Neutral Citation: [2014] IEHC 557

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2014 No. 320 J.R.]**

**BETWEEN**

**ROSSMORE PROPERTIES LIMITED AND KILLROSS PROPERTIES LIMITED**

**APPLICANTS**

**AND**

**AN BORD PLEANALA**

**FIRST NAMED RESPONDENT**

**AND**

**IRELAND AND THE ATTORNEY GENERAL**

**SECOND AND THIRD NAMED RESPONDENTS**

**AND**

**EIRGRID PLC.**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Hedigan delivered on the 24th day of November 2014**

1. This is an application for a certificate for leave to appeal the judgment herein pursuant to s. 50A(7) and s. 50A(11) of the Planning and Development Act, as inserted by s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006.

2. Section 50A(7) of the Planning and Development Act 2000 ("the 2000 Act") provides:

> *"that the determination of the Court of an application for leave to apply for judicial review or of the substantive application is final. . and no appeal shall lie from the decision of the Court to the Supreme Court 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 Supreme Court."*

Section 50A(11) confers the Supreme Court with jurisdiction to only determine the point of law certified by the trial judge and to only make orders consequent upon that determination. An applicant seeking certification must satisfy the Court that

> (*a*) the point or points of law which are proposed are of exceptional public importance and
>
> (*b*) that is desirable in the public interests that an appeal should be taken to the Supreme Court.

3. The principles to be applied in an application such as this were outlined by MacMenamin J. in *Glancré Teoranta v. An Bord Pleanála and Mayo County Council* [2006] IEHC 250, as follows:

*"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."*

The above principles were followed by Clarke J. in *Arklow Holidays Ltd. v. An Bord Pleanála* [2008] IEHC 2. Clarke J. held that:

*"(a) The decision must involve a point of law of exceptional public importance;*

*(c) it must be desirable in the public interest that an appeal should be taken to the Supreme Court;*

*(d) there must be uncertainty as to the law and*

*(e) the importance of the point must be public in nature and transcend the individual facts and parties of a given case."*

3. The applicants have raised four questions for certification. The first of these is:

*"By what standard must the courts assess the decisions taken by a Competent Authority on an appropriate assessment and the screening for an appropriate assessment?"*

4. The applicants cite a passage at para. 5.7 of the judgment herein as follows:

*"It seems clear that the Board had relevant evidence before it upon which it could decide that an AA was not required It had evidence both for and against the proposition, and in my view, its decision was well within its jurisdiction and was made by it in the exercise of a planning function. Moreover, in my view it applied the correct test in its consideration of the development in this context."*

This Court further stated at para 4, p. 4 of the judgment herein that:

*"All that is required of the Board is that there be some material to support its decision and that it gives reasons for its decision."*

And further, the applicants note that this Court relied on its own judgment in *Craig v. An Bord Pleanála* [2013] IEHC 402, where it said of the Stage One screening decision that:

*"The Board's decision on such matters is an exercise by it of its planning expertise and challengeable."*

The applicants refer the Court to the decision of Finlay Geoghegan J. of 25th July 2014 in *Kelly v. An Bord Pleanála* [2014] IEHC 400, where she stated:

*"... it appears to me that whilst the requirement for an appropriate assessment has been implemented in Ireland by amendment of the Planning Acts and requires to be carried out inter alia as part of the planning process, the determination which must be made by the Board as competent authority it is not a 'planning decision' in the sense used in the judgments relating to reasons relied upon by the Board. In such a planning decision, the Board is exercising a jurisdiction with a very wide discretion. By contrast, the determination it must make as part of an appropriate assessment is significantly narrower and legally constrained as explained in the CJEU cases cited. It also determines the Board's continuing jurisdiction to grant planning consent, and therefore a decision which goes to its jurisdiction.*

Is this judgment at variance with the judgment of the court herein? It seems to me that the decision of Finlay Geoghegan J. deals with the nature of a Stage Two appropriate assessment. Such an assessment, as identified by her, requires a very specific type of analysis, evaluation and decision. This is because it occurs where, on a Stage One screening, it has been determined that it is likely a certain project will have a significant effect on a European site. Thus, she finds a stage two assessment must be accompanied by a more detailed reasoning than would occur in the wider jurisdiction of a normal "planning decision". I think the rationale of this decision is limited to stage two assessments because the stage two appropriate assessment with which it deals must analyse the probable (likely) effects the better to deal with them or justify outruling them. Where the finding is that there is no such likelihood of effects, then there is, by definition, very much less to find, analyse and assess. That seems to be exactly the case here. The Board determined, on the basis of the Eirgrid and FERS report that there was no need for a Stage Two assessment. Thus, the high level of reasoning required in *Kelly* did not arise here. Finlay Geoghegan J. in the last sentence of para. 49 held that different levels of reason were required by different types of decision. Here, the decision at Stage One not to have a Stage Two assessment required much less elaborate reasoning than that required upon such a Stage Two assessment. Moreover, as stated by Finlay Geoghegan J. at para. 50, dependent on the relevant facts, some or all of the obligations of the Board to give reasons for its determination may be satisfied by the findings made and conclusions reached by the Board's Inspector. Here, the Board did just that. I find nothing relevant to this case to be inconsistent with the judgment of Finlay Geoghegan J. in *Kelly*. As for the *Meadows* decision, I note this Court's consideration in *Harrington v. An Bord Pleanála* [2010] IEHC 428, where the Court stated:

*"In Meadows v. Minister for Justice [2010] IESC 3, Denham J. recognised that the test for irrationality still applies to the decisions of An Bord Pleanála:-*

*'The decision in O'Keeffe v. An Bord Pleanála related to a specialised area of decision making where the decision maker has special technical or professional skill. A court should be slow to intervene in a decision made with special competence in an area of special knowledge. The O'Keeffe v. An Bord Pleanála decision is relevant to areas of special skill and knowledge, such as planning and development'."*

Thus, there is no inconsistency between the judgment here and that of the Supreme Court in *Meadows.* The applicants have based their application in respect of Question 1 on the proposition that there is an inconsistency between the *Kelly* case and the *Meadows* case. As noted above, in my view, no such inconsistency exists. No state of uncertainty exists in the law and thus this question is not one requiring certification.

5. The second question raised by the applicants is:

*"By what criteria must the Court assess the Competent Authority Stage One screening decision on whether an*

*appropriate assessment is required? For example, is an appropriate assessment required if there is a possibility of there being a significant effect?"*

The criteria referred to in Question 2 is set out by the CJEU in *Waddenzee* [2004] ECR 1-7405, where it held as follows:

> *"39. According to the first sentence of Article 63 of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.*
>
> *40. The requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site.*
>
> *41. Therefore the triggering of the environmental protection mechanism provided for in Article 6(3) of the Habitats Directive does not presume- as is, moreover, clear from the guidelines for interpreting that Article drawn up by the Commission entitled 'Managing Natura 2000 Sites: The Provisions of Article 6 of the Habitats Directive (92143/EEC)'- that the plan or project considered definitely has significant effects on the site concerned butfollows from the mere probability that such an effect attaches to that plan or project.*
>
> *42. As regards Article 2(1) of Directive 85/337, the text of which, essentially similar to Article 6(3) of the Habitats Directive, provides that 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment . .. are made subject to an assessment with regard to their effects, the Court has held that these are projects which are likely to have significant effects on the environment (see to that effect Case C-117102 Commission v. Portugal [2004] ECR 1-0000, para. 85).*
>
> *43. It follows that the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned."*

Thus, it is clear from both *Waddenzee* and the judgment herein that the criteria is likelihood or probability, not possibility. No question arises; no uncertainty exists in the law. This question also fails the test for certification.

6. The third question raised by the applicants is:

> *"To what extent is the Competent Authority entitled to take account of mitigation measures in the Stage One screening decision in determining that there would be no likely significant effect on an SAC?"*

The first thing to be noted in regard to this question is that this Court has found as a matter of fact that the mitigation measures proposed were an intrinsic part of the work to be carried out. This being so, the issue was decided by this Court in relying upon the judgment in *Hart v. Secretary of State for Communities and Local Government & Ors.* [2008] EWHC 1204 (Admin.) at para. 50 onwards and notably at para. 61 that, where mitigation measures are an intrinsic part of the project in question, they may be taken into account in the stage one screening process. This decision was considered and followed in the High Court of Northern Ireland in *Alternative A5 Alliances Application for Judicial Review* [2013] NIQB 30, and, of course, in this case. Thus, there are decisions of three jurisdictions supporting this principle. There is, thus, both no uncertainty in relation to this point, nor is there any pressing need within a sparing jurisdiction to further litigate the point, notably where the work involved has already been done. Indeed, in a certain sense, the issue is now moot. In any event, there is no uncertainty or any pressing need to further litigate this point and it, therefore, also fails the test for certification.

7. The fourth and final question raised by the applicants is:

> *"Whether the powers of the ESB - as the persona designata -pursuant to section 53 of the Electricity (Supply) Act 1927 were transferred to Eirgrid by Article 29 of the European Communities (Internal Market in Electricity) Regulations 2000 (S.J 445 of 2000). Is the answer to the above dispositive of the issue as to whether Eirgrid is a statutory undertaker/or the purposes of the exemptions in the Planning Code?"*

I find no merit in this question. It is quite clear from the legislation cited that Eirgrid is a statutory undertaker. This is a clear finding of fact and is dispositive of the issue. There is no public uncertainty in regard to the matter. Thus, this ground for certification also fails.

8. Thus, all four questions raised by the applicants for certification fail and I refuse leave to appeal.