

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 256 J.R.]

BETWEEN

MICHAEL DUFFY

APPLICANT

AND

ENVIRONMENTAL PROTECTION AGENCY

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 11th day of July, 2014

1. The applicant is a chartered civil engineer who lives in Kilfenora, Co. Clare and he brings this case as a litigant in person seeking judicial review against the respondent arising from what he alleges are failures by the respondent to properly perform its function under the European Communities Environmental Objectives (Surface Water) Regulations 2009, transposed into Irish law by S.I. 272/2009 and under the European Communities Environmental Objectives (Ground Water) Regulations 2010, transposed into Irish law by S.I. 9/2010. Leave to issue the proceedings for judicial review were granted on appeal to the Supreme Court in respect of two only of the reliefs sought, both in the form of declaratory relief. In summary, these are as follows:-

(a) A declaration that the Environmental Protection Agency ("EPA") failed to carry out a review of authorisation DO430-01 under the Surface Water Regulation; and

(b) A declaration that the respondent by failing to act in making a decision on the authorisation in reference No. A0079-01 has failed to ensure that an authorisation under the appropriate Emission Limit Values (ELVs) is place under the Ground Water Regulation.

2. The applicant also seeks an extension of time to apply for judicial review under O. 84, r. 21(3).

3. In summary what the applicant claims is, in regard to the Surface Water Regulation that the EPA has failed to review the authorisation already granted by it, and in regard to the Ground Water Regulations that by failing to issue an authorisation by what the applicant says was the final date for such authorisation, 22nd June, 2011, that the agency has acted unlawfully.

4. The applicant is a resident of Kilfenora and in or around the year 1992, he built a house there where he lives with his family. He has over his years living there because of his interest of swimming and snorkelling, come to be concerned with regard to the quality of the sea water and makes the general point that Clare County Council, the relevant County Council with the power and duty to control environmental pollution, has failed to protect the environment and the personal health of himself and his family.

Background Facts

5. Clare County Council was until 1st January, 2014, the relevant licensee, with powers and obligations with regard to waste water disposal for Co. Clare under the statutory regime, much of which has its origin in European Directives and Regulations. Irish Water took over this function on 1st January, 2014, and assumes all functions and obligations of Clare County Council since that date. Neither Clare County Council nor Irish Water is on notice of this application.

6. The applicant claims that the discharges of waters into Liscannor and Kilfenora were in each case required to have specified limits of pollutants for the specific discharge in question. In each case an authorisation to discharge waters was granted by the EPA, and it is Mr. Duffy's argument that in each case, the relevant authorisation ought to have had an ELV stated in the authorisation. He says that this obligation arises under European law and that the authorisation was required to be identified by 20th December, 2012. Different considerations apply in respect of each of the two locations and I will deal with each in turn.

Liscannor

7. It is asserted by Mr. Duffy that polluting water is discharged into coastal waters at Liscannor. Clare County Council was granted a licence to discharge waste water from its waste water treatment plant at Liscannor on 20th October, 2011. The applicant argues that the EPA was obliged under the Surface Water Regulations 2009 to carry out a review of the licence by 22nd December, 2012. The application for the discharge licence was made by Clare County Council on 19th June, 2009 and issued on 20th October, 2011. In essence, what Mr. Duffy says is that on a true construction of Article 11 of the Regulations of 2009, that the agency was required to carry out a review of the discharge licence by 22nd December, 2012. This, he says, would have involved the EPA in fixing the level of emissions appropriate for the discharge, and that the appropriate levels or ELVs be specified in the authorisation.

8. The EU issued Directive 2000/60/EC on 23rd October, 2000, for the stated purpose of *inter alia* regulating the quality of surface water and ground water. Article 4 of the Directive required Member States, in the case of surface water, to implement necessary measures to prevent deterioration of the status of surface water, and in the case of ground water to implement measures necessary to prevent or limit the input of pollutants into such water. The Directive was transposed into Irish law by S.I. 272 of 2009, which I will call the Regulations of 2009.

9. Article 10 of the Directive, while it directed that a Member State should ensure that all discharges into surface water were controlled according to the combined approach set out in the Article, gave the Member State three options as to how this would be done, but required that the establishment or implementation of one of these three alternative measures be put in place at the latest twelve years after the entry of force of the Directive. The relevant end date was 23rd October, 2012. The Irish legislation transposing the Directive opted for the second of the two approaches provided in the article, namely that the fixing of relevant ELVs.

10. The Directive was transposed into Irish law by S.I. 272 of 2009 which came into operation on 30th July, 2009. Article 7 of the Regulations required a public authority that authorises a discharge to waters to lay down emission limits in the authorisation that satisfied the requirements therein set out, including the emission limits to establish the maximum concentration and maximum quantity of a substance permitted in a discharge, and further requires that discharges be controlled and emission limits established to the stricter of the requirements. Article 9 provides that the requirements under Article 7 shall apply to all new discharge authorisations and to reviews of existing authorisations granted, *inter alia*, under the then relevant Irish legislation.

11. Article 11 of the Regulations made specific provision for the review of existing authorisations which was required to be done by a public authority as soon as may be practicable but not later than 22nd December, 2012. What was in practice required by Article 11 was that the relevant authority examine every authorisation then in force and consider whether a review or revision of the authorisation was necessary in the light of the express requirements of the Regulations.

12. The first point Mr. Duffy makes in this application is that Article 11 applies not merely to what is described in the Regulation as "*existing authorisations*" but to all discharge licences issued before or after the coming into force of the Regulations. Thus the first question I must decide is whether Article 11 has any application at all to the discharge licence issued to Clare County Council on 20th October, 2011, and whether this authorisation was required to be reviewed or revised not later than 22nd December, 2012, the end date fixed by the Regulations for "*existing authorisation*".

13. In my view, Mr. Duffy is incorrect in this assertion. Article 11 was implemented in order to deal with and make provision for discharge licences which were in place at the time the Regulations came into force on 30th July, 2009. It provided for a review of such old licences, and required this review be carried out by December 2012. This was an understandable and necessary transitional provision and this is particularly so as the Regulations gave effect to a Directive which was made in the year 2000.

14. In interpreting the relevant application of Article 11, regard must be had to Article 9 which makes applicable the requirements in Article 7 to what is described as "*all new authorisations, and to reviews of existing authorisations*". The new Regulations were not retrospective in their effect, but once the Regulations came into force all authorisations had to be made under and be compliant with the requirements of the Regulations. Article 9 made a clear distinction between new authorisations and existing authorisations and imposed a somewhat different regime which had the effect that existing authorisations, those which were granted prior to the coming into force of the Regulations, were to be reviewed, assessed having regard to the environmental requirements and obligations of the Regulation itself, and a decision be made as to whether the authorisation needed to be revised or whether on such review it could be said no revision was required. The effect of Article 7 was to create a mechanism whereby pre-2009 discharge licences were brought into compliance with the new statutory requirements, and the review mechanism set up under the Article was necessary for that purpose.

15. I cannot accept the interpretation advanced by Mr. Duffy of Article 11. The Regulation distinguishes between new and existing authorisations, and the clear purpose of Article 11 was to require the review of authorisations which issued before the coming into operation of the new regime which imposed strict and mandatory requirements and which prohibited the discharge of materials liable to cause water pollution save with a prior authorisation. The strict requirements of the new regime, not being capable of applying retrospectively, could be imposed only following a review of existing licences and it is clear to me that Article 11 applies to only existing authorisations and required the review of these for the purposes of bringing them up to the mandatory standards. Accordingly, I refuse the first relief sought by Mr. Duffy in respect of the Liscannor licence, which in no sense can be described as an "existing licence" to which Article 11 applies, as it was granted after the new statutory regime became operational and was therefore a "new" and not an "existing" licence.

Kilfenora

16. On 22nd December, 2009, Clare County Council submitted an application for a discharge certificate in accordance with the Waste Water Discharge (Authorisation) Regulations 2007, S.I. 284 of 2007 in relation to Kilfenora. This application has not yet been decided and is still before the EPA. The application in respect of Kilfenora is for a discharge certificate, the relevant form of authorisation required for agglomerations with a population of less than five hundred persons.

17. The applicant claims that the EPA is guilty of what he describes as its "*lack of action*" in making a decision on the County Council application and has as a result failed to ensure that an authorisation and appropriate ELVs are in place for the purpose of Article 10 of Directive 2000/60/EC, Article 5 of Directive 2006/11/EC and Articles 8(a) and 12 of S.I. 9/2010 (the Ground Water Regulations).

18. What Mr. Duffy says in relation to Kilfenora is that on a correct reading of the statutory regime, an authorisation, in this case by means of a certificate having regard to the size of the population of Kilfenora, had to issue by 22nd June, 2011. As a result of the failure to determine the application there exists an illegal discharge into the surface waters in the area, amounting to environmental pollution. He may well be correct in this as the relevant water authority has issued a "boil notice" with regard to drinking water to members of the public in the area. He says that the Waste Water Discharge (Authorisation) Regulations 2007, as amended by the Waste Water Discharge (Authorisation) (Amendment) Regulations 2010 requires that all authorisations in the form of certificates should be issued by 22nd June, 2011.

19. The respondent in an affidavit of Frank Clinton sworn on 17th January, 2014, sets out various correspondence and requests for further information that have been had with Clare County Council in respect of the Kilfenora authorisation. The Agency made it clear that it was not satisfied with the responses of the County Council and the agency has been particularly vigilant in its screening of the Kilfenora application. The current position is clear, however, and Clare County Council has acknowledged in a letter of 7th June, 2012, that following a review by a hydro-geologist that there was an unacceptable level of discharge from the Kilfenora waste plant. In that letter, it was suggested that a meeting with the EPA might facilitate the reaching of a "*feasible solution to the direct discharge*".

20. Clare County Council has still not fully dealt with the EPA's requirement and it seems that one reason at least for this is the lack of resources. Recent engagement with the EPA and Irish Water in respect of the discharge certificate is ongoing.

21. From the documentation before this Court it seems that the Agency has engaged with Clare County Council, although it might well be argued that the County Council has been tardy in its responses. However, what the applicant seeks in this application is a declaration that the EPA has failed in its duties and he complains of as a "*lack of action*".

22. On the facts before me I cannot find such a lack of action, and I have noted above that Clare County Council is not named as a respondent to this application. Furthermore, what the applicant seems to seek is that this Court would impose time limits or requirements on the EPA as to how it deals with Clare County Council. This Court has no enforcement powers under the Regulations, and while the Regulations provide a number of alternative systems of enforcement, the relevant enforcement agency in each case is either the local authority, the EPA itself, the Minister or where relevant, another public authority. The court cannot interfere with

these enforcement proceedings in the absence of an application under Regulation 37 which gives power to the EPA to apply to the High Court if it is alleged that a water services authority has failed to comply with the condition of the authorisation. No such application is before me. The legislative regime makes certain non-compliance a criminal offence liable to prosecution by the Minister, the agency or a local authority. The relevant bodies may request a report from a relevant water authority, and again the relevant body that has the power to seek such support does not include this Court.

23. This is an application for judicial review and the applicant's case in regard to Kilfenora is for declaratory relief that the EPA has delayed and failed to act in regard to Clare County Council. I find as a matter of fact that it did not do so, but insofar as the applicant by this application and by seeking declaratory relief, seeks to ask this Court to step into the shoes of the enforcement agencies identified in the statutory regime as being responsible for such enforcement in the manner as outlined above, it seems to me that the Court may not do this and the Court's power does not include a power to take enforcement proceedings. The applicant has not sought mandatory relief against the EPA, but insofar as the substance of this application before the Court is for mandatory relief requiring the EPA to make a decision with regard to the Clare County Council application, such an order is not available to the applicant in circumstances where he has not joined Clare County Council, and where more particularly the evidence before me suggests that it may be Clare County Council and not the EPA which has failed to engage fully with the process.

The Previous Litigation

24. Mr. Duffy brought application for judicial review in 2012, where he sought various forms of relief by way of judicial review against Clare County Council, Limerick County Council, the EPA and the Minister for Environment, Community and Local Government. His complaints in that case were broadly similar to the complaints made in this case namely, he objected to discharges that he alleged were polluting Liscannor Bay and Kilfenora. Peart J. delivered judgment on 8th February, 2013, case 2013 IEHC 51, and rejected the application in the first place on the procedural ground that the applicant was out of time for making the application, and he refused an application for an extension of time.

25. Furthermore, Peart J. made the clear point, applicable to this application, that the High Court could not direct Clare County Council as to the manner in which it carried out its statutory function, including its function with regard to water quality.

26. The case before Peart J. concluded on 7th December, 2012, and only five days later on 10th December, 2012, Mr. Duffy commenced the process of seeking this judicial review by a letter to the EPA with regard to the matters herein complained. He sought leave to bring this application on 15th April, 2013, and while it seems to me that he may well have been out of time to bring this application, I have decided the matter on the merits and did so because of the history of the litigation, and because I believe it is prudent for the court to express its views in a matter that might continue to be contentious. In doing so I am not accepting that Mr Duffy is in time.

27. With regard to the claim made by the applicant, I must be bound by the decision of Peart J. who refused to grant *mandamus* and expressly held that the High Court had no power to direct a body, person or authority which is statutorily charged with prosecuting offenders under the Regulations, to so prosecute. At para. 32 of the judgment, he said as follows:-

"The authority is the body which is empowered to decide whether or not a particular offence has been committed, and if so, whether or not to prosecute it. The applicant cannot decide that any particular alleged set of facts should be investigated and prosecuted by the authority, and this Court cannot interfere with that function. These reliefs are not in my view arguable and the applicant is not entitled to leave to argue them. "

28. Even were I to take the view that the EPA had delayed or been tardy in any way in dealing with Clare County Council, it does not seem to me that I have a power to direct the EPA to act in a particular manner as urged upon me by Mr. Duffy. Mr. Duffy does not merely say that the EPA has failed to act in regard to Kilfenora but he urges upon me the argument that this failure to act, as he sees it, means that the authorisation with the relevant ELVs was required to be in place by 22nd December, 2013. The effect of what Mr. Duffy seeks is to require the EPA to issue a licence of a particular form and this Court has no power to so order.

29. Further, it seems to me that insofar as Mr. Duffy seeks to go further than requiring a declaration as to tardiness, he is seeking to reopen and re-litigate the matters already decided by Peart J. and such an application cannot succeed.

30. Accordingly for the reasons stated I refuse the two forms of relief sought.