THE HIGH COURT

[2021] IEHC 201

[Record No. 2018/979 JR]

BETWEEN

GALINA HEANEY

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

JOHN GALVIN

NOTICE PARTY

JUDGMENT of Mr. Justice Barr delivered electronically on the 19th day of March, 2021

Introduction

1. In these proceedings the applicant seeks relief by way of judicial review, overturning a decision of the respondent made on 27th September, 2018, in which it granted planning permission to the notice party for retention of an existing cattle crush and concrete plinths as constructed, together with permission to construct a new extension to an existing livestock slatted house for the purpose of accommodating calf pens for existing livestock, along with associated site works, at the notice party's farm at Moyasta, Kilrush, Co. Clare.

2. It is common case between the parties that the notice party's farm is within 50 metres of the lower River Shannon special area of conservation (SAC) and within 60 metres of the River Shannon and River Fergus Estuary, special protection area (SPA). It is also accepted that there is a stream running from the notice party's farm into the adjacent Poulnasherry Bay.

3. Put at its very simplest, the applicant alleges that the inspector appointed by the respondent and by extension the respondent itself, which had adopted the inspector's report, had applied the wrong test when carrying out screening as to whether an appropriate assessment was necessary under the provisions of the relevant EU Directives and under the provisions of s.177U (4) and (5) of the Planning and Development Act 2000 (as amended). It was alleged that the test provided for under the statute, was that unless adverse effects on European sites could be excluded by means of objective evidence, an appropriate assessment "*shall*" be carried out.

4. The applicant alleges that the findings of the inspector appointed by the respondent as contained in his report, that there was no evidence of adverse environmental impact due to the existing structure in respect of which retention permission was sought and his further finding that there was no evidence that the proposed development would have an adverse effect on any European sites, did not satisfy the legal test that had to be carried out at the screening stage. On this basis, it was alleged that the decision of the respondent ought to be set aside.

5. In response, the respondent raised a preliminary objection that the applicant's proceedings herein seeking relief by way of judicial review were out of time, having regard to the time limit provided for in s.50 of the 2000 Act (as amended).

6. Without prejudice to that objection, the respondent contended that when one had regard to the entirety of the material that was before the inspector and had regard to the site visit that he had carried out in advance of preparing his report; then having regard to the substance of his report, rather than focussing on the wording used by the inspector, it was clear that he had applied the correct legal test when reaching the conclusion that a stage 2 appropriate assessment was not necessary. It was submitted that in reality, this application was a merits based appeal against the findings and conclusions reached by the inspector and adopted by the Board and such an attack was not permitted by way of judicial review.

7. In response to the argument raised by the respondent that her application was out of time, the applicant pointed to the fact that the respondent's decision of 27th September, 2018, had only been notified to her agent on 1st October, 2018. It was submitted that in circumstances where her papers seeking leave to seek relief by way of judicial review had been lodged in the Central Office of the High Court on 22nd November, 2018 and she had moved her *ex parte* application on 26th November, 2018; it was arguable that she was only one day out of time, or at most five days out of time, in bringing the application herein and in these circumstances the court ought to extend time pursuant to s.50(8) of the Act.

8. It is appropriate for the court to first determine the issue of whether the applicant's application herein is out of time, and if so, whether the court should extend time pursuant to the jurisdiction conferred on the court by s.50(8).

Chronology of relevant dates

9. On 15th September, 2017, the notice party made an application for planning permission to Clare County Council for retention of an existing cattle crush and concrete plinths as constructed and permission to construct a new extension to an existing livestock slatted house on his farm. On 9th November, 2019 Clare County Council issued a notification to grant planning permission for retention of the existing structure and for development of the extension to the livestock slatted house.

10. On 4th December, 2019 an appeal against that decision was submitted to the respondent by Ger O'Keeffe, Consulting Engineers Limited, on behalf of the applicant and her husband. The applicant's husband has died in the interim. Submissions on the appeal were made by Clare County Council and the notice party.

11. The respondent appointed a Senior Planning Inspector, Mr. Paul Caprani, to consider the appeal. He carried out a site inspection on 7th March, 2018. He issued his report on 26th March, 2018, in which he recommended that planning permission be granted in accordance with the plans and particulars lodged.

12. The submissions filed and the inspector's report were considered at a meeting of the respondent held on 10th September, 2018. At that meeting, the respondent decided to grant planning permission generally in accordance with the inspector's recommendation, for the reasons and considerations contained in the Board Directions dated 11th September, 2018.

13. By Order of the respondent dated 27th September, 2018, the respondent granted planning permission for the proposed development. In an affidavit sworn on 3rd February, 2020, by Mr. Chris Clarke, Secretary of the respondent, he outlined that, while it was the usual practice of the respondent to post out a notification of its decision to all interested parties on the day that the decision was made; sometimes due to the large number of decisions made by the respondent on a given day, the notification might not be sent out until the following day. In this case, a letter was posted to the applicant's engineer, along with certain explanatory documentation, by post on 28th September, 2018, which was a Friday. It is common case between the parties, that that correspondence was received by the applicant's engineer on Monday 1st October, 2018.

14. On 22nd November, 2018, the applicant, acting as a lay litigant, filed the statement of grounds and grounding affidavit in the within proceedings in the Central Office of the High Court. On 26th November, 2018, the applicant made her *ex parte* application seeking leave to apply for judicial review before Noonan J in the High Court. By order of the High Court dated 26th November, 2018, the applicant was ordered to make the application for leave to apply for judicial review on notice to the respondent and the notice party. That application was made returnable for 5th February, 2019.

15. A contested application for leave to apply for judicial review was heard before the High Court on 15th July, 2019. By order of the High Court (Noonan J) of 16th July, 2019, the applicant was granted leave to apply for judicial review. The question of whether the proceedings had been brought outside the time permitted by statute and whether the applicant was entitled to an extension of time, were specifically left over for determination at the hearing of the substantive proceedings.

The relevant time limit

16. Section 50 of the Planning and Development Act 2000 (as amended) deals with judicial review applications to the High Court in respect of various planning decisions by various planning authorities and the respondent. Subsections (6) and (8) of s.50 are the relevant subsections for the purposes of these proceedings. They are in the following terms:-

> *"(6) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(a) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate.*
>
> *[…]*

(8) The High Court may extend the period provided for in subsection (6) or (7) within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that —

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension."

17. The rationale for the strict time limit provided for under s.50 was explained by Baker J in *Irish Skydiving Club v. An Bord Pleanála* [2016] IEHC 448 at paras. 9 to 11:-

"[9.] Section 50(8) (a) is a reflection of the inherent jurisdiction of the court to extend time when it considers that good and sufficient reason exists to so do, but sub paragraph (b) of the subsection contains a restriction on the power such that in addition to being satisfied that good and sufficient reasons exists, the court must be satisfied as a matter of fact that the circumstances which resulted in the delay were outside the control of the applicant.

[10.] Thus, while the court has a discretion it is required by the cumulative provisions of subs. 8 to consider not merely the interests of justice, or the interests of all of the parties, but whether the applicant for the extension can show on the facts that the delay and the reason why he or she is out of time arose from matters outside his or her control. When a delay arises from circumstances which were within the control of the applicant, the court may not extend.

[11.] The time limit is strict, and one in respect of which the power to grant an extension is also to be strictly construed. That this is justifiably so has been considered in a number of cases. In Noonan Services Limited & Ors v. The Labour Court (Unreported, High Court, 25th February, 2004) Kearns J. explained the policy for a strict approach:

> *'This approach does no more than reflect a growing awareness of an overriding necessity to provide for some reasonable cut-off point for legal challenges to decisions and orders which have significant consequences for the public, or significant sections thereof.'"*

When does time start running?

18. It is clear from the wording of s.50 that time starts to run on the date when the relevant decision is made, not on the date when the person who wishes to challenge it, first learns of it: see *Irish Skydiving Club v. An Bord Pleanála* supra; *Reidy v. An Bord Pleanála* [2020] IEHC 423; and *O'Riordan v. An Bord Pleanála* [2021] IEHC 1.

19. If it were the case that a person, through no fault of their own, was only notified of the decision very late into the eight-week period within which he or she could challenge the decision, that would not change the operative date in relation to the running of time, but

it could provide a strong argument why the court would exercise its jurisdiction under s.50(8) to extend time for the bringing of the application. So, for example, if a person who is entitled to be notified of a decision of the respondent, was not notified of that decision due perhaps to the letter notifying them of the decision going astray in the post, or being delivered to the wrong address by the postal authorities and as a result the person affected by the decision only learnt of it very close to the expiry of the eight-week time limit, those circumstances could be used by such applicant as part of their argument as to why there would be good and sufficient reason to extend time and to explain why they did not bring their application within the relevant period.

20. For the purposes of this case, the operative date for the bringing of the judicial review application, was the making of the formal order by the respondent on Thursday, 27th September, 2018.

When does time stop running?

21. There has been some divergence in earlier decisions of the High Court as to when exactly time stops running in relation to the bringing of a judicial review application. A widely held view, among both practitioners and a number of judges, who have given decisions on the matter, has been that time only ceases to run on the date upon which an application for leave to apply for judicial review was moved before the High Court. In *McDonnell v. An Bord Pleanála* [2017] IEHC 366, Haughton J held that an application for leave to apply for judicial review was not "*made*" for the purposes of s.50A(2) of the 2000 Act until the matter was moved before the High Court.

22. A different view was expressed by Humphreys J in *McCreesh v. An Bord Pleanála* [2016] IEHC 394, where it was held that the submission of papers in advance of the making of the *ex parte* application for leave to seek judicial review, was the critical event which stopped time running and constituted the date on which the application for an extension of time should be judged.

23. In resolving this issue, the court has been greatly assisted by an authority which was brought to its attention by Ms. Carroll BL, counsel on behalf of the respondent, who referred the court to the Supreme Court decision in *Reilly v. The Director of Public Prosecutions* [2016] 3 I.R. 229. It does not appear that this decision was brought to the attention of Humphreys J in the *McCreesh* case.

24. In the *Reilly* case, the court was deciding when a particular application had actually been made pursuant to s.39 of the Criminal Justice Act 1994, in relation to the forfeiture of money that had been seized from the applicant. Under the rules of court which gave effect to the provisions of s.39 of the 1994 Act, it was provided that such applications were to be made by "*originating motion on notice*". In that case the originating notice of motion had been issued and served in advance of the statutory two-year time limit, but the application itself had not been moved until outside that period.

25. In delivering the judgment of the court, Dunne J referred to the judgment of Finlay CJ in *KSK Enterprises Limited v. An Bord Pleanála* [1994] 2 I.R. 128, where the Chief Justice

stated that he had no doubt that an application to the court made by motion *ex parte*, could not be said to be made until it was actually moved in court. Having referred to other portions of the judgment of the Chief Justice, Dunne J continued as follows at para. 32:-

> "*There is obviously a clear distinction being made in the passage set out above between an application by way of originating motion made* ex parte *and an application made by an originating motion on notice. The nature of an application being made by motion* ex parte *is such that it cannot be made until it is actually moved in court.*"

26. Having regard to the judgment of the Supreme Court in the *Reilly* case, the court holds that time stops running for the purposes of s.50 of the Act, when the application for leave to seek judicial review is first moved before the High Court. This means that in this case the operative date is 26th November, 2018; therefore, the court finds that the applicant was five days out of time in bringing her application to challenge the decision of the respondent made on 27th September, 2018.

Extension of time under s.50(8)

27. While strict time limits have been imposed on challenges by way of judicial review to planning decisions by s.50(6) of the 2000 Act, the legislation also provides a mechanism whereby the time period can be extended so as to enable an applicant in appropriate circumstances to bring a challenge by way of judicial review, notwithstanding that they are outside the eight-week time period when they seek to commence their proceedings. Section 50(8) of the 2000 Act provides that the High Court may extend the period within which a challenge may be brought, but shall only do so if it is satisfied that (a) there is good and sufficient reason for doing so and (b) the circumstances that resulted in the failure to make the application for leave within the period so provided, were outside the control of the applicant for the extension.

28. In considering whether the court should exercise its discretion in favour of granting an extension of time, the court can have regard to a large number of factors. In *Kelly v. Leitrim County Council* [2005] IEHC 11, Clarke J (as he then was) set out a non-exhaustive list of such factors, when considering a previous iteration of the section, which included the following: the length of time specified in the relevant statute; the question of whether third party rights may be affected; the clear legislative policy that determinations of the kind provided for in the legislation, should be rendered certain within a short period of time, thereby conferring certainty on certain categories of administrative or quasi-judicial decisions; blameworthiness (if any) on the part of the applicant; the nature of the issues involved and the merits of the case: see pp. 9 – 12 of the judgment.

29. Thus, it is clear that the onus rests on the applicant to show that there is "*good and sufficien*t" reason why an extension of time should be granted. This of necessity requires the applicant to establish a good reason why he or she did not move their application within the stipulated eight-week period. Furthermore, if there is a gap between the

expiry of the eight-week period and the date on which the application is actually made, the applicant also has to explain why that delay has occurred. There is also an onus on the applicant under the statute to satisfy the court that the circumstances that resulted in the failure to make the application for leave within the period provided, were outside the control of the applicant.

30. The fact that the extension of time sought is only very short, in this case of the order of five days, is not of itself determinative of the issue. In the *Kelly* case, where the delay was only some nineteen days outside the statutory period, the applicant had sought to excuse the delay, *inter alia*, on the ground that a member of his family had been diagnosed with a serious illness and that had prevented him from attending a consultation with junior counsel. When he consulted counsel, he did not like the advice that he received from the first junior counsel and so he instructed his solicitor to obtain the advices of another counsel, who advised that he did have grounds for bringing a judicial review application, which advice was received on the last day of the applicable period. Notwithstanding all of that, the court refused to extend time.

31. In the *Irish Skydiving* case, the extension of time sought was only of the order of seventeen days, but this was refused by Baker J. In the *O'Riordan* case, Humphreys J held that the shortness of the delay was not relevant. He stated as follows at para. 16:-

> *"16. I appreciate that the natural human tendency to overlook de minimis errors and short delays, but it is clear in the planning context at least that the fact that the delay is short is not relevant: see e.g. Casey v. An Bord Pleanála [2004] 2 ILRM 296, Kelly v. Leitrim County Council and Irish Skydiving Club Limited v. An Bord Pleanála [2016] IEHC 448 (unreported, High Court, 29th July, 2016)."*

32. In the *O'Riordan* case, papers were lodged five days outside the statutory period and the application was moved nineteen days outside the period. While Humphreys J did not specify which date he took as the operative cut-off date, it is reasonable to assume that he followed his earlier decision in *McCreesh* and held that the date of lodgement of papers would suffice. That would have meant that the application was brought five days outside the relevant period; yet he held that in the circumstances of that case, the applicant was not entitled to an extension of time within which to bring his application.

Conclusions in this case

33. The applicant in this case submitted her appeal to the respondent through a consulting engineer, who had made a submission to the respondent on behalf of the applicant and her husband. The decision of the respondent made on Thursday 27th September, 2018, was posted to the applicant's consulting engineer on 28th September, 2018 and was received by him on Monday 1st October, 2018.

34. It is common case that the applicant lodged her papers in the Central Office of the High Court on Thursday 22nd November, 2018. She moved her application before Noonan J on Monday 26th November, 2018.

35. The applicant's key argument in relation to the time point raised by the respondent was set out in her affidavit sworn on 23rd April, 2019 in the following terms at paras. 10 – 12:-

> *"10. As I understand the argument by An Bord Pleanála, it is claimed your deponent is out of time by a day, on the basis that they made a decision on the Thursday and your deponent lodged papers in the High Court on the Thursday. While of course it is a matter for this honourable court, I find it difficult to accept that An Bord Pleanála should be entitled to defeat my application in respect of a decision of the respondent which is said to have been made on the Thursday, but which was not posted until Friday and not received until the following Monday, a period of four days.*
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> *11. Should An Bord Pleanála be correct in its submission I have been advised and believe I have no alternative, except to request this honourable court to extend the period to bring this application for judicial review and I have been advised, this honourable court can only do so, if satisfied that there is good and sufficient reason to extend the time and that the circumstances which resulted in the making of the application for leave a day late, was outside the control of your deponent herein. I have been advised that being unaware that the Thursday was too late is not a reason, although that is the case.*
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> *12. I say and believe the circumstances outside of the control of your deponent is the failure of the Board to notify your deponent of its decision for a period of four days (until Monday) and with regard to good and sufficient reason for doing so, I have been advised and believe, this is closely allied with the criteria upon which this honourable court decides whether or not to grant leave, namely whether there are substantial grounds for contending the decision to grant retention permission is invalid, or ought to be quashed."*

36. While the court has sympathy for the applicant, who was acting as a lay litigant at the relevant time, she has not given any explanation at all why she did not bring her application within the eight-week period; much less has she shown that such explanation arose from circumstances beyond her control.

37. All that the applicant has done is to complain that her agent was not notified of the decision until he received the letter from the respondent on 1st October, 2018. That was well within time. The applicant cannot plead ignorance of the period for bringing judicial review applications as a ground for obtaining an extension of time. Nor can she plead that she was unaware that time would only stop when she first moved her application in court. It is well settled that the fact that a person was acting as a lay litigant at a particular time, does not mean that they are not bound by the same rules and procedures as other litigants who come before the courts, albeit with legal representation: see *Burke v. O'Halloran* [2009] 3 I.R. 809; *ACC Bank v. Kelly* [2011] IEHC 7; *Knowles v. Governor of Limerick Prison* [2016] IEHC 33; *O'Neill v. Celtic Residential Irish Securitisation plc No. 9 & Ors.* [2020] IEHC 334 and *O'Riordan v. An Bord Pleanála*, supra.

38. The time limits provided for under the 2000 Act are strict, but they are there for a reason. The applicant has not given any adequate reason why she did not bring her application on or before 21st November, 2018. She knew of the decision as far back as 1st October, 2018. She has not pointed to anything in the intervening period which prevented her making her application in time.

39. Under s.50(8) the court shall only extend time if it is satisfied that there is good and sufficient reason for so doing and is satisfied that the circumstances that resulted in the failure to make the application for leave within the period provided for under the statute, were outside the control of the applicant. The court cannot find that these matters have been established by the applicant in this case. The only excuse proffered is that her agent did not learn of the decision until four days after it was made. That is not sufficient. The court does not have jurisdiction to extend time for the bringing of this application. Accordingly, the court refuses the reliefs sought by the applicant in her amended notice of motion.

40. The parties will have 14 days from receipt of the judgment to make written submissions on the content of the final order and on any ancillary matters that may arise.