THE SUPREME COURT

Appeal Number: S:AP:IE:2019:00025

High Court Record Number: 2013/486 JR

Clarke C.J.
O'Malley J.
Irvine J.

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS 2000 TO 2011 AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN/

FRIENDS OF THE IRISH ENVIRONMENT LTD.

APPLICANT/APPELLANT

- AND -

AN BORD PLEANÁLA

RESPONDENT

JUDGMENT of Ms. Justice Irvine delivered on the 26th day of July 2019

1. On the 18th April, 2019, this Court granted Friends of the Irish Environment Ltd leave to appeal against the judgment and order of the High Court (Meenan J.) of the 16th January, 2019. For reasons set out in his judgment delivered on the 9th March, 2018 and to which I will later refer, the High Court judge refused the appellant's application for judicial review of a determination of the respondent ("the Board") made on the 3rd May, 2013.

2. This judgment does not deal with the substantive appeal against the decision of the High Court judge but rather the question of the scope of the appeal to this Court, an issue that became apparent following the delivery of the appellant's submissions. Having regard to the respondent's challenge to the entitlement of the appellant to rely upon certain arguments advanced in those submissions, the Court, in the course of case management, determined that an oral hearing was warranted in order to identify the scope of the appeal. That hearing took place on the 10th July 2019.

Principles

3. Before moving to consider the facts and circumstances relevant to the scope of the appeal it is first appropriate to identify the principles to be applied by the court when considering the permissible scope of an appeal to this court.

4. In its decisions in *McEnery v. Commissioner of An Garda Síochána* [2016] IESC 26, and *Grace & Sweetman v. An Bord Pleanála & Others* [2017] IESC 10, this Court stated that, subject to very limited exceptions, the only questions which may properly be addressed by this Court on an appeal, having regard to the 33rd Amendment to the Constitution, are those which can fairly be said to come within the ambit of the grounds upon which leave to appeal was granted.

5. It is nonetheless accepted that the Court should not adopt an overly technical approach when asked to rule out as impermissible a particular submission or issue on the basis that it was not raised in the court below. As Clarke J. stated in *Callaghan v. An Bord Pleanála, Ireland* [2017] IESC 60:-

> "An application for leave is necessarily made in a relatively summary form and the Court does not have access to all of the materials which were before the Court below. Because of this the precise boundaries of the arguments which may be properly addressed to the Court should not be regarded as written in stone by reference to the exact language used in the determination of this Court granting leave. Rather, by analogy with the question of whether an issue sought to be relied on was raised in a court or courts below (which issue was addressed in *SPV Osus*), the Court should consider whether the arguments sought to be put forward can fairly be said to arise within the terms on which leave has been given recognising that arguments will necessarily be refined or adjusted to some extent as the appellate process progresses."

6. The entitlement of the appellate court to entertain a point not advanced at first instance received further consideration by O'Donnell J. in his decision L*ough Swilly Shellfish Growers Co-operative Society Ltd v. Bradley* [2013] IESC 16. In his judgment he considered a broad spectrum of cases in which such an application might be entertained. Included amongst those in which a successful application might be anticipated would be an appeal in which the proposed new argument could be said to relate to a point advanced in the court below or where it might be considered a refinement of an argument earlier made. His judgement did not, however, as was observed by counsel for the Board, extend to a consideration of the circumstances in which a new point might be raised in judicial review proceedings where the proposed point was outside of the grounds upon which the applicant had been granted leave to apply for judicial review. Neither does it address the effect of a statutory restriction such as that found in s. 50A(5) of the Planning and Development Act 2000 Act ("the 2000 Act") on such an application.

Background

7. The impugned determination of the Board relates to a referral sent by the appellant to the Board pursuant to s. 5 of the 2000 Act, seeking a declaration as to whether certain peat extraction works on three different sites in Co Westmeath were "exempted development" within the meaning of the Act. The referral, made on the 21st August, 2010, was initially addressed to

Westmeath County Council but was subsequently referred on to the Board. It was the appellant's contention that the works were not exempted development and required an environmental impact assessment pursuant to national and European law, in particular the Environmental Impact Assessment Directive (85/337/EEC) and the Habitats Directive (92/43/EEC).

8. By its determination of the 3rd May, 2013, the Board dismissed that referral pursuant to s. 138(1)(b)(i) of the 2000 Act, stating that the question referred was "not sufficiently particular or detailed", having regard to the different parcels of land identified and the uncertainty regarding their ownership. Relevant also in the context of the proceedings is the fact that s. 5(1) requires a person making a referral to provide "any information necessary to enable [the planning authority] to make its decision on the matter" and the Board has the power to obtain further information by reason of the provisions of s. 6. Furthermore, under s. 250 the Board is given a range of powers in relation to how it may serve a notice or order required or authorised under the Act. Such a notice or order can be delivered in person or left at an address where the owner ordinarily resides. It can equally be sent by post to their address or in respect of any land or premises it may be served by delivering it to some person over 16 years of age resident or employed on the land or by affixing it in a conspicuous place on or near the land. In addition, where reasonable grounds exist the Board may dispense with the need for service of such an order or notice provided it is satisfied that to do so will not cause injury or wrong. It is common case that the Board in the present case, being unable to identify all of the landowners concerned, did not seek to rely upon its power to affix notices in conspicuous places on the lands concerned as is provided for in s. 250.

9. It was the Board's decision to dismiss the s. 5 referral without reaching a substantive conclusion on the legal issue it raised, which decision was challenged in the High Court proceedings.

10. Relevant to determining the scope of the appeal to this Court is the fact that in its statement grounding its application for judicial review the appellant only referenced the EIA Directive in relation to the substantive argument that it was seeking to make to the Board on its referral, namely that the peat extraction being carried out on the identified lands was not exempted development. No case was made that Article 2(1) of the Directive required the Board to determine the s. 5 referral as part of its obligations as an organ of the state in order to give effect to European law or that the Directive otherwise impacted on the exercise by the Board of its powers under s. 250 of the 2000 Act.

High Court

6. In his judgment delivered on the 9th March, 2018, Meenan J. found that those who would be affected by a determination of the Board as to whether development on their land would remain exempt had a right to fair procedures and a right to be heard within the process. He accepted the determination of the Board that the identities of the owners/occupiers of the relevant lands were difficult to ascertain and held that the decision of the Board to therefore dismiss the referral was not unreasonable and should be upheld. The High Court judge considered that the Board's decision in that regard was to be afforded curial deference.

Leave to appeal

9. By application filed on the 14th February, 2019, the appellant applied for leave to appeal to the Supreme Court on the grounds that its appeal raised an issue of general public importance.

10. In its application the appellant refers to Article 2(1) of the Environmental Impact Assessment Directive, which states that Member States must ensure that projects likely to have a significant impact on the environment are "made subject to a requirement for development consent". It argues that s. 5 of the Planning and Development Act 2000, which provides for the referral system, plays an important role in achieving compliance with Article 2(1), and that this role is frustrated by the Board's restrictive approach to issues regarding the size and ownership of plots of land affected by its decisions upon referral.

11. Further, the applicant contends that the proceedings raise the question of what is a matter of planning judgment attracting "curial deference", a second matter of general public importance.

12. In its proposed grounds of appeal, the appellant develops these issues into two grounds of appeal. First, it contends that the High Court judge failed to have adequate regard to the obligation contained in Article 2(1) of the EIA Directive, and in failing to appreciate the importance of the s. 5 referral procedure in achieving compliance with that obligation. Second, the appellant maintains that the High Court judge erred in his reliance upon the decision in *Kinsella v. Dundalk Town Council* [2004] IEHC 373, which had no application to fair procedures, and that he did not have adequate regard and/or took the wrong approach to the power of the Board to make further inquiries regarding ownership/occupation of the lands under s. 6 of the 2000 Act and its obligations in respect of service having regard to the procedures available under s. 250.

13. Having considered the application for leave to appeal as well as the respondent's notice, the Supreme Court granted leave in a determination of the 18th April, 2018, wherein the Court stated that it was:

> "satisfied that the issue raised by the applicant is one of general public importance in relation to the steps required to be taken to identify the owners/occupiers of the lands in question and whether or not the High Court was correct to afford curial deference to the Board in its approach to the undoubtedly difficult question of identifying the relevant owners/occupiers of the lands in question".

The Court continued:

> "Accordingly, the Court considers that the circumstances of this case justifies a grant of leave to appeal to this Court on the grounds set out in the application for leave, subject to any adjustment or refinement at case management".

The Board's objection

14. In the course of case management, the Board raised an objection to the scope of appeal as pursued by the appellant in its written submissions. It contends that the first issue set out above, regarding Article 2(1) of the EIA Directive and compliance therewith, is not within the scope of the appeal. In particular, it submits that, whilst the Directive had been mentioned at various points throughout the proceedings, it was only in the course of the appeal to this Court that the appellant has attempted to argue that Article 2(1) obliged the Board to act in a particular way with respect to the referral, e.g. to use its powers under s. 250 of the 2000 Act to serve notice on the owners/occupiers. In this regard the Board's objection, which has been argued before this Court in both written and oral submissions, may be summarised as follows.

15. First, the Board submits that there is only a passing reference to Article 2 in the appellant's statement of grounds upon which it was granted leave to apply for judicial review. Instead, in the statement of grounds the appellant focuses on the allegation that the approach of the Board to the issue of ownership was *ultra vires*, irrational and contrary to its statutory obligations.

16. Second, the Board submits that the Article 2 issue was not argued in the High Court. Article 2 is mentioned in the appellant's submissions in the High Court, where it is stated that the s. 5 procedure has an important role in ensuring that Ireland fulfils its obligation under that Article. However, the submissions go on to focus instead on how the approach of the Board with regard to ownership was unreasonable and in breach of its statutory obligations, with particular emphasis being placed on the failure of the Board to seek further information regarding ownership in that respect.

17. Third, the Board submits that the Article 2 issue was not the subject matter of the High Court judgment. The judgment instead focused on the question of whether the approach adopted by the Board to the issue of ownership was irrational or unreasonable, especially having regard to the curial deference which may be afforded to a planning authority.

18. Finally, the Board emphasises that in a judgment delivered on the 7th December 2018, the High Court judge refused to certify leave to appeal on the Article 2 issue on the basis that that question had not arisen on the application before him and thus did not arise out of the decision he had given.

19. For the above reasons, the Board contends that the appellant should not be at this late stage permitted to raise a new issue in the proceedings.

20. While the Board accepts that in certain exceptional circumstances this Court may allow a new issue to be argued, it maintains that such circumstances do not arise in the present case. The Board observes that s. 50A(5) of the 2000 Act places a statutory limitation on the ability of an applicant for judicial review to rely upon grounds other than those in respect of which leave is granted. It contends that this principle must extend on an appeal from a judicial review decision of the High Court. Thus, this case falls at the more restrictive end of the spectrum identified by O'Donnell J. in *Lough Swilly Shellfish Growers Co-operative Society v. Bradley* [2013] IESC 60, and the appellant should not be permitted to raise this new issue.

Appellant's submissions

21. Counsel for the appellant first takes issue with the Board's characterisation of its argument in relation to Article 2(1). Far from arguing that said Article obliged the Board to determine the referral one way or another, as the Board at para. 79 of its written submissions alleges the appellant to have done, the appellant simply argues that the Board had to have regard to the Article when it made its determination and that it erred in not doing so.

22. In this regard the appellant relies on the decision in Callaghan v. An Bord Pleanála [2017] IESC 60 as authority for the proposition that an appellant should be permitted to raise a European Union Law argument which might be relevant to the proper interpretation of the provisions of the 2000 Act. Counsel submits that the appellant should be permitted to rely on Article 2(1) of the EIA Directive as it is relevant to the proper construction of s. 5 and s. 250 of the 2000 Act.

23. Whereas the appellant concedes that its argument in relation to Article 2(1) of the EIA Directive was not referred to in the High Court judgment, it nonetheless contends that the issue was referred to in its statement of grounds supporting its claim for judicial review and was relied upon in both its written and oral submissions before that Court. Moreover, counsel for the appellant observed that the evidence before the High Court demonstrated that the Inspector had reminded the Board, in the context of the substantive issue, of its EU law obligations regarding development consent.

Decision

24. I am satisfied that there is much merit in the submissions made by the Board concerning the proper scope of this appeal, particularly having regard to (i) the pleadings relied upon by the applicant in the High Court, (ii) the issues argued before the High Court judge, and (iii) the issues determined in the judgment of the High Court judge. These serve to establish that the High Court was not asked to determine, on the facts before it, the extent to which Article 2(1) of the EIA Directive operated on the obligations of the Board to determine the s. 5 referral or upon its approach to its powers under s. 250 of the 2000 Act. I accept that the EIA Directive was only referenced by the applicant in the context of the substantive argument made in its referral to the Board, which was to the effect that the peat extraction was not exempted development and required an EIA.

25. What is evident from the submissions advanced by Mr Devlin S.C. on behalf of the appellant is that what his client intends on the appeal, should the Court hold with him, is to argue that the Board was required to have regard to Article 2(1) of the Directive when it made its determination to dismiss the referral and that it acted unlawfully in failing to do so. The Board resists this proposed approach on the basis that the appellant could have sought to advance that case in the High Court but did not, and that having regard to authorities such as *Lough Swilly* it should not now be permitted to do so.

26. Notwithstanding the arguments advanced by the Board and the failure of the appellant to rely on Article 2(1) in the court below, I am satisfied that the decision in *Callaghan v. An Bord Pleanála* [2017] IESC 60, a decision concerning the scope of the appeal in proceedings which

concerned the provisions of the Planning and Development (Strategic Infrastructure) Act 2006, provides significant support for the approach proposed by the appellant. *Callaghan* is of course, as earlier stated, authority for the proposition that the Court should not adopt an overly technical or narrow approach to determining the scope of the appeal. More importantly, in the context of the present case, the decision is authority for the proposition that an appellant may be permitted to raise a European Union law argument not made in the court below if it is likely to be relevant to the proper construction of some relevant statutory provision or statutory framework.

27. The following is what Clarke J. stated in his judgment in *Callaghan* concerning the Court's obligations to have regard to constitutional principles, and by analogy European law, when construing legislation in the course of an appeal:-

> "4.4 When an Irish court is considering the proper interpretation of a statutory measure it may well take into account any constitutional principles which might impact on the proper construction of the legislation concerned. Indeed, it is fair to say that a court might very well be reluctant to disregard such constitutional questions of interpretation even if they were not specifically raised by the parties. A court, and in particular a court of final appeal, is, as a matter of national law, required to give a definitive interpretation of the legislative measure which comes into question in the course of proceedings properly before it. It could not be ruled out, therefore, that a court in such circumstances would be reluctant to give a construction to legislation without having regard any constitutional issues which might impact on the proper construction of the measure concerned in accordance with *East Donegal* principles. This might well be so where there would be a real risk that the Court would give an incorrect interpretation of the legislation in question if it did not itself raise the constitutional construction issue. It must be recalled that the proper interpretation of legislation is objective and is not dependent, necessarily, and the arguments put forward by the parties.
>
> 4.5 By analogy, it seems to me that it is at least arguable that an Irish court, in order to comply with the principle of conforming interpretation, would be required to have regard, even on its own motion, to provisions of Union law where those provisions might have an impact on the proper interpretation of national measures under consideration."

28. Clarke J. proceeded to make clear that it would not be appropriate for the Court to embark on a consideration of the proper interpretation to be afforded to the overall statutory framework whilst ignoring its obligation to ensure, insofar as possible, that it would be construed in a manner consistent with European Union law:-

> "The proper interpretation of that statutory framework must be objectively considered, independent of the arguments of the parties, and must have regard both to the principles of Irish constitutional law and provisions of Union law insofar as those principles and measures may legitimately impact on the proper construction of the statutory framework in question".

29. Applying the same reasoning to the facts of the present case, given that the proper construction of s. 5 and/or s. 250 of the 2000 Act properly falls within the scope of the appeal, the deployment of Article 2(1) on the interpretive question can therefore properly be regarded as a refinement of the argument which the appellant seeks to advance in favour of what he contends are the obligations of the Board, and should thus be permitted in accordance with the jurisprudence earlier discussed. The appellant should not be excluded from making an argument as to how those provisions are to be construed in light of Article 2(1) of the EIA Directive even if this results in the applicant being afforded some considerable latitude in light of its failure to pursue such an argument in the course of the High Court proceedings. In so deciding I am mindful of the supremacy of EU law and the risk that if the Court was to take an overly restrictive approach to the scope of the appeal, such a restriction could interfere with its obligation to ensure that the relevant statutory provisions are properly construed against the backdrop of EU law. The Supreme Court, as the final appellate court, could not allow itself be placed in a position where it might incorrectly construe a statute by reason only of the fact that in the court below the applicant had failed to argue the effect of European Union law on that construction.

30. Finally, it is important to make clear the limited extent to which the appellant is entitled to rely upon Article 2(1) of the EIA Directive in the course of the upcoming appeal. The appellant is not being afforded the liberty of making any stand-alone argument or point based upon European law. EU law is only to be deployed as part of an argument as to the proper interpretation of the 2000 Act insofar as such an argument might be categorised as a permissible refinement of the argument made in the court below. Consequent on this judgment, I would propose that the parties be afforded an opportunity to amend their submissions.