THE HIGH COURT

[2024] IEHC 269

[Record No. 2022/232 JR]

BETWEEN

MARTINA DONOHOE AND CIARAN DONOHOE

APPLICANTS

AND

DEPARTMENT OF AGRICULTURE, FOOD AND THE MARINE FORESTRY DIVISION

RESPONDENT

JUDGMENT of Ms Justice Marguerite Bolger delivered on the 7th day of May 2024

1. This is an application for *certiorari.* For the reasons set out below, I am refusing this application.

The proceedings

2. These proceedings have been brought against the Department of Agriculture, Food and the Marine (hereinafter referred to as "the Department") by the applicants who seek *certiorari* of what they say was a decision of the Department in relation to the siting of a forestry road CN87289 and the decision of the Forestry Appeals Committee (hereinafter referred to as "FAC") upholding that decision. The applicants' home is close to the forestry road that they have sought to challenge. By order dated 11 July 2022, Barr J. gave the applicants liberty to file an amended Statement of Grounds to reflect the relief sought (i.e. *certiorari* of the decision of the Department and of the decision of the FAC) and allowed them time to file and serve a Notice of Motion, the amended statement and verifying affidavit. The applicants, who represented themselves, filed a Notice of Motion on 26 July 2022 against the same respondent as their original Statement of Grounds, i.e. the Department, and filed an affidavit on 20 July 2022. In both the Notice of Motion and the affidavit, they referred to:-

(1) The submissions they had made to the Department and to the FAC;

(2) The Technical Standard for the Design of Forest Entrances from Public Roads (hereinafter referred to as "the Technical Standards");

(3) Circular 03/2020 published by the Department;

(4) An Bord Pleanála's inspector's report APB/307630/20;

(5) A letter they received from the FAC dated 9 November 2021.

They also furnished an undated submission set out in a Form 1 for lay litigants in which they named the FAC as a *"defendant"* along with the Department, but at no time did they join the FAC to the proceedings or serve them with papers. That submission claimed that the proposed development did not adhere to the Technical Standards, referred to traffic safety, stated that the FAC had no legal standing to uphold the granting of the licence by the Minister and asserted that the decision of the Minister incorrectly claimed that the development would be carried out in accordance with the Technical Standards.

3. On 31 January 2023, when the matter was before the Court, the applicants furnished a written statement to the respondent in which they referred, for the first time, to a setback area of 60 metres that they said was required to be in place between forestry activity and a dwelling house. The amended Statement of Grounds does not refer to this point.

<u>Procedural challenges by the Department</u>

4. Section 22 of the Forestry Act 2014 requires a forest road construction project to be approved by the Minister for Agriculture, Food and Marine. Any such decision can be appealed to the FAC, an independent statutory body. The Department asserts that the applicants' challenge to the initial decision should have been brought against the Minister and not the Department but, wisely, did not labour at that point. More fundamentally, the Department said it is separate from the FAC and that the applicants failed to take any steps to review the decision of the FAC in spite of the order of Barr J. giving them liberty to do so.

5. The Department also asserted that the applicants' challenge to the decision of the Minister of 27 August 2021 is out of time, having been brought outside the three-month limit of O. 84, r. 21(1). There was no application for an extension of time or any explanation justifying any such extension. The Department also say the entire proceedings are moot as the impugned works were completed in or around June 2022 before the applicants brought their challenge and that the reliefs they seek would be futile.

<u>Discussion</u>

(1) The FAC

6. The FAC was established by s. 14A(1) of the Agriculture Appeals Act 2001 as amended. The impugned decision of the Minister, furnished to the applicants on 27 August 2021, clearly advised the applicants that they could appeal to the FAC *"which operates independently of this Department"*. The applicants duly lodged an appeal on 9 September 2021 and, by decision dated 22 December 2021, the FAC advised the applicants that, having considered all of the submissions made, it was satisfied that no significant errors were made in making the decision at the assessment stages or that the decision was made without regard to fair procedures. The FAC affirmed the decision of the Minister.

7. In spite of having been given leave do to so, the applicants have never brought the FAC into these proceedings, albeit they purported to name them as a defendant in their Form 1 submission. That was entirely insufficient. This Court has no jurisdiction over the decision of the FAC and can only consider the decision of the Minister.

(2) Order 84, Rule 21(1)

8. The applicants filed papers in the Central Office on 22 March 2022 and moved their *ex parte* application for leave on 4 July 2022. They said this was the date given to them by the Central Office. Their challenge to the Minister's decision was brought well outside the three months allowed by Order 84, rule 21(1). The onus is on the applicants to explain, on affidavit, any delay and establish good and sufficient reasons for the court to extend time. Prior to the hearing before this Court, the applicants never applied for an extension of time or sought to explain or justify their delay, even though they were advised that they were out of time in a letter from the Chief State Solicitor's Office of 2 December 2022. Some weeks after that letter, the applicants set out new points around a "*setback area*" to the court in a handwritten statement but made no mention of the time point of which they were made aware in the aforementioned letter. At the hearing before this Court, the applicants asserted that their challenge to the Minister's decision was within time because they had been directed by the Department to appeal to the FAC.

9. I am satisfied that these proceedings are out of time. The applicants confirmed that their challenge was to the Minister's decision of 27 August 2021. The lodging of an appeal, on which the applicants sought to rely for the first time in their oral submission to this Court, cannot justify their delay and/or constitute a good and sufficient reason for extending time – an extension which was in any event never applied for.

10. I adopt the approach of Meenan J. in *P.B. v. Child and Family Agency & TUSLA* [2022] IEHC 654 and deal with the application on its merits which I address further below. I do not consider the exercise of an appeal to the FAC precludes a court from considering the initial decision, albeit the fact or option of such an appeal could be relevant to the exercise of the court's discretion if it were of the view that an applicant had established a basis for obtaining relief.

(3) Technical Standards

11. The applicants claimed that the proposed development did not adhere to the Technical Standards due to its close proximity to the entrance to their residential property. That point was never made to the Minister during the statutory consultation process in which the applicants participated by way of a written submission of 1 July 2021. In any event, I find as a fact that the applicants' analysis of the requirements of those standards is incorrect. Section 4 provides:

> *"If it is necessary to locate the forest road entrance within the above desirable minima, then the Designer of the entrance shall record the fact that this has been undertaken in the design and the corresponding reasons why it cannot be appropriately located must be given by the application for permission consent. Also, the proposals must be developed to minimise the risks associated with the location of the forest entrance."*

12. The Department's official who swore an affidavit cited s. 4 and the references made to the Technical Standards by the response and reports on which the Minister's decision was based, including the engineer's report and the *"Relaxation from Standards",* in which it was recorded that a relaxation had been undertaken in the design of the upgrade to the existing entrance and the rationale and necessity for that decision. The affidavit also set out the other steps taken in the course of the Minister's decision including a consideration of the responses furnished to additional queries from the license applicant, a consideration of the applicants' submissions, a consideration of the response from the local County Council and the Department's Environmental Impact Assessment screening and an Appropriate Assessment screening which determined that neither an EIA nor Stage 2 AA was required. The affidavit confirms that the responses indicated that the entrance and/or the widening thereof did not constitute a risk to public safety. The applicants did not challenge those averments by way of replying affidavit.

13. The applicants are incorrect in their view that the proposed development did not adhere to the required Technical Standards or that it was a risk to road safety. The applicants' proposal of alternative locations which they asserted would have been more conducive to road safety, is not a ground for judicial review and their points in that regard bear more resemblance to an attempt to appeal a decision on its merits than a challenge to its legal status by judicial review.

(4) Setback

14. The applicants asserted in a written submission to the Court after they had filed their amended Statement of Grounds, that forestry activity must have a setback distance of 60 metres from a dwelling house and that the proposed development was, therefore, unlawful as it came within 60 metres of their house. The applicants did not have leave to challenge the Minister's decision on this ground. In any event, I find as a fact that they are incorrect in their analysis of what is required by the Forestry Standards Manual as the 60 metre setback relates to the tree-line (i.e. the distance from planted trees) to the edge of a dwelling, which does not preclude a forest road, as is at issue here, being constructed within that distance of a dwelling. That point was made in the Department's affidavit and was not challenged by way of replying affidavit.

(5) An Bord Pleanála's Planning Inspector Report

15. The applicants sought to rely on An Bord Pleanála's inspector's report in relation to a different development which arose in different circumstances and was determined by a different authority. The applicants have not established any basis for challenging the Minister's decision here by reference to those matters.

Conclusions

16. The applicants' challenge has been brought against the Department and not the FAC. The applicants' challenge to the Minister's decision is out of time, but, in any event, there is no stateable basis for a judicial review of the impugned decision on its merits and the applicants are incorrect in their views that the decision failed to adhere to the relevant Technical Standards, the requirements of public safety or the Forest Standards Manual.

17. I refuse this application.

Indicative view on costs

18. In accordance with s. 169 of the Legal Services Regulation Act 2015 and having regard to Department's offer in their letter of 2 December 2022 to allow the applicants to

strike out the proceedings at that stage with no costs order, my indicative view of costs is that the Department is entitled to their costs to be adjudicated upon in default of agreement. I will put the matter in for mention at 10.30am on 18 June 2024 for final orders including costs.

The applicants appeared for themselves.

Counsel for the respondent: Ben Clarke BL