Neutral Citation: [2015] IEHC 870

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2014 533 J.R.

IN THE MATTER OF SECTIONS 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMMENDED

BETWEEN

EDEL GRACE AND PETER SWEETMAN

Applicants

AND

AN BORD PLEANÁLA

Respondent

AND

ESB WIND DEVELOPMENT LIMITED & COILLTE

First & Second Named Notice Party

AND

THE DEPARTMENT OF ARTS, HERITAGE AND THE GAELTACHT

Third Named Notice Party

JUDGMENT of Mr. Justice Fullam delivered the 4th day of December, 2015.

Introduction

1. This is an application for a certificate for leave to appeal the judgment herein pursuant to s. 50A(7) and s. 50A(11) of the Planning and Development Act 2000, as inserted by s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006.

2. Section 50A(7) of the Planning and Development Act 2000 ("the PDA") provides:

> *"that the determination of the Court of an application for leave to apply for judicial review or of the substantive application is 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."*

3. Section 50A(11) confers the Court of Appeal with jurisdiction to only determine the point of law certified by the trial judge and to only make orders consequent upon that determination. An applicant seeking certification must satisfy the Court that:

> *"(a) the point or points of law which are proposed are of exceptional public importance and*
>
> *(b) that is desirable in the public interests that an appeal should be taken to the Court of Appeal."*

4. The principles to be applied in an application such as this were outlined by MacMenamin J. in *Glancré Teoranta v. An Bord Pleanála and Mayo County Council* [2006] IEHC 250, as follows:

> *"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.*
>
> *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.*
>
> *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."

5. The above principles were followed by Clarke J. in *Arklow Holidays Ltd. v. An Bord Pleanála* [2008] IEHC 2. Clarke J. held that:

"(a) The decision must involve a point of law of exceptional public importance;

(b) it must be desirable in the public interest that an appeal should be taken to the Supreme Court;

(c) there must be uncertainty as to the law and

(d) the importance of the point must be public in nature and transcend the individual facts and parties of a given case."

6. The high bar in the statutory test was recently emphasised by Baker J. in *Ogalas Limited v. An Bord Pleanála* [2015] IEHC 205 where she stated that points to be certified must go beyond the facts of an individual case:

"McMenamin J. summarised the law applicable to a grant of certificate in Glancré Teoranta v. An Bord Pleanála [2006] IEHC 250 and I will not repeat the ten criteria outlined by him at pp. 4 and 5 of his judgment but accept his proposition that it is not sufficient for an applicant for a certificate to show that a point of law emerges in or from a case, but an applicant must show that the point is one of exceptional public importance and must be one in respect of which there is a degree of legal uncertainty, more than one referable to the individual facts in a case. There must be a public interest in requiring that the point of law be clarified for the common good, but to an extent, if there exists uncertainty in the law, and because clarity and certainty in the common law is a desirable end in itself: and important for the administration of justice, if it can be shown the law is uncertain the public interest suggests an appeal is warranted".

Questions Raised for Certification

7. The Applicants have raised two questions for certification. The first of these is:

"What criteria should be applied when determining whether an Applicant has sufficient interest to challenge a decision to which the EIA Directive applies? Is prior participation a relevant factor and does an Applicant have to justify non-participation?"

8. There is no specific definition of "sufficient interest" in the Planning and Development Act 2000, nor is it defined under rule 20(5) RSC which applies to judicial review procedures in general.

9. This court in its judgement however summarised from the extant case law principles applicable in making a determination as to whether an applicant has sufficient interest within the meaning of section 50A(3) of the PDA. The Applicants argue that the Court interpreted that section incorrectly, in particular in regard to the EIA Directive, as interpreted by the Court of Justice of the European Union. The Applicants seem to focus on this Court's inclusion of a failure on behalf of the Applicants to provide a cogent explanation as to their lack of participation in the administrative procedures in making a determination that the sufficient interest threshold had not been met.

10. It is well established in the jurisprudence of the CJEU that the issue of *locus standi* thresholds is for the determination of each individual Member States. Furthermore one can take guidance on this point from the differing status of non-governmental organisations (NGOs) and individual persons in terms of the right to challenge decisions falling within the EIA Directive. This was discussed in the opinion of the Advocate General in *Djurgarden-Lilla* [2009] ECR I-9967. Here the Advocate General referred the automatic right of environmental NGOs to justice, and distinguished this from the less advantageous regime applicable to natural persons.

11. Given this lack of an automatic right to challenge decisions, it cannot follow that, when making a determination as to whether a natural person has a sufficient interest, their participation or lack of participation in the planning process is something which must be excluded from the equation.

12. The Applicant's further seek to rely on the recently decided case of *Commission v Germany.* This case did not concern standing. It related to restrictions on pleas which might be raised at a legal proceeding reviewing a prior administrative proceeding. This Court considered the prior participation in administrative proceedings in the context of making a determination as to whether the Applicants had a "sufficient interest" under Irish procedural rules. This had no bearing on the arguments considered by the Court during the substantive hearing.

13. The Applicants have not satisfied this Court that a state of uncertainty exists in the law and thus this question is not one requiring certification.

14. The second question raised by the Applicants is:

"What are the criteria in law to be applied by a competent authority to an assessment of the likelihood of a plan or project the subject of Article 6(3) of the Habitats Directive, having an adverse effect on the integrity of an SPA? Where the loss or potential loss of foraging habitats within the SPA constitutes a potentially significant negative effect on the Conservation Objectives of the SPA, is the provision of alternative foraging habitat to be regarded as a mitigation measure which can be taken into account under Art 6(3) or as a compensation measure?"

15. Two issues are raised in this submitted question. The first part of the question, which concerns the criteria to be applied to a determination as to whether a project or plan will adversely affect the integrity of a European site, was considered in detail by the *Advocate General in Sweetman v An Bord Pleanála* C-258/11. Comprehensive criteria were set out by the Advocate General and were

in fact subsequently applied by Finlay-Geoghegan J. in the High Court decision of *Kelly v An Bord Pleanála* [2014] IEHC 400. The site in that case included both SACs and SPAs.

16. Similarly, the question as to whether the provision of alternative foraging habitat within an SPA is to be regarded as a mitigation measure which can be taken into account under Article 6(3) or a compensation measure was set out in both the judgement of the CJEU and the opinion of the Advocate General in the decision of *Briels v Minister van Infarstuctur en Millieu* C-521/12.

17. In applying the Glancré principles, as distilled by Clarke J. in Arklow Holidays, it is clear that in this situation the law does not stand in a state of uncertainty; it does not require clarification so as to enable courts to administer that law in future cases; the question being sought for certification does not transcend the individual facts of the case; and it is not a point of exceptional public importance.

18. Thus, both questions raised by the Applicants for certification fail and I refuse leave to appeal.

Reference the CJEU
19. The Applicants have submitted that, in the event that the Court declines to certify either of the questions posed, as has happened, it should make a preliminary reference to the Court of Justice of the European Union. Article 267 of the Treaty of the Functioning of the European Union enables a court to refer a question to the CJEU where "it considers that a decision on the question is necessary to enable it to give judgement".

20. In *McNamara v An Bord Pleanála* [1998] 3 IR 453 it was concluded by the Supreme Court that such a jurisdiction may only be exercised by the High Court in the course of proceedings and in advance of judgement being given. This was a clear and unambiguous decision of the Supreme Court and thus, this Court having already issued its judgement, is no longer in the position of having jurisdiction to refer any question to the CJEU.

21. Furthermore, in *Srl CILFIT and Lanificio di Gavardo SpA v Ministry for Health* [1982] ECR 3415, the criteria a court must consider when deciding whether to refer a question to the Court of Justice were set out. *CILFIT* established that if the Court of Justice has already considered and made a determination on the issue, or where the issue cannot affect the outcome of the case, or where no doubt exists as to the validity of the EU measure, then a question should not be referred under the Article 267 TFEU procedures. In light of the *Briels* and *Sweetman* decisions of the CJEU, as discussed above, and the fact the Applicants did not succeed on the merits of their case, it is clear that under the principles outlined in CILFIT that this Court should not make a referral.

22. Finally, the Applicant's seek to rely on the decision of Cooke J. in *Lofimakin v The Minister for Justice, Equality and Law Reform* [2011] IEHC 116. In so far as this case was considered by the Supreme Court, any point relating to a possible reference to the CJEU was moot. This decision in no way altered the status quo as to the principles governing references to the CJEU as set down in the decision in *McNamara* and *CILFIT*.

Conclusion
23. I refuse the certify both questions submitted by the Applicants pursuant to s. 50A(7) and s. 50A(11) of the Planning and Development Act 2000 and I will not invoke the jurisdiction provided under Article 267 TFEU to refer a question to the CJEU.