

**THE HIGH COURT**

[2021] IEHC 391

[Record No. 2019/393 JR]

**BETWEEN**

**DONAL KENNY**

**APPLICANT**

**AND**

**ROSCOMMON COUNTY COUNCIL**

**RESPONDENT**

**AND**

**WESTMEATH COUNTY COUNCIL**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Barr delivered *ex tempore* on the 4th day of June, 2021**

**Introduction**

1. The applicant in these proceedings is a lay litigant. In this application he seeks a certificate from the court permitting him to bring an appeal against the decision of this court refusing him leave to proceed by way of judicial review.
2. The leave application in this matter was heard on notice to the respondent. The substantive decision refusing leave was delivered on 18th January, 2021, which is reported at 2021 IEHC 24.
3. A ruling on costs was delivered by the court on 10th February, 2021, wherein the costs of the contested leave application were awarded to the respondent against the applicant.

**The applicable legal principles**

4. Section 50A(7) of the Planning and Development Act, 2000 (as amended) provides as follows:-

*"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 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."*

5. The principles which the court should apply when determining whether it should issue a certificate that the substantive decision involved a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be brought, have been considered in a number of cases. In *Glancre Teoranta v. An Bord Pleanála* [2006] IEHC 250, having analysed all the relevant cases, McMenamin J. set out the following principles as being applicable when considering whether a certificate to appeal should be granted:-

- "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 (Kenny).*
  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 (Raiu).*
  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."*
6. In *Arklow Holidays Ltd v An Bord Pleanála* [2006] IEHC 102, Clarke J. (as he then was) had to consider whether a certificate should be granted where there had been a refusal to grant leave on certain grounds put forward by the applicant. In the course of his judgment he noted that the policy behind this section in the Act was that there should be a greater degree of certainty and expedition in the determination of planning judicial reviews. That case was similar to the present case, because it concerned an application for leave to appeal where the applicant had failed on certain grounds at the leave stage. Interestingly, one of the grounds on which the applicant had been refused leave was on the ground that he lacked *locus standi* to challenge the decision in the circumstances that arose in that case. In the course of his judgment, Clarke J. held that the point raised on behalf of the applicant in relation to the lack of *locus standi*, was a point of law of exceptional public importance. However, in considering the second limb of the test,

whether it was in the public interest to grant a certificate, he came to the view that it was not in the public interest that a certificate be granted on that point of law.

7. In *SA v. Minister for Justice and Equality* [2016] IEHC 646, Humphreys J. adopted the principles that had been set out in the *Glancre Teoranta* case and added the following further criteria:-

*"I have considered the case law relating to the criteria for the grant of leave to appeal including Glancre Teoranta v. An Bord Pleanála [2006] IEHC 250 (Unreported, High Court, McMenamin J., 13th July, 2006) To the factors set out in that case law I would add four further criteria as follows:*

- (i) The application for leave to appeal should be made promptly and ideally within the normal appeal period (10 days in the case of a leave application and 28 days in the case of a substantive decision). The applicant has applied promptly in the present application.*
- (ii) The question of law should be one which is actually determinative of the proceedings, not one which if answered differently would leave the result of the case unchanged.*
- (iii) The grant of leave should provide some added value to any matters already before the Court of Appeal; thus the fact that an issue is independently the subject of a pending appeal would tend to dilute the public interest in the point being brought before that court a second time.*
- (iv) The question must be formulated with precision in a manner that indicates how it is determinative of the proceedings and should not invite a discursive, roving, response from the Court of Appeal."*

8. In the course of his judgment, Humphreys J. stated that for a question on a point of law to be the basis of an application for leave to appeal, it must be one which admitted of a precise answer that was determinative of the proceedings. He stated that "write an essay" questions did not qualify.

### **The present application**

9. In support of his application for a certificate permitting him to appeal, the applicant swore a reasonably comprehensive affidavit on 13th May, 2021. In the affidavit, he did not set out with precision any precise points of law which he maintained constituted points of law of exceptional public importance. However, he set out a number of areas in which he took issue with the judgment and on which he felt there were points of law that should be determined on an appeal.
10. The court has read the applicant's affidavit and the material exhibited thereto. It is not proposed to go through each of the points raised by the applicant in his affidavit. It will suffice to deal with a number of the points under a single heading. In a number of the points raised by the applicant, he has argued that the variations to the two relevant

development plans were adopted prior to the completion of the joint retail strategy for the relevant area. As has been clearly stated in the substantive judgment of this court, that assertion is incorrect having regard to the evidence contained in the affidavit sworn by Ms. Mary Grier on 10th January, 2020, which evidence was accepted by the court. Accordingly, the court is satisfied that no point of law arises under arguments one, three and five as set out in the applicant's affidavit.

11. Similarly, his argument set out as his sixth point in his affidavit, being that the court erred in failing to determine that the variations were unlawful, either having regard to their content or to the procedure which led to their adoption and that this constituted a clear misinterpretation and error, because the court had considered that the variations were put in place as a result of the Athlone joint retail strategy, when the strategy was not in place at the time that the respondent adopted the variations and was completed subsequent to the adoption of the variations; this argument is likewise unsustainable having regard to the findings made by the court in its substantive judgment. Again, no point of law has been raised.
12. Insofar as the applicant asserts that there is matter of exceptional public importance raised on the basis that the variations were made prior to the joint retail strategy having been put in place, that argument is likewise unsustainable. No point of law arises from the judgment of the court.
13. The applicant also asserts that the court erred "*by the misinterpretation of the objective of a joint retail strategy*". While the applicant may be of the opinion that the court erred in its judgement in this regard, this does not raise a point of law which should be determined on an appeal. The court did not engage in any interpretation or evaluation of the joint retail strategy itself. It merely looked at the procedure which had been adopted by the respondent in relation to the making of variations to the two development plans. Thus, no question as to the interpretation of the joint retail strategy arose. No point of law arises under this heading.
14. The applicant also made complaints in relation to the findings that were made in the substantive judgment in relation to there being no evidence on which the decision could be challenged, on the basis that some of the members of the council, who had adopted the variations, may have had a conflict-of-interest. In this regard the applicant has exhibited documentation which suggests that one of the members of the council is an auctioneer, who practices in the area and on some unspecified basis may therefore have had a conflict-of-interest when he voted on the variations to the two development plans. That argument was rejected by the court in its substantive judgment for the reason that there was no evidence of any actual conflict-of-interest. This ground of challenge does not raise a point of law on which an appeal should be allowed.

### **Conclusions**

15. Even giving all due allowance for the fact that the applicant is a lay litigant, and having considered all of the matters raised in his affidavit sworn on 13th May, 2021, the court is

not satisfied that there is any point of law raised in this case on which it would be appropriate to grant a certificate.

16. Having regard to the case law cited above in relation to the elements that are necessary in order for the court to find that there was a point of law of exceptional public importance and that it is desirable in the public interest at an appeal be brought, the court is satisfied that this test has clearly not been met in the circumstances of this case.
17. It is very difficult to envisage circumstances where an applicant would be unsuccessful at the leave stage, but it could still be held that his application raised a point of law of exceptional public importance, on which it was desirable in the public interest that an appeal should be brought. The circumstances outlined by Clarke J. in the *Arklow Holidays* case, are probably one of the very few circumstances where such an appeal could arise. The court is satisfied that no such circumstances arise in this case.
18. For the reasons set out herein, the court refuses the applicant's application for a certificate permitting him to appeal the substantive decision of this court delivered on 18th January, 2021.

#### **Costs**

19. The court is satisfied that it is appropriate to make no order as to costs in respect of this discrete application.
20. The court has reached that conclusion for two reasons: firstly, this application was very brief in duration. The hearing of the application only lasted for approximately 45 minutes. Secondly, the court has had regard to the fact that the applicant has brought these proceedings as a lay litigant. He was not aware that he required the leave of the court to appeal the substantive judgment in this matter. He only became aware of that fact when he attempted to lodge a notice of appeal in the Court of Appeal. Had he been aware of the provisions of s.50A of the Act, he would undoubtedly have made his application for a certificate for leave to appeal, when the substantive judgment was handed down. Had that been done, obviously, no additional costs would have been incurred.
21. The court is also mindful of the fact that an order for costs has already been made against the applicant in respect of the contested leave application. In all the circumstances, the court is of the view that the justice of the case will be met by making no order as to costs on the application seeking a certificate for leave to appeal.