[2022] IEHC 699

THE HIGH COURT

COMMERCIAL

[2020 No. 810 JR]

[2021 No. 15 COM]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF AN APPLICATION

BETWEEN

LORRAINE QUINN

AND

ECO ADVOCACY CLG

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

NORTH KILDARE WIND FARM LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on the 16th day of December, 2022.

1. On 14th December, 2018, the notice party applied to Kildare County Council for permission to construct twelve wind turbines with a tip height of 169 metres, together with associated works including an electricity substation (application No. 181534). The works were to be carried out at a number of locations in County Kildare.

2. On 19th December, 2019, the council refused permission, primarily on the ground of inadequate road capacity. The council also had a second reason for refusal, which was the absence of the necessary consent for road improvement works. The developer then appealed to the board. The first named applicant also appealed, raising a number of objections to the development going beyond the grounds articulated by the planning authority.

3. Ultimately, the board decided to grant permission on 7th September, 2020 (ABP-306500-20).

Procedural history

4. The present proceedings were then instituted seeking *certiorari* of the board's decision. The statement of grounds was filed on 2nd November, 2020. An amended statement was filed dated 29th November, 2021.

5. By 7th February, 2022, issues had broken out about costs protection, but these were overtaken by developments in relation to the case overall.

6. On 17th June, 2022, the board wrote to the applicants consenting to an order of *certiorari.* This was expressed to be on a basis of ground E30 in the amended statement of grounds which related to inadequate particulars of the design.

7. The notice party then sought an order for remittal of the matter back to the board. That was contested, and a hearing on that issue took place on 25th July, 2022. Arising from that hearing, certain matters required to be clarified, and resumed hearings took place on 24th October and 7th November, 2022.

Materials before the court

8. Materials placed before the court by being uploaded to the ShareFile platform for this case included submissions, authorities, a core book, pleadings and exhibits running to a total of 5,175 pages.

The 2022 Act

9. On 24th July, 2022, after the commencement of the present application for remittal, the Planning and Development, Maritime and Valuation (Amendment) Act 2022 was enacted. A commencement order was made on 19th October, 2022, which brought the Act into operation from 20th October, 2022. The effect of s. 50A(3)(c) of the Planning and Development Act 2000 as inserted by the 2022 Act is to provide that if a developer requests remittal, the court shall make such an order unless it would not be lawful to do so. It is a matter of public record that the stated rationale for the amendment was to address alleged judicial reluctance that was said to have manifested itself recently to remit matters to planning authorities, in that it was suggested that at present, some judges refer matters back to the planning authority to make a new decision while other judges are allegedly reluctant to do so.

10. While the merits of political debate are of course a matter for other branches of government, insofar as the stated rationale for the amendment involved factual assertions regarding the activities of the judiciary, I think it is probably for the best if I can be forgiven for seeking to clarify matters in that regard. That is an attempt to exercise the educational function of the court, and not in any way to be critical or to seek to make anyone amenable for political utterances.

11. A table was helpfully prepared by the parties, with the notice party taking the lead, for which I am grateful, giving the following information relating to remittal orders in planning cases over the last five years:

Case	Judge	Order	Outcome	If remittal refused, reasons for refusal
DCC v. An Bord Pleanála [2022] IEHC 83	Humphreys J.	An order remitting the application for approval of the amendments to the planning scheme back to the board for consideration and	Remittal ordered	

		decision, such process to re-commence at the point in time immediately prior to the Board's Direction.		
C.H.A.S.E v. An Bord Pleanála [2021] IEHC 203	Barniville J.	An order remitting the application to a point in time immediately prior to the decision not to allow the public to make submissions on the further information received from the developer.	Remittal ordered	
Atlantic Diamond Limited v. An Bord Pleanála [2021] IEHC 322	Humphreys J.	The developer's application was invalid with an order of certiorari and an order that remittal would not be appropriate.	Remittal refused	The Court held that the developer's planning application was invalid, certiorari must issue and remittal would not be appropriate in those circumstances.
Joyce-Kemper v. An Bord Pleanála & Ors [2020] IEHC 477	Allen J.	The applicant succeeded on one ground of challenge – a failure on the part of the Board to consult with the EPA. There was an order of certiorari quashing the decision of the Board and an order remitting the developer's application for reconsideration from the point at which the	Remittal ordered	

		Inspector's report was submitted to the Board.		
Barna Wind Action Group v. An Bord Pleanála [2020] IEHC 177	McDonald J.	In addition to an order of certiorari quashing the two decisions of the Board in suit, the Court also made an order that the subject matter of both decisions be remitted to the Board, to be determined in accordance with law.	Remittal ordered.	
Redmond v. An Bord Pleanála [2020] IEHC 322	Simons J.	An order of certiorari was granted quashing a decision to grant planning permission. The court refused to order remittal and set aside the planning permission simpliciter.	Remittal refused	It was held that the principal objective of remittal is to remedy the error in the earlier decision-making process. On the facts of the case, the planning application was fatally flawed from the outset and could not be remedied on remittal.
Fitzgerald v. Dun Laoghaire Rathdown County Council [2019] IEHC 890	Barniville J.	The Council indicated that it was prepared to consent to an order of certiorari quashing the decision on a particular basis and to a remittal order on certain terms. An order was made quashing the Council's decision and remitting the planning application.	Remittal ordered.	

Damer & anor v. An Bord Pleanála & anor [2019] IEHC 505	Simons J.	The Court overturned the Board's decision to refuse permission, on the ground of the Board's failure to meet the standard of required reasoning.	Remittal ordered.	
Halpin v. An Bord Pleanála [2019] IEHC 352	Simons J.	The conclusions which the Board reached in relation to the Seveso III Directive were held to be unreasonable in the sense that there was no material before the Board capable of justifying its conclusions. An order of certiorari issued and the Court indicated that it would hear from the parties on whether the matter should be remitted to the Board for further consideration.	Remittal was mentioned in the order but no remittal order was granted.	
Clonres CLG v. An Bord Pleanála & ors [2018] IEHC 473	Barniville J.	The Board consented to an order of certiorari. The Court made an order of certiorari and an order remitting the application to the Board.	Remittal ordered.	
Connelly v. An Bord Pleanála &	Clarke C.J.	The High Court (Barrett J) decided to quash the decision of the Board	Remittal ordered.	

ors [2018] IESC 36		granting permission and the Board appealed to the Supreme Court. The Supreme Court (per Clarke CJ) held that it would dismiss the appeal and affirm the High Court judgment on narrower grounds (relating to appropriate assessment). An order of certiorari was made, together with an order of remittal.		
Element Power Ireland Limited v. An Bord Pleanála [2017] IEHC 550	Haughton J.	The Court granted an order of certiorari to the applicant and quashed the Board's decision. The Court remitted the matter back to the Board for reconsideration of the matter in relation to the reason given for the decision which was held to be unlawful.	Remittal ordered.	

12. What this shows is not judicial inconsistency, or reluctance by some judges contrasting with enthusiasm of others, but a high degree of judicial consistency. Remittal is the predominant result of an application for such an order following *certiorari* and appears in almost every case to be ordered, except where the court considered that it would not be lawful to do so. There is no evidence of the alleged or any reluctance or inconsistency, still less of this being manifested recently. Insofar as the rationale for the relevant amendment in the 2022 Act could be thought to suggest an individualistic approach by judges, it's notable that in any case where remittal was refused, there is another decision *by the same judge* allowing remittal in a different legal context that permits such an order. That doesn't really fit with the narrative of judges paddling their own canoes. Where different outcomes arise, these are driven by the legal context rather than the particular judge. The wider point (familiar to lawyers but worth repeating in an attempt to be helpful) is that one can't assess a judicial decision purely by its outcome. A judge in a court of local jurisdiction who acquits

a particular defendant if the evidence is inadequate is not acting inconsistently with another judge who convicts in another case on a similar charge where the evidence proves guilt. Both are acting consistently with the same overall theory of the standard of proof, and an analogous principle applies to judicial decisions on remittal. The overall theory is in broad terms to remit when it is lawful to do so and not when it isn't.

13. Very much in a spirit of respectfully correcting the record, I might hopefully be forgiven if I were to venture to suggest that it rather seems a missed opportunity that a possibly mildly critical, and, I'm afraid to say, not especially accurate narrative was given a certain amount of airtime here (in effect - the judges are getting it wrong and this must be fixed) in circumstances where a co-operative and more accurate narrative was very much available (in effect - the judges are getting it right and we should enshrine these gains).

14. In defence of the executive, it may be that confusion was caused by some of the language of the caselaw regarding remittal. That's understandable, because caselaw does in certain respects refer to the court as having a "wide discretion". But that simply does not reflect the reality of how the power to remit has been exercised in recent years. On the basis of recent case law, not only is there no sign of a wide discretion, there is not much sign of a discretion at all. Despite how matters may have been phrased, the actual outcome of a remittal application has been predominantly favourable, provided that it is sought and is lawful. Indeed, there are good separation of powers reasons why that should be so. That can still leave open a degree of discussion around what grounds and matters to consider in determining such lawfulness, the consequent decision on whether remittal is lawful, and the determination of the point in the administrative procedure to which remittal, if permissible, should be made. If one were to have any reservation about the current provision it might perhaps be that there is a distinction, only occasionally relevant, between remittal being broadly and almost always mandated when lawful, and it being automatically and always so mandated. It is hard to anticipate all possible situations that may arise, so perhaps a provision phrased in terms of a clear presumption might better facilitate unanticipated problematic cases. However that is a matter for the Oireachtas.

Can a failure to provide adequate drawings and particulars be cured during the process?

15. The question of remittal or not will frequently depend on the question of whether the provision infringed is one where compliance is required for the application to be valid *ab initio,* or alternatively is one where any initial non-compliance can lawfully be cured during the process.

16. A reasonable opening gambit as to what has to be complied with *ab initio* and what can be cured during the process is article 26(3) of the Planning and Development Regulations 2001 (S.I. No. 600 of 2011):

> "Where, following consideration of an application under sub-article (1), a planning authority considers that -
>
> (a) any of the requirements of articles 18, 19(1)(a) or 22 and, as may be appropriate, of article 24 or 25 has not been complied with, or

(b) the notice in the newspaper or the site notice, because of its content or for any other reason, is misleading or inadequate for the information of the public, the planning application shall be invalid."

17. On the face of things (and the face of things is often a good place to start the discussion), the effect of this provision is that if the non-compliance relates to articles 18, 19(1)(a), 22, 24, 25, or the newspaper or site notice, then the planning application is invalid *ab initio* and remittal is not possible or appropriate. On that assumption, if the matter related to any other breach then remittal could be considered, all other things being equal.

18. That simplistic approach appealed to Murphy J. in *P.M. Cantwell Ltd v. McCarthy Brothers Building Contractors Ltd* [2005] IEHC 351 (Unreported, High Court, 1st November, 2005) where he held that: "Article 23 refers back to Article 22 which deals with the content of planning applications generally. Sub-article (1) provides that an application is only deemed to be invalid for the requirements of Articles 18, 19(1)(a) or 22 and, as may be appropriate, if Articles 24 or 25 are not complied with. The requirement that 'the site boundary shall be clearly delineated in red' is one of the requirements contained under Article 23 and, accordingly, its omission cannot be deemed to invalidate the application for permission."

19. However, there are a number of reasons why this authority is not quite as conclusively binding as might otherwise be the case. The 2001 regulations have been heavily amended since that decision. Indeed, the whole of article 22 was substituted by article 8 of the Planning and Development Regulations 2006 (S.I. No. 685 of 2006), after *Cantwell*. Crucially, article 22(4)(a) now provides as follows:

"Subject to articles 24 and 25 –

(a) a planning application in respect of any development consisting of or mainly consisting of the carrying out of works on, in, over or under land or for the retention of such works shall be accompanied by 6 copies of such plans (including a site or layout plan and drawings of floor plans, elevations and sections which comply with the requirements of article 23), and such other particulars, as are necessary to describe the works to which the application relates, ..."

20. To that extent, since article 22 itself requires plans and drawings "which comply with the requirements of article 23", then non-compliance with article 23 inherently involves non-compliance with article 22. Unfortunately, in *Cantwell* there is no reference whatsoever to the wording in article 22 that corresponded with this wording in the pre-amended version of the regulations. One can only assume that this simply was not brought to the attention of the court.

21. The applicants in the present case submitted that accordingly *Cantwell* was either decided *per incuriam* or alternatively that the circumstances were such as to invoke the doctrine laid down by the Supreme Court in *The State (Quinn) v. Ryan* [1965] I.R. 70, 100 I.L.T.R. 105, that a point not argued is a point not decided. As it was put on behalf of the applicants, "there does not appear to be that analysis present" in *Cantwell.*

22. As implied from the discussion above, judicial canoeing is a collective effort rather than an individual slalom, so the individual judicial obligation to "uphold the Constitution and

the laws" is not to be construed as meaning that the view of a particular court as to the interpretation of the law can be formed entirely independently of having appropriate regard to previous judicial interpretations of such law. But in this case, by far the most crucial provision of the 2001 regulations simply was not considered at all in *Cantwell.* That, to my mind, significantly dilutes its status as a binding authority on the interpretation of what is now art. 22(4)(a). If the central provision is in effect ignored or overlooked, then the case can't be a definitive authority on that provision.

23. Another significant vector by which *Cantwell* can be distinguished is that the 2001 regulations in their form at the time only used language along the lines of the inclusion of plans which comply with the requirements of article 23, or corresponding provisions, in one place and one place only, which was article 22(4). However, due to extensive subsequent amendment, there is now corresponding wording in other provisions of the regulations, particularly arts. 227(2), 267, 297 and schedule, 3, form number 2 (the application form), as substituted by article 99(b) of the European Union (Planning and Development) Environmental Impact Assessment Regulations 2018 (S.I. No. 296 of 2018). That adds some increased significance to the use of such a wording. We will come back to form no. 2 later for more specific discussion.

24. It is perhaps also worth making the point that *Cantwell* has not received an uncritical reception. David Browne B.L., in the exceptionally practical textbook, *Simons on Planning Law* (3rd ed.) p. 233 n. 124 says: *"Cantwell* is incorrect insofar as it suggests that a breach of the requirements of article 23 would not invalidate an application. Article 23 simply elaborates upon the provisions of article 22 and thus failure to comply with article 23 would give rise to a breach of article 22*".* Compelling academic criticism, as here, does not of course mean that a binding authority ceases to be a binding authority. But it does mean that an authority that is not otherwise inescapably binding might not have quite the same persuasive impact.

25. In all of these circumstances, *Cantwell* is not strictly binding if only for the simple reason that it does not in fact deal with the primary point, which is the wording of what is now article 22(4)(a). When one considers that wording, the conclusion that breach of article 23 would give rise to a breach of article 22 is compelling both textually and logically, as the learned author of *Simons on Planning Law* asserts in the footnote dismissing the correctness of *Cantwell.*

26. Given that the express terms of art. 22 incorporate art. 23, the maxim *expressio unios exclusio alterius* relied on by the opposing parties (e.g. *H.H. v. Medical Council* [2012] IEHC 527 (Unreported, White J., 9th October 2012)) is just irrelevant here.

27. A final but critically important feature of the present case (which distinguishes it from *Cantwell* on the facts) emerges from the actual application for planning permission. The application form submitted to the council is headed "Form No. 2 of the Planning and Development Regulations 2015" and is dated 14th December, 2018 (see p. 12). The version of the form used has a running footer stating "version 1/12/17", which one assumes is a date, although the last page of the privacy statement attached to the form says: "last updated 25 May 2018".

28. In the 2001 regulations, form no. 2, the planning application form, is contained within schedule 3, headed "Prescribed Notices". Form no. 2 was substituted, as noted above, by article 99(b) of the European Union (Planning and Development) Environmental Impact Assessment Regulations 2018. By virtue of reg. 2(1) of the 2018 regulations, most of the provisions of those regulations came into effect on 1st September, 2018. Thus, even if the form apparently generated on 1st December, 2017 had been updated on 25th May, 2018, as the final page suggests, it was not the correct form as of the date of the application on 14th December, 2018 because an amended form had been prescribed as of 1st September, 2018.

29. The fact that a developer had used the incorrect application form to begin with might be thought to be a significant consideration against remittal, but for reasons that will become apparent, I don't even need to go there, albeit that this error arguably might not be completely lacking in legal relevance depending on what happens next.

30. Turning to the specific terms of the application form actually completed in the present case, p. 14 states: "This form should be accompanied by the following documentation. Please note that if the appropriate documentation is not included, your application will be deemed invalid". The form then goes on to refer on p. 15 to: "G. Applications that refer to a material change of use or retention of such a material change of use: Plans (including a site or layout plan and drawings of floor plans, elevations and sections which comply with the requirements of Article 23) and other particulars required describing the works proposed."

31. Is this project one that refers to a material change of use? Unfortunately for the notice party, that question is answered expressly in the application form itself at p. 7. This includes a table as follows under the heading of section 13 (footnote omitted):

> Where the application refers to a material change of use of any land or structure or the retention of such a material change of use:

Existing use (or previous use where retention permission is sought)	Forestry/Agriculture
Proposed use (or use it is proposed to retain)	Use of the site as a wind farm
Nature and extent of any such proposed use (or use it is proposed to retain)	Renewable Energy Production

32. Hence, taking these three statements in combination, the form actually submitted has the effect of stating expressly that, on pain of invalidity, the plans conform to art. 23.

33. There is some loose predictable suggestion that the applicants should be criticised for not challenging the original decision of the council to validate the application. This is without substance. Challenges to interim decisions can be saved for the final decision: see *Northeast Pylon Pressure Campaign Ltd v. An Bord Pleanála* [2016] IEHC 300, [2016] 7 JIC 2935; *North Westmeath Turbine Action Group v. Westmeath County Council* [2020] IEHC 505, [2020] 10 JIC 2205; *Spencer Place Development Company Ltd v. Dublin City Council* [2020] IECA 268. Mr. Bland S.C. for the applicants demolishes the objection in a submission for the ages:

> "Sartre said in *Nausea* that three o'clock is always too late or too early for anything you want to do, and the opposing parties tend to argue that it is always three o'clock for an applicant for judicial review. The familiar argument that applicants are either too early or too late is here deployed to undo the ratio in the *North Westmeath Turbine Action Group* case."

34. Finally, the board seemed at one point to suggest that requirements to validate planning applications had to be fairly simple (e.g., are there six copies of plans - Yes or No) so that the rules could be operated by the clerk at the counter in any given local authority. The implication is that the promotion of administrative convenience requires the abandonment of any substantive intellectual engagement with the detailed content of planning applications in order to enable the processing of such applications to be delegated down to the lowest rungs of the clerical staff hierarchy. As a jurisprudential philosophy of statutory interpretation, the stance that the detailed wording, content and purpose of legislation must be nullified in order to facilitate such legislation being operated by unqualified generalists scores highly on institutional chutzpah but unfortunately not so on legal acceptability.

The conceded ground

35. Any respondent to a judicial review that wants to concede *certiorari* can simply do so. There is no obligation on a respondent to identify why it is conceding or to name any specific ground on which it wants to declare itself to be in the wrong. In this case, the board did, but that is not always the case. Either way, nominating a specific ground on which one wants to run up a white flag can't put a respondent in a massively better position than if it had not done so.

36. The conceded ground here is ground E30 which provides as follows: "Furthermore, the proposed development fails to comply with Article 23(1)(d) of the Planning and Development regulations, shows indicative design in respect of the wind turbine, does not show as is required specific designs for each structure relative to specific site locations where it is located, does not show elevations, sections and the heights. The failure to submit these details is both contrary to the obligations of the Planning and Development Regulations as aforesaid and is also contrary to Council Directive 2014/52/EU and 92/43/EEC which requires a description of the proposed development at such a level and in such detail as to require an identification of the likely significant effects of that development and to a design that is in compliance with the Regulations which reflects the minimum obligations in respect of a specified development for the purposes of the EIA Directive." This is a point that arises under *Sweetman v. An Bord Pleanála* [2021] IEHC 390 and *Sweetman v. An Bord Pleanála* [2021] IEHC 662, [2021] 10 JIC 2601 (*Sweetman XVII*).

37. The notice party argued that article 23(1)(d) does not arise in the factual matrix of these proceedings, because it refers to the elevations of the main features of buildings which would be contiguous with the proposed development, and in particular, protected structures. These were issues that did not feature in relation to the present development. The problem with that is that it is an unduly narrow reading of ground E30 and, in particular, ignores the comma after the words "[a]rticle 23(1)(d) of the Planning and Development Regulations".

38. As in *R. v. Casement* [1917] 1 K.B. 98 (see *per* Lord Reading C.J.), the presence or absence of the comma is crucial and changes the meaning. In context here, that comma is clearly disjunctive, as the board appear to accept, and what follows after that constitutes separate and standalone grounds of complaint additional to the possibly misconceived complaint under article 23(1)(d). The material that follows is not merely a subset of the article 23(1)(d) point.

39. The board agreed that this complaint related to the *Sweetman XVII* case and that this was acceptably clear on the pleadings (see *Atlantic Diamond v. An Bord Pleanála* [2021] IEHC 322, [2021] 5 JIC 1403, *Clifford & Sweetman v. An Bord Pleanála* [2022] IEHC 474, [2022] 8 JIC 1502). I agree.

40. The specific complaints of the applicants relating to the plans and drawings can be found in other provisions of article 23 which begins: "[p]lans, drawings and maps accompanying a planning application in accordance with article 22 shall all be in metric scale and comply with the following requirements ...".

41. In short, the conceded infirmity must be construed as meaning non-compliance with art. 23, albeit not necessarily sub-para. (1)(d) in particular.

42. Having regard to all of the foregoing, and in particular to the terms of the application form itself, which states that the application will be invalid if it does not include plans that comply with article 23, it seems to me that this is confirmation, if such were needed, that the conceded infirmity is one that goes to the validity of the application from the outset, and therefore that remittal is not appropriate.

The non-conceded grounds

43. In the light of the foregoing, I do not need to deal with the interesting question of whether, if the conceded ground and that ground alone did not present any irremediable invalidity, the court could or should go on to consider any other grounds that were not conceded but that would have the effect, if established, that remittal would not be lawful. This would involve a hearing on at least some aspects of the substantive complaints. The applicants contended that while this might sometimes be inconvenient, it "wouldn't be the first time that the Oireachtas had, by a botched reform because they didn't necessarily trust the judges, made things worse" (I am recording rather than automatically endorsing that way of putting the matter). The board argued that such an interpretation would disincentivise settlement if it had the effect that all issues had to be considered in a full hearing. That said, not all issues would need to be considered - one would only have to have a hearing on points that, if made out, would be fatal to a remittal.

44. The authorities relied on against the concept of deciding on remittal on the basis of considering grounds that had not been conceded, don't in fact say that. *Usk & District Residents Association v. An Bord Pleanála* [2009] IEHC 396 deals with a superficially similar but in fact completely different point, which is that if one issue is found to be a basis for *certiorari,* the court does not need to consider any other points *that go to the same order*. That has nothing to do with the question of whether different grounds should be considered *if they might result in a different order*, such as remittal to a different stage in the process, or no remittal at all.

45. Reliance was also placed on *Cork Harbour Alliance v. An Bord Pleanála* [2021] IEHC 629 (Unreported, Barniville J., 26th April, 2022) at para. 90. But that is about the need for the points to be considered at the remittal stage to be confined to the grounds actually pleaded. It does not address the sort of situation that would arise if the conceded ground permitted of remittal, but an applicant wanted to argue a pleaded but non-conceded ground that did not. The same point also applies to *Clonres v. An Bord Pleanála* [2018] IEHC 473 (Unreported, Barniville J, 31st July, 2021).

46. In fact, the question of whether one might have to go beyond a conceded ground to consider whether there is any other legal obstacle to remittal does not seem to have been specifically determined at any stage. Indeed insofar as there is any authority it is somewhat the other way. McDonald J. in *Barna Wind Action Group v. An Bord Pleanála* [2020] IEHC 177 said at para. 26: "In addressing the question of justice or fairness, it is also important, in my view, to consider the other elements of the case made by the applicant in its statement of grounds" – "other" in this context meaning other than that conceded by the board.

47. On the applicants' interpretation, an opposing party should not be entitled to artificially force a remittal by conceding only a point that arose at the very end of the process, if in fact there are much more fundamental problems latent in the whole procedure that are pleaded in other grounds. Under the 2022 Act, in remitting, the court has to be satisfied that it would be lawful to do so. On the applicants' reading, if a court were to be artificially limited to a very narrow conceded point selected for the purpose by opposing parties, the court could not reasonably be said to be capable of being satisfied that remittal would in fact be lawful.

48. The logic of that argument is that if there is a positive duty on the court to be satisfied that the process post-remittal would be lawful, the court may have to investigate grounds other than the conceded ground, if requested to do so and if such investigation is necessary to be satisfied of the legality of that remittal. Full exploration of this issue must await another case because I don't need to decide whether to go into such grounds here having regard to the non-compliance with arts. 22 and 23 arising from the conceded ground.

Order

49. For the foregoing reasons, I will order:

(i). that there be an order of *certiorari* removing, for the purpose of being quashed, the decision of the board; and

(ii). that remittal of the application to the board be refused.