Neutral Citation: [2013] IEHC 3

THE HIGH COURT

[2011 No. 701 J.R.]

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

BETWEEN/

CORK INSTITUTE OF TECHNOLOGY

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CORK CITY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on the 15th January, 2013

1. Can it be said that a third-level educational institute possessing charitable status is a "voluntary organisation" so that it enjoys an exemption from the payment of planning fees and, by extension, by reason of the terms of a scheme drawn up by the planning authority pursuant to statute, from the payment of a development contribution levy under a scheme operated by Cork City Council? This is the principal question of interpretation which is raised in this application for judicial review.

2. In these proceedings the applicant, Cork Institute of Technology ("the Institute"), seeks to quash a decision of An Bord Pleanála dated the 21st June, 2011, which approved a decision of Cork City Council ("the Council") to impose a development levy of just over €215,000 on the Institute in respect of its development of a major site adjacent to its existing campus which was formerly operated by an electronics company. The Council had previously granted the Institute planning permission on 20th January, 2011, in respect of alterations to a building and a partial change of use from a light industrial use to educational facilities. The facilities included offices, storage, an examinations hall, seminar rooms and an elite sports training gymnasium.

3. Condition 5 of the planning permission required the Institute to pay a contribution to the Council in accordance with the Council's General Development Contribution Scheme ("the Scheme") which was adopted on 27th April, 2009. While the Institute appealed against this decision, the appeal was, as we have seen, rejected by An Bord Pleanála in its decision of 21st June, 2011. Before, however, considering any of the legal issues which arise, it is first necessary to set out the relevant provisions of the Council's scheme.

The Council Scheme

4. The Council's general power to levy development contributions is contained in s. 48 of the Planning and Development Act 2000 ("the 2000 Act"). Section 48(3)(c) of the 2000 Act provides, however, that a scheme "*may* allow for the payment of a reduced contribution or no contribution in certain circumstances, in accordance with the provisions of the scheme" (emphasis added). Table 5 of the Council's 2009 Scheme provides that provision of facilities by organizations "which are considered to be exempt from planning fees as outlined in Part 12, Article 157 of the Planning and Development Regulations 2001" are entitled to a 100% reduction. Furthermore, a 75% reduction obtains in those cases where there has been a change of use where "the intended use is likely to increase demands on services". While the Table does not quite say so in express terms, the implication is that in the event that there were to be no increase in demand for services, no development contribution would be payable.

5. In effect, however, the Council has used the technique of incorporating by reference the terms of Article 157(1) of the 2001 Regulations into the Scheme. While the language of s. 48(3)(c) of the 2000 Act does not seem *to require* a planning authority to elect to allow waivers or (as the case may be) reductions of otherwise exigible planning contributions, the authority may clearly do so. Here it has elected to do so by incorporating the terms of Article 157(1) of the 2001 Regulations into the s. 48 scheme which it has prepared.

6. It follows, therefore, that eligibility for a waiver of planning contribution is determined by the antecedent question of whether the applicant in question would also have been entitled to a waiver from planning application fees under Article 157(1). As it happens, the Institute did pay such fees when making this application for planning permission, but it is common case (and not in dispute between the parties) that in this sphere of public law no question of estoppel by conduct arises, in much the same way as the fact that an applicant applied for planning permission was held by the Supreme Court not to have precluded it from subsequently claiming a planning exemption: see *Fingal County Council v. William P. Keeling & Sons* [2005] IESC 55.

7. . In other words, the fact that the Institute previously paid such fees with reference to this application does not now preclude it from seeking to argue that it was not, in fact, obliged to pay them and that as it would have been entitled to a waiver for Article 157(1) purposes it was also entitled to a waiver from the planning contributions under the terms of the Council's s. 48 scheme.

8. Before proceeding to examine this legal issue in more detail, it is of some importance to note that the Institute is a registered charity.

Article 157 of the Planning and Development Regulations 2001

9. It will be seen from the terms of the scheme that the entitlement of an applicant for planning permission to be relieved of the obligation to pay a planning contribution (whether in whole or in part) is governed by reference to the question as to whether or not

such an applicant would separately have been entitled to an exemption from planning fees under the terms of Article 157(1) of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001). While Article 156 provides that, generally speaking, a fee should be paid to a planning authority by an applicant when making a planning application, Article 157 deals with exemptions from this obligation. This provides:-

> "(1) Where a planning application consists of or comprises development which, in the opinion of the planning authority is a development proposed to be carried out by or on behalf of a voluntary organisation, and which in the opinion of the planning authority –
>
> (a) is designed or intended to be used for social, recreational, educational or religious purposes by the inhabitants of a locality, or by a people of a particular group or religious denomination, and it is not to be used mainly for profit or gain,
>
> (b) is designed or intended to be used as a workshop, training facility, hostel or other accommodation for persons with disabilities and is not to be used mainly for profit or gain, or
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> (c) is ancillary to development referred to in para (a) or (b), a fee shall not be payable when making such an application.
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> (2) Where a planning application consists or comprise of the provision of houses or development ancillary to such provision and which is to be used or carried out by or on behalf of a body approved for the purpose of s. 6 of the Housing (Miscellaneous Provisions) Act 1992, (No. 18 of the 1992) and is not to be used mainly for profit or gain, a fee shall not be payable in respect of any such development."

The approach of the Inspector and the Board

10. It is plain from the commendably thorough analysis contained in the Inspector's report that he was troubled by the question of what constituted a "voluntary organisation" for this purpose. Noting that the Institute was charity, he then posed the question of whether a charitable organisation could also be a voluntary organisation. He then drew attention to a miscellany of decisions of the Board dealing with the point. Most of these related to applications on behalf of primary and secondary schools: these were held to involve applications by voluntary organisations.

11. The Inspector then concluded his analysis by saying that the Institute could:-

> "be regarded as a voluntary organisation for the purposes of Article 157 and Table 5, notwithstanding the third level status of the Institution. The proposed development will be provided for educational and recreational purposes and not mainly for profit and gain. I find therefore that the applicants would meet the criteria set out in the first item in Table 5 of the [scheme] and would be exempt from the requirement to pay development contributions under the scheme."

12. As it happens, however, the Board disagreed with the Inspector. On this point, the Board stated:-

> "Notwithstanding the applicant's charitable tax status, it is considered that Cork Institute of Technology does not come within the provisions of the Cork City General Development Contribution Scheme for exemptions from and reduction of development contributions, as the applicant is not a voluntary organisation….In disagreeing with the Inspector, the Board considered that the precedent cases cited and upon which his recommendation is based, are distinguishable from the instant case, in that the other development[s] cited were being carried on or on behalf of a voluntary organisation, *viz*., a school Board of Management."

The reasons given by the Board

13. Here we may pause to note that the adequacy of the reasons offered by the Board in its decision was the subject of detailed examination in the course of the hearing. For my part, however, I think it is unnecessary in the present case to traverse at any length issues as to the adequacy of reasons where were central in major cases such as *Mulholland v. An Bord Pleanála* (No.2) [2006] 1 IR 453, *Meadows v. Minister for Justice and Equality* [2010] IESC 3, [2010] 2 IR 701 and *Christian v. Dublin City Council* [2012] IEHC 163. I arrive at that conclusion for two reasons.

14. First, while the reasoning of the Board is admittedly terse, I cannot say that, at least as far the present case is concerned, the laconic nature of the reasons offered has actually inhibited the applicant in any significant fashion from seeking to have this Court exercise its powers of judicial review. In this respect, therefore, the present case is rather different from the adequacy of the reasons which were at issue in cases such as *Meadows* and *Christian*. As, for example, Murray C.J. pointed out in *Meadows*, there was an ambiguity in the reasons offered by the Minister in a deportation case where the applicant claimed that she was likely to be exposed to the threat of female genital mutilation if she were returned to Nigeria:-

> "An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.
>
> Unless that is so then the constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.
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> In my view, the decision of the Minister in the terms couched is so vague and indeed opaque that its underlying rationale cannot be properly or reasonably deduced. The recommendation with which the memorandum submitted to the Minister with the file is not helpful and adds to the opaqueness of the decision. That states that "*Refoulement* was not found to be an issue in this case".
>
> This decision is open to multiple interpretations which would include one that *refoulement* was not an issue and therefore it did not require any discretionary consideration. On the other hand it may well be that the Minister did consider *refoulement* an issue and that there was evidence of the appellant in this case being subject to some risk of being exposed to FGM but a risk that was so remote that being subject to FGM was unlikely: alternatively he may have

considered that while there was evidence put forward to suggest that the appellant might be subjected to FMG, that evidence could be rejected as not being of sufficient weight or credibility to establish that there was any risk.

The fact remains that it is not possible to properly discern from the Minister's decision the actual rationale on foot of which he decided that s. 5 of the Act had been "complied with". Accordingly in my view there was a fundamental defect in the conclusion of the Minister on this issue."

15. Nor can the present case be compared with *Christian* where Clarke J. held that the reasons advanced by elected councillors in electing to depart from professional advice and by adopting restrictive zoning in a development for particular categories of property were in the circumstances inadequate to enable this Court to assess the proportionality of the impugned measure.

16. By contrast, the reasons of the Board given in the present case, while admittedly terse, are nevertheless sufficiently clear. The Inspector had drawn an analogy with various decisions of the Board under Article 157(1) whereby it was held that planning fees should not be charged to applications brought by school boards of management and he concluded that the present application was indistinguishable from those other educational cases. By contrast, the Board thought (in part by implication, admittedly) that the present case was different because it involved a third level institution which had been established by statute, so that it was no longer a "voluntary" organisation.

17. Second, in any event it must be recalled that the adequacy of the reasons given for in respect of a question which to all intents and purposes involves a pure question of law cannot be regarded as important or as potentially dispositive as were, for example, the adequacy of reasons in respect of the deportation decision in *Meadows* or the zoning decision in *Christian*. Even if, for example, the Board had given a lengthy discursive judgment on the true meaning of Article 157(1), such an account, while doubtless edifying and interesting, could not really have any direct bearing on this Court's analysis of the proper meaning of these words in the context of a *vires* analysis.

18. For these reasons, insofar as it is necessary for me to do so, I reject the Institute's argument that the reasons given by the Board were inadequate in the circumstances.

Section 48(10)

19. Before proceeding further it is necessary to describe the role of the Board in relation to appeals made by developers in relation to the imposition of planning contributions. Section 48(10) of the 2000 Act provides:-

"(a) Subject to paragraph (b), no appeal shall lie to the Board in relation to a condition requiring a contribution to be paid in accordance with a scheme made under this section.

(b) An appeal may be brought to the Board where an applicant for permission under section 34 considers that *the terms of the scheme have not been properly applied* in respect of any condition laid down by the planning authority.

(c) Notwithstanding section 34(11), where an appeal is brought in accordance with paragraph (b), and no other appeal of the decision of a planning authority is brought by any other person under section 37, the authority shall make the grant of permission as soon as may be after the expiration of the period for the taking of an appeal, provided that the person who takes the appeal in accordance with paragraph (b) furnishes to the planning authority security for payment of the full amount of the contribution as specified in the condition." (emphasis supplied)

20. The underlined words in s. 48(10)(b) illustrate the nature of the appeal. The Board's task is not to review the decision anew, is if it were, for example, hearing an appeal against the grant or refusal of a planning permission. Rather, the task of the Board in this specific instance is to consider whether the terms of the applicable scheme were properly applied by the Council. As Kelly J. observed in *Cork City Council v. An Bord Pleanála* [2006] IEHC 761, [2007] 1 I.R. 761, 767:-

"The effect of these statutory provisions is that no appeal lies to the board in relation to a condition requiring a contribution to be paid in accordance with a scheme made under the section. But that prohibition is subject to a limited and specific exception. An appeal may be brought in circumstances where an applicant for planning permission considers that the terms of a scheme adopted under s. 48 have not been properly applied by a planning authority.

It is clear that the function of the board in an appeal under s. 48(10) is extremely limited. It has no entitlement to consider or review the merits of the scheme under which the contribution is required. Its remit is confined solely to the question of whether or not the terms of the relevant scheme have been properly applied.

The appellate jurisdiction provided under s. 48(10) is in marked contrast to the board's function in what may be described as ordinary planning appeals. In such appeals the board is obliged to consider applications for planning permission *de novo* (see s. 37(1)(b) of the Act). Such a power is not given to the board in an appeal under s. 48(10). All parties to this litigation agree that in considering an appeal under s. 48(10) the board is confined to a consideration of whether or not the terms of the relevant scheme have been properly applied."

21. The elaborate analysis contained in this judgment clearly demonstrates that the task of this Court in examining this question is to scrutinise for basic vires. In other words, since the sole issue before the Board is whether the local authority in question correctly applied the terms of its own s. 48 scheme to the case at hand, the issue before this Court in turn is one of pure law involving an analysis of the meaning of the language of the Scheme in the first instance and its subsequent application to the facts of the case by the Council in the first instance and, on appeal, by the Board. In those circumstances, for all the reasons advanced by Kelly J., the task of the Court is to scrutinise the decision of the Board for vires on grounds.

22. The starting point here is, of course, the interpretation of key phrases contained in Article 157(1), since this was the provision which was incorporated by reference in the Table to the Council's Scheme. It is only where this point was resolved adversely to the applicant that it would then be necessary to consider the secondary argument, namely, whether the development was likely to involve a change of use which did not involve an increased demand for services.

23. We may commence with an examination of the meaning of the phrase "which in the opinion of the planning authority" in Article 157(1). While these words involve some degree of subjective appraisal by the administrative decision maker, it has been nonetheless established that the decision-maker must act *bona fide* and in a manner which is not unreasonable and factually sustainable: see, *e.g., The State (Lynch) v. Cooney* [1982] I.R. 337; *Kiberd v. Hamilton* [1992] 2 I.R.257. It may also be observed in passing that these principles have since been emphatically re-stated in the judgment of Fennelly J. for the Supreme Court in *Mallak v. Minister for*

Justice and Equality [2012] IESC 59, albeit in a judgment whose delivery post-dated the hearing of the present case.

24. This statutory formula also presupposes that the decision-maker has, however, first correctly defined the relevant terms. It is not in dispute but that the development here is intended to be for educational purposes or that this development was not intended to be for profit or gain. Admittedly, it was somewhat faintly suggested during the course of the hearing that the latter condition was not satisfied by reason of the fact that certain elements of new development were designed to be revenue-raising. Thus, for example, part of the new gymnasium and ancillary sports facilities are designed for use by elite athletes and sporting organisations. The Institute has, for instance, recently entered into an agreement with the Munster rugby team which is designed to facilitate the Cork-based members of the Munster squad to use these facilities for training purposes. While arrangements of this and a kindred kind are doubtless intended to raise revenue, these factions are plainly ancillary to the main task of the Institute, namely, that of education and research and the Institute cannot be said to be directly engaged in such activities for profit.

Is Cork Institute of Technology a "voluntary organisation?"

25. The question of whether the Institute is a "voluntary organisation" lies at the heart of the entire application. Here it seems appropriate to examine the original object and purpose of Article 157(1) in the first place. Section 33(2)(c) of the 2000 Act enables the Minister for Local Government to make regulations governing the fees payable in respect of, *inter alia*, planning applications. Article 157(1) is, accordingly, the provision in the regulation which exempts such applicants falling within its terms from paying a fee.

26. The object, therefore, of this provision was to facilitate development designed to promote charitable, philanthropic and other socially beneficial purposes by exempting the promoters from the necessity to pay a planning fee where the object of the development was not for profit or gain. While the term "voluntary organisation" is not defined by the 2001 Regulations, it is necessarily implicit in paragraph (a) of Article 157(1) that, for example, religious organisations will generally come within this definition. It is also quite clear that the exemption would be broad enough to embrace developments as diverse as the construction of a community centre or the construction of a new club premises by a GAA, soccer or rugby club or the construction of a school by a parents' organisations. In all of these examples, the development would unquestionably have been at the behest of a voluntary organisation.

27. More difficult cases are presented by other potentially relevant examples. It is quite clear that a privately-run hospital would benefit from the exemption if, for example, it sought to re-develop its facilities, provided, of course, that it was not operated mainly for profit or gain. But if – as is increasingly the case – a particular hospital was governed or regulated by statute would that mean that it ceased to be "voluntary" in this sense?

28. Thus, for example, Article 4(1) of the Health Act 1970 (Section 76)(Adelaide and Meath Hospital (incorporating the National Children's Hospital) Order 1996 (S.I. No. 228 of 1996) provides that a "body corporate shall stand established on the commencement of this order" which is to be known as the Adelaide and Meath Hospital (incorporating the National Children's Hospital). Of course, in this type of case it may be said that the hospital in question is no longer a "voluntary organisation" in the special sense that a particular statutory instrument has decreed that such a body shall stand established and, presumably, such a body could not cease to exist absent further statutory intervention by the Oireachtas. It is in that particular sense the hospital would not be "voluntary", as distinct from, say, a charitable body which had been privately established not regulated by statute to operate a health clinic on a not for profit basis.

29. Other examples of this kind abound in the educational sector. The vast majority of primary and secondary schools are presumably voluntary in this sense in that they are under no legal obligation to remain open and have been given no legal permanency by statute. Third level institutions are, however, in a somewhat different category, since with the exception of some smaller privately established institutions, they are nearly all established or governed by statute, as such is now the effect of the Regional Technical Colleges Act 1992 and Universities Act 1997.

30. Indeed, it is all but conceded but that if the word "voluntary organisation" is to be understood in this restricted sense, then the Institute cannot be regarded as "voluntary" in this sense given that its establishment, powers and functions are mandated and regulated by the operation of the 1992 Act. Even if it wished to do so, the Institute could not voluntarily cease to exist, as further statutory intervention by the Oireachtas would be needed for this purpose. It is, after all, a body corporate with perpetual succession: see s. 3(5) of the 1992 Act. The Minister retains significant control over the Governing Body, in that he or she enjoys the power to dissolve the Governing Body in certain circumstances: see s. 8 of the 1992 Act. The Minister may even give general directions regarding the Institute's admission policies: thus, Paragraph 14 of the Second Schedule to the 1992 Act provides that the Governing Body is to carry out all the functions assigned to it by the Act and, in particular, that it:-

> "shall determine, subject to such directions as the Minister may give from time to time, the conditions under which persons should be admitted to the college and to any particular course of study therein."

31. Accordingly, it may well be that the Institute is a "public body" for some statutory purposes, such as, for example, the Freedom of Information Act 1997 or the Official Languages Act 2003 (cf. here the judgment of the Supreme Court in *Central Applications Office Ltd. v. Minister for Community, Rural and Gaeltacht Affairs* [2010] IESC 32). But just as, for example, certain hospitals might be so designated for the purposes of this type of legislation, it does not necessarily mean that an entity so designated cannot be a "voluntary organisation" in the quite different and separate statutory context of Article 157(1) of the 2001 Regulations.

32. One may wonder, therefore, what the drafters of Article 157(1) actually intended? After all, the term "voluntary organisation" is not a term of art with a clearly defined legal meaning. It is, rather, a chameleon-like phrase – with admittedly vague and ambiguous contours - which takes its meaning from the relevant context and which, as a matter of every-day speech has come to refer to non-State organisations engaging in social activity which enhances the common good. As understood in that context, no one would question, for example, the designation of a charitable organisation as a "voluntary organisation" on the ground that it had salaried employees who could not be described as volunteers. Certainly, no one who was not a lawyer would ever consider construing this term is this rather artificial fashion, an interpretation which, in any event, seems quite divorced from the everyday usage – whether formal or otherwise – of that term.

33. Given these inherent ambiguities and uncertainties, it seems appropriate to endeavour to ascertain the underlying object of this subordinate legislation, not least having regard to the provisions of s. 5(2)(a) of the Interpretation Act 2005 ("the 2005 Act"):-

> "(2) In construing a provision of a statutory instrument (other than a provision that relates to the imposition of a penal or other sanction)—
>
> (a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole in the context of the enactment (including the Act) under which it was made, the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment."

34. Viewed thus through the prism of s. 5(2)(a) of the 2005 Act, I find myself driven to the conclusion that the better view of Article 157(1) is that it was intended to dispense with the necessity for planning fees where the application for planning permission had been made for eleemosynary or charitable purposes by a body which was not *directly* part of the State apparatus. While it is true that the Institute's work is substantially subvented from public funds and its activities are regulated by statute, the fact remains that the core of its work is charitable and eleemosynary in the classic sense of that term which the law has always recognised.

35. Thus, the provision of education – not least in the field of science, technology and innovation – is of the first public importance. The work of the Institute opens this world to a new generation of young people and it would scarcely be an exaggeration to say that the future of the country is contingent on the education of that new generation. Accordingly, it is in that purposive sense - as mandated by s. 5(2)(a) of the 2005 Act - that it can be said that the Institute is a voluntary organisation within the meaning of Article 157(1) since, although not directly State controlled, subvented or run, its contribution to the social and intellectual capital of the State is enormous.

"The inhabitants of a locality"

36. It remains to consider the other objection voiced by Mr. Fitzsimons, counsel for the notice party, the County Council, namely, that the development was not intended to be used "designed or intended to be used for social, recreational, educational or religious purposes by the inhabitants of a locality", a further requirement of Article 157(1). But it is perfectly clear that the Institute's premises are so intended to be used by the inhabitants of the locality. It is not for nothing that the short title of the 1992 Act refers to the Regional Technical College Act 1992.

37. Of course, one may well assume that that the Institute attracts students from all over the island of Ireland and presumably has a fair quota of foreign students. But here it is sufficient to say that the Institute is intended to be used by the inhabitants of the general Cork locality, even if it is also intended to be used by other persons as well.

Conclusions

38. In view of my conclusion that the Institute is a voluntary organisation which satisfies the requirements of Article 157(1), it equally follows that the Institute satisfies the entitlement to an exemption from planning contributions as contained in Table 5 of the Council's 2009 Scheme.

39. Inasmuch, therefore, as the Board concluded to the contrary, it proceeded from an incorrect definition and understanding of the meaning of the critical term "voluntary organisation" as this term is used in the context of Article 157(1). This conclusion was absolutely central to the Board's decision. It follows, therefore, that the Board's decision of 21st June 2011 cannot stand as a matter of law and I will accordingly grant an order of certiorari quashing this decision.