[2020] IEHC 652

THE HIGH COURT
JUDICIAL REVIEW

[No. 2018/1072 JR]

BETWEEN

JOHN MOORE

APPLICANT

AND
AN BORD PLEANÁLA
AND
MINISTER FOR THE ENVIRONMENT, CLIMATE AND COMMUNICATIONS,
AND
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND
KILSARAN CONCRETE

NOTICE PARTY

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 4th day of December, 2020

Issues

1. The applicant secured leave on the 14th January, 2019, to maintain the within proceedings. A further order was made on the 4th of June, 2019, entitling the applicant to amend the statement of grounds in accordance with the said order. The statement to ground the application was ultimately filed on the 16th of July, 2019.

2. The claim against the first named respondent ('ABP') is for an order of certiorari in respect of two decisions made, both of the 24th of October, 2018, granting Kilsaran substitute consent ('SC') and granting Kilsaran permission to further develop its quarry.

3. Insofar as the claims against ABP are concerned it is asserted that ABP:

   (a) failed to apply s.177E of the Planning and Development Act 2000 as amended ('PDA') in failing to have regard to the test for exceptional circumstances, in failing to have regard to the unauthorised user of the lands in circumstances where the developer could not have believed the development was authorised and therefore the planning permission afforded cannot be reconciled with the European Directive;

   (b) erred in determining that the quarry was regularised by the consent achieved in private law proceedings as between residents of the Bellewstown area and others against Kilsaran pursuant to the provisions of s.160 of the PDA;

   (c) erred in failing to have regard to the concerns expressed as to the scope and limits of SC as identified in *An Taisce- The National Trust for Ireland v. McTigue Quarries Ltd* [2018] IESC 54;

   (d) failed to comply with the Court of Justice of the European Union ('CJEU') decision of *Commission v. Ireland*, Case C-215/06;

   (e) rejected the Inspector's report and various objector's concerns were not duly considered;

(f) failed to hold an oral hearing;

(g) the decision is irrational on the basis that the evidence before ABP conclusively established that the development was unauthorised either by a grant of planning permission or in accordance with s.261A of the PDA, where there was no basis for a belief that the quarry was planning compliant; and,

(h) the decision is premised on the existence of exceptional circumstances which cannot be reconciled with the facts.

4. In the reliefs claimed against the second named respondent ('the Minister') it is asserted:

(1)(a) that the European Communities (Environmental Assessment and Habitats) Regulations 2015 (Statutory Instrument No. 301/2015) ('the 2015 Regulations') are invalid having regard to Article 15.2.1 of the Constitution and therefore *ultra vires* the powers of the Minister; and/or

(b) not made pursuant to s.3 of European Communities Act 1972;

(2)(a) the State has failed to properly or faithfully transpose Directive 2011/92/EU of the European Parliament and of the Council of 13th of December, 2011, on the assessment of certain projects on the environment; and/or,

(b) Section 261A of the PDA and/or part XA thereof are contrary to European Law.

5. Thereafter in the statement to ground the application it is asserted:

(1) Insofar as the 2015 regulations are concerned, they didn't give effect to either the Environmental Impact Assessment ('EIA') Directive or the Habitats Directive and therefore are not incidental supplemental or consequential to same, and were not necessitated by the State's European Union obligations and in the circumstances comprised an impermissible transfer of legislative competence to the Minister rather than resting with the Oireachtas pursuant to Article 15.2.1 of the Constitution.

(2) Insofar as the obligation to transpose is concerned, it is asserted that by permitting delinquent developers without establishing exceptional circumstances, permission to develop in circumstances where there had been unauthorised developments which the developer could not have reasonably believed were exempt or authorised, is not in accordance with the relevant directions as since explained in the CJEU decisions.

(3) It is further argued that if the grant of SC be quashed then the grant of planning permission for further development must also be quashed. I did not understand the respondents or the notice party to disagree with this assertion. In this regard it is clear from the legislation as a whole that insofar as a quarry is concerned SC is one of the necessary prerequisites to the grant of future planning consent (in ABP's Inspector's report of November, 2016 concerning the application for future

development, one of the grounds for suggesting future development consent would be refused was that the quarry had not been regularised in accordance with the provisions of s.261A of the PDA - there was no SC granted to Kilsaran).

6. The relevant quarry is situate at Bellewstown in County Meath comprised in Folio 19959F and Folio 40523F respectively of the Register of Freeholders County of Meath. The applicant resides in Bellewstown aforesaid.

7. In the various statements of opposition filed by the respondents and the notice party, respectively dated 22nd of May, 2019, 16th of July, 2019, and 15th of July, 2019, it is asserted that the applicant is out of time in maintaining his claim in respect of exceptional circumstances as this was conclusively determined at stage one of a two-stage process in October, 2013 and therefore any challenge to that decision should have been made within 8 weeks in accordance with s.50 of the PDA.

8. The entirety of the applicant's claim is disputed by the respondents and the notice party.

9. In extensive written submissions of the 26th of June, 2020, the applicant has identified the refined and reduced issues as follows:

   (1) Was ABP's decision to grant Kilsaran SC in respect of its quarry lawful? (the applicant in oral submissions states that this encompasses an asserted failure by ABP to review exceptional circumstances).

   (2) Was the Board entitled to grant Kilsaran future development consent?

   (3) Has the State by enacting s.261A and part XA of the PDA complied with its obligations to transpose into Irish law the provision of the Directive? and,

   (4) Was the Minister entitled to make the 2015 Regulations?

10. Issue 2 above will be answered effectively by dealing with issues 1, 3 and 4.

Irrationality

11. The substance of the applicant's arguments in this regard might be summarised as follows:

   (1) ABP rejected the Inspector's report without reasons.

   (2) ABP failed to have due regard to the objector's concerns.

   (3) ABP failed to have an oral hearing.

   (4) The evidence before ABP conclusively established that the development was unauthorised and there can be no basis for the developer's belief that the quarry was planning compliant.

   (5) The grant of SC is premised on the existence of exceptional circumstances which cannot be reconciled.

(6) ABP erred in determining that the quarry was regularised by the consent in the s.160 proceedings.

(7) There is nothing in the legal history of the within quarry to support the grant of SC.

(8) ABP should not have relied on the guidelines.

(9) It is irrational to say that prior to the destruction of the monument on site a grant would have been given.

12. By reason of Order 84 of the Rules of the Superior Courts, the issues as to the guidelines and the matters dealt with in the 2013 decision are not before the court.

13. The holding of an oral hearing is a matter for the discretion of ABP and therefore it cannot be considered irrational not to have held an oral hearing. The applicant has not pointed to any obligation on the Board to hold an oral hearing rather than a power pursuant to s.177Q of the PDA.

14. The Board did in fact give reasons insofar as it departed from its Inspector's recommendation relevant to the monument, and the impact on the local community as follows:

(a) Insofar as the monument is concerned it was noted that the barrow was excavated in 2007 under licence from the National Monument section of the Department of Environment, Heritage and Local Government and was preserved by record. It also states that there was no objection to the subject application for SC by the Department (the applicant highlights the reference in the Inspector's prior report identifying some confusion in the Department submissions as to what is to be considered at SC stage. However, this does not amount to an objection to SC). In these circumstances ABP did in fact afford reasons as to the different view it took over the Inspector's report concerning the monument.

(b) Insofar as the local community is concerned, ABP accepted for a particular period of time intense activity occured, generally speaking between 2006 and 2009 with negative impacts owing to quarry traffic, dust and associated noise and general disturbance. However, taking account of the planning and legal history of the site, the pattern of development in the area, the policies of the County Development Plan and the tied nature of the resource the Board did not consider that these impacts would be unacceptable or would merit a refusal of SC.

15. ABP did not therefore determine that the conclusion to the s.160 proceedings regularised the planning status of the quarry but rather it appears that the conclusion to the s.160 proceedings achieved by compromise between them, together with other matters, led the Board to conclude that the impacts would not be unacceptable or merit a refusal of SC.

16. The applicant has not demonstrated therefore that ABP has acted outside of their jurisdiction or had no basis whatsoever to come to the conclusions it did come to,

including in relation to the destruction of the monument and the concerns of the local community. Therefore, the applicant has not discharged the onus on him to establish that the decision of ABP relative to SC was irrational.

EU relevant position

17. Under Article 2(1) of Directive 2011/92/EU (which replaced Directive 85/337/EEC, without material alteration insofar as the within proceedings are concerned) it is provided:

> *"Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects."*

18. Quarries are included in Appendix 1 of the Directive.

19. In Wells, Case C-201/02 (delivered on 7th of January, 2004) the Court was dealing with a failure to carry out an EIA and confirmed that it was the obligation of all Member States to nullify unlawful consequences of a breach of EU Law by every organ of the Member State. Subject to the limits laid down by the principle of procedural autonomy Member States should revoke or suspend consent until an EIA is undertaken. Subject to the principles of equivalence and effectiveness procedural rules are for Member States. Member States must make good any harm caused. It is for our national court to determine if it is possible to revoke or suspend consent (para. 64 and 65).

20. In *Protect Natur*-, Case C-664/15 (delivered on 20th December, 2017) the Court stated at para. 88 that Member States were obliged to give effect to the right to an effective remedy but the Aarhus Convention did not preclude the imposition of time limits. At para. 90 stated the Court stated that a rule imposing a time limit may be justified by law if it respects the essence of the law, is necessary and subject to the principles of proportionality, and genuinely meeting objectives of the public interest recognised by EU law.

21. In *Commission v. Ireland*, Case C-215/06 (delivered on 3rd of July, 2008) the Commission complained that Ireland had not taken all necessary measures to comply with Articles 2, 4 and 5 of Directive 85/337/EEC aforesaid as amended and the granting of retrospective consent was said to undermine the Directive when given without exceptional circumstances. The Commission's complaint was upheld. In the Court's judgment it is stated that it is clear from the Directive that projects for which an assessment is required should be subject to a requirement for development consent and the assessment should be carried out before such consent is granted. It was noted that it was undisputed that Irish legislation establishes retention permission and equates its effects to those of the ordinary planning permission. Retention is given without exceptional circumstances being established. The court held that community law did not preclude in certain cases regularisation consent provided it did not offer the person concerned the opportunity to circumvent community law and should remain the exception. The relevant assessment should be carried out at the earliest possible stage to prevent rather than subsequently

counteract adverse effects. The competent authorities are obliged to take the measures necessary to remedy failure to carry out an EIA in a consent granted (for example revocation or suspension) subject to the limits resulting from the procedural autonomy of Member States. A remedial EIA is not equivalent to an EIA preceding the issue of consent.

22. In the case of *Corridonia*, Case C-196/16 (delivered on 26th of July, 2017), the Court affirmed Member States' obligations to take all necessary steps to remedy the failure to carry out an EIA for example by revocation or suspension, and to make good any harm and recognising at para. 37 that EU law does not preclude national rules which in certain cases permit regularisation of unlawful measures provided such rules do not offer an opportunity to circumvent EU rules.

23. In *Stadt Wiener*, Case C-348/15 (delivered on 17th of November, 2016), the Court was considering an Austrian Law which permits project consents to be annulled within a three-year period if they were secured without an EIA, and thereafter permission is deemed to be granted. The Court held that where a national provision which deems project consent to be lawfully authorised purely and simply because consent can no longer be challenged before the courts by reason of the expiry of time limits for the bringing of such challenge proceedings, is not compatible with the Directive. EU Law does not in principle preclude, due to compliance with the principal of equivalence, a Member State from setting a time limit of three years for bringing proceedings, reasonable time limits being compatible with EU law.

24. By reason of the foregoing it would appear that in order for a Member State to comply with the relevant Directive:

    (a) development consent with an EIA in advance of the commencement of a project should be the norm with retrospective consent limited to exceptional circumstances;

    (b) provided that retrospective consent does not afford an opportunity to circumvent EU Law;

    (c) with Member States nullifying the consequences in compliance with the Directive securing consent in advance of the project for example by revocation or cancellation subject to and resulting from the procedural autonomy of Member States;

    (d) remedial EIAs should not be equivalent to an EIA; and,

    (e) regularisation consent should not equate to normal planning permission.

25. Insofar as time limits are concerned (which would engage the collateral attack jurisprudence) it would seem that the EU does not preclude time limits provided:

    (a) the remedial obligation survives;

(b) the obligation to carry out an EIA survives; and,

(c) the impact of the expiry of the time limits should not deem the project to be lawfully authorised.

Ireland's position on quarries

26. On 28th of April, 2004, s.261 of the PDA came into force. This required quarry owners/operators to register their quarries and provide certain detailed information in respect thereof. The provision enabled the relevant County Council to direct the quarry owner to apply for planning permission or indeed the local authority could impose conditions even without planning permission (s.261(6)).

27. On 21st of September, 2011, part XA of the PDA came into force. Section 261A is within Part XA. Section 261A applies only in respect of quarries. There are/were two further pathways under s.177B and s.177C enabling an owner/operator to apply for SC. Under those provisions leave might be afforded. Following the decision of the Supreme Court in *An Taisce v. An Bord Pleanala, An Taisce v. An Bord Pleanala, Sweetman v. An Bord Pleanala* [2020] IESC 39 ('McQuaid'), s.177C was found to be inconsistent with the EIA directive and the s.177B pathway is not the only such pathway available.

28. The pathway provided by s.261A is in the form of a direction to the quarry owner to apply for SC as opposed to granting the quarry owner leave to apply. Effectively under s.261A local authorities must examine quarries in their functional area:

(a) to establish if development was carried out after the 1st of February, 1990, which would have required an EIA or a determination as to whether an EIA was required but that no such assessment or determination was carried out;

(b) to establish if development was carried out after the 26th of February, 1997 which development would have required having regard to the Habitats Directive, an Appropriate Assessment (AA) but that such assessment was not carried out;

(c) to determine if the quarry commenced operation before the 1st of October, 1964 or permission was granted in respect of the quarry; and,

(d) to determine if applicable the requirements for registration under S.261 were fulfilled.

29. Depending on the outcome of the examination, the authority is obliged to issue a notice to the quarry owner or operator to apply to ABP for SC.

30. Whatever the pathway, the application for SC is made under s.177E.

31. If in the event an EIA or an AA therefore was required but not carried out and the quarry commenced operation after the 1st of October, 1964 or did not have a grant of permission, or the registration requirements under s.261 were not fulfilled the authority is obliged to serve an enforcement notice.

32. It is said that by enacting s.261A the State has identified a category of cases which meet the exceptionality criteria without the necessity for an individual assessment. It might also be noted that the local authority did in fact make an assessment and by notice in writing of the 25th of July, 2012, directed Kilsaran to apply for SC. That direction was subsequently reviewed and confirmed by ABP on the 10th of October, 2013. As is clear from the content of the statement of grounds same does not seek to quash the review decision aforesaid.

33. In *Sweetman v. An Bord Pleanála* [2018] IESC 1, the Supreme Court was asked to consider as a preliminary issue, whether the challenge to the grant of substantive SC amounted to an impermissible and out of time collateral attack on the prior determination of the planning authority to direct an application for SC under s.261A. Ultimately, the court determined that it was not appropriate to deal with the matter as a preliminary issue, however, did comment on the issue at paras. 7.1 and 7.2 of the judgment:

> *"7.1. The rationale behind the collateral attack jurisprudence is 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…*
>
> *7.2. The requirements of legal certainty make 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."*

34. Subsequently in considering the application of these principles where there is a two or more stage process leading to the ultimate substantive administrative decision the Court expressed the view:

> *"7.3. In such a case it seems to me that it is necessary to analyse the process concerned for the purposes of determining whether it is the overall intent of the scheme in question that the relevant issue or question be definitively and finally decided at the first stage with no capacity to revisit the issue at any subsequent stage in the process."*

35. In *Sweetman v. An Bord Pleanála & Ors*. [2020] IESC 39, (McQuaid) being a judgment delivered by Mr. Justice McKechnie on the 1st of July, 2020, the SC procedure was in issue. At para. 149 of the judgment the Court opined that the scheme for SC was a sort of two-stage process described in *Sweetman* by which final decisions are made at the initial stage which cannot subsequently be looked at anew – once a decision was made on the leave application then the decision was ring-fenced:

> *"… After the leave decision has been made, the option to subsequently reverse that decision is no longer a possibility. I therefore entertain no doubt but that both*

stages one and two are separate and self-contained… the leave decision could only be challenged within the time as specified in section 50 of the Act."

36. At para. 86 the Court determined that there was nothing in the Directive or in any of the judgments emanating from the CJEU which preclude satisfying the exceptionality test by way of legislation either by way of category threshold or criteria. This test does not involve an examination at an individual level. Indeed, the Court was satisfied that Article One of the Directive justified such a course of action on the basis that the objectives of the Directive can be achieved through the legislative process.

37. The Court considered the meaning of exceptional circumstances and indicated that it could be something remarkable, extraordinary or special, or the underlying events must be rare or unusual. Context is important. At para. 89 the Court was satisfied that the requirement for exceptionality was justified, otherwise developers might be incentivised to ignore or disregard the EIA requirements.

38. In the events the Court struck down one of the leave gateways provided in s.177C(2)(a) as being relatively general and ordinary, undeniably broad and widely drawn and these events are unlikely to be of dissuasive effect which is a key objective of the Directive.

39. Public participation was also a key feature of the judgment, however, in the instant matter it is common case that there was public consultation in respect of all steps which occurred in the s.261A process.

40. The Court indicated at para. 155 that a particular approach to the exercise of the collateral attack jurisprudence, in the area of SC may be required under European Law. However, in the events it was no longer necessary for the purposes of the proceedings before the Court to resolve or further advance that particular question. However, the Court indicated that collateral attack is judge made and driven and is thus capable of some adaptation or relaxation if a particular situation demands it. It is not, and not intended to be applied in some mechanical or formulistic way.

41. The Court also considered *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v. Workplace Relations Commission* Case C-378/17, a judgment of the CJEU delivered on the 4th of December, 2018, following a reference by the Supreme Court. The Irish Supreme Court suggested it would be unsatisfactory that national bodies should have jurisdiction to disapply national rules contrary to EU law as this is liable to give rise to disorder. The CJEU said it was the duty of the courts and all organs of the State including administrative authorities to disapply any domestic rule contrary to an EU rule. This is of significance in the instant proceedings.

42. In *Shillelagh Quarries Limited v. An Bord Pleanála* [2019] IEHC 479, (Barniville J.) delivered on the 11th of June, 2019, the Court cited, approved, and applied existing jurisprudence, *Patterson v. Murphy* [1978] ILRM 85, "*…on the effective meaning of a quarry which 'commenced operation before the 1st of October, 1964'*" (the Court was dealing with the meaning of this phrase as it appears in s.261A(24) being the same

wording that is relevant to the local authority's assessment under s.261) and stated the rule:

"121. There must have been some quarry operation on the relevant site before 1st October, 1964 and that operation must have continued (and not have been abandoned) on a proportionate basis since then…. Putting it a slightly different way but without changing the substance of the requirement, the current scale of the quarry operation must be what was or might reasonably have been anticipated at 1st October, 1964 as having been involved in the works taking place at that date… The essential focus then in considering whether the quarry "'commenced operation' before 1st October, 1964" is to compare the nature and extent of the quarry operation carried on before that date with the quarry operation being carried on at the date of the application for leave to apply…"

43. In *Friends of the Irish Environment Limited v. An Bord Pleanála & Anor*. [2019] IEHC 80 (Simons J.) delivered on the 15th of February, 2019, at para. 132 the Court noted tension between domestic jurisprudence on time limits and the case law of the CJEU which identifies a remedial obligation on a competent authority.

Submissions

44. The applicant has submitted:

(a) ABP has failed to assess exceptional circumstances and therefore has disregarded this essential requirement.

(b) The collateral attack jurisdiction is not engaged nor does it assist ABP as it is bound to assess exceptional circumstances before granting SC.

(c) The error of ABP can be corrected at stage two.

(d) ABP is obliged to nullify its earlier decision of December, 2013 based on the *Workplace Relations Commission* CJEU decision.

(e) The guidelines issued by the Department pursuant to s.28 of the Act in January, 2012 suggest that commenced operations before the 1st of October, 1964, merely requires a demonstration that the quarry commenced operations by the 1st of October, 1964 and no more. (Accordingly, the applicant poses the question as to how the public were to know that the guidance above was incorrect where the Inspector's report of the 9th of May, 2013 followed the guidelines.)

(f) Under current understanding of s.261A following the *Shillelagh* judgment, the quarry would not have been directed to apply for SC but rather an enforcement notice would have been served.

(g) In *McQuaid* the Court struck down gateway number three notwithstanding the collateral attack argument as it wasn't consistent with EU Law.

(h) The entirety of the legislation does not incorporate an assessment of exceptional circumstances.

(i) By reason of the guidelines and the misunderstanding as to the law, the within matter comes within the exceptions identified by Chief Justice Clarke in *Sweetman* at para. 7.2 when reference was made to '*subject to very limited exceptions such as fraud and the like'*.

45. In my view the applicant's arguments aforesaid must fail by reason of the following:

(a) Section 261A and part XA are entitled to the presumption of constitutionality.

(b) In accordance with *McQuaid* it is permissible for exceptional circumstances to be catered for by legislation as applied in s.261A. Applying the correct interpretation of this section (as per *Shillelagh* aforesaid), it is clear that the provision does require exceptional circumstances to the extent that the section envisages compliance with planning legislation (including no intensification or abandonment of a development which commenced prior to the 1st of October, 1964). Therefore, it does have a dissuasive affect in attempting to avoid EU legislation insofar as the gateway provided by that provision merely directs and enables the quarry owner to apply for SC at which time a remedial EIS must be commissioned and a remedial EIA undertaken.

(b) The error asserted in the decision of December, 2013 is ring-fenced and cannot be corrected at stage two (see *Sweetman* and *McQuaid* above). ABP may well be obliged under the *Workplace Relations Commission* case to disapply any national rule that conflicts with EU rules, however, that is a far different proposition to being obliged to nullify an earlier decision. A proposition to annul is not mentioned at all in the statement of grounds. The relevant statutory provisions to be considered at stage two do not incorporate an exceptional circumstances assessment.

(c) There is nothing in s.261A properly construed which affords relief to delinquent developers or might be considered to afford an opportunity to circumvent EU law.

(d) In *McQuaid* collateral attack jurisprudence was not ignored but rather in the events did not have to be considered insofar as the EU dimension is concerned.

(e) In relation to guidelines, the test identified in *Shillelagh* predated the January, 2012 Guidelines. The December, 2013 decision was the subject matter of an application for *certiorari* by other residents of Bellewstown on the basis of the failure to properly construe "*commenced development prior to 1964*". Such proceedings were ultimately abandoned. Certainly therefore it is clear that it was possible to challenge the December, 2013 decision and it was within public knowledge, the available argument contrary to the January, 2012 Guidelines, as to the meaning of development commencing prior to the 1st of October, 1964.

46. A grant of SC is not the same as a grant of future planning permission. In this regard the grant of SC on its face clarifies that it does not afford the recipient an entitlement to further develop the quarry. Furthermore, a grant of SC is a necessary prerequisite to secure a grant of further development permission (see for example ABP's Inspector's report of November, 2016 where one of the reasons the recommendation was made to refuse a future grant of planning permission was the fact that SC had not been granted).

47. Aside from the collateral attack argument it is the case that several arguments made relate back to the decision of ABP in December, 2013. In this regard the following is relevant:

    (1) In AP v. DPP [2011] IESC 2, the Supreme Court held that the scope of the court's jurisdiction in judicial review is confined to the grounds specified at leave. In the interest of good administration, it is essential that grounds of relief are set out clearly and precisely. Any additional grounds can be raised only after leave is granted. Mr. Justice Hardiman indicated an absolute necessity for precise defining of grounds.

    (2) S.I. No. 691/2011 provides for an amendment of O.84 as and from 20th the 1st of January, 2012

    (3) Under O.84, r.20 no application for judicial review can be granted unless leave is first granted and in any application there should be a statement of each relief and particulars for same.

    (4) Under O.84, r.21 an extension of time to seek judicial review is possible but the Court shall only extend time if good and sufficient reasons for the failure to institute the proceedings within the relevant timeframe are provided and the failure to do so was outside the applicant's control or could not reasonably be anticipated by the applicant. These matters must be put on affidavit. The three month time limit on seeking judicial review is expressed to be without prejudice to statutory provisions limiting the time.

48. None of the difficulties expressed by the CJEU in case law aforesaid and in particular in Stadt Wiener to the applications of time limits are applicable in the instant circumstances and accordingly no tension as such arises as between domestic and EU positions. (see paras. 23 and 25 hereof)

49. No application has been made to extend time to challenge the decision of December, 2013.

50. The applicant has not demonstrated at all that the issue of the guidelines might be considered as coming within the category of "*fraud and the like*" – there is no evidence whatsoever of any deliberate misinformation or such to consider the guidelines as akin to a fraud.

The 2015 Regulations

51. Article 15.2.1 of the Constitution provides that the sole and exclusive power of making laws for the State is reserved to the Oireachtas.

52. Pursuant to Article 29.4.6 no other provision of the Constitution invalidates laws enacted by the State that are necessitated by the obligations of membership of the European Union.

53. By virtue of the provisions of ss.1-3 inclusive of the European Communities Act 1972, all EU Directives will be binding on the State and the Minister may make regulations for enabling the binding obligation to have full affect. The regulations may contain such incidental supplementary and consequential provisions as appears to the Minister to be necessary for the purposes of such regulations.

54. The impugned 2015 regulations are dated the 14th of July, 2015. These regulations included ss. 37M, 37N, 37O, and 37Q to be inserted into the PDA. Under these provisions applications for further development of a quarry, as a quarry only, within a given timeframe were obliged to be made to ABP which body is then to consider the application for SC in conjunction with the application for future development and the duties imposed on ABP will ensure that the applications to it are made as expeditiously as possible.

55. In the statement of grounds it is complained that the regulations are ultra vires the Minister either under s.3 of the 1972 Act aforesaid or Article 15.2.1 of the Constitution.

56. In submissions the applicant's complaints are as follows:

    (1) There is no issue of broad policy requiring the regulation.

    (2) It eliminates the application to the local authority in advance of a possible appeal to ABP in respect of future development.

    (3) They are not necessary under European Law as s.261A and part XA of the PDA have, as asserted on behalf of the Minister, complied with the EU Directives and therefore, the provisions amount to a policy decision.

57. The test was described by Mr. Justice O'Donnell in *O'Sullivan v. Sea Fisheries Protection Authority and Ors.* [2017] IESC 75, at para. 41 as

> *"… Is the area of rule-making delegated so broad as to constitute a trespass by the delegate or subordinate on an area reserved to the Oireachtas by Article 15.2.1? This involves a consideration of a number of factors including the function of the parent legislation and the area in which the subordinate has freedom of action."*

58. In the case before the Supreme Court it was held that there was no issue of broad policy required by the Oireachtas following the relevant directive and the choice of range was severely limited in terms of the overall scheme. What has been left to the Member State was the establishment of the practical process to comply with the Directive. Viewed in this

way it can be said that the regulations were incidental, supplemental and consequential to the European Regulations.

59. The Court found the principles and policies tests somewhat elusive given that European Regulations very deliberately leave to Member States the choice of method for establishing a system to implement its directives. It is an error of approach to scour parent legislation to provide detailed guidance for the subordinate rule maker. This follows from the fact that the Minister does not possess any inherent legislative competence and the extent of the Minister's power to amend primary legislation by Statutory Instrument must be exercised "s*o as to ensure that what is done is truly regulatory or administrative only*" (see *Harvey v. Minister for Social Welfare* [1990] 2 IR 232).

60. Given:

(1) all operators looking for SC previously failed to carry out an EIA and therefore have been in breach of the within EU Directive;

(2) the amendments of the primary legislation as contained in Regulation 2015 and impugned in these proceedings apply to quarries only, in particular the sub-group thereof as passed through the s.261A gateway;

(3) as was pointed out by the Minister no new rights have been created;

(4) the expedited nature of the process involved is clearly more administratively efficient;

(5) the exercise of the option provided is time limited;

(6) insofar as the applicant complains that the relevant local authority has been removed from the decision making process, there exists already within the PDA generally a process is set out whereby certain classes of applications are made directly to ABP such as applications for strategic infrastructure development;

(7) within that portion of the PDA as addresses the instant European Directive there exists already a policy of application for permission or consent which does not involve the local authority namely the application for SC and the availability of an application under s.177(e)(2)(a) which enable general developers who are applying for an SC and who already hold development permission which is not yet completed or implemented, to apply for future development in conjunction with the SC application; and,

(8) the regulations might be considered to give further effect to the policy choices expressed in s.261A and part XA generally of the PDA.

61. I am satisfied that the applicant has not discharged the burden of proof that the area of rulemaking exercised by the Minister in the 2015 Regulations is so broad as to constitute

a trespass in the area reserved to the Oireachtas by Article 15.2.1 of the Constitution. Furthermore, I am satisfied that the procedure incorporated by virtue of the regulations are incidental, supplemental and consequential to the EU Directive as interpreted by the CJEU jurisprudence.

62. In the events, the applicant has failed to establish any unlawfulness in respect of the regulations.

Summary of decision based on applicant's arguments

63. The applicant has not established that:

(1) ABP's decision to grant SC and its decision to grant future planning permission are unlawful.

(2) The State has not transposed the provisions of the Directive in accordance with its obligations.

(3) The 2015 Regulations are unlawful.

64. The reliefs claimed by the applicant are therefore refused.