THE HIGH COURT

JUDICIAL REVIEW

[2021] IEHC 642

[2021 No. 20 JR]

IN THE MATTER OF SECTION 50B, SECTION 214 AND SECTION 215 OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED

AND

SECTION 51 OF THE ROADS ACT 1993 AS AMENDED

AND

SECTION 10 OF THE LOCAL GOVERNMENT (NO. 2) ACT 1960

BETWEEN

JAMES CLIFFORD AND PETER SWEETMAN

APPLICANTS

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

KERRY COUNTY COUNCIL

NOTICE PARTY

AND

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 19 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 76 OF AND THE THIRD SCHEDULE TO THE HOUSING ACT 1986 AS EXTENDED BY SECTION 10 OF THE LOCAL GOVERNMENT (NO. 2) ACT 1960 AND SUBSTITUTED BY SECTION 86 OF THE HOUSING ACT 1966
AND IN THE MATTER OF THE PLANNING AND DEVELOPMENTS ACTS 2000 TO 2019
AND IN THE MATTER OF SECTION 50B OF THE PLANNING AND DEVELOPMENT ACT 2000
AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 51 OF THE ROADS ACT 19993 (AS AMENDED)
AND IN THE MATTER OF AN APPLICATION

BETWEEN

DENIS O'CONNOR, CHRISTY MCDONNELL, MARY O'NEILL MCDONNELL AND THE GREENWAY INFORMATION GROUP

APPLICANTS

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

KERRY COUNTY COUNCIL

NOTICE PARTY

(NO. 2)

JUDGMENT of Humphreys J. delivered on Friday the 15th day of October, 2021

1. In *Clifford v. An Bord Pleanála (No. 1)* [2021] IEHC 459 (Unreported, High Court, 12th July, 2021) I dismissed an application for *certiorari* of development consent for the South Kerry Greenway under s. 51 of the Roads Act 1993.

2. The applicants now seek leave to appeal under s. 50A(7) of the Planning and Development Act 2000.

The form of the question

3. It is true that in *Arklow Holidays Ltd. v. An Bord Pleanála* [2008] IEHC 2 (Unreported, High Court, 11th January, 2008), Clarke J. drew distinction between a broad question of principle and the narrow question of its application to the case. But the concept of a broad question of principle is not to be entirely conflated with writing an essay. It ideally would involve an actual question – is the legal situation X? Another form (maybe a better form) is – is the legal situation X or alternatively is it Y?

4. Why is this better than an open-ended non-leading question like "what is the legal situation in these circumstances"*?* There are a number of reasons.

5. Firstly, it's clear that for a question to be one of exceptional public importance warranting an appeal to the Court of Appeal, the question (either alone or in combination with other questions) normally has to be decisive. That is obscured by an open-ended question. If the question is "is the legal situation X or is it Y", then that permits the court to consider that the losing party would be the loser under either scenario, thereby generally rendering the appeal on such a point otiose.

6. Also, by defining the scenarios to be discussed, the reality or otherwise of those scenarios comes into precise focus. "What is the legal situation here*"* is a question we might all think is reasonable and worthy of lengthy debate and discussion "Is the legal situation X?" immediately focuses the mind on X, which may compel us to acknowledge the obvious implausibility or otherwise of X.

7. Ultimately the dynamic encouraged by the open-ended question is for the would-be appellant to say "look at this interesting point of law, don't look at how it actually impacts on the actual case, in the context of the actual evidence and actual pleadings". Pandering to such an approach may even create a perverse incentive to inaccurately represent the import of the substantive decision in order to make the point of law as interesting and relevant as thought necessary (speaking generally – not about the applicants here). Dangling an interesting point in front of a court to obscure shortcomings in the case may seem good bare-knuckle practical tactics but doesn't do anything for the coherence of the legal system. The caselaw is clear that the point has to actually arise from the judgment and therefore from the pleadings and evidence as they actually stand.

8. Hence as suggested in *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646, [2016] 11 JIC 1404 (Unreported, High Court, 14th November, 2016), at para. 2, it is far better to formulate the question with precision in a manner that indicates how it is determinative of the proceedings, rather than inviting a discursive, roving response from the Court of Appeal.

9. While it is true that some previous certification decisions and indeed by analogy some Supreme Court leave to appeal determinations do involve general questions, and so the need for precision in the question might best be regarded not as an absolute rule (but as against that, the pros and cons of general questions probably aren't fully teased out in such decisions and virtually nothing in law is so fixed that it can't be capable of review

and if necessary development), a lack of precision in a question is nonetheless a pertinent factor going to the exercise of the court's jurisdiction to grant leave to appeal. It is also true that the court can reformulate the question proposed by a would-be appellant. But as noted above one of the obvious problems with the absence of a precise question is that it invites the court to stray some distance from the actual issues raised by the case. It also potentially invites the court to decide something which isn't in fact determinative. Hence, precision serves multiple needs in such a context and it is most certainly open to the court to decline to certify a question that is impermissibly imprecise.

Law in relation to leave to appeal

10. I have considered the law in relation to leave to appeal, in particular *Boland v. An Bord Pleanála* [1996] 3 I.R. 435, *Arklow Holidays Ltd. v. An Bord Pleanála* [2006] IEHC 102, [2007] 4 I.R. 112, *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250, [2006] 7 JIC 1302 (Unreported, High Court, MacMenamin J., 13th July, 2006), *Harding v. Cork County Council* [2006] IEHC 450, [2006] 11 JIC 3001 (Unreported, High Court, Clarke J., 30th November, 2006), *Arklow Holidays Ltd. v. An Bord Pleanála* [2008] IEHC 2 (Unreported, High Court, 11th January, 2008) (where Clarke J. noted (endorsing the view expressed at p. 641 of the 2nd Ed. of Simons on Planning and Development Law) that a decision based on narrow grounds such as factual grounds might not give rise to a point of law and that it is not permissible to allow an appeal "on a moot or on theoretical points of law which might have arisen for discussion or consideration during the Hearing, but which did not go the actual determination or decision of the High Court"), *Ógalas Ltd. v. An Bord Pleanála* [2015] IEHC 205, [2015] 3 JIC 2008 (Unreported, High Court, Baker J., 20th March, 2015), *Buckley v. An Bord Pleanála* [2015] IEHC 590, [2015] 9 JIC 1601 (Unreported, High Court, 16th September, 2015) (where Cregan J. emphasised that leave to appeal was not a re-running of the merits of the case), *Dunnes Stores v. An Bord Pleanála* [2015] IEHC 387, [2015] 6 JIC 1805 (Unreported, High Court, McGovern J., 18th June, 2015), *Aherne v. An Bord Pleanála* [2016] IEHC 536, [2016] 10 JIC 0303 (Unreported, High Court, Noonan J., 3rd October, 2016) and *Dublin Cycling Campaign CLG v. An Bord Pleanála* [2021] IEHC 146, [2021] 2 JIC 2508 (Unreported, High Court, McDonald J., 25th February, 2021).

11. As well as the *Glancré* and *Arklow Holidays* criteria, and the additional points highlighted in *S.A. v. Minister for Justice and Equality (No. 2)*, there is one further criterion worth emphasising which is that the point of law has to be one decided against the would-be appellant. There's no point trying to seek leave to appeal where any points of exceptional public importance in the case were decided in your favour, and you want to use that fact to appeal a finding against you that is not such a point. That is not how the system is meant to work. The object of leave to appeal is to discover if the High Court decision on the point of exceptional public importance was correct, not just if the decision overall was correct.

The applicants' proposed question of exceptional public importance

12. The applicants' proposed question is: "What are the obligations on a competent authority under the EIA directive and implementing legislation where it modifies a development proposal? Have they been satisfied in this case?"

13. Particular reliance is placed on the decision of the CJEU in Case C-2/07 *Abraham v. Région wallonne* (Court of Justice of the European Union, 28th February, 2008, ECLI:EU:C:2008:133). From one point of view this is ultimately and in reality an attack on the adequacy of the EIA exercise carried out by the board. But there is nothing particularly unusual in the way that that aspect was dealt with in the No. 1 judgment, which is compatible with the approach adopted in other decisions: see *Aherne v. An Bord Pleanála* [2015] IEHC 606, [2015] 10 JIC 0605 (Unreported, High Court, Noonan J., 6th October, 2015*), Ratheniska Timahoe and Spink (RTS) Substation Action Group v. An Bord Pleanála* [2015] IEHC 18, [2015] 1 JIC 1402 (Unreported, High Court, Haughton J., 14th January, 2015), *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 226, [2016] 5 JIC 0405 (Unreported, High Court, Hedigan J., 4th May, 2016), *Sweetman v. An Bord Pleanála* [2016] IEHC 277, [2016] 5 JIC 0407 (Unreported, High Court, McDermott J., 4th May, 2016), *McEntee v. An Bord Pleanála* (Unreported, High Court, Moriarty J., 10th July, 2015).

14. Turning to the specific question as worded, there are a number of problems immediately apparent:

    (i). Firstly, the question is extremely general and invites a roving, write-an-essay-type response.

    (ii). No provision of the EIA directive is identified.

    (iii). No provision of implementing legislation is identified.

    (iv). Also, the question presupposes that the board is modifying a development proposal. That is not technically correct. The board is giving permission subject to a condition involving the omission of a section of the proposal.

    (v). Finally, the arguments made in support of the question majored on the alleged breach of public participation requirements of the directive (rather than inadequate assessment by the board). That was not the basis of the argument at the substantive hearing and does not seem to have been pleaded in the sense now argued, so the applicants cannot reconfigure the case for the purposes of the leave to appeal application.

15. Even assuming that the applicants get over all of these points, the problem remains that this a poor case to raise this issue on the particular facts. The relevant facts are adverted to at paras. 67 - 72 of the No. 1 judgment, but I would highlight the following:

    (i). The board decided to omit sections of the greenway as set out in condition 2 by reason of environmental concerns. That was in accordance with the recommendation of the inspector at p. 167 of the report which proposed that parts of the greenway be omitted by planning condition pending further investigations of estuarine dynamics and consideration of an additional setback from the shoreline.

(ii). The board adopted that recommendation by providing in condition 2 for the sections from Renard Point to Cahersiveen Water Treatment Plant (Chainage c.50 to c.3,700) and Cloghanelinaghan (Chainage c.5975 to c.7100) to be omitted pending further investigation and potential increase in the buffer zone between the greenway and the boundary with the Valentia Estuary shoreline.

(iii). The omitted sections were relatively modest in the overall context of the project.

(iv). Given the environmental concerns involved, the omission of the relevant sections of the greenway was not a matter that could not have been contemplated.

(v). The decision does not ignore the possible future completion of the greenway.

(vi). Indeed, the board was aware of all aspects of the scheme.

(vii). In particular, the board was conscious of the local road network as set out in the EIA report (see maps at Ch. 9, fig. 9-1, set out in four sub-maps at pp. 5 - 8).

(viii). The greenway as submitted by the council has multiple access points (see fig. 9-1 referred to above and para. 3.3.6 of the EIA report, p. 25). So the creation of new termini does not create a wholly new issue.

(ix). The existing multiple access points inherently involve an acceptance that entry points without full visitor facilities are environmentally acceptable.

(x). The alleged impact on any European site was not supported by evidence.

(xi). The legal context is that it is clear from the EIA and habitats directive that a project can be amended following the EIA report or Natura Impact Statement.

(xii). In domestic law terms it is clear and unambiguous that the board can modify a development proposal by way of conditions.

16. If that wasn't enough, the judgment answered the question posed by the applicants in a way that the applicants cannot really complain about at the level of broad generality. What I said at para. 70 of the No. 1 judgment was that "the ultimate project approved does have to be assessed, and not just the project for which consent was sought". That was a finding by way of answer to the applicants' proposed question that is favourable to the applicants, so they cannot complain about that and indeed one cannot appeal a point in one's favour, which, as noted above, is something that probably also ought to be added to the list of factors to be borne in mind in the leave to appeal context.

17. Secondly, I said that "it is clear from the EIA and habitats directives that a project can be amended following the EIA report or NIS, so an amendment in the final decision does not automatically necessitate revised statements or going back to square one." The applicants simply haven't put up any substantial reasoned argument as to why that is incorrect. The most that they say is "[i]f revised statements are not automatically

necessary, the important question arises as to the circumstances in which they are actually necessary. This is a question of considerable importance, given the requirements of the Directive on the one hand, and the Board's powers of amendment on the other."

18. The applicants have not given any clear general answer to the question of when revised statements are necessary other than that it is a test of materiality, and that in this case the public did not have an opportunity to comment. I do not have any massive difficulty with calling it a test of materiality if that is understood in the sense of the No. 1 judgment - that is, if the condition requiring a change to the outcome is one that could have been contemplated and does not create any really new issue that was not assessed, then the condition passes the test and a further round of public participation is not required. The real question then is just the application of those general principles to the facts. So really the applicant's complaint comes down to being fact-specific.

Consistency with existing caselaw

19. For what it's worth, the applicant has not demonstrated any inconsistency between the approach I took and the jurisprudence in relation to project-splitting, not just the opinion of Advocate General Gulmann in Case C-396/92 *Bund Naturschutz in Bayern e.V. v. Freistaat Bayern, Stadt Vilsbiburg* (Advocate General of the Court of Justice of the European Union, 3rd May, 1994, ECLI:EU:C:1994:179), but also Case C-142/07 *Ecologistas en Acción-CODA v. Ayuntamiento de Madrid* (Court of Justice of the European Union, 25th July, 2008, ECLI:EU:C:2008:445, [2008] ECR I-06097), Case C-244/12 *Salzburger Flughafen GmbH v. Umweltsenat* (Court of Justice of the European Union, 21st March, 2013, ECLI:EU:C:2013:203), *Daly v. Kilronan Windfarm Ltd*. [2017] IEHC 308, [2017] 5 JIC 1103 (Unreported, High Court, Baker J., 11th May, 2017), *Fitzpatrick v. An Bord Pleanála* [2019] IESC 23, [2019] 3 I.R. 617, M28 *Steering Group v. An Bord Pleanála* [2019] IEHC 929, [2019] 12 JIC 2028 (Unreported, High Court, MacGrath J., 20th December, 2019), *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2021] IEHC 203, [2021] 3 JIC 1904 (Unreported, High Court, Barniville J., 19th March, 2021).

20. In the absence of any inconsistency in this or any respect with other caselaw it is hard to see a compelling need for leave to appeal.

21. Under those circumstances I do not need to consider the other limbs of the test.

Order

22. Accordingly, the order will be:

    (i). the application for leave to appeal is dismissed;

    (ii). I am provisionally minded to make no order as to costs in the absence of (and if made, subject to) any submission to the contrary within 7 days; and

    (iii). the issue of the stay remains listed on 19th October, 2021 for further submissions.