Neutral Citation: [2014] IEHC 522

THE HIGH COURT

[2013 No. 40 J.R.]

BETWEEN

WATERVILLE FISHERIES DEVELOPMENT LIMITED

APPLICANT

AND

AQUACULTURE LICENSES APPEALS BOARD AND THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE (No.3)

RESPONDENTS

AND

(BY ORDER) SILVER KING SEA FOODS LIMITED T/A MARINE HARVEST IRELAND

NOTICE PARTY

JUDGMENT of Mr. Justice Gerard Hogan delivered on 7th November 2014

1. This is now the third judgment which this Court has given in respect of judicial review proceedings involving a decision of the Acquacultural Licenses Appeals Board ("the Board") dated 31st October, 2012. By that decision the Board had confirmed an earlier decision of the Minister for Agriculture, Fisheries and Food on 22nd March, 2011, to grant a temporary licence for the amendment of operating procedures to the notice party, Silver King Seafoods Ltd. ("Silver King") in respect of the latter's salmon farming site at Deenish Island, Ballinskelligs Bay, Co. Kerry.

2. In the first judgment delivered on 8th April, 2014 ([2014] IEHC 248) I held that the applicant had the requisite *locus standi* to pursue this application for judicial review. I also ruled that the proceedings were not in themselves irregularly constituted and were valid.

3. In the second judgment delivered on 25th July 2014 ([2014] IEHC 381) I held that while the Board ought to have given written reasons for its failure to hold an oral hearing in respect of this application for a temporary licence in respect of the proposed amendment to Silver King's operating procedures, this did not mean that the applicant could show the existence of substantial grounds within the meaning of s. 73 of the Fisheries (Amendment) Act 1997 by which the validity of that licence could be successfully challenged. As I explained (at paragraphs 28-29 of the judgment):

> "28. ….no conflict of fact which is central to the outcome of the licensing process has been identified. In these circumstances, the Board was entitled to conclude that no oral hearing was necessary.
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> 29. Against that background, therefore, it cannot be said that - at least so far as the present case is concerned - the failure to give reasons in respect of the decision not to hold an oral hearing is likely to render the substantive decision invalid or liable to be quashed in circumstances where there was no underlying obligation to hold such a hearing. The Board certainly erred in law in failing to provide such reasons (or, alternatively, not providing objective justification for the failure to do so). Yet there is no nexus between this procedural failure - important and significant as it admittedly is - and the ultimate decision regarding the grant of the temporary licence. This is especially so given that there was no obligation to hold an oral hearing in the circumstances of this case."

4. It followed, therefore, in the wake of these conclusions that the application for leave to apply for judicial review would have to stand dismissed. On 31st July 2014 I then made certain orders for costs in favour of the two respondents and the notice party. One might have been forgiven for thinking at that juncture that the entire proceedings were at an end. The applicant nevertheless subsequently brought a motion dated 6th October 2014 seeking a declaration that such costs as were ordered against it in these proceedings should not be, having regard to the provisions of Article 11 of Directive 2011/9EU, "prohibitively expensive." This application raises again the manner in which the Aarhus Convention (1998) has been transposed into our domestic law.

5. It is certainly unfortunate that this application was made at this belated stage. Section 7(1) of the Environment (Miscellaneous Provisions) Act 2011 ("the 2011 Act") envisages that any such application for a modified costs order (or some variant of this, such as a protective costs order) should be made "at any time before or during the course of the proceedings." There is much force in the argument which was advanced by the respondents to the effect that the court is now *functus officio* given that the costs order has already been made and time for an appeal has expired. I will, however, assume for present purposes that I have a jurisdiction to entertain this motion.

The status of the Aarhus Convention in Irish law

6. The Aarhus Convention (or, to give it its full title, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) is an international agreement which was negotiated under the auspices of the UN Economic Committee for Europe. Although it is in strictness simply a regional agreement, it is quite possibly the most influential international agreement of its kind in the sphere of international environmental law. Perhaps one of the reasons that the Convention has proved to be so influential is that it has been ratified by the European Union and that it has been transposed into certain key areas of EU environmental law, on which the latest version of the Environmental Impact Assessment Directive (2011/92/EU) is only the most prominent example.

7. Save for the special case of where the Aarhus Convention has been transposed into EU law (which I will consider presently) and, by that process, has become part of Irish domestic law as a result, it is clear that, having regard to the provisions of Article 29.6 of

the Constitution, the Convention is otherwise only part of domestic law to the extent to which such either has been or may be determined by the Oireachtas. This point is doubtless beyond controversy, but a recent application of these well established principles in the context of a different international convention (namely, the Strasbourg Convention on the Transfer of Sentenced Persons) may be found in the judgment of the Supreme Court in *Sweeney v. Governor of Loughan House Open Prison*[2014] IESC 42.

8. The relevant provisions of the Aarhus Convention so far as costs are concerned are those contained in Article 9(3) and Article 9(4):

> "3. In addition…..each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.
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> 4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible."

9. So far as the Aarhus Convention and domestic law is concerned, the relevant statutory provisions are to be found in the Long Title and Part 2 of the Environment (Miscellaneous Provisions) Act 2011 ("the 2011 Act"). The Long Title recites that one of the objects of the 2011 Act is "to give effect to certain articles" of the Aarhus Convention and for judicial notice to be taken of the Convention. Section 8 of the 2011 Act provides that judicial notice of the Convention shall be taken. Sections 3 to 7 then modify the traditional costs order regime by "displacing the ordinary rules regarding the award of costs in litigation": *McCoy v. Shillelagh Quarries Ltd.* High Court, 16th July 2014 per Baker J. The modified rules may be taken to ordain a procedure whereby, normally, the default order in cases coming within this part of the 2011 Act is that each side must abide their own costs.

10. It is nonetheless striking that the Oireachtas did not make the Aarhus Convention part of our domestic law as such. As I pointed out in *Kimpton Vale Developments Ltd. v. An Bord Pleanála* [2013] IEHC 442 it would, of course, have been open to the Oireachtas to do just that. Thus, for example, s. 20B of the Jurisdiction of Courts and Enforcement of Judgments Act 1998 (as inserted by s. 1 of the Jurisdiction of Courts and Enforcement of Judgments (Amendment) Act 2012) provides that the Lugano Convention of 2007 "has force of law in the State." In that latter example the Lugano Convention was thereby given an autonomous, directly applicable status in Irish law, so that, for example, the relevant provisions of the Convention could be invoked appropriately on a free standing basis in all categories of litigation without further ado.

11. The Aarhus Convention was not made part of the law of the State in quite that sense. What happened instead was that the Oireachtas sought to approximate our law to the requirements of Article 9(3) and Article 9(4) of the Aarhus Convention by providing in ss. 3 to 7 of the 2011 Act for the modified costs rule in the manner in which I have described. If, however, it were subsequently to transpire – and I say this on a purely hypothetical basis – that these provisions of the 2011 Act did not sufficiently approximate to the requirements of Article 9(3) and Article 9(4) of the Aarhus Convention, then the only remedy in that situation would be for the Oireachtas to amend the law. Any disappointed litigant seeking to protect himself or herself against an excessive costs exposure could not, as it were, seek directly to invoke the provisions of Article 9(3) and Article 9(4) of the Convention for this purpose, precisely because, unlike the example given of the provisions of Lugano Convention, the provisions of the Aarhus Convention are not themselves part of the law of the State.

12. So far as the 2011 Act is concerned, it is clear that the modified costs rule in s. 3 is applied by s. 4 to the following category of cases:

> "4(1) Section 3 applies to civil proceedings, other than proceedings referred to in subsection (3), instituted by a person –
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> (a) for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition or other requirement attached to a licence, permit, permission, lease or consent specified in subsection (4), or
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> (b) in respect of the contravention of, or the failure to comply with such licence, permit, permission, lease or consent,
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> and where the failure to ensure such compliance with, or enforcement of, such statutory requirement, condition or other requirement referred to in paragraph (a), or such contravention or failure to comply referred to in paragraph (b), has caused, is causing, or is likely to cause, damage to the environment.
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> (2) Without prejudice to the generality of subsection (1), damage to the environment includes damage to all or any of the following:
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> (a) air and the atmosphere;
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> (b) water, including coastal and marine areas;
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> (c) soil;
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> (d) land;
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> (e) landscapes and natural sites;
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> (f) biological diversity, including any component of such diversity, and genetically modified organisms;
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> (g) health and safety of persons and conditions of human life;
>
> (h) cultural sites and built environment;
>
> (i) the interaction between all or any of the matters specified in paragraphs (a) to (h).

(3) Section 3 shall not apply –

(a) to proceedings, or any part of proceedings, referred to in subsection (1) for which damages, arising from damage to persons or property, are sought, or

(b) to proceedings instituted by a statutory body or a Minister of the Government.

(4) For the purposes of subsection (1), this section applies to –

(a) a licence, or a revised licence, granted under section 83 of the Environmental Protection Agency Act 1992,

(b) a licence granted pursuant to section 32 of the Act of 1987,

(c) a licence granted under section 4 or 16 of the Local Government (Water Pollution) Act 1977,

(d) a licence granted under section 63, or a water services licence granted under section 81, of the Water Services Act 2007,

(e) a waste collection permit granted pursuant to section 34, or a waste licence granted pursuant to section 40, of the Act of 1996,

(f) a licence granted pursuant to section 23(6), 26 or 29 of the Wildlife Act 1976,

(g) a permit granted pursuant to section 5 of the Dumping at Sea Act 1996,

(h) a licence granted under section 40, or a general felling licence granted under section 49, of the Forestry Act 1946,

(i) a licence granted pursuant to section 30 of the Radiological Protection Act 1991,

(j) a lease made under section 2, or a licence granted under section 3 of the Foreshore Act 1933,

(k) a prospecting licence granted under section 8, a State acquired minerals licence granted under section 22 or an ancillary rights licence granted under section 40, of the Minerals Development Act 1940,

(l) an exploration licence granted under section 8, a petroleum prospecting licence granted under section 9, a reserved area licence granted under section 19, or a working facilities permit granted under section 26, of the Petroleum and Other Minerals Development Act 1960,

(m) a consent pursuant to section 40 of the Gas Act 1976,

(n) a permission or approval granted pursuant to the Planning and Development Act 2000.

(5) In this section –

"damage", in relation to the environment, includes any adverse effect on any matter specified in paragraphs (a) to (i) of subsection (2);

"statutory body" means any of the following:

(a) a body established by or under statute;

(b) a county council within the meaning of the Local Government Act 2001;

(c) a city council within the meaning of the Local Government Act 2001.

(6) In this section a reference to a licence, revised licence, permit, permission, approval, lease or consent is a reference to such licence, permit, lease or consent and any conditions or other requirements attached to it and to any renewal or revision of such licence, permit, permission, approval, lease or consent."

13. To complete the picture, it is necessary to note that s. 6(a) of the 2011 Act further provides that the modified costs rule contained in s. 3 applies to judicial review proceedings in this Court concerning those matters which fall within the scope of s. 4.

14. However, it is equally plain that the licensing regime which obtains under the Fisheries (Amendment) Act 1997 – and which was the subject of the present judicial review application - simply does not come within the scope of the special costs rules contained in ss. 3, 4 and 6 of the 2011 Act. If it does not, then that is the end of the matter so far as domestic law is concerned, since for the reasons I have already set out, neither the Aarhus Convention nor Article 9 of the Convention can be regarded as having a free standing autonomous status in Irish law. It is true that Irish law has been modified and amended to take account of the requirements of Article 9 of the Convention, but the Oireachtas has not elected to go any further than this. Specifically, Article 9 has not, as such, been made part of the law of the State.

15. It follows, therefore, that this Court has not been given any jurisdiction by the 2011 Act to apply the modified costs rules contained in Part II of that Act to licensing applications coming within the scope of the 1997 Act or to applications for judicial review in respect of those licensing decisions.

The potential impact and relevance of the 2011 Directive

16. In fairness to the applicant, it should be stated that its principal argument has always rested on the potential impact of Directive 2011/92/EU ("the 2011 Directive"). The 2011 Directive is, however, simply a re-stated and consolidated version of the Environmental Impact Assessment Directive, Directive 85/337/EEC of 27 June 1985. As recitals 18 to 21 of the 2011 Directive make clear, the Directive reflects one of the objectives contained in Article 6 of the Aarhus Convention, namely, that the public should be able to participate in decisions "on the specific activities listed in Annex 1 thereto and on activities not so listed which may have a specific effect on the environment."

17. Article 11(1) of the Directive provides that Member States shall ensure that relevant members of the public shall have access:

"….to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive."

18. Article 11(4) – reflecting, doubtless, the provisions of Article 9(1)(b) of the Aarhus Convention – provides that any such procedure "shall be fair, equitable, timely and not prohibitively expensive."

19. So far as the substantive provisions of the 2011 Directive is concerned, Article 4(2) provides that, subject to an exception not here relevant:

"…for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that assessment through:

(a) a case by case examination or

(b) thresholds or criteria set by the Member State.

Member States may decide to apply both procedures referred to in points (a) and (b)."

20. Intensive fish faming is one of the projects listed in Annex 1(f) as coming within the scope of Article 4(2). If, therefore, it were to be contended that a project involving intensive fish farming had been embarked upon without compliance with the appropriate environmental impact assessment, then any judicial review proceedings arising thereform would benefit from the provisions of Article 11(4) and the consequential requirement that any such application be not prohibitively expensive.

21. That, however, is not the position here. Article 11(1) and Article 11(4) are quite specific in their requirements. Specifically, Article 11(4) does not state that all judicial review proceedings involving the licensing of intensive fish farming should benefit from the application of the modified Aarhus Convention costs rules. Rather, Article 11(4) makes it clear that these provisions apply only insofar as such proceedings allege material non-compliance with a procedural or substantive requirement of the 2011 Directive in respect of an Annex II category project such as intensive fish farming.

22. Since these judicial review proceedings do not involve compliance with the requirements of the 2011 Directive in any shape or form, it follows in turn that the specific provisions of Article 11(4) of the 2011 Directive have no application to the present case.

Conclusions

23. For all the reasons stated, therefore, I consider that the modified costs rules envisaged by Article 9 of the Aarhus Convention have no application to the present case. The Aarhus Convention was not, as such, made part of the law of the State and the applicant cannot bring itself within the provisions of Part II of the 2011 Act which approximated our law (and, specifically, modified costs rules) to the requirements of the Aarhus Convention.

24. Nor can the applicant obtain the benefit of these modified costs rules by virtue of the operation of Article 11 of the 2011 Directive. Article 11(4) does not apply these modified costs rules to all judicial review proceedings involving intensive fish farming as such, but rather only to those proceedings which allege non-compliance with the requirements of the 2011 Directive in respect of an Annex II category project such as fish farming.

25. For all of these reasons, it follows that the ordinary costs rules must continue to apply to the costs orders which I have already made in the present case.