THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 398 J.R.]

IN THE MATTER OF SECTION 50 OF THE

PLANNING OF DEVELOPMENT ACT 2000, (AS AMENDED)

BETWEEN

BULRUSH HORTICULTURE LTD

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

WESTMEATH COUNTY COUNCIL

FIRST NAMED NOTICE PARTY

AND

FRIENDS OF THE IRISH ENVIRONMENT

SECOND NAMED NOTICE PARTY

[2013 No. 424 J.R.]

IN THE MATTER OF SECTION 50 OF THE

PLANNING OF DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

WESTLAND HORTICULTURE LTD, WESTMEATH PEAT LIMITED

AND CAVAN PEAT LIMITED

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

WESTMEATH COUNTY COUNCIL

FIRST NAMED NOTICE PARTY

AND

FRIENDS OF THE IRISH ENVIRONMENT LTD

SECOND NAMED NOTICE PARTY

JUDGMENT of Mr. Justice Meenan delivered on the 7th day of December, 2018

Background

1. These are two judicial review proceedings that, essentially, involve similar facts and issues of law.

2. In the first set of proceedings, the applicant is Bulrush Horticulture Limited, hereinafter referred to "Bulrush". In the second set of proceedings, I refer to the applicants collectively as "Westland".

3. By order of the President of the High Court, dated 30 May 2013, Bulrush was granted leave to apply by way of application for judicial review for:-

> (i) An order of *certiorari* quashing the decision of the respondent dated 15 April 2013 in respect of a referral made pursuant to s. 5(4) of the Planning and Development Act 2000 (as amended) (hereinafter referred to as the Act of 2000) whereby the respondent decided that drainage of bog lands, peat extraction, access from public roads, peat handling activities and other associated activities and works at Camagh Bog, Doon, Castlepollard, County Westmeath are development and were exempted development until 20 September 2012, after which it is development and not exempted development
>
> (ii) A declaration that the said decision was and is *ultra vires*, invalid and of no legal effect
>
> (iii) A declaration that the said decision is so unreasonable as to be invalid.

By order of Feeney J., dated 6 June 2013, Westland was granted similar reliefs in respect of lands at Lower Coole, Mayne, Ballinealloe, Clonsura near Coole and Fineagh, County Westmeath.

4. These judicial review proceedings came on for hearing before the Court and a written judgment was delivered on 8 February 2018 wherein I dismissed both applications for judicial review (*Bulrush Horticulture Ltd. v An Bord Pleanála; Westland Horticulture Ltd. & Ors v An Bord Pleanála* [2018] IEHC 58).

5. What is now before the Court is an application, made on behalf of both Bulrush and Westland, seeking a certificate "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 [Court of Appeal]" on specified points of law, as per the requirements of s. 50A(7) of the Act of 2000. In respect of Bulrush, those points of law are:-

> (i) Is the continuation of peat extraction within the same area of land of more than 30 hectares in area, which enjoyed exempted development status prior to the transposition of Council Directive 85/337/EEC, on the assessment of the effects of certain public and private projects on the environment (the "EIA Directive") (this Directive underwent a number of amendments and was ultimately codified in Directive 2011/92/EU) and Council Directive 92/43/EEC, on the conservation of natural habitats and of wild fauna (the "Habitats Directive"), subject to the requirements of the said Directives or the relevant provisions of the Act of 2000 (including s. 4(4) of the said Act) and/or the Planning and Development Regulations 2001 (as amended) ("the Regulations"), implementing same, so that the exemption no longer applies?
>
> (ii) Can peat extraction not occurring within a new or extended area be regarded as sub-threshold development for the purposes of s. 172(1)(b) of the Act of 2000 and para. 2(a) of Part 2 of the Schedule 5 to the Regulations to which the obligation to carry out an EIA might apply?

6. With regards Westland, the specified points of law are:-

> (i) Whether the provisions of the EIA Directive and/or the Habitats Directive apply to a project, in this case peat extraction, lawfully commenced as exempted development prior to the latest dates for transposition of those Directives?
>
> (ii) Whether an EIA can be required pursuant to s. 172(1)(b) of the Act of 2000 in respect of peat extraction development other than peat extraction development involving a new or extended area of 30 hectares or more?

7. In the course of my earlier judgment, I set out the relevant legislation which encompasses both domestic and EU legislation. I also referred to case law from both the Irish Courts and from the Court of Justice of the European Union ("CJEU").

Statutory Provision

8. Section 50A(7) of the Act of 2000 provides:-

> "The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the Supreme Court in either case save with leave of the Court which leave shall only be granted where the Court certifies 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."

9. By virtue of s. 75 of the Court of Appeal Act 2014, references to the Supreme Court are to be construed as reference to the Court of Appeal unless the context otherwise requires.

10. Therefore, to obtain a certificate for leave to appeal, this Court has to certify that its decision involves:-

> (a) a point of law of exceptional public important; and
>
> (b) that it is desirable in the public interest that an appeal should be taken.

Test to be Applied

11. In *Glancré Teoranta v. Mayo County Council* [2006] IEHC 250, MacMenamin J. set out at para. 7 the principles that should be applied in an application such as this:-

> "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.
>
> 2. The jurisdiction to certify such a case must be exercised sparingly.
>
> 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.
>
> 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."

12. These principles have been followed in numerous other cases and were considered by Clarke J. (as he then was) in *Arklow Holidays Limited v. An Bord Pleanála* [2006] IEHC 2 where he stated at para. 3.1:-

> "(i) There must be an uncertainty as to the law in respect of a point which has to be of exceptional importance, see for example *Lancefort v. An Bord Pleanála* [1998] 2 I.R. 511.
>
> (ii) The importance of the point must be public in nature and must, therefore, transcend well beyond the individual facts and parties of a given case. *Kenny v. An Bord Pleanála (No. 2)* [2001] 1 I.R. 704. It is the case that every point of law arising in every case is a point of law of importance. *Fallon v. An Bord Pleanála* [1992] 2 I.R. 380. That, of itself, is insufficient for the point of law concerned to be properly described as of "exceptional public importance".
>
> (iii) The requirement that the court be satisfied "that it is desirable in the public interest that an appeal should be taken to the Supreme Court" is a separate and independent requirement from the requirement that the point of law be one of exceptional public importance. See *Kenny v. An Bord Pleanála (No. 2)* [[2001] 1 I.R. 704]. On that basis, even if it can argued that the law in a particular area is uncertain, the court may not, on the basis, *inter alia*, of time or costs, consider that it is appropriate to certify the case for the Supreme Court. *Arklow Holidays Ltd. v. Wicklow County Council* [[2004] IEHC 75] (Unreported, High Court, Murphy J., 4th February, 2004)."

13. Not all of the principles enunciated by MacMenamin J. are applicable to the instant case. There are however two principal issues, those being "exceptional public importance" and "uncertainty in the law".

"Exceptional public importance"
14. It is submitted by Bulrush and Westland that my interpretation of s. 4(4) of the Act of 2000 was essential to the issues which I had to decide. Section 4(4) provides:-

> "(4) Notwithstanding paragraphs *(a), (i), (iA) and (l) of subsection (1) and any regulations under subsection (2),* development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required."

15. The consequences of the decision of this Court, in the opinion of Westland, are set out in an affidavit of Mr. Mark Hamill, Head of the Technical Department at Westland, made in support of this application. Mr. Hamill states:-

> "[T]he consequences of the Board's interpretation of s. 4(4) – which I accept has been endorsed by this honourable court – was that the continuation of all commercial peat extraction above a certain threshold (30 hectares) would likely no longer be considered exempted development and would have to cease pending applications for planning permission being prepared, submitted and determined. I don't believe that it is overstating the case to state that the imposition of such obligation would, in effect, bring the industry to a standstill."

He further states that:-

> "[T]he great majority of commercial peat harvesting and related activities would likely have to cease until permission could be obtained. It is difficult to calculate exactly how many jobs would be temporarily or permanently lost as a result that it is estimated that up to 11,000 people are directly or indirectly employed as a result of the peat harvesting industry. The impact would be national and would not be localised to one area or sector. However, it is estimated that the worst affected areas would be rural locations which are heavily reliant on agriculture, peat harvesting and forestry."

16. I accept that the decision of this Court has important and far reaching implications for the peat harvesting industry and I accept that the Court's interpretation of the relevant legislation "involves a point of law of exceptional public importance". However, this is not, of itself, sufficient for me to grant the certificate sought.

"Uncertainty in the law"
17. The requirement for uncertainty is reflected in the wording of s. 50A(7) of the Act of 2000 which refers to it being "desirable in the public interest that an appeal should be taken to the Court of Appeal." Thus, there can be points of law "of exceptional public importance" which are not so uncertain as to require a ruling from the Court of Appeal.

18. To meet the "uncertainty" test, both Bulrush and Westland point to my interpretation of the decision in *Stadt Papenburg v. Germany*, Case-2206-08 (Unreported, European Court of Justice, 14 January 2010) (this case and others are generally referred to as the "Pipeline cases"). They submit that my interpretation is at odds to the views expressed by Charleton J. in *An Táisce v. Ireland* [2010] IEHC 415.

19. Both Bulrush and Westland maintain that the obligation to carry out an EIA does not arise in respect of peat extraction development other than peat extraction development involving a new or extended area of 30 hectares or more.

20. Hearing an application such as this the Court is in a somewhat invidious position. On the one hand, I have heard and considered submissions and arguments from counsel representing each of the parties involved and I have reached my conclusion. An application to certify points of appeal cannot be an opportunity to "re-run" the original application. On the other hand, I am conscious of the observations of Clarke J. (as he then was) in *Arklow Holidays Limited v. An Bord Pleanála* [2008] IEHC 2 where he stated at para. 4.5:-

> "However the whole basis on any appeal is that this court may be wrong and I have to assess the grant or refusal of a certificate in this case on the basis that I may be wrong unless, perhaps, it might be said that the law was so clear that there would be no legitimate basis for requiring a ruling from the Supreme Court on this matter."

21. As for the submission that my views on the *Stadt Papenburg* "Pipeline Cases" are at odds to those expressed by Charleton J. in *An*

Táisce v. Ireland I refer to the judgment of Charleton J. wherein he stated at para. 3:-

> "[P]rojects which had already commenced when these (EIA and Habitats) directives were transposed into Irish law were not then subject to the restrictions *later made possible under s. 261(5) and (7) of the 2000 Act*; see … *Stadt Papenburg v. Bundesrepublik Deutshcland* (C-226/08) …" (emphasis added).

22. Further, in the course of my judgment I referred to a passage of O'Neill J. in *M & F Quirke & Sons v. An Bord Pleanála* [2009] IEHC 426 which was, as submitted by the respondent, approved by Charleton J. in *McGrath Limestone Works Limited v. An Bord Pleanála* [2014] IEHC 382. Thus I do not see that a level of uncertainty in the law as would require me to grant the certificate sought has been reached.

23. With regards the issue of the peat extraction involving an extended area of 30 hectares or more, I am satisfied that there is no uncertainty here. My judgment set out and analysed the relevant Directives and legislation. From this analysis it was entirely clear to me that an EIA could be required on a "case by case examination". Such was the case here. Therefore, I will not grant a certificate on this point.

24. In the course of the hearing, both Bulrush and Westland submitted that peat extraction was a "use" development as opposed to a "works" development and thus s. 4(4) of the Act of 2000 did not apply. I rejected this submission having applied the decision of the Supreme Court in *Kildare County Council v Goode* [1999] 2 I.R. 495. I do not see any uncertainty on this point of law. In any event, the points of law which both Westland and Bulrush seek to have certified do not appear to cover this point.

25. In reaching my view that the threshold of uncertainty has not been reached I believe I am entitled to take into account what was deposed to in the affidavit of Mr. Mark Hamill, which has already been referred to. In the course of his affidavit he states:-

> "[T]he main reason that there was a such a delay between the issuing of these proceedings and the hearing of the substantive application was because there were a number of applications for adjournments on the basis that pending legislation was imminent which would, I believe, have addressed the adverse consequences for the industry of s. 4(4) (as interpreted by the Board)."

He continues to state that:-

> "I believe that the making of this legislation and the widespread consultation in relation thereto clearly reflects the significance of the issues which the Board's application of s. 4(4) has thrown up for the industry".

And,

> "As appears from Mr. Nugent's affidavit, the legislation has not yet been completed as at the date of swearing of his affidavit and I am not aware when it is expected that the relevant Regulations will come into operation"

26. These averments lead me to believe that what both Bulrush and Westland require is not a decision of the Court of Appeal resolving an uncertainty in the law but rather a change in the law itself. Indeed, had the new legislation, in the form of Regulations, been enacted then the applications before this Court would not have proceeded.

27. By reason of the foregoing, I will not grant the certificate(s) sought.