Neutral Citation Number: [2006] IEHC 288

THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 144 J.R.]

BETWEEN

MARGARET POWER

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENTS

AND
THE WATERFORD COUNTY COUNCIL

NOTICE PARTY

Judgment of Quirke J. delivered the 2nd day of October 2006.
This is an application made on behalf of the applicant for a certificate of leave to appeal to the Supreme Court against a decision of this court made on the 17th January, 2006.

The application has been made pursuant to the provisions of s. 50(4) (f) of the Planning and Development Act, 2000, (hereafter "the Act of 2000"), which provides *inter alia* that:

> *"…Leave shall only be granted where the High 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 shall be taken to the Supreme Court."*

Pursuant to a direction of this court the applicant has identified seven points of law which, she says, come within the category of points of law *"…of exceptional public importance.."* referred to in s. 50(4)(f) of the Act of 2000.

The applicant and An Bord Pleanála (hereafter "the Board") have exchanged and provided the court with extensive submissions including submissions on what constitutes a point of law"*.. of exceptional public importance*".

In addition the Board argues that it is not desirable in the public interest that an appeal should be taken to the Supreme Court contending that such an appeal would now comprise a moot.

It is unnecessary to address the latter point because I am not satisfied that any of the points identified on behalf of the applicant can be categorised as points of law "*of exceptional public importance*" within the meaning ascribed to that term by s. 50(4) (f) of the Act of 2000.

I propose to deal briefly with each point in the sequence in which they have been raised on behalf of the applicant.

Point 1

> *In considering whether or not to grant approval to the proposed development located within and adjacent to a site of Community Importance within the meaning of Council Directive 92/43/EEC of 21st May, 1992, on the conservation of natural habitats and wild fauna and flora ("the Habitats Directive") and a European Site within the meaning of the European Communities (Natural Habitats) Regulations, 1997 (S.I. No. 94 of 1997) as amended by S.I. No. 233 of 1998) ("the Habitats Regulations") in the exercise of its powers conferred by s. 175 of the Planning and Development Act, 2000, what is the correct legal test to be applied by An Bord Pleanála pursuant to Article 6(2) and (3) and Article 4(5) of the Habitats Directive and/or Regulation 28 of the Habitats Regulations?*

Under this heading it is submitted that the applicant's principal contention at the hearing before this court was that the Board, in reaching its decision to approve the proposed development, erred by asking itself the wrong question.

It is contended that the court failed to address that argument in its judgment, deciding instead that the applicant's argument was "*limited to a contention that, on the facts, the Board could not have been satisfied that the (presumptively proper), test had been satisfied*", (see para 9 of the applicant's submissions).

If there is a lack of clarity within the judgment of the court then that is regretted. The language chosen by counsel on behalf of the applicant to indicate his displeasure at the court's decision is also to be regretted.

The court would point out that the so called *"..correct legal test to be applied by An Bord Pleanála…"* was identified repeatedly within its judgment.

At the commencement of its substantive decision, (under the heading "*the Habitats Directive*"), the court declared (at p. 14):

> *"Regulation 28 of the Habitats Regulations imposes an obligation upon the Minister to agree, (broadly in the terms of Article 6.3 of the Habitats Directive), to a proposed development within a special area of conservation only when satisfied that the development 'will not adversely affect the integrity of the site concerned…'*
>
> *… the applicant argues that the obligations imposed upon the Minister by Regulation 28 of the Habitats Regulations (and imposed upon the State by the provision of Article 6(3) of the Habitats Public Directive) must be deemed to have been imposed upon the Board which is the designated State authority to which the Minister's decision making function has been delegated.*
>
> *It is argued that the Board could only have granted approval for this development if satisfied that the development would not result in any adverse effect upon the conservation objectives of the site. Reliance is placed upon the decision of the Court of Justice in case C-172 /02 – Landelijke Vereniging tot Behoud Van de Waddenzee v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij [2004] E.C.R. 1 – 7405 and in particular paragraph 59 thereof which provides:*
>
> *"Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent natural authorities, taking account of*

> *the conclusions of the appropriate assessment of the implications of (the plan or project in question) for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects."*

During the course of the hearing the court was repeatedly reminded by counsel on behalf of the applicant that it was the contention of the applicant that the Board had misdirected itself in law by failing to apply the test identified in *Waddenzee* and instead applying an incorrect legal test.

The court was satisfied that the Board had not misdirected itself in law and had applied the correct legal test identified in *Waddenzee*.

The use, from time to time, by the court of terminology identified with the principle of irrationality was deliberate. It was intended to confirm that, on the evidence adduced at the hearing, the Board's decision was (a) consistent with the correct application by the Board of the test identified in *Waddenzee* and, (b) could not be impugned on the ground of irrationality.

The fundamental dispute between the parties in these proceedings was factual in nature. The correct legal test was never in dispute. The parties addressed the factual dispute by undertaking a detailed exhaustive analysis of the evidence which was considered by the Board and of the material which came before it. That analysis occupied most of the four days during which the hearing lasted.

This court concluded on the evidence that the Board had made its decision in a manner consistent with the objectives of the Directive and of the Regulations and with the test identified in *Waddenzee*. It also concluded that the Board's decision could not be categorised as "irrational" within the meaning ascribed to that term by successive authorities within this jurisdiction.

Since the "*correct legal test*" to be applied by the Board was identified in these proceedings and is not in dispute, it would be absurd for this court to certify the question identified by the applicant as "Point 1" as a point of law of exceptional public importance. Accordingly, the court declines to do so.

Point 2

> *Are there substantial grounds for contending that An Bord Pleanála failed, in the instant case, to apply the correct test pursuant to Article 6(3)(c) and Article 4(5) of the Habitats Directive and/or Regulation 28 of the Habitats Regulations?*

This court has found that there are no substantial grounds for so contending. The question posed on behalf of the applicant "*…in the instant case*" is a point which is of importance to the applicant. It is not a point of law of exceptional public importance. It has been determined by the High Court. The provisions of s. 50(4) (f) of the Planning and Development Act, 2000 do not authorise an appeal per se against decisions of the High Court for the benefit of dissatisfied litigants.

Point 3

> *Can the High Court… in proceedings challenging the validity of a decision to grant approval…on the basis that An Bord Pleanála failed to apply the correct legal test…refuse leave to seek judicial review unless the applicant first establishes that An Bord Pleanála behaved "unreasonably"…*

The answer to this question is self-evident. The court declines to make any observation upon this question.

Point 4

> *In considering whether or not to grant approval…is An Bord Pleanála required to take account of or give effect to Article 4 and 7(1) of Council Directive 75/442/EEC of 15th July, 1975, on waste and Article 8 and Annexe 1 of Council Directive 1999/31 EC of 26th April, 1999, on the landfill of waste?*

The answer to this question is also self evident. At p.21 of its judgment the court confirmed that the Board…

> *"has, inter alia, been designated by the State as a competent authority with responsibility to approve or reject proposed planning developments on the grounds of proper planning and sustainable development within specific areas".*

As a "*competent authority*" the Board is clearly required to take account of and give effect to the Articles concerned. No contention to the contrary has been advanced by any party in these proceedings or suggested in the judgment of the court. Accordingly, no point of public importance requires to be determined by the Supreme Court on this issue.

Point 5

> *If so are there substantial grounds for contending that the respondent fails to have any or any adequate regard to… (the Articles concerned).*

The court declines to certify this point for precisely the same reasons as it has declined to certify Point 2 above.

Point 6

> *In the absence of an adjudication upon the applicant's submission that there are substantial grounds for contending that An Bord Pleanála failed to apply the correct legal test… is the High Court obliged, having regard to the principle of effectiveness of Community law, to grant leave to appeal to the Supreme Court?*

Point 7

> *Does a determination by the High Court to refuse to grant leave to appeal to the Supreme Court in circumstances where it has not adjudicated upon a submission that there are substantial grounds for contending that An Bord Pleanála failed to apply the correct legal test…render virtually impossible or excessively difficult the exercise of rights conferred by the said provision of Community law as transposed into the Irish legal order?*

These "*points*" are misconceived. As indicated earlier this court has adjudicated upon the applicant's submission that there are substantial grounds for contending that the Board failed to apply the correct legal test. Accordingly, these points do not arise from the decision of this court as reflected in the judgment of the court delivered on 17th January, 2006.

The court declines to certify any of the points identified on behalf of the applicant.