THE HIGH COURT

[2023] IEHC 93

[2021/759 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT, 2000, AS AMENDED

BETWEEN

BALLYSHANNON ACTION GROUP

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

KILSARAN CONCRETE TRADING AS KILSARAN BUILD

NOTICE PARTY

JUDGMENT of Mr. Justice Charles Meenan delivered on the 28th of February 2023

Background

1. These Judicial Review proceedings concern an application by the Notice Party, Kilsaran Concrete, to develop a 32.2-hectare quarry on a green field site on land at Racefield, Ballyshannon, Co. Kildare.

2. The Applicants are a group/association comprising of over 229 local residents who, as part of the group and on their own individual basis, have opposed the proposed development. The group/association and its members have actively participated in the planning process that resulted in the impugned decision of the Respondent.

3. The Applicant is an unincorporated body.

4. On its *ex parte* application for leave to seek certain reliefs by way of Judicial Review the court directed that the application be on notice to the Respondent and the Notice Party. The Notice Party objects to leave being granted.

The issue

5. The Notice Party submits that the Applicant, as an unincorporated body, has neither the standing nor the capacity to bring these Judicial Review proceedings. It is common case that an unincorporated body, such as the Applicant, is not a legal entity and has no separate legal personality. However, it is also the case that this legal situation can be altered by statutory provisions, in this case the provisions of the Planning and Development Act 2000 (as amended) (the Act of 2000).

Relevant statutory provisions

6. The provisions of the Act of 2000 that are directly relevant to this application are:

> "S. 50 (1) "Where a question of law arises on any matter with which the Board is concerned, the Board may refer the question to the High Court for decision.
>
> (2) A person shall not question the validity of any decision made or other act done by—
>
> (*a*) a planning authority, a local authority or the Board …
>
> (*b*) …
>
> (*c*) …
>
> …
>
> otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (the "Order").
>
> S. 50A
>
> …
>
> (3) The Court shall not grant *section 50* leave unless it is satisfied that—

(*a*) there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed, and

(*b*) (i) the applicant has a sufficient interest in the matter, which is the subject of the application, or

(ii) where the decision or act concerned relates to a development identified in or under regulations made under *section 176*, for the time being in force, as being development which may have significant effects on the environment, the applicant—

(I) is a body or organisation (other than a State authority, a public authority or governmental body or agency) the aims or objectives of which relate to the promotion of environmental protection,

(II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives, and

(III) …"

Submissions

7. Mr. Oisin Collins SC, on behalf of the Applicant, relied upon the provisions of s. 50A (3) (b) (i). He submitted that under s. 50(2) the applicant was "a person" who could bring Judicial Review proceedings. "Person" is not defined in the Act of 2000 but rather is defined in s. 18 of the Interpretation Act 2005 as follows:

"(*c*) *Person*. "Person" shall be read as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons, …"

Thus, he submits, the applicant is a "person" for the purposes of s. 50 of the Act of 2000.

8. It was submitted that the "applicant" referred to in s. 50A (3) (b) (i) is referable to "person" in s. 50. For the court to grant leave, the court must be satisfied that the applicant has "sufficient interest" in the subject of the application. It was submitted that the Applicant had

"sufficient interest" by reason of its participation in the planning process. Reliance was placed on the following passage from the judgment of the Supreme Court in *Grace and Anor v. An Bord Pleanála* [2017] IESC 10 where it was stated:

> "That may be especially so where the person concerned does not have a reasonably close physical proximity to the development in question or an established connection with a particular amenity value which might arguably be impaired by the proposed development. In that context it is important to emphasise that participation in the process will undoubtedly confer standing."

Thus, it was submitted that the Applicant had both standing and capacity to bring these Judicial Review proceedings.

9. As for the provisions of s. 50A (3) (b) (ii), it was submitted by the Applicant that this was an alternative basis upon which the applicant could have capacity to bring these proceedings. It was submitted that this statutory provision conferred capacity on certain applicants who did not have "a sufficient interest" in the matter.

10. Mr. Paul Gardiner SC, on behalf of the Notice Party, relied on the Supreme Court decision of *Sandymount and Merrion Residents Association (SAMRA) v. An Bord Pleanála & Ors* [2013] 2 IR 578. Mr. Gardiner submitted that in *SAMRA* the court found that it did have capacity to institute proceedings on the basis of s. 50A (3) (b) (ii) not because of (i). He further submits that if the applicant's submissions were correct the Supreme Court would never have reached (ii) because it would have stopped at (i). The Notice Party also relied on the decision of Humphreys J. in *Dublin 8 Residents Association v. An Bord Pleanála & Ors* [2022] IEHC 116. In that decision, Humphreys J. made a reference to the European Court of Justice and would not have done so had the applicant's interpretation of (i) been correct.

11. In response, the Applicant submitted that the submissions made to this court on the relevant sections of s. 50A (3) (b) may not have been made in either the *SAMRA* case or the *Dublin 8* case.

Consideration of submissions

12. In my view, the Applicant's interpretation of the provisions of s. 50A (3) (b) (i) and (ii) are persuasive. If similar submissions had been made in either the *SAMRA* case or the *Dublin 8* case there does not appear to have been any ruling on them. However, in the course of his judgment in the *Dublin 8* case Humphreys J. stated:

> ***"Whether s. 50A(3)(b)(i) confers capacity on an unincorporated body that satisfies the test in that sub-paragraph***
>
> *76. The question is whether sufficient interest is enough to confer capacity on an unincorporated body, or whether it merely confers standing on a body that already has legal capacity.*
>
> *77. The Supreme Court decision in Sandymount & Merrion Residents Association v. An Bord Pleanála [2013] IESC 51, [2013] 2 I.R. 578 doesn't really answer this question because it finds that implied capacity is created by para. (b)(ii), but does not address para. (b)(i). The meaning of para. (b)(i) ultimately turns on the effect of EU law given the point as noted earlier that para. (b)(i) is a straight implementation of art. 11(1)(a) of EIA directive 2011/92/EU."*

Humphreys J. continued:

> *"80. This issue seems to me raises referable questions of EU law as follows:*
>
> ***Does Art. 11(1)(a) of directive 2011/92/EU read in conjunction with Article 47 of the Charter of Fundamental Rights and/or art. 9(2) to (4) of the Aarhus Convention as approved on behalf of the European Community by Council decision***

> ***2005/370/EC have the effect that where an environmental NGO meets the test for standing set out in that provision, the NGO concerned is to be regarded as having sufficient capacity to seek a judicial remedy notwithstanding a general provision of domestic law which precludes unincorporated associations from bringing legal proceedings?"***

Humphreys J. also referred a number of other questions to the European Court of Justice.

Conclusion

13. Though, as I have said, I find the interpretation of the Applicant on the relevant provisions, ss. 50 and 50A of the Act of 2000, persuasive the correct course for this court to take is to await the determination of the European Court of Justice on the questions referred by Humphreys J. in *Dublin 8 Residents Association v. An Bord Pleanála & Ors* [2022] IEHC 116/482. I will list this matter for mention only on 24 March 2023.