Neutral Citation Number: [2005] IEHC 11

THE HIGH COURT
JUDICIAL REVIEW

Record No. 2004/1066 JR

BETWEEN

JOHN KELLY

APPLICANT

AND

THE COUNTY COUNCIL OF THE COUNTY OF LEITRIM AND AN BORD PLEANÁLA

RESPONDENTS

Judgment of Mr. Justice Clarke delivered 27th January, 2005.

1. In these proceedings the applicant ("Mr. Kelly") seeks to challenge the validity of two planning related decisions. The first such decision relates to the issuing of an enforcement notice under the provisions of the Planning and Development Act, 2000 (as amended) (the "2000 Act") and was made by the first named respondent ("The County Council"). The second relates to an aspect of the decision of the second named respondent ("The Board") concerning the materiality and exempted status of a change of use in Mr. Kelly's premises.

2. The first decision does not require the special procedures for leave set out in s. 50 of the Planning and Development Act, 2000. That section is, however, applicable to any attempt to seek judicial review in respect of the second decision.

3. The application currently before the court is required by those procedures and is therefore, only concerned with the second decision. It arises under a notice of motion in which Mr. Kelly seeks both an extension of time under s. 50(4)(a)(iii) of the 2000 Act together with an order pursuant to that section granting leave to apply for judicial review. Further ancillary reliefs are also sought in the notice of motion.

4. By agreement between the parties it was determined that the question of the extension of time sought would be tried first leaving over the issue as to whether leave should be granted to a subsequent hearing which would only arise in the event that the time was extended.

5. Therefore the only issue which I have now to determine is as to whether an order extending the prescribed period within which application seeking leave to apply for judicial review must be brought should be made.

The Facts

6. Insofar as material to this aspect of the case the following facts appear to me to be relevant. The matters under review arise originally out of separate proceedings brought by the County Council against Mr. Kelly. Those proceedings related to alleged unauthorised development being carried out by Mr. Kelly at his hotel "The Landmark Hotel" at Carrick-on-Shannon, County Leitrim. As part of the settlement of those proceedings it was agreed that the County Council would make a reference to the Board under the provisions of s. 5(4) of the 2000 Act as to whether or not the activity in question constituted development as defined in that Act and, if so, whether such development was exempted development. The development in question related to a change in use. The change involved an alteration of the use of a structure from a leisure centre to a function room/nightclub within a hotel complex. The issues were as to whether such a change represented a material change in use and, if so, whether it was, nonetheless, exempted development. Having considered the matter the Board issued its decision on 17th September, 2004 which in material part provided as follows:-

> "AND WHEREAS An Bord Pleanála has concluded that:-
>
> > (a) the change of use from use as a leisure centre, comprising swimming pools, sauna and steam rooms along with an aerobics/gymnasium area and ancillary facilities, to use as a nightclub/functions area constitutes a material change of use in the context of s. 3 of the Planning and Development Act, 2000,
> >
> > (b) the said change of use does not fall within the scope of any of the classes of use specified in part (4) of schedule 2 to the Planning and Development Regulations, 2001, and
> >
> > (c) the associated alterations to the structure in question, involving the carrying out of works being related to a change of use not being exempted development, would come within the scope of s. 3 of the said Act;
>
> NOW THEREFORE An Bord Pleanála in exercise of the powers conferred on it by s. 5(4) of the 2000 Act hereby decides that the said change of use of a leisure centre to a nightclub/functions area at the Landmark Hotel Carrick-on-Shannon, County Leitrim is development and is not exempted development."

7. While not directly relevant to this challenge to that decision it should also be recorded that some six days later on 23rd September, 2004 the County Council issued an enforcement notice which followed closely the same sequence of reasoning set out in the decision of the Board and which provided in relevant part as follows:-

> "(2) as the owner of said property, this enforcement notice requires you to carry out the following works in order that the said unauthorised development is discontinued in a manner acceptable to the planning authority,
>
> > (a) where as An Bord Pleanála in exercise of the powers conferred on it by s. 5(4) of the Planning and Development Act, 2000 has decided, in an order dated 17th September, 2004 that the change of use of a leisure centre to a nightclub/functions area at the Landmark Hotel, Carrick-on-Shannon, County Leitrim is development and not exempted development, the planning authority considers that the development of a nightclub/functions area at the Landmark Hotel, Carrick-on-Shannon, County Leitrim constitutes an unauthorised change of use at the premises.
> >
> > (b) you are required to immediately discontinue the unauthorised use of the leisure centre as a nightclub/functions area or any other use other than that of a leisure centre.
> >
> > (c) you are further required to undertake works to remove all alterations to the leisure centre being works associated with the unauthorised change of use and to undertake works to develop the leisure centre in

accordance with that permitted by the grant of permission in respect of File No. P13037 in the planning register. The period for compliance with this requirement to be 84 days from the date of this notice".

8. At a general level the complaint of Mr. Kelly in respect of both the decision of the Board and the enforcement notice issued by the County Council relates to what he says is a decision or finding contained in both of them to the effect that the works carried out to facilitate the change of use are themselves unauthorised and are, by the enforcement notice, required to be undone. Mr. Kelly accepts that the decision of the Board in respect of the materiality and lack of exempted status of the change of use itself was made within jurisdiction. Consequently he accepts that the planning authority was entitled, at least in principle, to seek to have him discontinue that use. His complaint with the decision of the Board relates solely to sub-paragraph (c) as set out above which he says amounts to an impermissible determination by the Board that the works associated with the transformation of the relevant portion of the hotel premises into a functions area/nightclub are not exempted and, what he describes as the consequentional decision by the County Council to include the removal of those works in the enforcement notice.

The Delay
9. It is common case that insofar as Mr. Kelly seeks to challenge by way of judicial review the decision of the Board he must comply with the provisions of s. 50 of the 2000 Act. Subsection (4) of that section requires that application for leave to apply for judicial review in respect of applications to which the section applies must be made within a period of 8 weeks commencing on the date of the decision of the relevant planning authority or the Board, or in certain cases not relevant to this application from the date on which notice of the relevant decision was first published.

10. Section 50(4)(a)(iii) further provides as follows:-

> "The High Court shall not extend the period referred to in sub-paragraph (1) or (2) unless it considers that there is good and sufficient reason for doing so."

11. The relevant decision of the Board was made on 17th September, 2004. Thus the last day for making application for leave was the 11th November, 2004. In *K.S.K. Enterprises Limited v. An Bord Pleanála* [1994] 2 I.L.R.M. 1 the Supreme Court in considering the largely equivalent provisions of s. 82 of the Local Government (Planning and Development) Act, 1963 as amended by s. 19(3) of the Local Government (Planning and Development) Act, 1992 determined that compliance with the similar time limit contained in that section was achieved if within the period of two months (as provided for in that section) from the date of the relevant decision a notice of motion was filed in court and served on the mandatory parties. While the relevant sections which were the subject of that decision were different in not providing any jurisdiction to the court to extend time there is no reason not to apply that test for compliance with the time limit to s. 50 of the 2000 Act.

12. At the hearing before me it was contended by counsel for the Board that it had been agreed in correspondence (which had not been exhibited) that service was only achieved on 30th November. As the solicitor for Mr. Kelly was not in court (being represented by a town agent) counsel for Mr. Kelly was not in a position either to contest or deny that contention. In the circumstances it was agreed that, subject to the entitlement of the parties to come back on this issue if it proved to be controversial, I should treat the case as one on which the application was in fact made on 30th November, 2004 in the sense in which that term was interpreted by the Supreme Court in K.S.K. Thus, as counsel for the Board points out, the delay may be taken to be one of 19 days which, as she points out, is slightly more than one third again on top of the statutory period of 56 days.

13. As an explanation for that delay Mr. Kelly refers to two matters. Firstly he draws attention to the fact that a member of his family was diagnosed with a most serious illness on 17th August, 2004 leading to admission to hospital in Dublin for significant treatment. At all material times up to the making of this application that hospitalisation continued. In particular Mr. Kelly states that the difficulties which he has encountered in relation to that illness and having to deal with his private situation in the light of same led, amongst other things, to his being unable to attend a consultation which had been arranged with junior counsel for the purposes of considering his position.

14. Secondly he draws attention to the fact that he received initial advices from junior counsel on 9th November to the effect that he should not proceed with judicial review proceedings but instead should simply contest any proceedings that might be taken by the County Council on foot of the enforcement notice. He states that he was dissatisfied with that opinion and instructed his solicitor to seek further advices which were received two days later on 11th November. These advices were to the effect that it would be inappropriate to ignore the enforcement notice and recommended the seeking of a judicial review of both the decisions of the Board and the County Council. Unfortunately no real explanation is given as to why, given the receipt of those advices on 11th, and the undoubted urgency which would necessarily have attended the matter as of that stage (it being the last day for making application) a further period of some 19 days elapsed before the necessary papers were served. Furthermore in this context it should be noted that Mr. Kelly had, at all times, the benefit of expert legal and planning advice. It is clear from the affidavit of Bernard McHugh the leading planning expert sworn on behalf of Mr. Kelly in these proceedings that Mr. McHugh was, at all material times, engaged by Mr. Kelly. Furthermore the papers reveal that Mr. Kelly has had the benefit of expert legal advice in the planning field going back over a significant period of time.

The Test
15. In the light of the above facts it is necessary to consider the proper approach of the court to the exercise of the discretion which it undoubtedly has to extend time. As was pointed out by Finlay C.J. in *K.S.K.* (at p. 5):-

> "It is clear that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by planning authorities and in particular one must assume that it was intended that a person who has obtained a planning permission should at a very short interval after the date of such decision in the absence of a judicial review be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision."

16. While the section to which Finlay C.J. was referring was one which did not contain any provision for an extension of time the broad principle referred to must be equally applicable to s. 50 of the 2000 Act. It should also be noted that provisions broadly similar to s. 50 have been introduced in other areas of administrative or quasi judicial decision making in recent times. Section 5 of the Illegal Immigrants (Trafficking) Act, 2000 also requires that application for judicial review must be made by motion on notice to, in that case, the respondent Minister and must, subject to an extension of time possibility, be made within 14 days.

17. In public procurement matters Order 84 A of the Rules of the Superior Courts 1986 was inserted into those rules by the Rules of the Superior Courts (No. 4) (Review of the Award of Public Contracts) 1998, S.I. No. 374 of 1998 and provides:-

> "An application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending such period.

18. As is noted in the decision of the Supreme Court in *Dekra Eireann Teoranta v. Minister for the Environment and Local Government* [2003] 2 I.L.R.M. 210 the time constraints in the above rule reflect the objectives in law and policy of the European Union under a series of council directives relating to the review of public contract award procedures.

19. Therefore it is clear that in recent times in a range of different areas whether by statute or by amendment to the rules of court provision has been made which requires additional procedures to be gone through (such as notice in both planning and asylum cases) and restricted time limits (being 8 weeks in planning cases, 14 days in asylum cases and 3 months in public procurement cases) to be complied with. For completeness it should be noted that the original absolute time limit provided for in planning matters was the subject of significant constitutional challenge commencing with the decision of Costello J. (as he then was) in *Brady v. Donegal County Council* [1989] I.L.R.M. 282. It was, doubtless to meet such constitutional concerns that the discretion to extend such shortened time limits was introduced by amendment into the planning process and also included in the other areas to which similar processes have been applied.

20. As the provisions in respect of the other areas referred to are similar authorities on the principles to be applied in relation to applications to extend time in such cases are clearly of assistance in determining the appropriate principles to be applied in applications for extension of time under s. 50. However some regard has also to be had to the different nature of the matters with which those legislature regimes are concerned.

21. Without being exhaustive it seems to me that the following factors may need to be considered prior to a decision as to whether or not to exercise a discretion conferred to extend time of the type referred to above:-

(a) The length of time specified in the relevant statute within which the application must be made. In in Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 I.R. 360 ("the reference case") the Supreme Court at p. 394 stated that a party who in all the circumstances of the case could be shown to have used reasonable diligence might well be in a position to persuade the court to extend the 14 day period provided for in that legislative regime. Obviously the shorter the period of time which a person has to make application to the court the easier it maybe to show that despite reasonable diligence that person has been unable to achieve the time limit.

(b) The question of whether third party rights may be affected. It is clear from the passage from K.S.K. referred to above that one of the matters which the Supreme Court identified in that case as forming part of the legislative intention was that, in particular, a person who had obtained planning permission should be put, within a short period of time, in a position where that planning permission, if not challenged, was absolute. Similarly the clear intention behind the time limits provided for in respect of public procurement matters is that both the public authorities who would wish to get on with the projects which were the subject of the public contract concerned and a successful tenderer for such contract should be entitled to know for certain that the contract can go ahead within a short period of time. It therefore seems to me that the question of whether third party rights might be involved in the late challenge to a decision is a factor which the court is entitled to take into account.

(c) However it should be noted that notwithstanding the point made at (b) above there is nonetheless a clear legislative policy involved in all such measures which requires that, irrespective of the involvement of the rights of third parties, determinations of particular types should be rendered certain within a short period of time as part of an overall process of conferring certainty on certain categories of administrative or quasi judicial decisions. Therefore while it may well be legitimate to take into account the fact that no third party rights are involved that should not be regarded as conferring a wide or extensive jurisdiction to extend time in cases where no such rights may be affected. The overall integrity of the processes concerned is, in itself, a factor to be taken into account.

(d) Blameworthiness. It is clear from all the authorities to which I have been referred in each of the areas to which stricter rules in respect of judicial review have been applied that one of the issues to which the court has to have regard is the extent to which the applicant concerned may be able to explain the delay and in particular do so in circumstances that does not reflect any blame upon the applicant. However in that context it should be noted that McGuinness J. in *C.S. & Ors v. The Minister for Justice Equality and Law Reform* (unreported judgment of the Supreme Court of 27th July, 2004) said (at p. 32 and 33):-

> "There is, it seems to me, a need to take all the relevant circumstances and factors into account. The statute itself does not mention fault; it simply requires "good and sufficient reason". The dicta of this court in the reference judgment quoted earlier indicate many factors which may contribute to "good and sufficient reason". By no means all of these can be attributed to fault or indeed absence of fault, on the part of the applicant."

While the blameworthiness (or the lack of it) on the part of the applicant is, therefore, a relevant factor it is only one such factor to be weighed in the balance.

(e) The nature of the issues involved. Both this Court and the Supreme Court in C.S. seem to have had regard to the severe consequences of deportation to a State where fundamental rights might not be vindicated. The consequences of being excluded from challenging a planning or public procurement decision, while significant, are not in the same category.

(f) The merits of the case. Some considerable argument took place during the course of the hearing before me as to whether the merits of the case in the sense of whether the applicant had established an arguable case was a factor which could properly be taken into account. In favour of that proposition reliance was placed upon the judgments of the Supreme Court in *G.K. v. Minister for Justice Equality and Law Reform* [2002] I.L.R.M. 401 in which Hardiman J. (at p. 406) delineated the approach to applications for extension of time as follows:-

> "On the hearing of an application such as this it is of course impossible to address the merits in the detail of which they would be addressed at a full hearing, if that takes place. But it is not an excessive burden to require the demonstration of an arguable case. In addition, of course, the question of the extent of the delay beyond the 14 day period and the reasons if any for it must be addressed".

In applying that principle in *C.S.* McGuinness J. having referred (at p. 34 of the judgment) to the observations of Hardiman J. in *G.K.* noted that "the demonstration of an arguable case is what is required".

22. There can, therefore, be little doubt that a consideration as to whether there is an arguable case is a matter which the court is entitled, in asylum matters, to take into account in considering whether to extend time. As against that counsel for the Board notes that in *Dekra* (in relation to public procurement) and in *Casey v. An Bord Pleanála & Ors* [2004] 2 I.L.R.M. 296, which is the only reported case on an extension of time under s. 50 in a planning matter, no consideration was given to the question of whether the applicants in those cases had established an arguable case.

23. Counsel for the Board makes the point that to have regard, in the course of an application for an extension of time, to the question of whether the applicant has an arguable case might well lead to an excessive complication of the judicial review process in relation to planning matters in that the possibility would exist of three substantive hearings at which the merits of the case might be considered. The first might be an application for an extension of time (should such be required) at which, amongst other things, the applicant would need to show an arguable case. Assuming an extension of time was granted the applicant would then need to meet the slightly higher test of substantial grounds at the leave application. Finally if leave were granted the full merits of the case would require to be determined at the hearing of the substantive application. This, it is said, would be contrary to the whole legislative intent which is to ensure that doubts about the validity of planning decisions should be dispelled one way or the other as quickly as possible. As against this counsel for the applicant makes the point that there is no necessary reason why the application for an extension of time could not be heard along with the application for leave-it only being at the request of the Board that the two matters were separated in this case. Counsel for the Board further makes the undoubtedly valid point that it is frequently the case in planning matters that even a consideration of whether there is an arguable case may require a detailed consideration of frequently complex planning documentation including plans specifications and the like.

24. Taking all those factors into account it seems to me that the legislative intent for speedy resolution in a planning matter can best be met in the following way.

> (i) an applicant who seeks to move for leave outside the 8 week period must, as the applicant here has, seek in his notice of motion both the relevant extension of time and leave itself.
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> (ii) In so doing the applicant's motion will necessarily be accompanied by a draft of the statement which would be required to ground the application for judicial review together with the evidence put forward in support thereof and also the evidence sought to be relied on for the extension of time.
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> (iii) Whether in those circumstances the respondent wishes to raise the question of whether there is an arguable case is a matter within the election of the respondent. It would therefore be a matter for the respondent to determine whether it wishes to urge upon the court that no arguable case has been made out and thus require the court to enter into a consideration of that issue. If the respondent does not wish to raise the matter (as here) then it is not necessary for the court to engage in a consideration of the merits of the case.

25. Such a procedure enables a respondent who feels that it can be demonstrated simply that an applicant has no arguable case to invite the court so to find and thus reject the application for an extension. If a respondent feels that the issues which would need to be canvassed in order to determine whether there is an arguable case are complex and would lead to delay then such a respondent is perfectly free to invite the court to consider the extension of time on a stand alone basis without having regard to the merits of whether there be an arguable case. As the decision will be entirely one for the respondent concerned no prejudice to such a party can take place.

Conclusions

26. Applying the above general considerations to the facts of this case it seems to me the factors that I have to take into account are the following.

> 1. The period involved, being one of 8 weeks, while short is not unduly harsh, this is so, in particular, in cases where it is likely, as here, that an applicant will already have the benefit of expert professional advice prior to the commencement of the time running by the employment of appropriate professionals in the planning process which led to the decision sought to be challenged.
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> 2. The nature of the decision being challenged (being a planning decision) is not of a similar character to those being challenged in the asylum process where the court rightly takes into account the consequences (whereby the potential for serious infringement of the fundamental human rights of an applicant should such applicant be excluded from making what might otherwise be a valid judicial review application to the court) must be taken into account.
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> 3. There are no significant third party rights involved in this case.
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> 4. Nonetheless the delay of 19 days in relation to a period of 56 days is significant having regard to the necessity to bring finality to all planning matters even those that do not involve third parties.
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> 5. While some degree of explanation has been given for the fact that the application was not made within the time prescribed same represents, at best, a partial explanation only having regard to the following matters:-
>
> > (a) while Mr. Kelly was undoubtedly in a difficult personal position at all material times he was, nonetheless, in a position to attend the District Court in respect of a renewal of his annual dance licence on the 22nd of September at which hearing he obviously became aware of the potential seriousness of the planning issues. No real explanation is given as to why it took a period of in excess of 6 weeks from that time to obtain the initial advices of junior counsel. The only matter adverted to was that Mr. Kelly's personal situation led to the cancelling of one consultation. While there can be little doubt that the fact that someone receives conflicting advices would explain any delay attributable to that situation it seems clear that the revised advices upon which Mr. Kelly has acted were received within 2 days of the initial advices. Thus that matter did not, of itself, contribute significantly to the overall delay in the matter. Finally, as pointed out above, no real explanation is given as to the reasons for the 19 day delay from the receipt of the advice in favour of seeking judicial review to the service of the documentation thus stopping time running.

27. Under this latter heading some regard must be had to the possibility (though on the evidence before me it is impossible to reach any conclusion) that part of that delay may be attributable to Mr. Kelly's legal advisors. In considering such a question in C.S. McGuinness J. seemed reluctant to attribute blame to the applicant in that case for delay attributable to her legal advisors. However

in so doing she stated that she was bearing in mind the observations of Finnegan J. (as he then was) in this Court in the G.K. case where he held (at p. 87) that:-

> "In determining the extent to which an applicant should be held vicariously liable for the default of his solicitor it is important to bear in mind the serious consequences which could result from an application failing because of the delay ... where however an applicant is deported the consequences for him maybe very serious indeed in that he may be deported to a state in which his fundamental human rights would not be vindicated".

28. It seems proper therefore to regard the question of the vicarious liability of an applicant for delay attributable to his or her advisors as being a factor which might loom less heavily in asylum type matters than it would in planning or public procurement matters.

29. In all the above circumstances it seems to me that I should exercise my discretion against extending the time. The only one of the above factors which appears to weigh significantly in favour of such an extension is the fact that there are no significant third party rights involved. However having regard to the significant extent of the delay, the fact that the explanation therefore seems, in reality, to be limited and in all the other circumstances of the case it does not seem to me that, on balance, I should accede to the application.