Neutral Citation [2013] IEHC 92

THE HIGH COURT

[2011 No. 154 J.R.]

BETWEEN

Shillelagh Quarries Limited

Applicant

AND

An Bord Pleanála

Respondent

AND

South Dublin County Council and Dublin Mountain Conservation and Environmental Group

Notice Parties

Judgment of Mr. Justice Hedigan delivered on the 5th day of March 2013.

Application

1. The applicant applies to this Honourable Court for a certificate that the court's decision of the 27th June, 2012, whereby the applicant was denied leave to apply for judicial review of the decision of the respondent dated the 24th December, 2010, involves a point of law of exceptional public importance and it is therefore desirable and in the public interest that an appeal should be taken to the Supreme Court.

2. The principles applicable in considering an application for leave to apply to the Supreme Court were set out by Mac Menamin J. in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 as being :-

> (i) 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.
>
> (ii) The jurisdiction to certify such a case must be exercised sparingly.
>
> (iii) 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.
>
> (iv) 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*).
>
> (v) 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.
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> (vi) 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*).
>
> (vii) 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".
>
> (viii) Normal statutory rules of construction apply which mean *inter alia* that "exceptional" must be given its normal meaning.
>
> (ix) "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.
>
> (x) 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.

Factual background

3. On the 24th December, 2010, the respondent refused planning permission for the continued use of the applicant's quarry based on the fact that the proposed development required an Environmental Impact Assessment in accordance with the requirements of EU Directive 85/337/EEC (as amended) and also that it included a significant element of retention permission. The applicant sought leave to have this refusal judicially reviewed which leave was refused by this court.

Applicant's Submissions

4.1 In *Urrinbridge v. An Bord Pleanála* [2011] IEHC 400 (decision of 26th January, 2012, MacMenamin J. granted a certificate of leave to appeal, finding at para. 17:-

> "Clearly, the issue as to when the board 'determines' an appeal may arise in a number of cases. It is therefore important and in the public interest that this issue be finally determined in the context of the PDA 2000.....I am also satisfied that an

> affirmative public benefit from an appeal can be identified (Criterion 10).It is self-evident that the point may determine other cases."

In *Harding*, the court also placed emphasis on the fact that the point then in question had the potential to arise in a significant number of cases.

The applicant submits that applying the principles and authorities applicable to the grant of a certificate and taking into account examples of points of law that have already been certified or deemed to be of exceptional public importance (*Urrinbridge*), that the points of law involved in the Court's determination in these proceedings should be certified.

4.2 The respondent claims it had regard to its decision in respect of a s. 5 referral when deciding the appeal the subject of these proceedings. The respondent also admits its decision in relation to the s.5 referral was taken at a meeting on the 23rd December, 2010, although its decision on the matter was not in fact determined until at least the 24th December, 2010, being the date of the decision. Thus, when it was deciding the appeal, the board had regard to its own decision regarding the s.5 referral which was not in fact determined until at least the day after it had regard to it.

In *Urrinbridge v. An Bord Pleanala [2011] 400 IEHC* (decision of the 28th October, 2011) MacMenamin J. quashed a decision of the board to refuse planning permission on an appeal. The board claimed that it had determined the appeal at its meeting (although it had not yet issued and given notice of its determination) and therefore the subsequent withdrawal of the appeal was invalid. MacMenamin J. held at para. 26 that :-

> "… while the Board may 'determine' matters at its meeting, this is not the final step in the decision making process at all".

Thus, following this, where a decision is made by the board at a meeting, it has no legal effect until notice is given of the decision and it has not determined the matter until the board's formal order is signed. MacMenamin J. granted a certificate of leave to appeal that judgment and that appeal has yet to be determined by the Supreme Court.

There is a question regarding the legal status of an undetermined decision of the board, and in particular if the board may have regard to a decision it had made but which it has not determined. It is submitted by the applicant that this is a point of law of exceptional importance and it is in the public interest to have it determined.

It is further submitted that this also raises serious questions about the public's right to fair procedures and constitutional justice.

4.3 Central to the respondent's reasons and considerations in refusing permission for the continued use of the quarry was that the quarry the subject of the proceedings was an unauthorised development.

It is clear from the judgment of Finlay Geoghegan J. in *Roadstone Provinces Ltd v. Wicklow County Council* [2008] IEHC 210 that the board has no jurisdiction on a s.5 reference to determine what is or is not unauthorised development. At para. 21 she said:-

> "The respondent has no jurisdiction on a reference under s.5 (4) of the Act to determine what is or is not 'unauthorised development'. It may only determine what is or is not 'development'."

If a finding within a s.5 declaration can establish that a particular development is unauthorised it has far reaching consequences for all members of the public. The scope and effect of a s.5 declaration is, the applicant submits, a point of law of exceptional public importance and it is in the public interest that this matter be clarified.

Respondent's Submissions
5.1 The law pertaining to the test to be applied is as per *Harding v. Cork County Council* [2006] IEHC 450 adopting the statement of principle in *Glancré*. The applicant, the respondent submits, has not specified any point of law which could be of exceptional public importance nor is it in the public interest that an appeal be brought.

5.2 The respondent argues that the applicant fails paragraph 5 of the *Harding/Glancré* test i.e. "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."

The respondent contends that the matters that the applicant refers to in its outline legal submissions do not arise from the decision of the court nor are they raised in the pleadings. The applicant in particular did not introduce its argument in relation to the s. 5 declaration into its pleadings and it is argued that it is somewhat incongruous for the applicant to now maintain that this amounts to a point of law of exceptional public importance.

Thus, it would be inappropriate for the court to certify any point concerning the validity of the decision made on the s.5 reference which has not been the subject of a challenge.

5.3 The respondent argues that this Court, in refusing the applicant leave to apply for judicial review, was finding that there were no substantial grounds to challenge the board's decision. In this regard the dicta of Mc Kechnie J. at para.23 of *Kenny v. An Bord Pleanala* [2001] 1 I.R. 704 is important:-

> " When leave is refused ,it is, I feel, so refused by reason of and resulting from the decision of the Court which must mean that the threshold of substantial grounds had not been established …If this is so, I ask how logically can it then be said, that within the same decision ,one can have, on the one hand, a failure to establish substantial grounds and yet, on the other, on the same material, whether this be fact, inference or law, have a point of law of exceptional public importance?"

5.4 *Harding* is authority for the proposition that the jurisdiction to certify case must be exercised sparingly. The respondent argues that it is hard to see how the public interest is served in permitting an appeal in respect of a development which has already been the subject of High Court proceedings and which cannot be granted development consent per case C-215/06 *Commission v. Ireland*. It is notable that the applicant does not seek leave to appeal in respect of the substantive element of the court's decision i.e. that the board was correct and entitled to determine that the applicant's quarry, as currently operated, constitutes unauthorised development and should not be operating.

5.5 The applicant argues that the board, when deciding the appeal, had regard to its own decision in respect of a s.5 referral which was not in fact determined until at least the day after it had regard to it. However, the respondent submits, it is clear from the

minutes of the meeting that the s.5 referral was listed for consideration on the 23rd December, 2010, followed by the appeal. Moreover, the respondent points out that the applicant specifically requested the board to consider its submissions on the appeal when considering the s. 5 referral.

The applicant's contention seems to be that the s. 5 decision was not final until the order was signed and this did not occur until the 24th December, 2010, and so the board had regard to a s.5 decision that had no legal effect. However, the respondent notes, it would also have to follow on the applicant's logic that the board's decision on the appeal did not have legal effect until the order was signed. So the decision on the appeal was not legally effective before the decision on the s.5 referral. It is inconceivable that a point of this nature could be of any significance to any other case and indeed, is of minimal significance to this case.

5.6 In U*rrinbridge* (decision of the 28th October, 2011) the court decided at para.54 that a decision of the board did not "necessarily [constitute] a final binding 'determination' for the purposes of the PDA 2000". The respondent argues the court did not hold that a decision of the board is legally ineffective as appears to be urged by the applicant. In that case the Court held that the determination was *ultra vires* as the appeal had been withdrawn before it had been 'determined', albeit after it had been 'decided'. At no point did the High Court conclude that a decision of the board is of no legal effect such that it cannot be considered by the board in making another decision such as occurred here.

5.7 The applicant is seeking leave to appeal by effectively criticising the board for considering the matters together, as the applicant itself had urged the board to do all along. The respondent submits that the artificiality of the applicant's point can be seen in the fact that it would have absolutely no point to make if, for example, the board had decided the s.5 referral, waited until notice of the s.5 referral was sent and then met to decide the appeal. Precisely the same decision making process would have occurred and precisely the same material and matters would have been considered.

Decision of the Court
6.1 This Court on the 27th June, 2012, following a telescoped hearing, denied the applicant leave to seek judicial review of the respondent's decision to refuse to grant planning permission on the basis that there were no "substantial grounds for contending that the decision concerned ought to be quashed".

The applicant now seeks that the Court certify that this 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.

6.2 Section 50(a)(7) of the Planning and Development Act 2000 states :-

> "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."

It is clear that the court must certify that there is an exceptionally important point of law and also that there is a public interest in having that point of law heard by the Supreme Court. It is evident from s.50 (a)(7) that both of these criteria are cumulative. The principles applicable are set out above (see chapter 2).

6.3 The point of law sought to be raised relates to the board's taking account of its finding in the section 5 referral before that finding had been determined in the sense of *Urrinbridge* and thus having achieved "legal effect". The point does not arise from the judgment but it did arise in the course of the argument during the hearing. The point was not raised in the grounds upon which the applicant sought relief. In short, the applicant did not seek judicial review on the basis of the board's reliance on its decision under s.5 of the Planning and Development Act 2000. If it was intended to raise the point and rely upon it, the applicant should have immediately amended his grounds to reflect this. The requirement to do this is not a mere technical formality but has a substantial significance. The grounds allowed on a leave application constitute the extent of the jurisdiction of the court .This does not change in a telescoped hearing. The applicant in such a case ought to apply to amend the grounds upon which he seeks leave. The applicant did not do so and that is why the point was not specifically referred to in the judgment herein. However counsel for the applicant did argue the point at the hearing and I allowed him do so. In all the circumstances and with some hesitation, I think I should consider the point.

6.4 The applicant contends that time should have been allowed by the board for the s. 5 decision to become "legally determined" before dealing with the planning application. That would not, in my view, be a correct manner in which to deal with the planning process. The point seems highly technical. In my view it is an unreal approach to decision making by a body charged with serious matters of great public importance. Having just made a decision on the section 5 matter, it was something within the board's knowledge and it was bound to take account of it. Moreover, I do not accept the applicability of *Urrinbridge* to the situation herein. The decision in that case that a matter had not been "determined" until notice had been given does not mean that the decision is so devoid of effect that the board that made that very decision itself cannot even refer to it or take account of the existence thereof. I detect a slight whiff of pettifoggery. The applicant was fully engaged with what the board was doing. There is no question but that the applicant was aware of the fact that the respondent would take into account its submissions in the section 5 refusal and decide them together. No claim could arise that the applicant was taken by surprise. It was the applicant that asked the board to do what it now complains of. Thus no question of any lack of fair procedure can arise.

Lastly, the two points under s. 50(a)(7) of the Planning and Development Act 2000 are cumulative. It is difficult if not impossible, to see how the public interest could be served in questioning the status of a quarry that 35 years ago was deemed to be unauthorised and which has continued to be unauthorised notwithstanding its continued use.

Therefore the Court refuses to certify any point of law pursuant to s. 50A of the Planning and Development Act 2000.