THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 349
[Record No. 2018/1072 JR]

BETWEEN

JOHN MOORE

APPLICANT

AND

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

RESPONDENTS

AND

KILSARAN CONCRETE

NOTICE PARTY

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 18th day of May, 2021.

Introduction

1. Judgment was delivered in the above matter on 4 December 2020 in respect of the applicant's claim for judicial review seeking the relief of *certiorari* in respect of two decisions, both of 24 October 2018, whereby the notice party was afforded substitute consent and consent for future planning in respect of its quarry at Bellewstown, Co. Meath, by An Bord Pleanála (ABP). This judgment is for the purposes of addressing the applicant's application for a certificate for leave to appeal the principal judgment aforesaid to the Court of Appeal pursuant to the provisions of s.50A of the Planning and Development Act 2000 as amended (the PDA).

2. The applicant submitted written submissions on 8 March 2021 and supplemental written submissions on 16 April 2021. The Minister's response submissions are dated 26 April 2021, and the response submissions by ABP and separately by the notice party are respectively dated 27 April 2021. The matter was heard by the Court on 5 May 2021.

3. Section 50A(7) of the PDA provides:

> "The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the Supreme Court in either case save with leave of the Court which leave shall only be granted where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court."

4. Section 50A(8) of the PDA provides:

> "*Subsection* (7) shall not apply to a determination of the Court in so far as it involves a question as to the validity of any law having regard to the provisions of the Constitution".

5. Section 75 of the Court of Appeal Act 2014 provides that references to the Supreme Court are to be construed as references to the Court of Appeal unless the context otherwise requires.

Questions for which certification is sought

6. In replying oral submissions by the applicant, it was suggested for the first time that question number one might be supplemented, with further submissions being delivered by the parties, and a further hearing by reason of supplementing query number one. This proposal was rejected by the Court on the basis that such a proposal is not in accordance with the applicant's requirement for precision in or about the nature of the question to be posed, and it was entirely inappropriate to seek such an alteration in the questions at such a late stage in the application.

7. Furthermore, the proposed amendment procedure was resisted both by the Minister and the notice party on the basis that the applicant's proposal amounted to an unsatisfactory process to deal with a point in fact raised in the Minister's submissions, but not addressed in the applicant's opening oral submissions, and it was inappropriate to raise such an amendment by way of applicant's reply.

8. The applicant has in any event indicated that the first three questions for which certification is sought come within the ambit of s.50A(8) of the PDA and therefore certification is not required.

9. The questions raised are as follows:

   (1) Was it necessary for the Minister to make S.I. No. 301/2015 - European Union (Environmental Impact Assessment and Habitats) Regulations 2015 (the 2015 regulations) in order to transpose the Environmental Impact Assessment (EIA) Directive?

   (2) Is the Minister entitled, by statutory instrument, to direct that applications for development consent should be made directly to the Board, as an exception to the general scheme of the PDA, for certain classes of development (only)?

   (3) Can the Minister look to Irish legislation to find the principles and policies to guide in making regulations pursuant to s.3 of the 1972 Act?

   (4) Having regard to the obligation on all organs of the State to ensure that developments which required an EIA and development consent, but which were commenced and continued without them, may only be retrospectively regularised in exceptional circumstances, must the Board dis-apply or re-examine, at the second stage of a two-stage process, a finding made at the first stage which was incorrectly premised? To what extent is it relevant that the earlier error was attributable to Ministerial guidelines offering an interpretation of the very complex statutory scheme which was subsequently rejected by the Board and the High Court?

(5) To what extent is the remedial obligation on the High Court limited or restricted by the pleadings in the case?

10. The applicant argues that the first three questions come within the ambit of s.50A(8) of the PDA on the basis that it is asserted that the Minister exceeded his powers by trespassing on the legislative competence of the Oireachtas enshrined in Article 15.2.1 of the Constitution, and it is a necessary corollary of the argument that the 2015 regulations were *ultra vires* the Minister and that the provisions inserted in the 2000 Act are invalid with respect to Article 15.2.1.

11. It is said that queries four and five relate to the State's remedial obligations under the EIA Directive and subsequent case law of the European Court of Justice.

12. The parties did not dispute the impact of the decision in *Dellway Investment Limited v. National Asset Management Agency (NAMA*) [2010] IEHC 375, to the effect that this Court ought to proceed on the basis that s.50A(8) does not apply and the questions raised should be considered on their merits.

13. The applicant argued that following the decision of McDonald J. in *Dublin Cycling Campaign CLG v. An Bord Pleanála* [2021] IEHC 146 where it was observed at para. 21 that following the enactment of the Court of Appeal Act 2014, the court should bear in mind that while a direct appeal to the Supreme Court under the "leapfrog" provisions of Article 34.5.4 of the Constitution is potentially open, an appeal to the Court of Appeal should remain "the more normal route for appeals from the High Court". The applicant suggests on this basis that the test for leave to appeal to the Court of Appeal has been reduced, and an overly strict approach to such an application should not be taken by the High Court.

14. I am satisfied that having regard to para. 21 of McDonald J.'s judgment aforesaid that same did not involve an alteration to the existing and accepted jurisprudence on certification for leave to appeal to the Court of Appeal, such jurisprudence arising both before and after the enactment of the Court of Appeal Act 2014.

Applicable principles

15. The principles guiding the test to be applied to the within application have been set out, and subsequently followed extensively, by McMenamin J. in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 as follows:

"(1) The requirement goes substantially further than that a point of law emerges in or from the case. It must be one of *exceptional importance* being a clear and significant additional requirement.

(2) The jurisdiction to certify such a case must be exercised sparingly.

(3) The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.

(4) [Not relevant as it deals with leave].

(5) The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.

(6) The requirements regarding 'exceptional public importance' and 'desirable in the public interest' are cumulative requirements which although they may overlap, to some extent require separate consideration by the court (*Raiu*).

(7) The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word 'exceptional'.

(8) Normal statutory rules of construction apply which mean *inter alia* that 'exceptional' must be given its normal meaning.

(9) 'Uncertainty' cannot be 'imputed' to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.

(10) Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases."

16. Clarke J. in *Arklow Holidays Limited v. An Bord Pleanála* [2008] IEHC 2 clarified as follows:

(1) There must be uncertainty as to the law in respect of a point which has to be of exceptional importance.

(2) The importance of the point must be public in nature.

(3) The requirement that the Court be satisfied 'that it is desirable in the public interest that an appeal should be taken…' is a separate and independent requirement from the requirement that the point of law be one of exceptional public importance.

(4) The Court must assess the grant or refusal of a certificate on the basis that the Court may have been wrong unless the law is so clear that there would be no legitimate basis for an appeal (see paras. 3.1 and 4.5).

(6) The strength or weakness of the argument is not relevant (see paras. 4.3).

17. In *Ashbourne Holdings Limited v. An Bord Pleanála (No. 3*) [2001] IEHC 98 Kearns J. confirmed that there is no place for a moot in an application for leave to appeal.

18. In *S.A. v. Minister for Justice (No. 2)* [2016] IEHC 646 Humphreys J. identified the following additional factors necessary to secure the relevant certification:

(a) the relevant question should be determinative of the proceedings (as opposed to being moot);
(b) where an issue is already pending before the Court of Appeal this would tend to dilute the public interest in the point being brought before the court again; and,
(c) the question must be formulated with precision and should not invite a discursive, roving, response.

19. In *Heather Hill Management Company CLG v. An Bord Pleanála* [2019] IEHC 820, para. 55, the Court was satisfied that the second limb of the statutory test would not be met in circumstances where *inter alia*, a successful appeal on one of the points of law in the subject matter of leave to appeal would not affect the outcome of the judicial review proceedings.

20. McDonald J. in his judgment in *O'Neill v. An Bord Pleanála* [2021] IEHC 58, at para. 30 confirmed that a question of law raised should be one which is actually determinative of the proceedings.

Question one

Was it necessary for the Minister to make the 2015 regulations in order to transpose the EIA Directive?

21. During the course of submissions, the applicant pointed out to the Court that there is effectively a typographical error in the principal judgment at para. 53 thereof. The final word should read "directive" as opposed to "regulations".

22. The applicant argues that it was not necessary for the Minister to make the 2015 regulations as the EIA Directive was already implemented without a lacuna and there was nothing outstanding, and therefore the regulations could not be said to come within the ambit of the Minister's power under s.3 of the European Communities Act 1972 (the 1972 Act). It is said that the regulations brought into effect a significant change, and constituted a trespass by the Minister on the authorities of the Oireachtas, and accordingly there is an affirmative benefit in allowing an appeal on the point.

23. Generally speaking, although not specific to any point, it is argued that all points raised are of exceptional public importance and it is in the public interest that an appeal would be permitted.

24. On behalf of the Minister it was argued that it was necessary for the State to establish a practical administrative process to regulate substitute content applications, and the choices exercised by the Minister as provided for in the 2015 regulations did not transgress into the legislative sphere and were administrative in nature.

25. On behalf of the notice party:

(a) It is argued that the first three issues relate to the circumstances in which s.3 of the 1972 Act might be used with the principles surrounding the deployment of s.3 being well-established.

(b) It is pointed out that this Court relied on the Supreme Court judgment in *O'Sullivan v. Sea Fisheries Protection Authority & Ors*. [2017] IESC 75 to ascertain such principles and thereafter applied same.

(c) The notice party also relies on several recent Supreme Court decisions to the effect that the application of well-established principles will rarely give rise to a point of law of general importance, let alone exceptional public importance (*Buckley v. An Bord Pleanála* [2018] IESC DET 45; *Heather Hill Management Company CLG v. An Bord Pleanála* [2019] IEHC 186 and *BS v. Director of Public Prosecutions* [2017] IESC DET 134).

(d) It is argued that the law is not in a state of uncertainty and therefore there is no reason to depart from the general principle aforesaid which is acknowledged as not being an absolute principle. In the circumstances it is argued that the threshold established by s.50A(7) of the PDA has not been met.

26. The applicant has not pointed to any uncertainty in the law in or about an assessment of the principles as to whether or not the exercise of the power of the Minister under s.3 of the 1972 Act is lawful, and although it may well be the case that there would be some affirmative public benefit in securing the view of the Court of Appeal on the point, such benefit in my view does not meet the threshold established by the case law aforesaid.

27. The applicant argues that by the courts supporting the 2015 regulations the Minister is enabled to remove the effective appeal process within the planning code (that is, a first instance decision by the local authority with a potential appeal by any dissatisfied party to ABP, to a set of circumstances where the application is to ABP only). It is further argued that the Minster might well introduce similar legislation in areas other than quarries. This does not bring the argument into the realm of a point of exceptional public importance and in the public interest to permit an appeal, not least because no uncertainty in the law as to the applicable principles have been identified by the applicant, and further such potential future action by the Minister does not arise from the judgment.

Question two

Is the Minister entitled, by statutory instrument, to direct that applications for development consent should be made directly to the Board, as an exception to the general scheme of the PDA, for certain classes of development (only)?

28. The applicant argues that the relevant directive does not require a streamlined process, therefore although the directive does not preclude the State from making policy choices it is not necessitated by the State's obligations to the EU. It is argued that the regulations are in the form of a policy choice of the Minister in circumstances where the beneficiaries thereof are quarries without development consent, but are treated preferably to the quarries operating within the law.

29. The Minister argues that this question does not arise from the judgment and no leave for judicial review in respect of such a ground was ever granted in the matter.

30. The notice party indicates that the second issue appears to be directed at para. 60(6) of the principal judgment which merely contains a statement of fact and the notice party further argues that such an issue was not argued before the Court.

31. The question addressed in the principal judgment was specific to the facts presented to the Court namely:

    (a) the relevant regulation had a temporal limit;

    (b) it applied only where there was an application pending for substitute consent;

    (c) it related to quarries;

    (d) the relevant quarries had been directed to apply for substitute consent pursuant to the provisions of s.261A of the PDA; and,

    therefore there was no contemplation in the principal judgment as to whether or not the Minister had a general power to make regulations, and in those circumstances it appears to me that the issue now posed by question two does not arise on the judgment, was not considered, and was not the subject matter of submissions to the Court.

32. I accept the argument on behalf of the Minister to the effect that a finding that a general power cannot be delegated to the Minister does not imply that a limited power cannot be delegated. Accordingly, the resolution of the question posed does not alter the outcome of the decision.

33. In the above circumstances it does not appear to me that the second question is an issue for which leave to appeal might be afforded.

Question three

Can the Minister look to Irish legislation to find the principles and policies to guide in making regulations pursuant to s.3 of the 1972 Act?

34. In the principal judgment it is clear from para. 51 *et seq*. that the lawfulness of the 2015 regulations was considered in the context of the 1972 Act in regard to the guidance given by the Supreme Court in *O'Sullivan v. Sea Fisheries Protection Authority & Ors*. [2017] IESC 75. In the matter before the Supreme Court the Court was considering the implementation of an EU directive. The test applied in the principal judgment followed a test described by O'Donnell J. in *O'Sullivan v. Sea Fisheries* aforesaid. Neither within the Supreme Court judgment, nor within the principal judgment, is Irish legislation relied on to find the principles and policies to guide the Minister in making the regulations pursuant to s.3 of the 1972 Act, and in these events it cannot be said that question three arises from the judgment.

35. In determining that the regulations were incidental, supplemental and consequential to the EU directive as interpreted by the CJEU jurisprudence, various matters of fact were set out in para. 60 of the judgment. Such matters of fact do not amount to a finding that the Minister is enabled to look at Irish legislation to find the guide on principles and policies in making the 2015 regulations.

Question four

Having regard to the obligation on all organs of the State to ensure that developments which required an EIA and development consent, but which were commenced and continued without them, may only be retrospectively regularised in exceptional circumstances, must the Board dis-apply or re-examine, at the second stage of a two-stage process, a finding made at the first stage which was incorrectly premised? To what extent is it relevant that the earlier error was attributable to Ministerial guidelines offering an interpretation of the very complex statutory scheme which was subsequently rejected by the Board and the High Court?

36. This question is premised on an erroneous assertion at para. 33 of the applicant's submissions of 8 March 2021 where it is intimated that there was a finding by the Court in the principal judgment that an error was ring-fenced and could not be corrected at stage two.

37. A further erroneous argument is found at para. 35 of those submissions to the effect that in the principal judgment there was a conclusion that certain grounds of challenge constituted an impermissible collateral attack on the 2013 decision.

38. In the event there was no finding, and indeed no consideration at all as to whether or not the applicant's assertion that there was an error at the first stage was, or was not accurate. The issue was not raised in the statement of grounds, but rather in submissions.

39. The question of annulment did not arise on these pleadings as was noted in para. 45 of the principal judgment. Furthermore, the issue has been decided by the Supreme Court in *An Taisce v. An Bord Pleanála* [2020] IESC 39 and although certain issues were left over for consideration on another occasion, for example, in the context of a constitutional challenge and/or an application of EU law, such issues do not arise on foot of the within proceedings.

40. I am satisfied therefore that the query does not arise on foot of the principal judgment.

Question five

To what extent is the remedial obligation on the High Court limited or restricted by the pleadings in the case?

41. It is noted that this question was not pleaded and therefore not before the Court prior to the principal judgment, nor was it dealt with in the principal judgment.

42. It is further noted that in *Rushe v. An Bord Pleanála* [2020] IEHC 429, Barniville J. at para. 64 accepted the argument that the Court was required to dis-apply on its own motion domestic law, and the Court was satisfied that the case law highlighted did not support the applicant's contention that EU law entitles a party to raise whatever points it wishes at the hearing without having pleaded those points in advance.

43. Question five is a point that does not come within the pleadings..

44. In the circumstances the applicant has not demonstrated that such a question would be appropriate for certification for leave.

Conclusion

45. The applicant’s application for certification for leave to appeal to the Court of Appeal is refused in its entirety.