Neutral Citation: [2013] IEHC 348

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2011/431JR

Between/

EILEEN STACK SHANAHAN AND GERARD SHEEHAN

Applicants

-and-

IRELAND AND THE ATTORNEY GENERAL, AN BORD PLEANALA, THE MINISTER FOR THE ENVIRONMENT, COMMUNITY AND LOCAL GOVERNMENT, THE MINISTER FOR ARTS, HERITAGE AND THE GAELTACHT, CORK COUNTY COUNCIL AND THE NATIONAL ROADS AUTHORITY

Respondents

-and-

PETER SWEETMAN

Notice Party

Judgment of Ms. Justice Iseult O'Malley delivered the 19th July, 2013.

Introduction

1. In a judgment delivered on the 12th November, 2012 this court refused the various reliefs sought by the applicants in a case concerning the decision of An Bard Pleanala to grant approval for the development by the County Council of a dual carriageway from Baile Bhuirne to Coolcour, bypassing Macroom.

2. The applicants, who represented themselves throughout the hearing, have now instructed solicitor and counsel for the purpose of seeking leave to appeal.

3. By virtue of s. 50(7) of the Planning and Development Act, 2000 as substituted by s.13 of the Planning and Development (Strategic Infrastructure) Act, the determination of the court on such an application is final save where the court grants leave to appeal. Leave is to be granted only 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."*

4. The applicants now seek certification of the following questions:

> 1. Whether the Board can be considered to have conducted an environment impact assessment within the meaning and requirements of the EIA Directive and/or the Act in circumstances where the impact of certain of the environmental factors prescribed for impact assessment by article 3 of the EIA directive were not assessed by the Board but where the Board restricted itself to considering whether the impacts on those factors identified by the Board's inspector would justify refusal by the Board of the development in question.
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> 2. Whether a development consent process that asks whether certain selected adverse environmental impacts justify refusal of a development already adjudged acceptable in light of non-adverse environmental impacts constitutes an environmental impact assessment that complies with the requirements of the EIA Directive and/or sections 171A and 172 of the Act for development projects where environmental impact assessment is a necessary pre-condition.
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> 3. Whether the Board must record the environmental impact carried out by it in such a way so as to enable the courts and interested persons to review the legality of the assessment and/or decision taken following the assessment.
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> 4. Whether section 5OB of the Planning and Development Act, at the date of issue of these proceedings and/or as amended, properly implements the State's obligations under the Aarhus Convention and for under article 10a of the EIA Directive, and/or under article 11 of Directive No. 2011/92/EU.
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> 5. Whether section 5OB of the Planning and Development Act, at the date of issue of these proceedings and/or as amended breaches the provisions of article 34.1and/or article 40.3.1of the Irish Constitution and for the principle of effective judicial protection/effective access to justice under EU law.
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> 6. Whether section SOB of the Planning and Development Act, at the date of issue of these proceedings and/or as amended, breaches the principle of equivalence and/or effectiveness under EU law.

7. In the context of this case the application is concerned with two issues. The first is the adequacy of the compliance with the EIA Directive. The second relates to the impact of s.50B of the Act, which, both in its original form and as amended, placed certain limitations on the rights of litigants to recover their costs in proceedings under the Act.

Criteria for the grant of leave to appeal

6. In *Glancre Teoranta v. Mayo County Council* [2006] IEHC 250 MacMenamin J. considered the test to be applied on an application for leave to appeal. Having referred to a number of authorities he set out ten principles governing the approach of the court. The formulation of these principles has been adopted and applied both in other cases under the planning code and in immigration cases,

where the statutory wording in relation to leave to appeal is the same. In so far as they are applicable to this case, the principles are:

> • *It is not enough that the point of law emerges in and from the case. The requirement that the point be one of exceptional importance is a clear and significant additional requirement.*
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> • *The jurisdiction to certify such a case must be exercised sparingly.*
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> • *The law relating to the proposed question must be in a state of uncertainty. It must be necessary in the public interest that the law be clarified so as to enable the courts to administer that law not only in the instant, but in future cases.*
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> • *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.*
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> • *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.*
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> • *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".*
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> • *Normal statutory rules of construction apply which means inter alia that "exceptional" must be given its normal meaning.*
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> • *"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.*
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> • *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.*

7. These principles were adopted and followed by Clarke J. (in *Harding v. Cork County Council* [2006] IEHC 450) who added a caveat that there might be some cases where the point did not arise from the decision because, due to inadvertence, it might not have been considered in the judgment.

Submissions on behalf of the applicants

8. Dealing with the first three proposed questions ("the EIA points") Mr. Conleth Bradley SC submitted that the applicants had challenged the decision of the Board on the basis that the Board had failed to satisfy the requirement of Article 3 of the Directive in that it failed to assess the project's direct and indirect effects in an appropriate manner. The applicants had, is submitted, argued that there was nowhere in the decision-making process a consideration of the interrelationship between the impacts on cultural heritage and the impacts on landscape, in particular the landscape that is the physical setting of Carrigaphooca Castle and the stone circle.

9. In support of this argument, for the purposes of this application, the applicants' submissions rely on the analysis of the Board's decision found in the affidavit of the notice party, where the criticism was made that the Board failed to "identify, describe and assess in an appropriate manner" the impacts of the project. It is also noted that the first named applicant had focussed on the failure of the Board "to give due consideration principally to the cultural heritage, landscape and aesthetics in the heritage rich environment of Carrigaphooca".

10. It is submitted that in giving judgment in this case the Court made no explicit finding as to the legality of the Board's process having regard to the EIA Directive but restricted itself to finding "no material flaw" in that process. It is therefore submitted that the Court either inadvertently failed to deal with the questions as to the validity of the Board's process in relation to environmental impact assessment, or found that the Board properly acquitted itself in that regard. In either case, it is said, the decision of the Court involves a point of exceptional public importance relating to the sufficiency of the assessment carried out by the Board.

11. The argument here is that, having regard to the views of the European Court of Justice expressed in *Case C-50/09 Commission v. Ireland* (in which the Court found that Ireland had not, at that stage, adequately transposed the requirements of the EIA Directive), the Board itself must "identify, describe and assess in an appropriate manner" the "direct and indirect effects" of the project on human beings, flora, fauna, soil, water, air, climate, the landscape, material assets, cultural heritage and the interaction between all of these factors. It is not, therefore, sufficient to record the findings of the Inspector and then set out the view of the Board that the impacts identified by him did not justify refusal of the development.

12. Further or in the alternative it is submitted that if the Board could be described as having carried out an assessment it did not properly describe or record it in writing. It is argued that this is an inherent obligation under the EIA Directive, now recognised and enforced by the European Union (Environmental Impact Assessment) (Planning and Development Act 2000) Regulations 2012 (SI 419/2012).

13. Following Mr. Bradley, Mr. Michael O'Donnell BL submitted that in paragraph 49 of the judgment the Court had effectively applied an *O'Keeffe*-type test, which he said was not an appropriate approach to the question whether the Directive had been complied with. He submitted that there must be a review procedure which allows a review of the substance of the decision, not simply the procedural legality of the process. The absence of such a substantive review was described as a fundamental omission in the case. It was contended that the court can itself conduct an EIA.

14. Mr. O'Donnell accepted that no submission to this effect had been put before the court, but pointed out that the applicants did not have the benefit of legal advice.

15. In relation to the proposed questions 4, 5 and 6 ("the 5OB points"), Mr. Bradley submitted that s. 5OB as it stood at the date of commencement of the proceedings, did not properly implement the State's obligations under the Aarhus Convention, was in breach of Article 34.1 and Article 40.3.1 of the Constitution and was in breach of European Union law. It was submitted that the applicants had made a protected costs application, which somehow got mixed up with the application to amend the proceedings to include the compulsory purchase order.

16. Anticipating the argument of the respondents that the issue did not arise until costs came to be determined, Mr. Bradley cited the judgment of the Court of Justice in the case of *R (on the application of Edwards and Pallikaropoulos) v. Environment Agency & Ors.* (C-260/11, 11th April 2013) dealing with certain questions referred by the United Kingdom Supreme Court, as authority for the proposition that the question could be looked at either prospectively or at the end of the proceedings.

Discussion

The EIA points
17. Reviewing the judgment, it is apparent that there are aspects which could have been explained with greater clarity or with more extensive citation of authority. However, I think it best to avoid the temptation to improve or strengthen it at this stage and to leave it as it stands.

18. Counsel now retained on behalf of the applicants have, as one would expect, presented their arguments with skill. However it seems to me that, ultimately, the points they make either were not in issue in the case as it ran, and therefore do not arise from the judgment, or were decided on the basis of very well established authority.

19. The argument put forward by Mr. O'Donnell simply does not arise and for the purpose of this application it is not sufficient to say that the applicants did not have the benefit of legal advice. Leave to appeal cannot be given on a point that was not made at first instance.

20. The applicants have submitted that the court did not make "an explicit finding as to the legality of the Board's process". This is somewhat difficult to understand in circumstances where the applicants devoted a great deal of time and energy on the proposition that the Board's process was fundamentally invalid, for very many reasons, and the court in its decision upheld the Board. The finding of "no material flaw" is a finding that there was no illegality.

21. The applicants' case was built upon a very extensive factual critique of the entire process from the public consultation/information stage through to the decision of the Board. They cited an equally extensive volume of case-law. However, there was no legal issue on which the authorities conflicted or where the court found any doubt or uncertainty as to the applicable law. The legal findings are based on very well-established legal principles.

The 50B(2) points
22. Section 5OB(2) of the Planning and Development Act, 2000, as amended, provided at the date of the institution of these proceedings that in cases to which it applied (this case being one such) "*each party (including any notice party) shall bear its own costs*." As an exception, an award of costs could be made in favour of a party "*in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so*". There were also exceptions where costs might be awarded against a party whose claim or counterclaim was frivolous or vexatious, or who was in contempt of court, or because of the manner in which the litigation was conducted.

23. The applicants in this case were granted leave to seek a declaration that "*the matters of this judicial Review are of "Public Importance': are of "Special Circumstances" and are "in the interests of justice" to merit any relief that the Court deems suitable*". This was clearly a reference to the provisions of s. 5OB, with a view to the possibility of a costs application.

24. At the hearing, the applicants wished to file an amended statement of grounds, which amended their pleadings in relation to a number of aspects. As set out in paragraphs 7 and 8 of the judgment, most of the amendments were uncontroversial. However, objection was taken to the addition of two new reliefs. The court reserved its decision on those matters and did not grant leave, having regard to the fact that the applicants had not previously sought leave despite having been told by the President almost a year earlier that any proposed amendments should be brought forward by the 31st July, 2011.

25. On the day on which the judgment was given, it was explained to the applicants (with the assent of counsel for the other parties) that if they wished to appeal a refusal of leave, they were required to mention the matter in the Supreme Court. I am not aware any application having been made in that regard.

26. No decision was made in respect of the declaratory relief in respect of s.50B(2) for which the applicants did have leave because, by agreement between the parties, costs issues were left over until the end of the case.

27. It seems to me therefore that the application for leave to appeal in relation to this issue is misconceived. There is no point of law determined in the judgment which could give rise to the proposed questions.

Conclusion
28. Having regard to the foregoing, I refuse leave to appeal on the proposed questions.