Neutral Citation Number: [2011] IEHC 3

THE HIGH COURT

JUDICIAL REVIEW

Record No: 2011 1 JR

IN THE MATTER OF S. 50 OF THE PLANNING AND DEVELOPMENT ACTS 2000 – 2010

AND IN THE MATTER OF ORDER 84 OF THE RULES OF THE SUPERIOR COURTS;

AND IN THE MATTER OF AN INTENDED APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF AN APPLICATION FOR LEGAL AID UNDER ART. 47 OF THE FUNDAMENTAL CHARTER OF EUROPEAN RIGHTS

AND IN THE MATTER OF AN APPLICATION PURSUANT TO S.50(8) OF THE PLANNING AND DEVELOPMENT ACTS 2000 – 2010

Between

MARTIN COLLINS

APPLICANT

- AND -

GALWAY CO COUNCIL, IRELAND &

THE ATTORNEY GENERAL

RESPONDENTS

- AND –

AN BORD GAIS & KEELDERRY WIND FARM LIMITED

NOTICE PARTIES

JUDGMENT of Mr Justice John Edwards delivered on the 4th day of January, 2011.

Introduction

The applicant in these proceedings desires to seek the leave of the High Court to challenge by way of judicial review two decisions of Galway Co Council dated the 5th of September 2007 and the 1st of November 2010, respectively, made pursuant to section 42 of the Planning and Development Act 2000 (as amended), extending the life of a planning permission granted by An Bord Pleanála (ref 00/5248 & PL. 07.125978) on the 23rd of July 2002 for the erection of 48 wind turbines, service roadways, a control house and septic tank at Keelderry, Peterswell, Co Galway in furtherance of a wind energy project promoted, and to be developed, by the notice parties to these proceedings. The original planning permission was a five year permission that was due to expire on the 23rd of July 2007. The decision of the 5th of September 2007 purported to extend the life of the planning permission to the 4th of September 2011. The decision of the 1st of November 2010 purports to further extend the life of the planning permission to the 3rd of September 2014. The applicant, who appears in person assisted by a McKenzie friend, a Mr Percy Podger, has put forward a detailed and reasonably cogent affidavit indicating the likely parameters of his intended challenge in the event of him successfully obtaining leave to apply for judicial review. This affidavit flags an intention to seek to challenge the decisions in question on various jurisdictional grounds as well as on domestic and European legal grounds.

The Proceedings before the Court today

The applicant recognizes that he is ostensibly out of time to seek leave to apply for judicial review having regard to the provisions of s. 50(6) of the Planning and Development Acts 2000 – 2010 which provides that such an application must be made within eight weeks of the date of the relevant decision. He has come before the Court *ex parte* on foot of what amounts to a draft Notice of Motion and Grounding Affidavit claiming, *inter alia*, leave to apply for judicial review. However, the only document actually filed is the affidavit which does not exhibit a draft Statement of Grounds. Accordingly his paperwork is irregular and is not in compliance with what is required under Order 84 of the Rules of the Superior Courts.

The draft Notice of Motion, which the Court is disposed to treat as an *ex parte* docket, seeks several ancillary, and in reality preliminary, reliefs, which the applicant regards as essential to enable him to proceed with the matter, in addition to the substantive relief of leave to apply for judicial review.

Among the ancillary / preliminary reliefs sought are (i) an Order pursuant to Art. 47 of the Fundamental Charter of European Rights directing that legal aid should be provided (by the State effectively) for his legal representation; (ii) an Order protecting him from all adverse costs Orders in the course of his intended proceedings, should such protection be necessary, or should the need for such arise, from such proceedings; and (iii) such extension, or extensions, of time as may be required (presumably pursuant to s. 50(8) of the Planning and Development Acts 2000 – 2010).

Whether the applications should be on Notice
At an early stage of the hearing on the applications before me I expressed concern that certain aspects of the matter ought properly to be dealt with on notice to interested parties. In particular, I formed the view that Ireland and the Attorney General ought to have been put on notice of the claim to compel the State to provide the applicant with legal aid in purported direct reliance upon Art. 47 of the Fundamental Charter of European Rights (assuming for the moment that the Court would have jurisdiction to make such an order, - a matter in respect of which the Court has considerable doubts and on which it will require some persuasion having regard to the principle of separation of powers), particularly having regard to the provisions of s. 50 B of the Planning and Development Act 2000, as inserted by s. 33 of the Planning and Development (Amendment) Act 2010, and I indicated that I was not prepared to allow the applicant to proceed with that part of his application until that was done, and that in that regard I would of my own motion adjourn the hearing of that aspect of the legal aid application pending the relevant parties being put on notice.

While the applicant was disposed to accept my ruling with respect to the legal aid issue he strongly pressed me to allow him to proceed *ex parte* both with his claim for an extension of time and also with his claim for substantive relief, namely leave to apply for judicial review. In doing so, he sought to rely upon the recent amendment to s. 50A of the Planning and Development Act 2000, as inserted by the Planning and Development (Specific Infrastructure) Act 2006, which is contained in s. 32 of the Planning and Development (Amendment) Act 2010, and which allows an application for leave (and arguably by extension relevant ancillary applications) to be made by motion *ex parte*. In order to deal with this issue it is necessary to consider the relevant statute law.

Relevant statutory provisions

I have carefully considered s. 50A of the Planning and Development Acts 2000 – 2010 in its present form, and in particular ss 2, 3, 4 & 10 thereof.

S 50A (2) provides:

> "(a) An application for section 50 leave shall be made by motion *ex parte* and shall be grounded in the manner specified in the Order in respect of an *ex parte* motion for leave.
>
> (b) The Court hearing the *ex parte* application for leave may decide, having regard to the issues arising, the likely impact of the proceedings on the respondent or another party, or for other good and sufficient reason, that the application for leave should be conducted on an inter partes basis and may adjourn the application on such terms as it may direct in order that a notice may be served on that person.
>
> (c) If the Court directs that the leave hearing is to be conducted on an inter partes basis it shall be by motion on notice (grounded in the manner specified in the Order in respect of an *ex parte* motion for leave)-
>
> (i) if the application relates to a decision made or other act done by a planning authority or local authority in the performance or purported performance of a function under this Act, to the authority concerned and, in the case of a decision made or other act done by a planning authority on an application for permission, to the applicant for the permission where he or she is not the applicant for leave,
>
> (ii) if the application relates to a decision made or other act done by the Board on an appeal or referral, to the Board and each party or each other party, as the case may be, to the appeal or referral,
>
> (iii) if the application relates to a decision made or other act done by the Board on an application for permission or approval, to the Board and to the applicant for the permission or approval where he or she is not the applicant for leave,
>
> (iv) if the application relates to a decision made or other act done by the Board or a local authority in the performance or purported performance of a function referred to in section 50(2)(b)or (c), to the Board or the local authority concerned, and
>
> (v) to any other person specified for that purpose by order of the High Court.
>
> (d) The Court may-
>
> (i) on the consent of all of the parties, or
>
> (ii) where there is good and sufficient reason for so doing and it is just and equitable in all the circumstances, treat the application for leave as if it were the hearing of the application for judicial review and may for that purpose adjourn the hearing on such terms as it may direct."

S. 50A (3) provides:

> "The Court shall not grant section 50 leave unless it is satisfied that-
>
> (a) there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed, and
>
> (b) (i) the applicant has a substantial interest in the matter which is the subject of the application, or
>
> (ii) where the decision or act concerned relates to a development identified in or under regulations made under section 176, for the time being in force, as being development which may have significant effects on the environment, the applicant-
>
> (I) is a body or organisation (other than a State authority, a public authority or governmental body or agency) the aims or objectives of which relate to the promotion of environmental protection,

(II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives, and

(III) satisfies such requirements (if any) as a body or organisation, if it were to make an appeal under section 37(4)(c), would have to satisfy by virtue of section 37(4)(d)(iii) (and, for this purpose, any requirement prescribed under section 37(4)(e)(iv) shall apply as if the reference in it to the class of matter into which the decision, the subject of the appeal, falls were a reference to the class of matter into which the decision or act, the subject of the application for section 50 leave, falls)."

S. 50A (4) provides:

> "A substantial interest for the purposes of subsection (3)(b)(i) is not limited to an interest in land or other financial interest."

S. 50A (10) provides:

> "The Court shall, in determining an application for section 50 leave or an application for judicial review on foot of such leave, act as expeditiously as possible consistent with the administration of justice."

I have also considered the provisions of s. 50 of the Planning and Development Act 2000, as substituted by s. 13 of the Planning and Development (Specific Infrastructure) Act 2006, and in particular s. 50(8) thereof which provides:

> "The High Court may extend the period provided for in subsection (6) or (7) within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that –
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> (a) there is good and sufficient reason for doing so, and
>
> (b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension."

Finally, in terms of my review of the relevant statutory provisions, I have considered and have had regard to the provisions of s. 42 of the Planning and Development Act 2000 as originally enacted and also as amended by the Planning and Development (Amendment) Act 2010. The Court notes in particular that there is no provision for public participation in the context of the decision to extend the life of a planning permission. Nor is there any provision for an appeal. Obviously this may be of relevance in the context of s.50(8)(b) considerations, and indeed it is one of the matters on which the applicant relies in his affidavit.

Returning then to the issue as to whether the Court should allow the applicant to proceed *ex parte* both with his claim for an extension of time and also with his claim for substantive relief, I have decided in the exercise of my discretion that it is not appropriate to permit him to do so. My reasons for doing so are that having regard to the issues arising which are complex, as well as the likely impact of the proceedings on the respondents and the proposed notice parties, the interests of justice require that both the application for an extension of time, and the application for leave should be conducted on an *inter partes* basis. I am particularly influenced with regard to the former by the fact that I must, *inter alia*, be satisfied that "there is good and sufficient reason" for extending the time. It is not enough for the applicant merely to provide good and sufficient reason for the delay. In considering whether there is good and sufficient reason for extending the time the Court will have to have regard to many considerations such as the length of the delay, prejudice and so forth, but one important consideration to which it will be entitled to have regard is the question of the merits of the substantive application for judicial review, and bearing in mind that the applicant is required to demonstrate not just an arguable case but "substantial grounds". The nature of this case is such that the Court feels that it could not justly form any view with respect to the merits of the case without hearing from the respondents and other interested parties. Moreover, in this regard the Court notes the decision of Peart J in *Coll v Donegal Co Council* [2005] IEHC 231 which is, ostensibly, against the applicant in terms of the merits of his application, although in fairness to the applicant he contends that that decision may be distinguishable on several bases, and not least on the basis that, unlike in the present case, the lands in question in the *Coll* case were neither an SPA nor an SAC under the Habitats Directive. Moreover, the *Coll* decision has received some critical commentary (see in particular Garrett Simons in Planning and Development Law , 2nd ed, Thompson Round Hall, 2007) and the Court understands the applicant to be contending that certain comments of the learned judge were *obiter dictum* and possibly *per incuriam*. Certainly, the matter is by no means clear cut and it requires to be argued fully by the applicant, but by the same token the respondents and notice parties must also in the interests of natural justice be entitled to have their say in response In all the circumstances the Court considers that it would be totally invidious to all concerned for it to allow the matter to proceed *ex parte*.

I therefore direct that the respondents and the notice parties are to be on notice of the application. As the applicant is a lay litigant I will allow him to do so by means of a letter, to be delivered by ordinary pre-paid post with a certificate of posting, enclosing copies of (i) his draft Notice of Motion (deemed for the purposes of todays proceedings to be his *ex parte* docket), (ii) his affidavit of 4th of January 2011 and the documents therein exhibited; (iii) the supplemental affidavit hereinafter directed and the document therein exhibited; (iv) this judgment and (v) the Order of the Court resulting from today's proceedings.

I further direct the applicant to file on or before the 13th of January a short supplemental affidavit exhibiting a draft Statement of Grounds in accordance with Order 84 of the Rules of the Superior Courts.

Finally, I will adjourn this matter to the judicial review list on the 13th of January, 2011 before whatever judge is assigned thereto.