Neutral Citation [2014] IEHC 381

THE HIGH COURT

[2013 No. 40 J.R.]

BETWEEN

WATERVILLE FISHERIES DEVELOPMENT LIMITED

APPLICANT

AND

AQUACULTURE LICENSES APPEALS BOARD AND THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE (No.2)

RESPONDENTS

AND

(BY ORDER) SILVER KING SEA FOODS LIMITED T/A MARINE HARVEST IRELAND

NOTICE PARTY

JUDGMENT of Mr. Justice Gerard Hogan delivered on 25th July, 2014

1. This is an application for leave to apply for judicial review in respect of a decision of the Acquacultural Licenses Appeals Board ("the Board") dated 31st October, 2012. By that decision the Board confirmed an earlier decision of the Minister for Agriculture, Fisheries and Food on 22nd March, 2011, to grant a temporary licence for the amendment of operating procedures to the notice party, Silver King Seafoods Ltd. ("Silver King") in respect of the latter's salmon farming site at Deenish Island, Ballinskelligs Bay, Co. Kerry.

2. This is now the second judgment on this application for leave. In the first judgment delivered on 8th April, 2014 ([2014] IEHC 248) I held that the applicant had the requisite *locus standi* to pursue this application for judicial review. I also ruled that the proceedings were not in themselves irregularly constituted and were valid. It had been agreed that those issues should be finally determined by me on a preliminary basis (subject, of course, to the question of any appeal).

3. It is further agreed that I should now determine the remaining issues in a slightly different way, so that I would adjudicate on the question of whether the applicant could demonstrate the existence of substantial grounds within the meaning of the statutory test contained in s. 73(2)(b) of the Fisheries (Amendment) Act 1997 ("the 1997 Act") for contending that "the decision or determination is invalid or ought to be quashed" in respect of the substantive grounds on which it seeks this relief. This application has been heard on notice to both the Board and Silver King.

4. That salmon farm itself first become operational in 1989. Silver King acquired the farm in 2005 and operated the farm pursuant to a Licence No. T 6/202 AQ 199. In January, 2010 the Waterville Fisheries Development Group ("the Group") complained to the Minister contending that this licence should be revoked. Following the making of submissions by the relevant parties, the Minister made a decision on 9th April, 2010, not to revoke the licence. On the 28th April, 2010, the Minister informed the parties that the licence was not to be revoked.

5. In February, 2011 Silver King applied to the Minister for permission to amend the licence to permit new stocking arrangements at the farm. Silver King maintained that this new stocking arrangements would allow for what is termed an "all out, all in" arrangement which would permit the stocking of 800,000 smolt every two years rather than the existing arrangement of 400,000 smolt per year. While Silver King contend that this would lead to an amelioration of the environmental impact of the farm and that this would be in line with best international practice, this is hotly disputed by the applicant and others.

6. As it happens, the Minister granted the licence amendment on 22nd March, 2011, but this was appealed by a number of objectors (including the Group) to the Board. In a letter dated 9th May, 2011, the Group sought an oral hearing and paid the requisite fee.

7. So far as the remaining issues are concerned, the principal objection relates to the manner in which the Group's application for an oral hearing was rejected by the Board and the failure to give reasons for this refusal. The applicant expressly abandoned any suggestion of bias on the part of the Board.

8. Section 49(1) of the 1997 Act provides in relevant part that the Board:

> "... of its own motion or at the request of a party, shall have an absolute discretion to hold an oral hearing of an appeal under this Chapter."

9. Section 49(5) further provides that:

> "Where the Board is requested to hold an oral hearing of an appeal and decides to determine the appeal without an oral hearing, it shall serve notice of its decision on the person who requested the hearing, on each other party to the appeal and on each person who, in accordance with section 45, made submissions or observations to the Board in relation to the appeal."

10. At the hearing, counsel for the applicants, Mr. Mulloy S.C. made three separate points regarding the question of an oral hearing. First, he submitted that the Board had not been made properly aware of the fact that the applicants had made a request for an oral hearing. Second, he submitted that the Board had not given reasons for the failure to hold an oral hearing. Third, he submitted that the Board had not complied with the requirements of s. 49(5) of the 1997 Act in that the applicants were informed of the refusal to hold an oral hearing only after receiving notification that their objection to the grant of the temporary licence had been rejected by the Board. For their part, counsel for the Board, Mr. Galligan S.C., and counsel for the notice party, Mr. Mulcahy, stressed the wide amplitude of the discretionary powers vested in the Board by s. 49(1). Against that background, it seems appropriate first to consider

the nature of the discretion conferred on the Board by s. 49(1).

The nature of the discretion conferred on the Board by s. 49(1)

11. In their submissions concerning the nature of the discretionary power contained in s. 49(1) of the 1997 Act, Mr. Galligan S.C, and Mr. Mulcahy not unnaturally emphasised the fact that the Board's discretion regarding the holding of an oral hearing is described as "absolute". Yet s. 49(1) cannot be literally read in this fashion. As Article 5 of the Constitution makes clear, the State is a democracy. A central element of this guarantee of democratic government is that the State is governed by the rule of law. It has been in any event axiomatic since the Supreme Court's decision in *East Donegal Co-Operative Ltd. v. Attorney General* [1970] I.R. 317 that the Constitution requires all discretionary powers must be exercised fairly, reasonably and in accordance with their statutory purposes. The whole scheme of the Constitution pre-supposes that citizens can have recourse to the judicial branch to ensure that these statutory powers are exercised in this manner.

12. If, accordingly, the Oireachtas purported to vest the Board with an essentially arbitrary or even autocratic power, this would amount in itself to a violation of the guarantee of democratic government in Article 5. On this basis, therefore, if s. 49(1) was to be read entirely literally, it would be unconstitutional insofar as purported to give the Board an absolute power which, on this definition, could be exercised in a fashion which did not require objective justification by reference to principles of *vires*, reasonableness and fair procedures. The Board would be thereby effectively rendered immune from judicial scrutiny and oversight in the manner in which it exercised this power and it would freed, for example, from the constitutional obligation to abide by the principles of fair procedures.

13. Section 49(1) must, of course, be given a constitutional interpretation where it is reasonably possible to do so without doing actual violence to the statutory language. Applying, therefore, the double construction test (*McDonald v. Bord na gCon* [1965] I.R. 217), s. 49(1) must accordingly be read as if it merely vested the Board with a wide and flexible power to decide whether to hold an oral hearing. It cannot be read as granting the Board any wider power, nor can the Board be dispensed from the obligation to give reasons for its decision not to hold an oral hearing.

14. These principles were, in any event, confirmed by the Supreme Court in its seminal decision in *Mallak v. Minister for Justice and Equality* [2012] IESC 59. In that case the Minister for Justice contended that the absolute discretion vested in the Minister by s. 15 of the Irish Nationality and Citizenship Act 1956 meant that he was not required to give reasons for his decisions as to whether to grant citizenship to an application seeking naturalisation in this fashion. Fennelly J. rejected the argument the "absolute" nature of the discretion enabled the Minister to dispense with the obligations to give reasons:

> "It cannot be correct to say that the "absolute discretion" conferred on the Minister necessarily implies or implies at all that he is not obliged to have a reason. That would be the very definition of an arbitrary power. Leaving aside entirely the question of the disclosure of reasons to an affected person, it seems to me axiomatic that the rule of law requires all decision-makers to act fairly and rationally, meaning that they must not make decisions without reasons. As Henchy J. put it, in a celebrated passage in his judgment in *The State (Keegan) v Stardust Victims' Compensation Tribunal* [1986] I.R. 642, 658, "the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."
>
> In similar vein but with slightly different emphasis, Walsh J., in his judgment in *East Donegal Co-Operative Marts Ltd. v Attorney General* [1970] I.R. 317, 343-4 said of the powers conferred on a Minister, under consideration in that case, which were exercisable "at his discretion" or "as he shall think proper" or "if he so thinks fit" are powers which may be exercised only within the boundaries of the stated objects of the Act; they are powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or an unqualified or an arbitrary power to grant or refuse at his will."
>
> The fact that a power is to be exercised in the "absolute discretion" of the decision-maker may well be relevant to the extent of the power of the court to review it. In that sense, it would appear potentially relevant principally to questions of the reasonableness of decisions. It could scarcely ever justify a decision-maker in exceeding the limits of his powers under the legislation, in particular, by taking account of a legally irrelevant consideration. It does not follow from the fact that a decision is made at the absolute discretion of the decision-maker, here the Minister, that he has no reason for making it, since that would be to permit him to exercise it arbitrarily or capriciously. Once it is accepted that there must be a reason for a decision, the characterisation of the Minister's discretion as absolute provides no justification for the suggestion that he is dispensed from observance of such requirements of the rules of natural and constitutional justice as would otherwise apply. In this connection I agree with the following remarks of Hogan J., regarding the provision under consideration in this case, in his judgment in *Hussain v. Minister for Justice* [2011] IEHC 171:
>
> "This description nevertheless cannot mean, for example, that the Minister is freed from the obligations of adherence to the rule of law, which is the very "cornerstone of the Irish legal system": *Maguire v. Ardagh* [2002] 1 I.R. 385 at 567, per Hardiman J. Nor can these words mean that the Minister is free to act in an autocratic and arbitrary fashion, since this would not only be inconsistent with the rule of law, but it would be at odds with the guarantee of democratic government contained in Article 5 of the Constitution."

15. A similar approach is to be found in *Murphy v. Ireland* [2014] IESC 19, [2014] 1 I.L.R.M. 457. In that case the Supreme Court held, following the analysis of Fennelly J. in *Mallak,* that Director of Public Prosecutions must, in principle, at least, give reasons for her decision to transfer an accused person for trial from the ordinary courts to the Special Criminal Court. As O'Donnell J. explained ([2014] 1 I.L.R.M. 457, 486):

> "Nevertheless, trial by jury is a constitutional requirement in those cases to which it applies. A decision which has the effect of removing a case which would otherwise be tried by a jury to be tried by a judge or judges alone is a decision which must comply with the dictates of the Constitution. Accordingly, the Court considers that it is necessary in such a case that the Director of Public Prosecutions, if requested, should either give such reason, or, as contemplated in *Mallak*, justify a refusal to do so."

16. Applying these principles to the present case, it is plain that the Board is required to give reasons for its decision not to hold an oral hearing or, at the very least, be prepared to justify its failure to give such reasons. These reasons need not be elaborate, but it is clear from *Mallak* that they must nonetheless either be given or the failure to do so must be objectively justified. In that respect, therefore, the applicant can demonstrate that the Board erred in law in failing to give such reasons or otherwise justify its failure to give such reasons in respect of the decision not to have an oral hearing.

Other aspects of the decision not to hold an oral hearing
17. I cannot accept Mr. Mulloy S.C.'s submission that the Board were actually unaware that an oral hearing had been requested. It is true that section 3 of the Technical Advisers Report (which, as the name implies, was a specialist group whose report was designed to give the Board specialist and technical advice) stated:

> "At this time an oral hearing has not been called for nor requested by any appellant or the applicant. As this licence application constitutes a change in operation only, it is unlikely that an oral hearing would be required."

18. The Board nonetheless determined that an oral hearing would not be required and said so in its letter of 31st October 2012 rejecting the applicant's objections. In my view, this was sufficient compliance with the requirements of s. 49(5).

Does the failure to give reasons in respect of the decision not to hold an oral hearing give rise to substantial grounds for contending that the decision is invalid or ought to be quashed for the purposes of s. 73 of the 1997 Act?

19. While I have found that in the wake of the Supreme Court's decision in *Mallak* that the Board was obliged to give reasons for its failure to grant an oral hearing and that it did not do so, this does not necessarily mean that the applicant has established the existence of substantial grounds for contending that the licensing decision is invalid or ought to be quashed. The failure to give reasons for the decision not to hold an oral hearing is, of course, one stage removed from the actual decision itself. If, of course, the Board had wrongly declined to grant an oral hearing in respect of the licensing application when it should have done so, then that would be another matter entirely.

20. Can it be said, however, that the Board improperly declined to hold an oral hearing when it ought to have done so?

21. In this context it must be recalled that what was at issue here was an operational change to an existing licence. The application required the Board to survey the likely impact of the grant of the licence, while weighing a range of environmental, economic and other pertinent considerations. This may be contrasted with many of the cases dealing with the right to an oral hearing where the administrator in question was effectively called upon to adjudicate on the legal rights of parties - sometimes in circumstances not very different from that which might obtained in a court of law – where crucial facts were in dispute.

22. It is in the latter type of case that the necessity for some form of oral hearing is perhaps more obvious, for the simple reason that the administrator cannot fairly resolve those disputed facts without the assistance of an oral hearing. This is clear from a series of decisions to this effect involving the Financial Services Ombudsman where on the facts an oral hearing has been held to be necessary: see, e.g., *Hyde v. Financial Services Ombudsman* [2011] IEHC 422, *Lyons v. Financial Services Ombudsman* [2011] IEHC 454, *Smith v. Financial Services Ombudsman* [2014] IEHC 40 and *O'Neill v. Financial Services Ombudsman* [2014] IEHC 454.

23. In all of those cases there was a stark conflict of facts, the fair resolution of which was essential to the outcome. In *Lyons*, the appellants complained that they had been given certain oral assurances by a financial institution regarding interest only loans. The financial institution in question had emphatically denied that any such assurances had been given. The FSO concluded that there was no reason to doubt the assurances given by the bank and concluded that no oral hearing was necessary in the circumstances. I found that, viewed objectively, this amounted to a breach of the appellant's constitutional right to fair procedures:

> "It must, after all, be recalled that the existence of an oral agreement or understanding regarding a supposed entitlement on the part of the appellants to an interest-only loan deal for a ten year period was of the essence of the appellants' complaint….in the present case….. the appellants could not realistically hope to establish the underlying merits of their case without an oral hearing."

24. A similar approach had been previously taken by Cross J. in *Hyde*. In that case the appellant contended in her complaint to the Ombudsman that the credit institution in question had agreed to advance the sum of €965,000 for a property transaction. Some €715,000 was required for the actual purchase of the property and it was envisaged - or so the appellant maintained - that the balance would be paid for renovations. She further contended that the bank had represented orally that the balance of €250,000 would be paid down subsequently, but that it had resiled from this commitment when difficulties or disagreements arose in relation to the servicing of the €715,000 mortgage. Cross J. held that "without an oral hearing, I do not see this how the appellant's complaint….could be fairly or properly determined".

25. The decision of Barrett J. in *Smith* is also in similar terms. Here a couple in their late 50s contended that they had been advised by a financial institution to invest in what they contended was a highly unsuitable (and high risk) investment vehicle known as Jubilee Consortium, the precise terms of which investment they had not been properly advised. Just as in *Lyons*, the financial institution had denied the assertions made by the complainants. The FSO rejected the complaints without an oral hearing.

26. Barrett J. set aside this decision, saying:

> "There are assertions and counter-assertions by Mr. and Mrs. Smith and Ulster Bank and by declining to hold an oral hearing the Financial Services Ombudsman in effect denied Mr. and Mrs. Smith the opportunity to test by way of cross-examination various factual issues arising between the parties, the determination of which was necessary to enable the Smiths to establish the merits of their case. Such issues include but are not limited to: whether Mr. and Mrs. Smith or either of them had any meaningful contact with Mr. Goodman before they invested in the Jubilee Consortium; what advice, if any, Mr. McHugh gave Mr. and Mrs. Smith before they invested in the Jubilee Consortium; whether Mr. and Mrs. Smith acted on the advice of Mr. McHugh when they invested in the Jubilee Consortium; whether Mr and Mrs Smith received an information memorandum in advance of their investment in the Jubilee Consortium; and whether Mr. and Mrs. Smith were apprised of the high risk nature of the Jubilee Consortium investment before they participated in same. The failure by the Financial Services Ombudsman to allow these issues to be tested at an oral hearing denied Mr. and Mrs. Smith the opportunity to establish the merits of such case as they sought to make and thus is an error of such significance as to vitiate the finding. As the question of whether there should be an oral hearing is a matter that is not within the specialised area of knowledge of the Financial Services Ombudsman, the issue of the deference to be accorded to that expertise does not arise."

27. The decision in *O'Neill* was also along the same lines, given that the conflict of fact arose from a stark disagreement between vehicle assessors as to whether the engine of the claimant insured's motor vehicle had in fact been damaged by flood waters.

28. The present case is totally different, as no conflict of fact which is central to the outcome of the licensing process has been identified. In these circumstances, the Board was entitled to conclude that no oral hearing was necessary.

29. Against that background, therefore, it cannot be said that – at least so far as the present case is concerned - the failure to give reasons in respect of the decision not to hold an oral hearing is likely to render the substantive decision invalid or liable to be quashed in circumstances where there was no underlying obligation to hold such a hearing. The Board certainly erred in law in failing to provide such reasons (or, alternatively, not providing objective justification for the failure to do so). Yet there is no nexus between this procedural failure - important and significant as it admittedly is – and the ultimate decision regarding the grant of the temporary licence. This is especially so given that there was no obligation to hold an oral hearing in the circumstances of this case.

Other grounds relied upon by the applicant

30. The other grounds pleaded by the applicant are effectively generic pleas pleaded at a high level of generality. The applicant contended that the "environmental perils posed by acquaculture are such that the precautionary principle of EU law and the provisions of the Habitats Directive requires maximum prudence and caution." This ground was not, however, advanced with any vigour at the hearing. As matters stand, this pleading is, in any event, simply too vague for the purposes of judicial review proceedings and it could not realistically ground the grant of leave for this purpose: *cf*. by analogy the comments of Murray C.J. and Denham J. for the Supreme Court in *AP v. Director of Public Prosecutions* [2011] IESC 2, [2011] 1 I.R. 729.

31. The applicant further pleaded that the Board's decision was flawed by manifest error. Here again, having regard to the comments in *AP*, the pleading is simply too vague and generic to admit of a ground on which leave to apply for judicial review could properly be granted.

Conclusions

32. For all the reasons stated, therefore, I am not satisfied that the applicant can meet the substantial grounds threshold contained in s. 73 of the 1997 Act in respect of the grounds in respect of which it seeks leave. I would accordingly refuse to grant the applicant the leave which it seeks.