Neutral citation no. 2005 IEHC 215

THE HIGH COURT

Record Number: 2004 No. 350 JR

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)

BETWEEN

JAMES TALBOT AND MARGARET TALBOT

APPELLANTS

AND
AN BORD PLEANÁLA,
KILDARE COUNTY COUNCIL,
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr Justice Michael Peart delivered on the 21st day of June 2005

1. The applicants are husband and wife and seek leave to apply for judicial review for the following reliefs.

> Firstly, they seek an Order of *Certiorari* quashing a decision of An Bord Pleanala dated 27th February 2004 ("the decision") by which their application for the construction of a house and ancillary works at Gormanstown, Co. Kildare was refused.
>
> Secondly, they seek a declaration that they are persons who benefit from a positive presumption under the Kildare County Development Plan ("the county development plan") towards the building of one-off housing for their own occupation on the lands the subject matter of these proceedings.
>
> Thirdly, they also seek as against Kildare County Council ("the County Council") a declaration that paragraph 2.9.1(A)(4) and 2.9.1(A)(5) of the county development plan are not reasonably related to the securing of proper planning objectives and/or are unconstitutionally arbitrary and vague and accordingly were made ultra vires the powers conferred on the County Council by the Planning and Development Act ("the 2000 Act")
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> Fourthly, they seek, if necessary, as against Ireland and The Attorney General, a declaration that the said two paragraphs of the county development plan are incompatible with the State's obligations under the European Convention on Human Rights Act, 2003.
>
> Lastly, they seek an order remitting the application for planning permission back to the County Council for reconsideration in the light of any directions which this Court might make in its determination of the proceedings for Judicial Review.

2. For completion, I should note that the applicants no longer seek leave in respect of the relief set forth at 4(d) of the Reliefs sought in the Statement of Grounds.

Facts

3. The applicants married in December 1970. At paragraph 8 of his grounding affidavit James Talbot sets out his close family links with County Kildare. His mother's family were from Moone in County Kildare, and he says that he himself was "partially raised in south County Kildare", and that he has many family connections there. He avers that he spent virtually every summer in Moone at his mother's family home during what he describes as his "formative and teen years", and that as a consequence he has strong ties still in that county with his cousins. In addition he has averred that many of his relatives, including great grand parents, grandparents, uncles, aunts, and a cousin are all interred in the cemetery at Moone, and that he has a great number of relatives living in a number of stated locations in the county. He and his wife moved to and lived in Dublin until 1989, when they returned to live in County Kildare, namely at Yellow Bog, near Kilcullen. They and their children integrated into the local community and involved themselves in many local activities and organisations. He gives considerable details of all this in his grounding affidavit. These averments are relevant to the relief claimed at 4(b) of the Statement of Grounds, relating to the presumption contained in the county development plan for one off housing for persons with close family or employment connections with rural parts of the county. I will consider those presumptions and submissions made in relation thereto in due course.

4. The applicants purchased a site in April 2002 at Gormanstown, Kilcullen, Co. Kildare. Their first application for a planning permission to build a house on the site was refused in February 2003. They applied again in August 2003, but before doing so they had a pre-planning meeting with planning authority officials. However, permission was refused on six grounds which are set forth in the Inspector's Report to An Bord Pleanala dated February 2004. On appeal to An Bord Pleanala, these grounds of refusal were reduced to two, namely:

> 1. The site of the proposed development is located in a rural area which is within the Strategic Green Belt as set out in the Strategic Planning Guidelines for the Greater Dublin Area and is identified as an Area of Development Pressure in the current Kildare County Development Plan. It is an objective of the planning authority, as expressed in the current Development Plan, to restrict residential development in such areas to certain classes of person. This objective is considered reasonable. It is considered that the applicants do not come within the scope of the housing need criteria in the Development Plan. The proposed development would, therefore be contrary to the proper planning and sustainable development of the area.
>
> 2. The proposed development would result in a disorderly, backland pattern of development in this rural area lacking certain public services and community facilities and would militate against the preservation of the rural environment and lead to demands for the uneconomic provision of further public services and facilities in the area where they are not proposed. The proposed development which would constitute suburban type sprawl in a rural area, would, therefore, be contrary to the proper planning and sustainable development of the area.

5. The Grounds put forward for the reliefs sought relate to the first of the reasons of the refusal. That gives rise to a submission made on behalf of the first named respondent, to which I shall in due course refer, namely that this application should be refused because, even if the Court were to allow leave to seek judicial review on the grounds sought, the applicants would still be faced with the second ground of refusal set out above, and that a victory in relation to reason number 1 would avail them nothing.

6. What has been referred to as "the positive presumption" contained in the County Kildare Development Plan is at the heart of this application, and I should set it out. In that Plan at paragraph 6.6.2 under the heading "Policy Statement" it states, relevantly to these proceedings:

"It is the policy of the Council to focus the provision of one-off housing in the rural countryside to the category of 'local need', outlined below, subject to compliance with normal planning criteria. Applicants must comply with normal siting and design considerations and one of the following criteria outlined in Schedule 6.1 below:

1 ……

2 ……

3. Persons who have grown up in or who have spent substantial periods of their lives (c.12 years) living in rural areas in Kildare as members of the rural community and who seek to build near their family residence and who currently live in the area.

4. Persons who have grown up in or who have spent substantial periods of their lives (c.12 years) living in rural areas in Kildare as members of the rural community who have left the area but who now wish to return to reside near other immediate family members or to care for elderly immediate family members. Immediate family members are defined as mother, father, brother, sister or guardian.

5 ……"

7. The applicants seek to establish in these proceedings that the manner in which the Board reached its decision is flawed. It is well recognised that judicial review proceedings must be confined to the process by which the body reached its decision, rather than the merits of the application itself. If the process was not flawed, then it is of no concern to the Court that it might have, on the same facts, reached a different decision. It is simply concerned with the manner in which the decision was arrived at. There is no need at this stage to refer to well-known authority in that regard.

8. Regarding the first and second reliefs sought as set out above, the applicants rely on the following grounds in their Statement of Grounds:

1. The Board erred in its interpretation of the Kildare county Development Plan in the following ways;

a. treating the presumption in favour of certain categories of persons as conclusive and exhaustive;

b. Finding that the applicants had created their own housing need by moving from Yellow Bog to Kilcullen;

c. requiring that the business and employment of the applicants should itself be located in the specific community in which the appeal site is located;

d. holding that the evidence that the applicant's business and voluntary activities provided services to the rural community of south Kildare and the specific local community in which the appeal site is located did not establish compliance with the criteria in the development plan;

e. impermissibly introducing new (and more restrictive) requirements into the criterion of service to the rural community, not contained in the development plan and not warranted by it;

f. introducing a restriction on the application of the condition of service to the local community which is inconsistent and incompatible with the absence of any such criterion in relation to the employment of the applicants (which need only be in Kildare) or the employment in agriculture, horticulture, forestry or bloodstock (which is not geographically restricted at all);

g. requiring that relevant family linkages be limited to family members resident in the specific local community in which the appeal site is located;

h. unduly and harshly restricting the policy criteria for rural housing under the development plan and under the national Spatial Strategy;

i. Failing, in spite of recognising the requirement, to assess the case on its individual merits.

j. Failing to properly consider the application as required.

2. The applicants also contend in relation to Point 1 that the Board also erred in failing to give sufficient weight to the duty to vindicate the applicants' constitutional rights

a. to earn their livelihoods in a manner free of unjust restrictions on residence;

b. to the enjoyment of their property as property owners;

c. their freedom of movement within the State or to live in the county of their choosing;

d. to their rights, and the rights of their immediate family, to the care, nurture and companionship of other family members;

e. their right to be treated equally with other citizens.

3. The decision was unreasonable and/or irrational, contrary to commonsense as a matter of law and in fact, namely the character and status of the applicants as persons who benefit from a positive presumption under the development plan towards the building of one-off houses for their own occupation.

4. The Board acted ultra vires by reference to restrictions identified as being contrary only to the spirit of the

development plan.

5. The Board had regard to an irrelevant consideration, namely the Strategic Planning Guidelines for the Greater Dublin Area for the purpose of casting doubt on the coherence of and/or interpreting the Kildare County Development Plan, and that they had regard also to an application for permission in relation to an adjacent site.

6. The Board failed to have proper regard to the evidence of close family linkages in south county Kildare and of provision of services to the local community.

9. In relation to the third relief sought, as against Kildare County Council only, as set out above, the following grounds are relied upon:

1. The requirement of family linkages to the area in which landowners wish to build is not reasonably related to the planning objectives of the development plan including the objective of preventing urban sprawl.

2. The requirement for persons whose primary employment is within county Kildare to provide a service by their employment to the local rural community is not reasonably related to the relevant planning objectives in the development plan including the objective of preventing urban sprawl.

3. The requirement that persons' primary employment be in agriculture, horticulture, forestry or bloodstock is not limited to the County of Kildare or the particular locality of the proposed development.

4. The restrictions in question do not prevent persons who benefit from a positive presumption from selling, renting or otherwise alienating the dwelling houses constructed by them, nor more generally does the development plan impose a positive requirement of residence on persons who benefit from such presumption.

5. The restriction in question constitutes a breach of the provisions of the Treaty of Rome relating to the freedom of movement of persons including Irish Citizens within the European Community and/or of the provisions relating to freedom of establishment.

10. In addition there are grounds set out in relation to the fourth relief as against Ireland and the Attorney General to the effect that the planning requirements set forth constitute an unjust, unnecessary and disproportionate attack on the applicants' right to earn their livelihoods in a manner free from unjust restrictions on residence, and other rights already identified; that the said requirements are vague, arbitrary and incapable of being applied in a just manner; that the presumption at paragraph 2.9.1 of the development plan discriminates unjustly against the applicants who, as persons who, although they provide economic services to persons in the locality, run their business from a nearby town, and that it discriminates in the other ways set out in paragraphs (xvi) to (xviii) of the Statement of Grounds.

11. I have set forth these reliefs and the Grounds relied upon in relation to same for the purpose of making clear that none relates to the second ground of refusal by the Board of planning permission which I have set forth. This is relevant to the submission made in response to the application that the Court would be indulging in a futile and pointless exercise in exercising its discretion by granting leave to the applicants to seek the reliefs they seek in relation to Ground 1 of the refusal. It is appropriate to deal with this aspect of the application now.

12. Relief by way of judicial review is discretionary. In other words, even if the Court considers that the applicant has shown substantial grounds for contending that the decision is invalid or ought to be quashed, and that he enjoys standing in the matter, the Court can in the particular circumstances of the case refuse leave to seek relief by way of judicial review. One of those circumstances is where it would be futile in the sense that no real benefit will accrue to the applicant even if, having been granted leave the applicant were to be successful in the substantive hearing and the decision was quashed. Ms. Hyland referred the Court to judgments such as those of O'Higgins CJ. And Henchy J. in the Supreme Court in *Cahill v. Sutton* [1980] 269, and *Brady v. Donegal County Council* [1989] I.L.R.M. 282. Albeit in the context of a constitutional challenge to statutory provisions, the former case makes clear the caution which the Court must exercise to ensure that access to the Court is reserved to those for whom there is some benefit from any order which might be made.

13. It is also worth noting the interesting remarks of O'Higgins CJ in *The State (Abenglen Properties) v. Corporation of Dublin* [1984] IR 381 at p. 394 where he considered the respondent's submission that the appellants had deliberately chosen not to appeal the impugned decision when they could easily have done so, and that by choosing to bring proceedings by way of judicial review, they were pursuing a collateral objective, and that the Court should exercise its discretion to refuse to grant relief. In that regard, the learned Chief Justice stated:

> *"……The purpose of their application for certiorari was not, primarily, to correct a grievance which they had suffered as a result of a process alleged to have been without legal authority but to avail of the alleged irregularity in order to obtain a benefit not contemplated by the planning code……I do not find it necessary to express a view as to whether that subsection would operate in such circumstances. It is sufficient to say that the object and purpose of the Abenglen's application for certiorari was to by-pass the scrutiny of planning proposals provided by the Planning Acts and, thereby, to frustrate their operation in this instance…….In my view, having regard to the existence of an adequate appeal procedure, to the conduct and motives of Abenglen and to all the circumstances of this particular case, the High Court should have refused, in the exercise of its discretion, to make absolute the conditional order of certiorari."*

14. In the same case, Walsh J. at p. 400 stated in the context of the discretion:

> *"…If it could be held that the respondents acted in this case in excess of jurisdiction, the grant of certiorari would necessarily be a matter of discretion for no benefit, or no particular benefit would accrue to Abenglen by the granting of the order."*

15. In *Farrell v. Farrelly* [1988 IR. 201, O'Hanlon J. had to consider whether he should exercise his discretion to quash a warrant of arrest. The learned judge decided that since the arresting officer had in any event a common law power of arrest on the occasion, it had not been necessary in the first place to apply for the warrant of arrest to the Peace Commissioner. The applicant in that case was duly tried and convicted of the offences charged. O'Hanlon J. concluded at p. 205:

> *"…Even if I were of opinion that the arrest was invalid for the reason urged on behalf of the applicants it appears to me,*

having regard to the discretionary nature of the relief by way of certiorari, that it would not be appropriate in the circumstances of the present case to grant the relief sought, having regard to the fact that the applicants were duly tried and convicted in due course of law and that any invasion of their personal rights which might have preceded such trial and conviction must be regarded as having been minimal in character, and not involving any deliberate or conscious violation of such right."

16. In *Heavey v. The Pilotage Committee*, unreported, 7th May 1992, Mr Justice Blayney had occasion to consider whether he should exercise his discretion to quash a decision in circumstances where, as events turned out, the applicant was entitled in any event to make a fresh application, and that in the circumstances of that case, there was no longer any reason why that fresh application would not be successful. In those circumstances, there would be no benefit to the applicant, and the discretion ought not to be exercised. The learned judge referred to *The State (Abenglen Properties) v. Corporation of Dublin* [supra], and concluded that part of his judgment saying:

"In the present case the quashing of the decision of the Committee is not necessary for the protection of the applicant's rights and neither would it confer any benefit on him. It would not have procured for him the endorsement he was seeking and, irrespective of whether the Committee's decision was quashed or not, he was entitled to apply again."

17. These passages speak for themselves, and make clear that in judicial review matters, the Court enjoys a discretion in the matter of granting relief taking all the circumstances of the case into account, even where the Court is satisfied that some breach of rules or procedures has occurred.

18. Equally, it is well established that the Court will not act in vain. There are circumstances where a Court will refuse relief otherwise available, where to do so would serve no useful purpose.

19. Relevant also is the fact that in planning matters, the Oireachtas has decided that applications of this kind for judicial review shall, even at the leave stage, be on notice to the proposed respondents. It is no longer a matter of an applicant making an unopposed ex parte application for leave to bring judicial review proceedings under O. 84 of the Rules of the Superior Courts. The proposed respondents must, under s. 50 of the 2000 Act, be put on notice of any application for leave, and are thereby given an opportunity of making submissions to the Court as to why leave ought not to be granted. A purpose served by this requirement is clearly that the Court ought not to allow cases to be brought which serve only to use up, if not waste, valuable resources such as court time and costs. Another purpose also in some cases is to avoid development being held up by the delay inevitably involved in having a case heard to finality, when even at an early stage it would have been clear, had the leave application been on notice, that the applicant had little or no prospect of ultimately succeeding in his/her arguments.

20. The threshold of arguability at this leave stage has been the subject of well-known judicial consideration, and it is not necessary to repeat again the accepted threshold often stated by reference to the judgment of Carroll J. in *McNamara v. An Bord Pleanala* [1995] 2 I.L.R.M. 125.

21. But I will refer to a passage from the judgment of Geoghegan J. in *Jackson Way Properties Limited v. Minister for the Environment*, unreported, 2nd July 1999 where, albeit in the context of the Roads Act, 1998 where the term "substantial grounds" also occurs, he stated as follows:

"I am satisfied that it was clearly intended by the Oireachtas that stricter criteria be applied to the granting of leave than would be applied on an ex parte application in an ordinary Judicial Review. Once a Court has established that the points at issue in the proposed proceedings are not trivial or tenuous, the Court must assess whether there is real substance in the argument and not merely that it is just open to argument."

22. This is of course relevant more to the question of whether the applicant has established substantial grounds, but I refer to it also in relation to the concept that the Court should be ever watchful that cases which ought not to be permitted to take up the time of the Court in vain, should be excluded from entry into the arena at the start, where no ultimate or worthwhile benefit can result to the applicant, even if successful. There is a public interest, particularly these days when the resources of courts and court time are pushed to their limit, in ensuring that those resources are appropriately, justly and fairly preserved for worthy causes. Hence the vigilance with which I am looking at the argument made by the respondents in the present case that these applicants can derive no benefit from these proceedings, even if successful, since the reliefs sought bear only upon the first reason for the refusal of their planning application, and do not touch upon the second reason for refusal, namely:

"2. The proposed development would result in a disorderly, backland pattern of development in this rural area lacking certain public services and community facilities and would militate against the preservation of the rural environment and lead to demands for the uneconomic provision of further public services and facilities in the area where they are not proposed. The proposed development which would constitute suburban type sprawl in a rural area, would, therefore, be contrary to the proper planning and sustainable development of the area."

23. The question in that regard to be determined at this stage of the present case is whether, even if leave was granted in this case and the applicant was ultimately successful in having the decision of the Board quashed on the ground that the Board had wrongfully interpreted, construed and applied the positive presumption, and had been guilty of all the matters relied upon in the grounds set forth in the applicants' Statement of Grounds in relation to reliefs (a), (b), (c), as well as being successful on the discrimination argument under relief (e), it could reasonably avail the applicants at all in the long run.

24. If the applicants were to be successful in their challenge to the Board's decision on the grounds put forward, either on the basis that the County Development Plan was invalid, or on the ground that the Board had wrongly interpreted same when deciding that the applicants did not come within the "positive presumption", that would result in the present decision of the Board being quashed, and the matter being remitted to the Board for decision having regard to any findings made by the Court as to the manner in which the positive presumption should be interpreted and applied. It is conceivable also that depending on the outcome of the substantive hearing, the positive presumption provisions in paras. 2.9.1 (A) (4) and (5) of the Kildare County Development Plan might be found to be ultra vires, and perhaps even found to be infringing obligations under the European Convention on Human Rights Act, 2003. In which case of course the positive presumption itself could not form part of the Board's fresh consideration of the appeal at all. But it seems to me that one way or another, the Court's decision on any substantive hearing could not touch upon the second ground of refusal. The question then arises as to the inevitability or otherwise of that same ground being found to be applicable in any reconsideration of the appeal, or any fresh application which might be made for permission to the County Council.

25. In this regard the history of this matter, including the history of the applications by Kevin Talbot and Valerie Talbot (the

applicant's son and daughter in law) for planning permission to erect a house on a site adjoining that of the applicants, is of relevance.

26. In the matter of the first application for permission made by the applicants, James and Margaret Talbot, the report of the Inspector notes under "Relevant Planning History" that "permission was refused in February 2003 for a dwelling, septic tank and constructed wetland treatment system" (ref. 02/2340), and that six reasons for refusal were cited, namely:

> *"incongruous pattern of development, non-compliance with rural settlement location policy of the county development plan, demand for public services and community facilities, contravention of the strategic planning guidelines, adverse impact on residential amenities of adjoining property, lack of public road frontage or access to public road resulting I disorderly development."*

27. Their second application was made and refused, as I have set forth already and they appealed that refusal to the Board, who in turn refused the appeal, but reduced the grounds of refusal from six to two, the latter having been already set forth.

28. The six grounds originally forming the basis for the refusal by the Planning Authority can be summarised as being the following, namely: the absence of a housing need shown by the applicants means that an undesirable precedent would be set for the development of random rural housing in a partly serviced area; it would be against the policy of the development plan that residential development be restricted to the current housing needs of agriculture, and others who have a functional need to live in the area; the development would comprise a random rural development; would create additional traffic movements in the area and would conflict with the policy for the need for sustainable development; would consolidate a haphazard and incongruous suburban pattern of development which would be inappropriate to the area; would represent a precedent to further such development; and would conflict with the policy of directing residential development to serviced centres and to maintain agriculture as the primary land use of the rural area.

29. The reasons for refusal by the Board of the appeal were reduced, or perhaps even simply condensed into two grounds as follows and as already set out:

> *1. The site of the proposed development is located in a rural area which is within the Strategic Green Belt as set out in the Strategic Planning Guidelines for the Greater Dublin Area and is identified as an Area of Development Pressure in the current Kildare County Development Plan. It is an objective of the planning authority, as expressed in the current Development Plan, to restrict residential development in such areas to certain classes of person. This objective is considered reasonable. It is considered that the applicants do not come within the scope of the housing need criteria in the Development Plan. The proposed development would, therefore be contrary to the proper planning and sustainable development of the area.*
>
> *2. The proposed development would result in a disorderly, backland pattern of development in this rural area lacking certain public services and community facilities and would militate against the preservation of the rural environment and lead to demands for the uneconomic provision of further public services and facilities in the area where they are not proposed. The proposed development which would constitute suburban type sprawl in a rural area, would, therefore, be contrary to the proper planning and sustainable development of the area."*

30. A fair reading of reasons 1 and 2 is that they reflect, perhaps in different words and phraseology, more or less exactly what is contained in the reasons originally comprising six grounds.

31. The first application by Kevin and Valerie Talbot (ref. 02/2339) was refused in respect of a dwellinghouse for five reasons, which can be summarised as follows, namely it would constitute a haphazard, incongruous and inappropriate development; would conflict with the current county development plan of preventing overdevelopment arising from random rural development, and would conflict also with the policy of restricting development to current needs of agriculture; applicants have failed to show a sufficient functional need to live in the area, and is unrelated to the needs of agricultural, and would give rise to a generation of additional traffic and demand for community and public services which are neither planned for, nor economic to provide; would constitute unsustainable development and contrary to the aims and objectives of national policy; the restricted area of the site would preclude satisfactory siting of the proposed house within its confines and would result in the overlooking of an adjacent house, thereby injuring the residential amenities of the property.

32. Their second application was refused on broadly similar grounds.

33. I have set out this history in order to demonstrate that the ground relied on in these proceedings, namely the positive presumption ground, if I can so briefly describe it, is very far from being the sole ground on which the applicants' (James and Margaret Talbot) appeal has been turned down. Some of the reasons contained in the refusal by the Kildare County Council relate to that point, and certainly Ground 1 in the Board's refusal is in relation to that point, but what is stated as Ground 2 of the Board's refusal is perhaps easily described as an amalgam of the other grounds contained in the original refusal being appealed against to the Board. Certainly there can be no prospect whatsoever from the history of the application, both in respect of these applicants as well as their son and daughter in law, and the reasons stated therein for refusal, that even if this Court were to find a frailty in the first ground of refusal related to the interpretation of and application of the positive presumption in relation to the applicants, the applicants would be left with the inevitable prospect that in any further application which they might make, the remaining grounds of refusal would remain and they would have gained nothing of benefit from any successful outcome of these judicial review proceedings.

34. I am satisfied that in such a situation as this, the Court ought to exercise its discretion by refusing leave to seek judicial review in respect of the reliefs sought and on the grounds disclosed in the Statement of Grounds, on the basis that no benefit can result in any event from success in the application at the end of the day.

35. I therefore refuse the application for leave.