

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 636
[2020 No. 568 JR]

BETWEEN

HELLFIRE MASSY RESIDENTS ASSOCIATION

APPLICANT

AND

**AN BORD PLEANÁLA, THE MINISTER FOR HOUSING, PLANNING AND LOCAL
GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

AND

SOUTH DUBLIN COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Wednesday the 13th day of October, 2021

1. In *Hellfire Massy Residents Association v. An Bord Pleanála (No. 1)* [2021] IEHC 424, [2021] 7 JIC 0201 (Unreported, High Court, 2nd July, 2021), I dismissed the application for *certiorari* of the impugned planning permission in this case and decided in principle to refer certain separate issues to the CJEU which arise out of a challenge to the legislative scheme in relation to derogation licences.
2. The applicant now seeks leave to appeal under s. 50A(7) of the Planning and Development Act 2000 and I have considered the relevant law, in particular *Arklow Holidays Ltd. v. An Bord Pleanála* [2006] IEHC 102, [2007] 4 I.R. 112, *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646, [2016] 11 JIC 1404 (Unreported, High Court, 14th November, 2016), *Heather Hill Management Company CLG v. An Bord Pleanála* [2019] IEHC 820, [2019] 12 JIC 0502 (Unreported, High Court, Simons J., 5th December, 2019), *Halpin v. An Bord Pleanála* [2020] IEHC 218, [2020] 5 JIC 1501 (Unreported, High Court, Simons J., 15th May, 2020), *Rushe v. An Bord Pleanála* [2020] IEHC 429, [2020] 8 JIC 3101 (Unreported, High Court, Barniville J., 31st August, 2020), *Dublin Cycling Campaign CLG v. An Bord Pleanála* [2021] IEHC 146, [2021] 2 JIC 2508 (Unreported, High Court, McDonald J., 25th February, 2021).

Applicant's proposed questions 1 to 3 – environmental impact assessment

3. The applicant's first three proposed questions of exceptional public importance relate to environmental impact assessment (EIA):
 - "1. What are the legal requirements on a Developer and the Competent Authority in identifying and assessing the predicted major impact of a development? Is it appropriate to rely on estimates based on cautious assumptions for the purposes of Environmental Impact assessments? Is that consistent with the precautionary principle. Were those requirements correctly applied in this case?
 2. To what extent is the task on the Competent Authority effected (sic) by the absence of any alternative statistical analysis submitted in the course of the permission procedure?

3. How is the test of "flawed on its face by a reasonable expert" to be applied? Was it applied correctly here?"
4. The applicant has a point to the extent that the impact of the project to be carried out, which may include the impact arising from the use and exploitation of the end-product of the works, must be assessed: see Case C-2/07 *Abraham v. Région wallonne* (Court of Justice of the European Union, 28th February, 2008, ECLI:EU:C:2008:133), paras. 43 and 44.
5. Insofar as its complaint about estimates of the extent of the use of the project arose here, the applicant relies on the 2014 EIA directive (2014/52/EU) amending the 2011 directive (2011/92/EU). That does go somewhat beyond the terms of the original pleadings, which only refer inferentially rather than explicitly to the 2014 directive and don't refer to annex IV for example, which was one of the centrepieces of the leave to appeal application. It is true that the EIA directive must be interpreted in the light of the precautionary principle (see Case C-526/16 *European Commission v. Republic of Poland* (Court of Justice of the European Union, 31st May, 2018, ECLI:EU:C:2018:356), para. 67). However, all that said, that does not have the effect that the estimate of visitor numbers here in the visitor centre for which permission was granted was invalid.
6. There are a number of distinct problems with the applicant's questions:
 - (i). The vague and general terms of the questions invite a discursive, roving, write-an-essay type response, illustrative of the insufficiently defined nature of the actual points involved: see *S.A. v. Minister for Justice and Equality*. While it's true that very general questions might not be absolutely prohibited, jurisprudence doesn't stand still and the shortcomings of such vague generalities have become clear over time. The key point is that the certified question must be decisive, and must actually arise on the evidence and pleadings. The vague, generalised, essayistic question can inveigle the court into disregarding these limitations and becoming fascinated with an interesting point of law dangled in front of it. The more precise question on the other hand throws into sharp focus the key question of whether the point of law is in reality an inflection point in the case or alternatively a sideshow. Hence the extreme desirability of a question that is precise and from which it is clear as to how the answer is pivotal for the proceedings, as emphasised in *S.A.*
 - (ii). Here, the applicant's points were not in fact properly pleaded: see para. 57 of the No. 1 judgment.
 - (iii). On top of that, as put in the board's submission "the Applicant's aforesaid contentions bear little to no relation or comparison to its written submissions dated 20th May 2021 (for the substantive hearing) as regards the issue of estimated visitor numbers." The board calls this a feature of "the Applicant's attempts to recalibrate its case in light of the Court's judgment". A point I made recently in *In Re Lennon* [2021] IEHC 594, [2021] 9 JIC 3003 (Unreported, High Court, 30th September, 2021), is that any unsuccessful litigant can potentially think of new and better points once armed with an adverse decision (what O'Donnell J. referred to as

'the principle of delayed eloquence' (The People (D.P.P.) v. Rattigan [2013] 2 I.R. 221 at 245)), but that isn't an appropriate procedure.

- (iv). Noonan J. pointed out in *Ross v. An Bord Pleanála* (No. 2) [2015] IEHC 484, [2015] 7 JIC 2107 (Unreported, High Court, 21st July, 2015) that it is generally inappropriate to grant leave to appeal on the basis of a point that hasn't been properly pleaded.
- (v). There is a lack of an adequate evidential basis for the challenge. The applicant did not bring any contrary information regarding visitor numbers to the table: see para. 53(iii) of the No. 1 judgment. That limits the extent to which it can challenge the decision in the absence of being able to point to some contrary evidence otherwise before the board or some flaw on the face of the materials. In that regard the applicant did not establish evidentially that a reasonable expert would have seen the council's material as flawed on its face. As applicants seem to want to misunderstand this point, I am not saying either here or anywhere else that an applicant herself must bring forward contrary information, because there are always other options including pointing to problems with existing information.
- (vi). The vague nature of the questions disguises the fact that the real impact of the applicant's points is very fact-specific. The applicant has not shown real doubt on the current jurisprudence that the legal tests are applied in the No. 1 judgment were incorrect. So the question becomes (as the applicant semi-admits in the phrasing of the first tranche of points of alleged exceptional public importance): "was [the test] applied correctly here?". That is not normally a point of law of exceptional public importance and is not so here.

Applicant's fourth question - habitats directive and derogation licences

- 7. The applicant's fourth proposed question of exceptional public importance is: "[w]as the High Court correct to conclude that the validity of the planning permission could be upheld, notwithstanding that the Court has referred a question to the Court of Justice of the European Union on an issue that is integral to that permission?"
- 8. There are two major problems with that question. Firstly, as pointed out in the No. 1 judgment, the derogation legislation argument was pleaded against the State, not as a ground for *certiorari*. So I think that the attempt to seek leave to appeal the *certiorari* decision on the basis of that aspect of the judgment is going beyond the pleadings.
- 9. Secondly and independently, the argument that this issue is "integral to th[e] permission" does not arise on the facts: see para. 61 of the No. 1 judgment. The board did not rely on a derogation licence in the sense pleaded. As noted in para. 79 of the No. 1 judgment, the decision was not taken "under" the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011), which are meant to give effect to the system of strict protection, so it cannot be invalid on the basis of any challenge to those regulations. The applicant impermissibly sought to expand the pleaded case, but obviously that cannot be a basis for leave to appeal.
- 10. The applicant also in this context makes the elaborate-sounding point that the principle of effectiveness of European law and the requirement to implement directives with

"unquestionable binding force" (Case C-6/04 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* (Court of Justice of the European Union, 20th October, 2005, ECLI:EU:C:2005:626)), mean that permissions that rely on an invalid procedure must be quashed.

11. The applicant would indeed have a point if the decision did in fact rely on the legislation and a court dismissed the challenge to the decision while continuing to entertain a challenge to the validity of the legislation. But that is not factually the case so this conceptually interesting point does not arise.

Order

12. Accordingly, the order will be as follows:

- (i). the application for leave to appeal is dismissed;
- (ii). the order refusing *certiorari* should now be perfected;
- (iii). in respect of the relief against the State which remains outstanding, the parties should now complete the Eco Advocacy directions (see *Eco Advocacy CLG v. An Bord Pleanála* [2021] IEHC 265 (Unreported, High Court, 27th May, 2021), in order to enable the order for reference to the CJEU to be finalised;
- (iv). in that regard the board should deliver submissions within 2 weeks from the date of delivery of this judgment, the State respondents within a further 2 weeks and the council within 2 further weeks; and on the expiry of that period the order for reference will be finalised without further formality; and
- (v). the matter will be listed for mention on 29th November, 2021 to confirm that all matters are completed, but in the event that in the meantime any party wishes there to be consideration to the addition of an *amicus curiae*, that party should contact the List Registrar to have the matter listed for mention on the next following Monday list for consideration of such a proposal.