a development carried out after the 1st of February, 1990, which would have required an EIA but same was not carried out, or the second being a development after the 26th of February, 1997, which would have required an AA but such assessment was not carried out.

51. The respondent argues that there was no determination in accordance with the provisions of subs. (2)(a)(i) as the WCC determined that there was development carried out after the 1st of February, 1990, but an EIA was not only required but carried out. Accordingly,

the only matter which validly came before ABP under subs. (6) was the determination that an AA was required but not carried out.

52. I am satisfied that the wording of s.261A(6) is such that the review jurisdiction of ABP is limited by the specific terms of the section to the matters identified therein. Given that s.261A(2)(a)(i) and s.261A(2)(a)(ii) are in turn expressed in the negative, only a local authority determination identifying a deficiency in a prior grant of planning permission is capable of being within the terms of the review contemplated by s.261A(6)(a)(i). In addition the other matters raised by the applicant do not come within the ambit of any of the enumerated review issues specified in s.261A(6). Accordingly ABP simply had no jurisdiction to entertain them.

53. In light of the foregoing I am not satisfied that the applicant has not discharged the burden required of her to establish that ABP had greater jurisdiction than contended for by ABP in the within judicial review proceedings.

Conclusion

54. In the circumstances the reliefs claimed by the applicant are refused.