Neutral Citation [2016] IEHC 490

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 150 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED

BETWEEN

NORTH EAST PYLON PRESSURE CAMPAIGN LIMITED AND MAURA SHEEHY

APPLICANTS

AND

AN BORD PLEANÁLA

THE MINISTER FOR COMMUNICATIONS, ENERGY AND

NATURAL RESOURCES, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

EIRGRID PLC

NOTICE PARTY

(No. 2)
JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of July, 2016

1. In *North East Pylon Pressure Campaign Ltd. & Maura Sheehy v. An Bord Pleanála (No. 1)* [2016] IEHC 300 (Unreported, High Court, 12th May, 2016), I declined to give the applicants leave to apply for judicial review by way of prohibition of a planning inquiry into the North-South electricity interconnector on the grounds that the application was premature.

2. All of the successful parties are now seeking their costs against the applicants. The applicants, in turn, seek their costs against the other parties. I have had regard to the issues raised by all parties at the hearing and to the written submissions filed.

3. The primary arguments made at the hearing of this issue related to the application, or otherwise, of s. 50B of the Planning and Development Act 2000, s. 3 of the Environment (Miscellaneous Provisions) Act 2011, or, if neither of those provisions applied, the principles applicable under O. 99 of the Rules of the Superior Courts.

4. It seems to me however that the question of the interpretation of the statutory provisions cannot be properly dealt with without first determining the extent to which European law applies to the application, for the simple reason that the provisions in question, insofar as they reflect EU law, must be read purposively in accordance with that law and in particular cannot be read in a manner that would contravene EU law rights.

5. Two potential sources of European law arise, firstly the environmental impact assessment directive ("EIA directive") (Council Directive 97/11/EC of 3rd March, 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment), and secondly the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25th June, 1998 (the "Aarhus Convention"), as incorporated into EU law for certain purposes by the ratification of that instrument on behalf of the Union itself in May, 2005.

The application of the EIA directive

6. The original Environmental Impact Assessment directive was adopted in 1985 as directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment. It was amended by the Public Participation Directive 2003/35/EC, which inserted a new Article 10a which provided for a legal entitlement to "*challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive*". The article went on to provide that "*any such procedure shall be fair, equitable, timely and not prohibitively expensive*".

7. Following the codification of the EIA directive in directive 2011/92/EU, this provision became art. 11 of the 2011 directive.

8. Article 11(1) of the 2011 directive requires that members of the public having a sufficient interest "*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*".

9. A number of questions arise in the present context. Clearly the present challenge is brought in relation to matters which are subject to the public participation provisions of the directive, given the requirement for environmental impact assessment. However the challenge is broader than an allegation of shortcomings in the environmental impact assessment process.

10. The first question is whether the benefit of art. 11 is obtained by a challenge on any grounds, whether including on grounds of national law, to a decision, act or omission subject to the public participation provisions of the directive.

11. A second question is the meaning of the phrase "*decisions, acts or omissions*" in art. 11. As appears from the substantive

decision in this case (*North East Pylon (No.1) at paras. 84 to 85 and 109 to 110*), I considered that in the context of s. 50 of the Planning Development Act 2000, reference to acts or decisions should not include intermediate or administrative decisions which did not irreversibly determine legal rights. However, in the different context of art. 11(1), does the phrase "*decisions, acts or omissions*" include administrative decisions in the course of determining an application for development consent, even if such administrative decisions do not irreversibly determine the legal rights of the parties?

12. Article 11(2) provides that: "*Member States shall determine at what stage the decisions, acts or omissions may be challenged*".

13. In the context of the Irish legal system, no explicit statutory rule has been laid down in relation to this matter. Rather, parties are subject to general common law rules of administrative law as discussed in the substantive judgment in this case. For the reasons explained in that judgment, there are strong grounds in public policy for viewing as premature a challenge to an intermediate administrative decision until such time as it crystallises in a legally binding and normally final outcome. However, it is clear that this is not an absolute rule, because there are counter-instances where the courts have intervened (on my analysis, exceptionally) prior to the making of a definitive decision.

14. However it is also clear that such a common law approach carries some risks of uncertainty for an applicant. For the reasons set out in the substantive judgment in this case, it does not seem to me to be acceptable in terms of legal certainty that an applicant should be left in a position where the determination of whether his or her proceedings are moot or out of time was to fall for decision purely on a case-by-case basis.

15. In the context of a common law system such as ours where the legislature has not expressly stated that a challenger is entitled to wait for the final decision (an express clarification which I consider would be highly desirable for all of the reasons set out in the substantive judgment), a third question arises as to whether the entitlement under art. 11(4) to a "*not prohibitively expensive*" procedure applies to the process before national courts whereby it is determined as to whether the application has been brought at the correct stage.

16. Ms. Emily Egan S.C., for the board, submits that a judicial procedure to determine at what stage the process should be challenged does not attract the benefit of art. 11 unless the procedure itself is challenged in the proceedings, which is not the case here. The applicants have not sought to argue that the uncertainty relating to whether a challenge is premature or out of time is itself a breach of the EIA directive.

17. The present case did not get beyond the stage of determining whether it was premature or not, and in view of the answer to that question, the substantive challenge to the legality of the process did not proceed further. Does such a process, in this case as part of a leave application, attract the benefit of art. 11?

The Aarhus Convention as an element of EU law

18. In *McCoy v. Shillelagh Quarries Limited* [2015] IECA 28 (Unreported, Court of Appeal, 19th February, 2015) at para. 14, Hogan J. noted that the Aarhus Convention had been ratified by the EU itself, and that "*[t]o the extent… that the Aarhus Convention has been subsumed into EU law … [the]Court would be obliged, in an appropriate case, to give effect to the terms of the Convention as part of these wider EU law obligations*".

19. The Convention is significantly wider than the directive in the sense that Art. 9(3) provides that: "*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*".

20. Article 9(4) contains the auxiliary requirements that these procedures "*shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive*".

21. As noted in para. 4 of the substantive judgment, the present project arises under Regulation 347/2013 of the European Parliament and of the Council of 17th April, 2013 on Guidelines for Trans-European Energy Infrastructure and repealing Decision No. 1364/2006/EC and amending Regulations (EC) No. 713/2009, (EC) No. 714/2009 and (EC) No. 715/2009.

22. A fourth question arises in this case as to whether national legislation should be read in a manner compatible, as far as possible, with the Aarhus Convention in the present context, by virtue of the fact that it has been ratified by the European Union and that the development consent process involves a project of common interest that has been designated under European Union law, and/or because the development affects a European site (hence the need for a Natura Impact Statement). It is true as pointed out by Mr. McDowell S.C. for the State respondents in written submissions that when ratifying the Convention, the EU acknowledged that it bound the EU rather than the member states (see Case C-240/99, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* [2011] E.C.R. I-01255 (Judgment of the Grand Chamber of the CJEU, 8th March, 2011) at para 39). But in the present context, the development concerns a project authorised under EU law rather than by national decision.

23. A fifth and related question is whether, if so, the stipulation that applicants must "*meet the criteria, if any, laid down in its national law*" precludes the Convention being regarded directly effective in a case where (as here) there is no legislation depriving the applicants of standing to bring their challenge and no question raised as to their standing. Hogan J. in *Shillelagh Quarries* at paras. 16 to 20 was of the view that this was a difficulty, relying on Joined Cases C 404/12, P and C 405/12, P, *the Council of the EU and the European Commission v. Stichting Natuur en Milieu and Pesticide Action Network Europe* (Judgment of the Grand Chamber of the CJEU, 13th January, 2015) at para. 47. That decision related to a perhaps different context, the annulment by the General Court (reversed on appeal) of an EU level instrument by reference to the Aarhus Convention. *Lesoochranárske* dealt with a situation closer to the present case (see para. 45). The court held at para. 50 that "*in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention*", despite the conclusion that art. 9(3) was not itself directly effective. There appeared to be an issue in that case as to the standing of the applicant, which is not a factor here.

Transposition of the EIA directive

24. The requirement that costs of environmental proceedings not be prohibitively expensive is reflected in s. 50B of the Planning and Development Act, 2000.

25. The general rule is set out in s. 50B(2) that each party bears its own costs in an application for judicial review of an action, decision or failure to take any action pursuant to any law of the state that gives effect to EU directives on Environmental Impact

Assessment or integrated pollution prevention and control. Pursuant to sub-s. (3), costs can be awarded against a party if its claim is "*frivolous or vexatious*" or "*because of the manner in which the party has conducted the proceedings*", or where it is in contempt of court.

26. Furthermore a party may be entitled to its costs where the point is of "*exceptional public importance"* and where such an award is in the interest of justice in the special circumstances of the case (subs. (4)) or where the party is the applicant and has succeeded in obtaining some relief (sub-s. (2A) inserted by s. 21(b) of the Environment (Miscellaneous Provisions) Act 2001).

27. In the present case, Mr. Brian Murray S.C. for the notice party submits that the action is in fact frivolous and vexatious because he submits that the application had no hope of success and "*the court could never determine the issue before the board determines it*".

28. There are separate but related questions involved here. A sixth question in the overall application is whether it is open to the state to provide for exceptions to the rule that environmental proceedings should not be prohibitively expensive, where no such exception is provided for in the EIA directive or indeed the Aarhus Convention.

29. Assuming that such exceptions are permissible, a further question then arises as to whether a challenge could be said to be frivolous or vexatious just because it is made before the board determines a particular issue in a final manner. As noted at para. 216 of *North East Pylon (No. 1),* there are relatively unusual cases where the courts have intervened before a final decision by the board, such as *An Taisce v. An Bord Pleanála* [2015] IEHC 633 (Unreported, High Court, White J., 9th October, 2015). The latter question is purely one of national law.

Implementation of the Aarhus Convention
30. The Aarhus Convention has been implemented in the State by means of ss. 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011, which are however in certain respects somewhat narrower than the Convention. In context those sections appear to be designed to reflect the Convention rather than the directive as such, although, as with any legislation, they would need to be construed in a manner compatible with EU law where possible.

31. Section 3(1) provides that in proceedings to which the section applies, each party shall bear its own costs. This rule is subject to exceptions mirroring s. 50B of the 2000 Act.

32. Section 4(1) of the 2011 Act defines proceedings to which the section applies as civil proceedings "*(a) for the purpose of ensuring such compliance with, or enforcement of, such statutory requirement, condition or other requirement attached to a licence, permit, permission, lease or consent specified in subs. (4), or (b) in respect of the contravention of, or the failure to comply with such license, permit, permission, lease or consent*" where the failure or contravention concerned "*has caused, is causing, or is likely to cause, or is likely to cause damage to the environment*".

33. It is clear from the judgment of Hogan J. in McCoy at para. 28 that the reference to "*statutory requirement*" in s. 4(1)(a) "*is a free standing one which is distinct and separate from proceedings designed to ensure the compliance with or enforcement of a condition or other requirement of a license, permit or other form of development consent*".

34. Section 4(1) also includes a requirement of a causative link between the failure to ensure compliance with or enforcement of the statutory requirement and result in damage or likely damage to the environment (see *Callaghan v. An Bord Pleanála* [2015] IEHC 357 (Unreported, High Court, Costello J., 11th June, 2015) at paras. 93 to 95).

35. Section 4(1) interpreted in *Callaghan* envisages a direct causative link between non-compliance and damage: such that such a link could never in practice be demonstrated prior to the making of a decision on an application for development consent. Any attempt to do so before such a decision would be met with the same repost proposed by Costello J. at para. 95 that such a contention "*would be predicated upon an assumption that this entire process would not be carried out properly in due course*". Thus only a final decision to grant development consent, which was alleged to be in breach of a statutory requirement, can satisfy the test as so construed.

36. Clearly this approach is significantly narrower than that envisaged by the Aarhus Convention.

37. The seventh question of EU law is therefore as to whether a requirement of a causative link is compatible with the Aarhus Convention.

Order 99
38. Arguments were addressed to me of the subject of application for O. 99 of the Rules of the Superior Courts. However, these were essentially fall-back arguments in the event that neither s. 50B nor the 2011 Act applied to the proceedings. Under those circumstances I think it is appropriate to postpone a decision on the O. 99 issues until such time as the EU related issues are determined.

Reference to the Court of Justice
39. As I have determined that s. 50 of the 2000 Act does not apply to this action, this Court could not on any view be a court of last resort and is therefore not obliged to refer any of the foregoing questions to the Court of Justice pursuant to Article 267 of the Treaty on the Functioning of the European Union. Even if s. 50 did apply, the constitutional route of leapfrog application to the Supreme Court under Article 34.5.4° means that the High Court is never actually obliged to refer a question to Luxembourg, even if it refuses leave to appeal to the Court of Appeal.

40. However, where the court considers that a decision by Luxembourg on the question is "*necessary to enable it to give judgment*", it has discretion pursuant to Article 267 to request a preliminary ruling. As I consider that resolution of questions of EU law among the lines of those identified in the judgment are necessary to enable the giving of judgment, and that this is an appropriate case for such a reference, I intend to exercise the discretion to do so in this case.

41. In accordance with Article 23(a) of the Statute of the Court of Justice and art. 105(1) of the Rules of Procedure of the Court, it is open to the referring court to request the utilisation of the expedited preliminary ruling procedure. In the present case, I am of the view that such a request should be made, given the status of the project as a designated project of common interest for the EU and given the consequential need to finalise the proceedings with a certain degree of priority. It appears that the referring court is only obliged to indicate its proposed answer to the questions in the case of the urgent preliminary ruling procedure (art. 107(2) of the Rules of Procedure) applicable to justice and home affairs matters, rather than the expedited procedure, so there does not appear to

be a need to formally indicate my proposed answers in this case prior to making the reference.

Order

42. In accordance with art. 94 of the Rules of Procedure of the Court of Justice, the reference will be accompanied by the present judgment and the judgment in the substantive matter which together set out:-

> (i) a summary of the subject matter of the dispute and relevant findings of fact;
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> (ii) details of national provisions applicable and national case law; and
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> (iii) a statement of the reasons which prompted the referring court to seek an answer to the questions of EU law and the relationship between the EU provisions in question and the national legislation.

43. In the light of the foregoing I will make a request to the Court of Justice of the European Union for an expedited preliminary ruling on the following questions of EU law:-

> (i) in the context of a national legal system where the legislature has not expressly and definitively stated at what stage of the process a decision is to be challenged and where this falls for judicial determination in the context of each specific application on a case-by-case basis in accordance with common law rules, whether the entitlement under art. 11(4) of Directive 2011/92/EU to a "not prohibitively expensive" procedure applies to the process before a national court whereby it is determined as to whether the particular application in question has been brought at the correct stage;
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> (ii) whether the requirement that a procedure be "*not prohibitively expensive*" pursuant to art. 11(4) of Directive 2011/92/EU applies to all elements of a judicial procedure by which the legality (in national or EU law) of a decision, act or omission subject to the public participation provisions of the directive are challenged, or merely to the EU law elements of such a challenge (or in particular, merely to the elements of the challenge related to issues regarding the public participation provisions of the directive);
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> (iii) whether the phrase "*decisions, acts or omissions*" in art. 11(1) of Directive 2011/92/EU includes administrative decisions in the course of determining an application for development consent, whether or not such administrative decisions irreversibly and finally determine the legal rights of the parties;
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> (iv) whether a national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, should interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in art. 9(3) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25th June, 1998 (a) in a procedure challenging the validity of a development consent process involving a project of common interest that has been designated under Regulation No. 347/2013 of the European Parliament and of the Council of 17th April, 2013 on guidelines for trans-European energy infrastructure, and/or (b) in a procedure challenging the validity of a development consent process where the development affects a European site designated under Council Directive 92/43/EEC of 21st May, 1992 on the conservation of natural habitats and of wild fauna and flora;
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> (v) whether, if the answer to question (iv)(a) and/or (b) is in the affirmative, the stipulation that applicants must "*meet the criteria, if any, laid down in its national law*" precludes the Convention being regarded as directly effective, in circumstances where the applicants have not failed to meet any criteria in national law for making an application and/or are clearly entitled to make the application (a) in a procedure challenging the validity of a development consent process involving a project of common interest that has been designated under Regulation No. 347/2013 of the European Parliament and of the Council of 17th April, 2013 on guidelines for trans-European energy infrastructure, and/or (b) in a procedure challenging the validity of a development consent process where the development affects a European site designated under Council Directive 92/43/EEC of 21st May, 1992 on the conservation of natural habitats and of wild fauna and flora;
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> (vi) whether it is open to a member state to provide in legislation for exceptions to the rule that environmental proceedings should not be prohibitively expensive, where no such exception is provided for in Directive 2011/92/EU or the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25th June, 1998; and
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> (vii) in particular, whether a requirement in national law for a causative link between the alleged unlawful act or decision and damage to the environment as a condition for the application of national legislation giving effect to art. 9(4) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25th June, 1998 to ensure that environmental proceedings are not prohibitively expensive is compatible with the Convention.

44. The applications will thus be adjourned to a date to be fixed for final determination once the judgment of the Court of Justice is available.