Neutral Citation Number: [2006] IEHC 250

THE HIGH COURT
COMMERCIAL

2005 No. 1309 JR

BETWEEN

GLANCRÉ TEORANTA

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
MAYO COUNTY COUNCIL

NOTICE PARTY

Judgment of Mr. Justice John MacMenamin delivered the 13th day of July, 2006.

1. The court has previously delivered judgment wherein it declined the application made for judicial review. The background facts and the legal principles may be found in the text of the judgment itself.

2. The applicant now submits that the court should allow an application for leave to appeal to the Supreme Court on the following points of law:

> 1. Whether Council Directive 75/442/EEC, as substituted by Council Directive 91/156/EC (the "Waste Framework Directive"), is properly construed as meaning that the proximity principle does not apply to waste for recovery within national boundaries, and if so, whether An Bord Pleanála in its consideration of an appeal in respect of a waste recovery facility is required to interpret the proximity principle as set out in the relevant waste management plan in accordance with Article 5 of Council Directive 75/442/EEC, as amended by Council Directive 91/156/EEC ("the Waste Framework Directive") and paragraph 5.5 of the Schedule to the Waste Management (Planning) Regulations 1997, that is to not apply it in its consideration of the appeal;
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> 2. Whether the policy direction issued by the Minister for the Environment Heritage and Local Government on 3rd May, 2005 pursuant to s. 60 of the Waste Management Acts 1996 – 2005 in respect of the movement of waste is relevant or material to the determination by An Bord Pleanála of an appeal in relation to a proposed development of waste recovery facility, in circumstances where some of the waste to be treated is generated outside the waste management planning region in which that waste recovery facility is located;
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> 3. Whether, where An Bord Pleanála is obliged to have regard to a ministerial direction issued pursuant to s. 60 of the Waste Management Acts 1996 - 2005 a rebuttable presumption arises that it did have such regard.

3. The determination of the court on the substantive issues involved, *inter alia*, the following findings:

> (a) That a definition of the "proximity principle" contained within the judgment in Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV v. Minister Van Volkhuisvesting Ruimtelijke Ordening En Milieubheer* [1998] ECR 1-4075 is not conclusive or definitive and that on the facts herein interpretations compatible with European law.
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> (b) That the interpretation and true meaning of the proximity principle in the Connaught Waste Management Plan was similar to the rectification at source principle and could not accordingly be considered to breach European Law;
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> (c) That it was the unambiguous intention as expressed in the body of the Connaught Waste Management Plan that the principle of proximity expressed therein applied to recovery;
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> (d) That the respondents decision was based on this broader proximity principle as set out in the Connaught Waste Management Plan and that the Board did not misapply that broader principle.

4. Appeals of this type are governed by s .50(4)(f)(i) of the Planning and Development Act 2000 (as amended). Such an appeal requires a certification from the High Court that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.

5. It is clear that the statutory regime which has been devised by the legislature indicates an interest to ensure that the planning process is not to be hampered by a completely unrestricted access to the court which may cause harmful delays. I am satisfied that it is a restriction to be lifted only in exceptional cases.

6. There have been a number of decisions in relation to the meaning of a test of exceptional public importance. Amongst these are *Kenny v. An Bord Pleanála* [2002] 1 ILRM 68, *Raiu v. Refugee Appeals Tribunal* [2003] 2 I.R. 63, *Lancefort Limited v. An Bord Pleanála* [1998] 2 I.R. 511, *Fallon v. An Bord Pleanála* [1992] 2 I.R. 380, *Irish Press v. Ingersoll* [1995] 1 ILRM 117, *Ashbourne Holdings v. An Bord Pleanála* (Kearns J., 19th June, 2001, Unreported) and *Arklow Holidays Limited v. An Bord Pleanála* (Clarke J., the High Court, 29th March, 2006 Unreported).

7. I am satisfied that a consideration of these authorities demonstrates that the following principles are applicable in the consideration of the issues herein.

> 1. The requirement goes substantially further than that a point of law emerges in or from the case. It must be one of *exceptional importance* being a clear and significant additional requirement.
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> 2. The jurisdiction to certify such a case must be exercised sparingly.
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> 3. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.
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> 4. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not

been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court (*Kenny*).

5. The point of law must arise out of *the decision* of the High Court and not from discussion or consideration of a point of law during the hearing.

6. The requirements regarding "exceptional public importance" and "desirable in the public interest" are cumulative requirements which although they may overlap, to some extent require separate consideration by the court (*Raiu*).

7. The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word "exceptional".

8. Normal statutory rules of construction apply which mean inter alia that "exceptional" must be given its normal meaning.

9. "Uncertainty" cannot be "imputed" to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.

10. Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases.

8. For the purposes of this application the applicant has caused a search to be made of the current or proposed draft replacement waste management plans for all 10 waste management planning regions within the State. It is clear from an analysis of the provisions of these plans that each one makes reference to a proximity principle but this is done in different contexts or using different variations of the definition of that principle.

9. It is essential within the context of this case to identify precisely what the decision does and does not do. Findings made herein constitute an interpretation of the Connaught Waste Management Plan, and as to what was meant by the use of the terms the "proximity principle" contained therein, having regard to the various elements in that plan including the glossary. The finding does not govern to other waste management plans. The evidence adduced demonstrates that the term "proximity principle" is used in different ways dependent on context and modes of interpretation. The finding herein is referable *exclusively* to the facts of this case having regard to the specific content of the Connaught Waste Management Plan. It is of no wider relevance than that. In four affidavits filed referring to other waste management plans support the proposition that each individual waste management plan contains its own particular interpretation or definition of a proximity principle and that the utilisation of the term can only be interpreted having regard to the totality of each such plan. Context is all. Therefore the judgment herein does not contain a finding in relation to the correct interpretation of the proximity in the Connaught Waste Management Plan that goes beyond the terms of that plan itself.

10. Were it to do so quite other considerations might arise.

11. The judgment contains a further finding, that is that a principle in a waste management plan that applies *inter alia* to waste recovery is compatible with EC law. I do not consider that such a finding is of exceptional importance. The fact that a determination involves an interpretation of EC law does not render it a point of law of exceptional public importance. I do not consider that evidence has been adduced that clarification of the law is required in this respect as is identified by Morris J. (as he then was) in *Lancefort*.

12. The court is not holding that there is a common thread or principle of interpretation running through the various waste management plans insofar as relates to the issue. Indeed the paradox is that the "common" feature or principle is in fact the diversity of interpretation contained in each of the waste management plans. To seek to identify common underlying theme in such circumstances such as to constitute a single point of law of exceptional public importance would, I think, be to stand logic on its head.

13. It is difficult to avoid the conclusion that a similar misconception underlies further submission put so ably by Mr. Gardener S.C. on behalf of the applicant. This was to ask whether the Waste Framework Directive, properly construed means that "the proximity principle" does not apply to waste for recovery within national boundaries. It seems to me that the conclusion urged is based upon a faulty premise, such premise being that there exists one only proximity principle. It is clear that a proximity principle was identified in *Dusseldorp*. But there are other such interpretations including one adverted to by the applicant itself in its submission to the respondent. No issue arises here as to shipment of waste across frontiers of States of the European Union.

14. Mr. Gardener submitted that in one sense the application was a challenge to the Connaught Waste Management Plan. He states that the finding of the court made the plan incompatible with EU law. I do not accept that this is so. Indeed I think that to make such an assertion is to place an unnecessary gloss on the plan itself. To demonstrate the fallacy of the contention it is necessary only to ask one rhetorical question as to what principle of EU law is engaged on the particular facts of this case confined as it is to activities within the boundaries of the State? I do not think any such principle has been established, nor has any authority been cited to such effect. Moreover as has been submitted by Mr. Brian Murray S.C. for the respondent; no challenge was brought against that waste management plan itself by way of judicial review, declaratory proceedings or otherwise.

15. In *Raiu* the question arises: if the applicant has failed to demonstrate a point of law is of exceptional public importance is there is a need to consider the question of whether it is in the public interest that such decision be appealed? In *Arklow Holidays* Clarke J. had to consider such a situation, and although there was a point of law of exceptional public importance a question arose as to whether it is in the public interest that the decision be appealed. Two of the factors in finding no public interest issue arose were the time and costs involved in such ?

16. In the instant case however there are two other additional factors which are particularly relevant.

17. The applicant has already ventilated his concerns in respect of the proximity principle once in its appeal before the Board, and once, in rather different fashion in these judicial review proceedings. On neither occasion has its arguments been accepted. I do not consider that the public interest will be served in permitting those arguments to be made on a third occasion, having regard to the findings herein. The respondents state that it is not apparent that there is any basis on which the applicant should be permitted to ask a fourth body (that is the Supreme Court) to adjudicate on its entitlement to construct a waste recovery plant at Muingmore following adjudication by Mayo County Council, the Board, and the High Court. I agree.

18. Secondly it has been well established that it is an aim of the legislature in enacting the planning legislation that certainty and

finality be promoted in planning decisions and that challenges hereto should be dealt with expeditiously. To permit a further appeal would not serve that aim.

19. Accordingly I do not consider that the applicant has persuaded this court on any aspect of the tests which have been applied in established case law with regard to the first question.

The Section 60 Direction
20. Insofar as the s. 60 direction was concerned two separate findings were made by the court.

21. The court held that the applicant had not established that the Board had failed to have regard to the policy direction, having regard to the fact that the Inspector not only referred to that direction, but quoted from a material part thereof in her report; the onus of proof lay on the applicant, there was a rebuttable presumption the respondent had acted in accordance with the procedures. Additionally the court found that it is by no means clear that the direction itself was specifically relevant or material to the situation which arose in the instant case and was not persuaded that the direction in its proper meaning and interpretation would have led the respondent to decide in the applicants favour.

22. With regard to the first point the rebuttable presumption of compliance with fair procedures is a well established principle of law (*Re Comhaltas Ceolteoiri Eireann* (High Court, Unreported, 14th December, 1977 and *Lancefort* [1998] IEHC 119). Both these judgments were referred to in the judgment herein.

23. While I accept that a question of law arises here I cannot accept that the assertion gives rise to a question of exceptional public importance. While Mr. Gardener S.C. in the course of his argument sought to raise the spectre of discovery in significantly prolonged judicial review proceedings I do not accept that this argument has force now any more than it had prior to the decision herein. The principle in the two authorities cited has been well established for a number of years.

24. Insofar as the applicant seeks to make the case that the decision of the High Court was to the effect that the direction may not be specifically relevant or material to the determination of an appeal by the Board in respect of a waste recovery facility leads to uncertainty as to the law I consider that were such an argument made it would involve a misconception as to the effect of the decision of the court. The court did not rule that the direction did not apply to waste management plans, rather that it did not apply to the situation which arose in the instant case. Thus the finding was simply that, on the facts of this case the court was not of the view that the direction in fact applied at all. To reiterate it is necessary to distinguish between what was, and was not established in the course of this decision. No determination was made which has an effect beyond the facts of this particular case. Accordingly I do not consider that there is present a point of law of public importance, and certainly not a point of exceptional public importance.

25. Similar considerations on the public interest aspect of the test apply in this, as in the former issue. In the circumstances I do not consider that any of the questions advanced by the applicant meet the criteria laid down by s. 50(4)(f)(i) of the Act. Accordingly the court will refuse to certify such questions.