

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 363 J.R.]

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000
(AS AMENDED)**

AND IN THE MATTER OF AN APPLICATION

BETWEEN

ANNA AHERNE, GLEN BARRY, DERMOT CAHILL, JOHANNA CAHILL, BENNY FLAHERTY, PADDY HISTON, JIM HICKEY, COLUM HORGAN, JOHN MURPHY, BARBARA O'GORMAN, SEAMUS ROCHE,

MICK WALLEY, AIDEEN WHITSTON AND TOM WOOD

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CORK DOCKYARD HOLDINGS LIMITED AND COBH TOWN COUNCIL

NOTICE PARTIES

JUDGMENT of Mr. Justice Noonan delivered the 3rd day of October, 2016

1. This is an application by the applicants for a certificate pursuant to s. 50A(7) of the Planning and Development Act 2000, giving leave to the applicants to appeal the judgment delivered by me in this matter on 23rd April, 2015. This section, as amended, provides:-

"The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the Court of Appeal 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 Court of Appeal."

2. The applicants have formulated six questions in respect of which they seek certification pursuant to the section. These are:-

"(1) Does an EIA as defined by s. 171A of the Planning and Development Act and Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (the "EIA Directive") have to be recorded by the decision maker?

(2) If such a record of an EIA is required, what are the legal requirements for such a record for the purpose of s. 171A and s. 172 of the Planning and Development Act 2000 and the EIA Directive?

(3) If a record of the Board's EIA is required, to what extent does the EIA have to be separately recorded by the Board where the Board does not adopt the recommendation and/or report of its inspector?

(4) What are the legal requirements for the record of or information to be made available to the public relating to the evaluation of the direct and indirect effects of the proposed development on the matter set out in s. 171A to ensure compliance with s. 172(1J) of the Planning and Development Act 2000, as interpreted in the light of the EIA Directive?

(5) To what extent does the said evaluation or information have to be separately recorded and/or made available to the public by the decision maker where the decision maker does not adopt the recommendation and/or report of its inspector?

(6) Is the Board entitled, for the purposes of s. 172(1H) of the Planning and Development Act 2000 and Directive 2011/92/EU, to adopt the EIS furnished by the developer as its EIA, or part thereof, and if so, what steps must be taken by the Board to ensure its effective adoption?"

The Applicable Test

3. The principles to be applied in applications of this nature are set out in the judgment of MacMenamin J. in *Glancré Teoranta v. An Bord Pleanála* (Unreported, High Court, 13th July, 2006) and have been followed in many cases. They bear repeating:-

"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."

4. These principles must, I think, now be regarded as settled.

The Earlier Judgment

5. The main relief sought in these proceedings was a declaration that the respondent ("the Board") failed to carry out an Environmental Impact Assessment (EIA) in accordance with s. 172 of the Planning and Development Act 2000, as amended, ("the PDA"). As noted in the judgment, the only issue arising for consideration was the impact of vehicular road traffic arising from the proposed development. With regard to the applicants' case, I noted the following:-

"[13.] The principle thrust of the applicants' argument in this regard is that the Board failed to carry out an EIA contrary to the requirements of the PDA. Alternatively, they argue that if such an EIA was carried out, there is no record of the Board's examination, analysis and evaluation, nor does the Board describe and assess the direct and indirect effects of the proposed development on human beings, and in particular the applicants. They further argue that insofar as the Board in its reasons and considerations stated that it completed an EIA and considered the Inspector's report, the conclusions of which were broadly accepted, the Board failed to identify which conclusions it did in fact accept and which it did not. This left the applicants in the position of being unable to identify the reasons for the decision with sufficient clarity to enable them, and indeed the court, to consider whether the decision was lawfully arrived at. A number of well known authorities in support of that proposition were relied upon."

6. In the course of my judgment, I held that the Board's decision recorded that it did carry out an EIA. In that regard, I said:-

"[22.] However, there is no requirement in the PDA that the Board must state in writing within its own decision what the EIA comprises and it seems to me that once it is clear from the terms of the decision and the documents therein referred to how the EIA was arrived at that this satisfies the Board's obligations under s. 172."

7. I decided that the Board was entitled to adopt Cork Dockyard Holdings Ltd's EIS under s. 172(1H) in order to carry out its EIA. I did not, however, decide, as question 6 appears to imply, that the Board had adopted the EIS as its EIA. In the result, I came to the view that the decision made clear that the Board had engaged with the issue of traffic that was of concern to the applicants who were left in no doubt as to the reasons for the decision.

The Questions

Question (1): Does an EIA, as defined by s. 171A of the Planning and Development Act 2000, and Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (the "EIA Directive") have to be recorded by the decision maker?

This question appears to be predicated on the underlying assumption that the judgment herein concluded that an EIA does not have to be recorded by the decision maker. In para. 4.5 of their submissions, the applicants suggest that I concluded that there is no requirement for a record of the EIA. That is incorrect. Para. 22 of the judgment above quoted makes that clear.

8. The Board's decision on its face states that it carried out an EIA. It cannot, therefore, be said that there is no record of an EIA having been carried out. The applicants' complaint rather is that the record is insufficient, an issue dealt with in the judgment.

9. This question, therefore, does not arise from the terms of the judgment itself. That is a prerequisite for compliance with the *Glancré* criteria. Further, in my view, there is no uncertainty in the law relating to the recording of EIA's. (See *Ratheniska Timahoe and Spink (RTS) Substation Action Group & Anor. v. An Bord Pleanála & Anor* [2015] IEHC 18 and *Buckley v. An Bord Pleanála* [2015] IEHC 572). The applicants place reliance on the recent judgment of Barton J. in *Balz v An Bord Pleanála* (Unreported, High Court, 25th February, 2016) where it was held that it was not possible to determine from the decision if the Board complied with its obligation to carry out and complete an EIA. They suggest that this gives rise to uncertainty in the light of my findings but I am satisfied that the conclusion of Barton J. was arrived at by the application of settled principles to the particular facts of that case and thus no uncertainty arises.

10. The existence of such uncertainty is, in any event, a further and cumulative requirement which is not satisfied in relation to this question.

Question (2): If such a record of an EIA is required, what are the legal requirements for such a record for the purpose of s. 171A and s. 172 of the Planning and Development Act 2000 and the EIA Directive?

11. It must be borne in mind that in applications for leave to appeal such as this, although the points of law allegedly arising are frequently couched in neutral terms, as here, in reality the applicant must make the case that the trial judge erred in his or her

determination of a particular point of law which must possess the characteristics previously identified. At the end of the day, as in any appeal, the appellant must convince the appeal court that the judgment in question was wrong. The procedure is not one akin to a consultative case stated where a court of first instance may seek the guidance of a higher court as to how a particular point of law should be determined to facilitate the final decision. In the light of that, it is somewhat difficult to see how question (2) arises from the judgment herein. Here again, there is, in any event, no uncertainty as to what the section requires. (See section 172(1J) quoted in full in the judgment)

12. The applicants appear to be contending that the Board has an obligation to separately set out the detail of an evaluation of the direct and indirect effects of the proposed development on the matters set out in s. 171A, but this point has been rejected in other cases and no uncertainty arises. (See *People Over Wind v. An Bord Pleanála* [2015] IEHC 271 and *Ratheniska Timahoe and Spink (RTS) Substation Action Group & Anor. v. An Bord Pleanála & Anor* [2015] IEHC 18)

Question (3): If a record of the Board's EIA is required, to what extent does the EIA have to be separately recorded by the Board where the Board does not adopt the recommendation and/or report of its inspector?

13. This question is predicated on the assumption that the Board did not adopt the report of its inspector. I came to the opposite conclusion. The decision of the Board expressly recorded that it completed an EIA which considered the EIS, the inspector's report and his conclusions which were broadly accepted. I concluded that a reading of the decision as a whole indicated that the Board accepted the inspector's conclusions with the exception of his recommendation to refuse permission. There is, therefore, no question that the Board did not adopt the inspector's report.

14. I expressly noted that the Board reached a different conclusion from the inspector based on the same evidence, that evidence obviously being the content of his report as well as the other material before the Board. It seems to me, therefore, that this question cannot arise from the judgment. In the judgment, I drew attention to the fact that there was no dispute on the evidence with regard to traffic movements and their effect on the environment. What was at issue was whether such effect was acceptable from a planning point of view, quintessentially a matter for the expertise of the Board as I decided. In its decision, the Board gave clear and readily understandable reasons for reaching a different conclusion from the inspector. It was simply a difference of opinion. In my view, no point of law arises here, less still one that could be said to be uncertain in any respect.

15. Insofar as the applicants now place reliance upon *Commission v. Ireland* Case C-50/09, this was never raised in the course of the original hearing, was not the subject of any determination by me and cannot thus arise from the judgment.

Question (4): What are the legal requirements for the record of or information to be made available to the public relating to the evaluation of the direct and indirect effects of the proposed development on the matter set out in s. 171A to ensure compliance with s. 172(1J) of the Planning and Development Act 2000, as interpreted in the light of the EIA Directive?

16. This point appears to substantially overlap with point (2) above. Insofar as it relates to information being made available to the public, this does not arise from the judgment and was not an issue raised or canvassed at the hearing.

Question (5): To what extent does the said evaluation or information have to be separately recorded and/or made available to the public by the decision maker where the decision maker does not adopt the recommendation and/or report of its inspector?

17. This point appears in substance to be essentially the same as point (3) as the first part which I have already dealt with. As to the second part regarding making the evaluation available to the public, this overlaps with Question (4) dealt with above.

Question (6): Is the Board entitled, for the purposes of s. 172(1H) of the Planning and Development Act 2000 and Directive 2011/92/EU, to adopt the EIS furnished by the developer as its EIA, or part thereof, and if so, what steps must be taken by the Board to ensure its effective adoption?

18. As I have already made clear, I did not conclude that the Board adopted the EIS as its EIA. Accordingly, this point cannot arise.

Conclusion

19. For these reasons, therefore, I am satisfied that no point of law of exceptional public importance arises in this case nor is there any uncertainty in the law arising as a result of the judgment herein.

20. Accordingly, I refuse this application for a certificate pursuant to section 50A(7).