[2020] IEHC 505

THE HIGH COURT

JUDICIAL REVIEW

[2020 No. 426 JR]

BETWEEN

NORTH WESTMEATH TURBINE ACTION GROUP AND NORTH WESTMEATH TURBINE ACTION GROUP CLG

APPLICANTS

AND

WESTMEATH COUNTY COUNCIL, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

COOLE WINDFARM LIMITED

NOTICE PARTY

Judgment of Mr. Justice Richard Humphreys delivered on Thursday the 22nd day of October, 2020

1. The notice party made a planning application for 13 turbines, a compound and ancillary works in 2017 (reference no. 17/6292). That was refused by Westmeath County Council, but granted on appeal by An Bord Pleanála. At that stage permission wasn't sought for the works required to connect the site to a substation in Mullingar.

2. The present applicants brought judicial review proceedings challenging the permission granted by An Bord Pleanála [2019 No. 297 JR/2019 No. 84 COM]. Similar proceedings were also brought by Mr. Peter Sweetman [2019 No. 305 JR]. The applicants' proceedings were struck out against State parties ([2010] IEHC 924). Both judicial reviews were heard together by Quinn J. in February and March 2020 followed by written submissions during the COVID-19 emergency, with judgment reserved as of the date of hearing of the present matter.

3. During the judicial review the developer indicated that it would be making an application for express permission for the grid connection. That application was lodged on 25th May, 2020.

4. On 3rd June, 2020 Westmeath County Council made a decision to accept the application as valid under art. 26 of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001), as substituted by art. 48 of the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018).

5. On 25th June, 2020 a statement of grounds in the present proceedings was filed challenging the decision to accept the permission as valid. An application for leave was made to Meenan J. on 29th June, 2020. He directed that it should be made on notice and gave liberty to issue a notice of motion seeking leave. On 2nd July, 2020 a motion was issued, but by mistake it was limited to seeking a stay and did not include the leave application. On 14th July, 2020 the matter was put back to 15th July, 2020 with liberty to serve the correct notice of motion. That was issued later on 14th July, 2020 and on the following day Meenan J. put both matters in for hearing on 17th July, 2020.

6. In relation to the stay and the leave application, I received helpful submissions from Mr. Peter Bland S.C. (with Mr. Michael O'Donnell B.L. who also addressed the court for the applicant); from Ms. Deirdre Hughes B.L. (and Ms. Isabelle Aylmer B.L. who addressed the court initially on her behalf), for the council; from Mr. Stephen Dodd S.C. for the State respondents; and from Mr. Neil Steen S.C. (with Mr. John Kenny B.L.) for the developer.

Sequencing of issues

7. The test for a stay set out in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] IESC 49, [2012] 3 I.R. 152, requires determination in the first instance of whether the point is arguable. In contexts such as planning or asylum where there is a higher test, that should be read as meaning substantial grounds. Thus, to decide on a stay involves first asking whether there are substantial grounds, which is equivalent in effect to deciding whether leave should be granted absent some special reason militating against the grant of leave. The logic, therefore, where a stay and leave is sought, is to decide on leave first and then whether the stay should be granted.

8. When the matter was heard on 17th July, 2020 I decided in principle to grant leave subject to the submission of a draft amended statement of grounds, and to refuse a stay, indicating that I would give reasons later, and now do so, although subsequent developments in relation to withdrawal of the planning permission have since overtaken the proceedings.

Leave application

9. The only particularly notable features of the leave application worth mentioning at this stage are the question of prematurity and the question of the length and format of the statement of grounds.

10. An application to cut off a process in midstream raises the perennially awkward question as to whether the applicant has to challenge a preliminary decision (such as to accept a planning permission) or whether the applicant can wait until the final decision. The general principle must be that a process should be allowed to proceed and that all steps can be challenged at the end. Any other rule would encourage multiple judicial reviews and unnecessary expenditure of court time on a premature basis: see *North East Pylon Pressure Campaign Ltd v. An Bord Pleanála* [2016] IEHC 300, [2016] 5 JIC 1215 (Unreported, High Court, 12th May, 2016), and the authorities discussed there, an approach recently approved by the Court of Appeal in *Spencer Place Development Company Ltd v. Dublin City Council* [2020] IECA 268 *per* Costello J.

11. In *An Taisce v. An Bord Pleanála* [2015] IEHC 604 (Unreported, High Court, 7th October, 2015), Haughton J., at para. 75, dealing with an objection to "*project-splitting*", took the view that a direction should have been challenged when the environmental impact statement was received and said, "*[i]t is like calling back 400 metre runners after they have finished their race to rerun it because of a false start; the time to rectify the false start is immediately after it happens*."

12. The analogy of a false start is a really inspired and brilliant piece of rhetoric, firstly because it sticks in the mind and secondly because if one accepts the analogy as so persuasively offered, the conclusion follows automatically. But the analogy is in some respects problematic. First of all, for the court to deal immediately with the allegation of a false start is normally to go against the wishes of the race organisers, who reject any and all such allegations and want the race to continue. It is to an extent to require all runners to freeze in mid-stride for however long it takes. And finally, if the race resumes and there is any further alleged irregularity in the process, it is to hold up the prospect of freezing matters again for however many more times it takes. Otherwise why privilege a problem early on over a problem mid-stream? And indeed acceptance of an application only happens a little way into the process, albeit shortly after the start. It is not in fact itself the start of the process; at best it might be the first decision, so it isn't even a false start.

13. The really important practical implication of Costello J.'s judgment for the Court of Appeal in *Spencer Place,* superseding previous approaches such as in *An Taisce,* is that, on the contrary, it is generally more convenient both for the legal system and for the process under review to have everything dealt with together at the end. Whether there is ultimately a need for a stewards' enquiry may depend on who wins the race, rather than having to litigate every point as it arises.

14. My view is that the applicants could have waited for the outcome of the planning process and did not need to challenge the acceptance of the permission as valid at the outset. Waiting until the end of the process would not mean that they lost the point, and it could have been included perfectly legitimately in a judicial review of an overall decision with which they were unhappy. But in fact the respondents and notice party haven't in fact objected to leave. In the absence of such objection I wouldn't rule out the leave application on prematurity grounds, but things might have been different if there had been an objection, and again I emphasise that failure to challenge such an initial decision in no way prejudices an applicant if they seek to include such a point in a challenge to the final outcome of the process.

15. The second issue worthy of note is the length and format of the statement of grounds. The original statement was some 26 pages long with a mix of factual background, legal background, core grounds and detailed particulars. At one level that is relatively modest by the (possibly over-detailed) currently prevailing planning law standards, and indeed Mr. Bland suggested that this 26-page statement was, to use his phrase, a mere "*slim slip of a thing*" (James Joyce, *Finnegans Wake* (London, Faber & Faber, 1939), p. 202) in comparison with the 53-page statement of opposition in the judicial review before Quinn J. And maybe respondents have less excuse as there is no need to deny a statement of grounds point by point; indeed it is counterproductive to do so as it lessens the communications value of the statement of opposition and may mean losing sight of any positive points that a respondent has.

16. Ideally, a statement of grounds in a complex technical matter like this should be formatted in three sections:

    (i) the core grounds to be laid out concisely in a *ratio* format; assuming hypothetically that the applicant were to win the case one might ask what would the *ratio* of the headnote to a law report look like*, e.g*. the applicant was entitled to relief because of a specific doctrine as applied on a specific basis;

    (ii) further particulars setting out the microgranular details; and

    (iii) the factual and legal matters relied on.

17. This format has since been codified in Practice Direction HC96 but is worth using more widely. On the basis that the applicants were willing to reformat the statement of grounds in a more digestible form I decided to grant leave in principle.

Application for a stay

18. As noted above, the test for a stay is set out in *Okunade*. Even though I decided to allow the applicants to bring the present challenge, that didn't mean that the principle that the process should normally be allowed to proceed was irrelevant. The applicant claimed that the major factors in favour of a stay were as follows:

    (i). this is a jurisdictional situation, therefore, there should be a stay;

    (ii). if there is an adverse decision, the applicants could be faced with the question of whether to judicially review that decision or to appeal it;

    (iii). if the planning authority made a decision, the applicants could lose that point if they didn't judicially review that decision because they could be held to be out of time;

    (iv). the planning application affects the planning history of the site;

    (v). the application is so deficient that the process can't properly proceed;

    (vi). this impairs rights conferred by European law because it impairs public participation; and

    (vii). the applicant would incur further costs in the further administrative procedures required.

19. The first point is not very persuasive. The fact that an objection goes to jurisdiction doesn't automatically mean that the process can't be allowed to continue.

20. As regards the assertion of EU law rights, European law requires the court to have the power to issue a suspending decision, but the power to do something should not be confused with an obligation to use that power. EU law does not impose a mandatory requirement that nothing can happen unless any challenge to the extent of public

participation is first determined. The sequencing of procedures and orders is well within the scope of national procedural autonomy as long as the court has in principle power to suspend a decision and the net outcome is the effective implementation of EU law. If the decision will be quashed if the process required by EU law is not followed and if no environmental harm takes place during the process (which would certainly require utilisation of the power to suspend the process), then that amounts to an adequate implementation of EU law.

21. Ultimately, this all comes down to the prejudice of having to engage in further procedures. That is normally not irremediable prejudice and it is normally (and certainly here), outweighed by the benefits of allowing the process to continue: see *Northeast Pylon at paras*. 98, 106, 107 and 239. Such a conclusion is consistent with the views of Binchy J. in *Sweetman v. Clare County Council* [2018] IEHC 517 (Unreported, High Court, 31st July, 2018), Simons J. in *Spencer Place Development Company Ltd. v. Dublin City Council* [2019] IEHC 384 (Unreported, High Court, 30th May, 2019), and crucially of Costello J. on appeal therefrom.

22. As regards the applicants losing any procedural rights if there was no stay, the rule of law requires that if the applicants win the present judicial review, any decision premised on that outcome would have to be set aside (a point I made recently in *Barry v. The Commissioner of An Garda Síochána* [2020] IEHC 307 (Unreported, High Court, 8th June, 2020)). Mr. Bland does, however, ask the interesting question as to what the mechanism for that is in the sense of whether a planning authority or An Bord Pleanála would consider that it has jurisdiction to set aside its own decision that was based on an erroneous legal premise in the same way that a normal administrative or ministerial decision-maker could simply review or revise its own decision. One can see the argument for the necessity for a further judicial review, but that doesn't seem a desirable procedure. It would seem much better to hold that the board has an inherent legal obligation to treat as a nullity any decision that was premised on an earlier decision that had been quashed.

23. To put the matter beyond doubt, the applicant should be entitled to amend the application to add a challenge to any ultimate planning authority decision in the present judicial review. I see no reason in principle why that could not be challenged *ab initio* on the basis of *certiorari* of the decision "*when issued*" or alternatively by way of amendment as soon as any adverse decision is made. The applicants argue that they might be faced with the contention that they should seek a second judicial review rather than an amendment. In one sense I have dealt with that in terms of the proposed entitlement to amend as above, but in any event, as in *Habte v. The Minister for Justice and Equality* [2019] IEHC 47, [2019] 2 JIC 0405 (Unreported, High Court, 4th February, 2019), for the reasons there discussed, convenience and cost frequently if not normally lean in favour of a single set of proceedings, thus rendering amendment a preferable option to requiring a second judicial review.

24. Turning then to the case against a stay, a decisive factor is that the notice party's funding applications in the context of public interest in carbon mitigation would be affected by such a stay. It seems to me that there is no real contest and it is clear the process should be allowed to proceed.

25. In fairness to the applicants, there have been persistent uncertainties in many of the aspects of the procedures here. Mr. Bland had frequent recourse to saying in effect that I might think X, but some other court might think Y. It seems to me there is scope for further procedural clarification in order to achieve the sort of level of certainty inherent in an effective remedy and in accessibility of the law that would pass muster in EU terms. The applicants here haven't specifically challenged the State's failure to set out clear procedural rules (such as exactly when to challenge particular decisions and when to await further procedures, and what exactly is the mechanism to quash a subsequent planning decision if an earlier decision is found invalid). Having said that, Costello J.'s judgment in *Spencer Place* is a really major development in procedural clarification (something the legal system would benefit from a bit more of) and will be of immense practical benefit to the management of judicial reviews in the High Court, not least in the planning context.

26. Finally, I indicated that in order to save costs, the issues against the State respondents could be postponed following the grant of leave depending on the outcome of the issues against the council.

Order

27. Accordingly, the order made on 17th July, 2020 was:

    (i). to grant leave in principle subject to the submission of a draft amended statement of grounds;

    (ii). to refuse the stay on the following terms:

        (a). the refusal is without prejudice to the applicants' entitlement in the event of succeeding in the judicial review to contend that any decisions premised on an invalid application must be treated as invalid;
        (b). the applicants would be entitled to amend the proceedings to add as an additional relief a challenge to any such decision, if issued, with liberty to seek to add additional grounds if they arise.