

No redaction needed

Approved



THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2020] IECA 355

RECORD NOS 2020/55 & 2020/56

BETWEEN

NORTH WESTMEATH TURBINE ACTION GROUP and

NORTH WESTMEATH TURBINE ACTION GROUP

COMPANY LIMITED BY GUARANTEE

Appellants

AND

AN BORD PLEANALA, IRELAND AND THE ATTORNEY GENERAL

Respondents

AND

WESTMEATH COUNTY COUNCIL, COOLE WINDFARM LIMITED.

GREENWIRE LIMITED/GREENWIRE WINDFARMS LIMITED

Notice Parties

JUDGMENT of Mr Justice Maurice Collins delivered on 11 December 2020

PRELIMINARY

1. Before the Court for determination are two applications brought by Ireland and the Attorney General (collectively, “*the State*”) seeking to strike out appeals brought by the Appellants on the basis that (so it is asserted) the Appellants are not entitled to bring those appeals without first obtaining leave to appeal from the High Court pursuant to section 50A(7) of the Planning and Development Act 2000 (as amended).
2. It is common case that no leave to appeal was sought from the High Court and the essential issue on these applications is whether the appeals come within the scope of section 50A(7) or not.

THE APPEALS

3. Before that issue can usefully be addressed, it is necessary to explain what the appeals are about and the background to them. I will endeavour to do so as briefly as I can.

4. These proceedings involve a challenge by the Appellants to a decision of An Bórd Pleanála (“*the Board*”) to grant planning permission for a 13 turbine windfarm in the townland of Coole and adjacent townlands in Co Westmeath. The decision of the Board was given on 26 March 2019.

5. Leave to apply for judicial review was granted by the High Court on 27 May 2019 and the proceedings were subsequently admitted to the Commercial List.

6. In August 2019, the State brought an application to dismiss/strike-out the proceedings against it pursuant to Order 19, Rules 27 and/or 28 RSC and/or the inherent jurisdiction of the Court, asserting that the proceedings disclosed no reasonable cause of action as against the State and/or were frivolous and vexatious and/or were doomed to fail.

7. The basis for the application was set out in an affidavit sworn by Barry Ryan, a solicitor from the Chief State Solicitor's Office, sworn on 13 August 2019. Mr Ryan observed that of the 45 paragraphs in the Statement of Grounds, only five (E26 and E41-E44) could be construed as touching on the State *"insofar as they raised issues concerning the transposition of the EIA and Habitats Directive."* However, Mr Ryan said, those pleas were *"vague and so unclearly expressed as not to be in accordance with Order 84 Rule 20(2)"* RSC. Mr Ryan observed that no reliefs were sought against the State and referred to previous correspondence in which these points had been raised with the solicitors for the Appellants and the Appellants had been invited to release the State from the proceedings. Mr Ryan also observed that the grounds raised in relation to the State depended on the meaning of particular conditions of the planning permission and suggested that the State *"had been named in reserve as a backup to other grounds relevant"* to the Board. That, Mr Ryan suggested, was *"not a proper way to proceed, in particular in circumstances where no declaratory relief or otherwise can be granted"* against the State.
8. The particular paragraphs in the Statement of Grounds referred to by Mr

Ryan are lengthy. They make a number of complaints about the transposition of Council Directive 2014/52/EU (the EIA Directive) and Council Directive 19/43/EU (the Habitats Directive) into Irish law, both as regards issues of public participation (paragraphs E41 and E43) and mechanisms for the imposition of mitigation measures (paragraphs E42 and E44). For the purposes of this judgment, it does not appear necessary to refer in any more detail to these paragraphs.

9. The State's application appears to have prompted the Appellants to bring an application seeking to amend the Statement of Grounds by the addition of two further declarations, in the following terms:

“A Declaration that Council Directive 92/43/EU has not been properly transposed by the Second Named Respondent in circumstances where there is no provision in the Planning and Development Act 2000 (as amended) whereby mitigation measures can be lawfully imposed on lands other than those provided for under section 34(4) of the Planning and Development Act.”

and

“A Declaration that the provisions of Council Directive 2014/52/EU have not been properly transposed in circumstances where there is no provision whereby mitigation measures can be lawfully imposed on lands other than those provided for under section 34(4) of the Planning and Development Act.”

10. The application to amend was grounded on an affidavit sworn by Gabriel Toolan, the solicitor acting for the Appellants, on 9 October 2019. He explained in brief terms the basis for the Appellants’ complaints regarding the transposition of the EIA Directive and the Habitats Directive and observed that these issues had been raised in the Statement of Grounds in the paragraphs I have summarised above.

11. The two motions came on for hearing before the High Court (Twomey J) (“*the Judge*”) over 2 days in November 2019. By then, the State had filed a Statement of Opposition in which, after making a preliminary objection to the effect that the proceedings against the State ought to be dismissed because of the failure to seek relief against them, proceeded to address the transposition grounds.

12. The Judge gave judgment on the two motions on 19 December 2019. He addressed what he referred to as “*the strike-out application*” first, on the basis that it was first in time. As regards that application, the Judge referred extensively to the decision of the High Court (Costello J) in *Alen-Buckley v An Bord Pleanala* [2017] IEHC 311. In *Alen-Buckley v An Bord Pleanala* the court had acceded to an application to strike out judicial review proceedings against the State in circumstances similar to the circumstances of the State’s application in these proceedings and the Judge concluded that the same approach was appropriate here.

13. The Judge rejected the argument that *Alen-Buckley v An Bord Pleanala* should be distinguished on the basis that no application to amend had been made in *Alan-Buckley* whereas such an application had been brought by the Appellants here. The reasoning of the Judge on this point is a little difficult to follow. He considered that it was “*self-evident that if the pleadings are now amended to include relief against the State parties, there would then be a cause against the State parties.*” (Judgment at para 38). However, the filing of the motion to amend “*does not, and cannot, impact on the strength of the standalone argument contained in the motion for*

strike out, that where pleadings disclose no relief as against the State parties, they are bound to fail” (Judgment, at para 44). In coming to that conclusion, the Judge expressed concern that to permit the amendment would circumvent strict time sensitive rules and would allow the Appellants to bring a judicial review challenge against the State some 142 days after the time for doing so had expired. He also criticised the absence of any explanation as to why no reliefs had not been sought against the State. The Judge suggested that the failure to do so may not have been an oversight though he did not identify what might have been the reason for any intentional omission of such reliefs.

14. The Judge then went on to address the amendment motion, though noting that his earlier analysis had effectively disposed of it. Again, he emphasised the time-limits involved and the public policy underpinning them and also stressed (as he had done earlier in his Judgment) the failure of the Appellants to explain their failure to seek relief against the State. He rejected the argument that permitting the amendment was not akin to permitting an entirely new case to be advanced against the State, given that the grounds for seeking those reliefs were already in the Statement of Grounds. The Judge concluded that even if the application to amend “*was*

to be considered in isolation”, no sufficient justification to permit the amendment had been offered.

15. The Judge expressed his conclusions as follows:

“52. In summary, this Court will grant the motion of the State parties .. for an Order striking out the proceedings against them as bound to fail. It follows therefore that this Court refuses the application of the Action Group ... to amend the Statement of Grounds.”

The correctness of these conclusions is not in issue before this Court at this time. That is a matter to be addressed if and when the Court comes to hear the appeals the subject of the applications now before the Court.

16. In any event, by two Notices of Appeal dated 19 February 2020 the Appellants appealed the order striking out the proceedings against the State as being bound to fail and also appealed against the order refusing their amendment application (separate orders having been drawn up by the High Court). In due course, Respondents’ Notices were filed by the State. Those Notices do not appear, on their face, to take any issue with the Appellants’

entitlement to bring the appeals.

17. The applications now before this Court then issued, affidavits were exchanged and the applications were heard by the Court yesterday.
18. In order to complete the narrative, I should mention that the judicial review proceedings – in which the Board is now the sole respondent - have since been heard by the High Court (Quinn J). Judgment was reserved and has not yet been delivered. The State did not participate in that hearing.

SECTION 50A(7) AND THE ISSUES BEFORE THE COURT

19. Sections 50 and 50A of the Planning and Development Act 2000 are significant provisions concerning the bringing and determination of judicial review proceedings in planning matters. Section 50A(7) provides as follows:

“(7) 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.”

The “*Court*” referred to is, of course, the High Court. The reference to the Supreme Court is now to be read as a reference to the Court of Appeal by virtue of the section 75 of the Court of Appeal Act 2014.

20. Having regard to the terms of section 50A(7), the issues that the Court must address in order to decide the applications brought by the State are as follows:

- Whether the appeal from the decision of the High Court to refuse the amendment application is properly to be regarded as an appeal from “*the determination of the [High] Court of .. an application for judicial review*”
- Whether the appeal from the decision of the High Court to strike out the proceedings against the State as being bound to fail is properly to be regarded as an appeal from “*the determination of the [High] Court of .. an application for judicial review*”

DISCUSSION

21. A large volume of authorities was provided to the Court but only a limited number of them have any real relevance to the issues presented.
22. The starting point for analysis is Article 34.4.1 of the Constitution. In relevant part, it provides that:

“The Court of Appeal shall –

i save as otherwise provided by this Article, and

ii with such exceptions and subject to such regulations as may be prescribed by law,

have appellate jurisdiction from all decisions of the High Court ...”

23. *Prima facie*, therefore, all decisions of the High Court may be appealed to this Court. That was described as “*the primary rule*” by Fennelly J in

Clinton v An Bord Pleanala [2007] 1 IR 272, at para 49.

24. Prior to its amendment by the Thirty Third Amendment of the Constitution (Court of Appeal) Act 2013, Article 34 contained (in Article 34.4.3) an equivalent provision providing for appeals from the High Court to the Supreme Court. That provision has been considered in a significant number of Supreme Court decisions, including *State (Feran) v Browne* [1967] IR 147, *People v Conmey* [1975] IR 341, *People v O' Shea* [1982] IR 384 *Hanafin v Minister for the Environment* [1996] 2 IR 321, *AB v Minister for Justice* [2002] 1 IR 296, *Clinton v An Bord Pleanala* [2007] 1 IR 272, *A v Minister for Justice* [2013] IESC 18, [2013] 2 ILRM 457 and *Stokes v Christian Brothers High School Clonmel* [2015] IESC 13, [2015] 2 IR 509.. There are a number of other such decisions also.
25. These decisions, and the principles established by them, apply with equal force to this Court's appellate jurisdiction under Article 34.4.1 of the Constitution: *Law Society of Ireland v Tobin* [2016] IECA 26,
26. All those decisions emphasise the entrenched nature of the appellate jurisdiction provided for in Article 34. Thus in *Hanafin*, Hamilton CJ

stated that:

“the fundamental position [is] that if it is the intention of the legislature to oust, except from or regulate the appellate jurisdiction of this Court to hear and determine appeals from the decisions of the High Court, such intention must be expressed in clear and unambiguous terms and it is a matter for interpretation by the Court as to whether or not any provision of any law which purports to except from or regulate the appellate jurisdiction of this Court is effective so to do.” (at 389)

27. Any limitation on the appellate jurisdiction has to be “*clear and unambiguous*”: per Denham J in *Clinton* at para 27. Where there is even “*a degree of ambiguity*”, any purported ouster will be ineffective. That principle applies to questions concerning the scope of a legislative ouster as it does to the existence of such ouster. That is illustrated by *Clinton* itself. It concerned section 50(4)(f) of the Planning and Development Act 2000 which was in terms similar to section 50A(7) and the issue was whether, where leave had been granted by the High Court, the appeal was then confined to the point or points of law certified as ones of exceptional

importance. The Supreme Court held that the provision was to be interpreted as not restricting the appeal to the certified points of law. The wording was ambiguous and therefore ineffective to restrict the appeal in the manner suggested.

28. For reasons which will become evident, the decisions in *AB v Minister for Justice* and *A v Minister for Justice* warrant particular attention.
29. At issue in *AB* was whether a decision of the High Court to refuse to grant an extension of time to bring judicial review proceedings challenging a deportation order was within the scope of section 5(3) of the Illegal Immigrants (Trafficking) Act 2000, such that an appeal from that decision could be taken only with the leave of the High Court. Section 5(3) is in very similar terms to section 50A(7). So far as material, it provides that the “*determination of the High Court of an application for leave to apply for judicial review ... or of an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case except with the leave of the High Court...*”
30. The principal judgment in *AB* was given by Geoghegan J. The kernel of

his analysis is contained in the following passage from his judgment:

“In this connection, it is irrelevant in my view whether the application for an extension of time is brought by an independent motion on notice in advance of an application for leave or whether the extension of time is requested in a combined motion on notice seeking the extension of time and then, if granted, leave for judicial review. In either event the issues involved on the application for extension of time may be substantially different from those involved in the application for leave. Under the express terms of the Act the restrictions on the right of appeal to the Supreme Court apply to the application for leave or the application for judicial review and as a matter of ordinary grammar and syntax, I find it difficult to see how it could be argued that there is an ouster of the right of appeal from a refusal to extend time. If the Oireachtas had intended that, it should have said so. Until the extension is granted there is no application for leave in existence. But even if as a matter of grammar and syntax, such an argument could be made, there is certainly not a clear and unambiguous ouster of the right of appeal which is required under the constitutional jurisprudence referred to earlier in this

judgment.” (at page 319)

31. Geoghegan J was also concerned at the “*unfair anomaly*” that would arise if the decision to refuse an extension of time was regarded as a “*determination*” for the purposes of section 5(3). On that basis, an unsuccessful applicant for an extension could not appeal a refusal without leave but, where a decision was made to extend time, the State could appeal that decision without any requirement for leave (at page 320).

32. That anomaly also exercised McGuinness J (at page 313) and in his judgment Fennelly J characterised such an interpretation of section 5(3) as “*both inconsistent and discriminatory*” and “*not an acceptable approach to the interpretation of a provision claimed to limit the right of an affected person to access to the courts.*” (at page 325) Fennelly J concluded his judgment as follows:

“It is not necessary for me to repeat the references made by Geoghegan J. to the decided cases on the interpretation of Article 34.4.3 of the Constitution. These cases show that this court has been correctly vigilant in its interpretation of this important constitutional

guarantee of access to the court, whose establishment is mandated by the Constitution as the final appellate court. This is not to preserve some institutional prerogative of the court itself, but to protect the constitutional rights of litigants to bring an appeal against judicial decisions affecting them. The notion that a double degree of jurisdiction is an important part of the normal judicial system is widespread in modern legal systems. It is not necessarily a fundamentally guaranteed right (see Toth v. Austria (1991) 14 E.H.R.R. 551). It is, however, recognised throughout the legal structure of this State. It should not be lightly encroached upon or invaded by ambiguous language. The least that is required is that, if the right is to be excluded, this should be done by clear and unambiguous words.” (at 319)

33. It is apparent from the concurring judgment of McGuinness J in *AB* that one of the arguments made on the Minister’s behalf was that, where there was a refusal of an application for an extension, there would indeed be a “*determination*” of the application for leave and that “*would in fact be the end of the matter.*” It was, it was argued, “*clear from wording of the Act that a decision which determined the proceedings could not be appealed*”

(at page 311).

34. A very similar argument was made here by Mr Dodd on the State's behalf. However, it is apparent that such an argument did not convince the Supreme Court in *AB*.
35. In his judgment in *AB*, Keane CJ took a rather different approach but ultimately concluded that section 5(3) could not "*be regarded as having clearly and unambiguously excluded the constitutional right of appeal to this court.*" (at page 309)
36. Section 5(3) was again at issue in *A v Minister for Justice*. The applicant had brought an application for leave to seek judicial review of a decision of the Refugee Applications Commissioner that she should not be declared a refugee. Before the application for leave was heard, the respondents brought a motion to dismiss the proceedings on a basis similar to the application brought by the State here. That application was successful, the High Court judge finding that the application for leave was bound to fail "*because, quite apart from the absence of prima facie of (sic) substantial grounds for the grant of leave, it is clearly a case in which the court would*

in any event require the applicant to pursue the statutory appeal instead.”

37. The applicant appealed to the Supreme Court and, as here, the respondents sought to have the appeal dismissed for failure to comply with the requirement to obtain leave.
38. In her judgment (with which Murray and Clarke JJ concurred) Denham CJ referred to the terms of section 5(3) and to the judgment of Geoghegan J in AB, setting out part of the passage that I have already referred to. She continued:

“27 I would apply that analysis to this case. The issues involved in a motion to dismiss may be substantially different from those involved in an application for leave to apply for judicial review. I agree and apply the reasoning of Geoghegan J. that the wording of s. 5(3)(a) does not clearly oust an appeal from such a motion. Further, even if such an argument could be made, there is certainly not a clear and unambiguous ouster of the right of appeal, such clear language being necessary under the constitutional jurisprudence.”

Consequently, the appellant in *A* had an untrammelled right of appeal from the decision to dismiss.

39. On its face, the decision in *A* presents a very significant obstacle to the State's applications here. However, Mr Dodd says that *A* is distinguishable. In the first place, he says, the immigration context is different. The time limits applicable to bringing judicial review proceedings in the immigration area are different to the time-limits applicable under the Planning and Development Act 2000. The interests involved are also different. In the immigration context, vital interests of individuals may be at stake. That is not the case in the planning context. These factors, he says, may have influenced the Supreme Court's approach to the availability of an unrestricted appeal in *A* (and presumably also in *AB*).

40. I do not see any force in these arguments. The restrictions on appeal in the Illegal Immigrants (Trafficking) Act 2000 and in the Planning and Development Act 2000 are cast in materially identical terms and they both fall to be construed and applied within the framework of Article 34.4.1 of the Constitution (as is evident from *Clinton* which was, of course, a planning case). If a particular category of decision – such as a decision to

refuse an application to amend or a decision to dismiss proceedings on the basis that they are bound to fail – does not fall within the scope of section 5(3) of the Illegal Immigrants (Trafficking) Act 2000 and thus may be appealed to this Court without leave, the submissions of the State do not identify any plausible basis on which this Court might properly conclude that the corresponding category of decision would fall within section 50A(7) simply because that subsection is addressed to decisions in the area of planning rather than immigration.

41. Mr Dodd makes a further argument about *A* – namely that its *ratio* extends only to certain kinds of applications to dismiss and the application here was, he says, of a materially different character. I will address that argument shortly. First, however, I propose to address the separate application before the Court to strike out the Appellants’ appeal from the Judge’s decision to refuse their application to amend the Statement of Grounds.
42. It may seem surprising that the State should argue that an application to amend a statement of grounds in judicial review proceedings should be regarded as “*the determination of the [High] Court of .. an application for*

judicial review”. Certainly, having read the State’s written submissions, it was not clear to me what was the basis for that argument and the State’s position is no clearer now having heard its oral submissions.

43. In my opinion, it is clear at the level of principle that a decision on an amendment application does not come within the scope of section 50A(7). Section 50A(7) restricts a party’s right of appeal to this Court in respect of, and only in respect of, the categories of decision expressly identified in it. The Court is not at large to expand those categories. On the contrary, section 50A(7) must be read narrowly in accordance with the principles identified in the authorities to which I have referred. Section 50A(7) does not refer to decisions on amendment applications. That is clear. It is equally clear, in my view, that section 50A(7) is not open to the construction that appeals from *all* decisions made by the High Court relating to or in the course of an application for leave or application for judicial review require leave.

44. What the State says is that, where an application for amendment is refused on the basis that the underlying proceedings are bound to fail (as it says was the basis for the refusal here) the decision to refuse the amendment is

so inextricably bound up with the decision to dismiss that it is somehow to be regarded as “*submerged*” into it.

45. In my view, there is no substance in that argument, which appears to me to be founded on a fundamental misunderstanding of section 50A(7). If this Court is to conclude that the Judge’s decision to refuse the amendment application here comes within section 50A(7), it can only be on the basis that that decision is, as a matter of law, to be regarded as the determination of the Appellants’ application for judicial review. The refusal decision was manifestly not such a determination and the Court has no power to treat it as such simply because the decision appears to have been based, in whole or in part, on the Judge’s conclusion that the proceedings should be dismissed on foot of the separate application brought by the State. In my view, the reasons for refusing an application to amend do not – and as a matter of law cannot – alter the character of such application or the character of the decision to refuse such application. That, it appears to me, is clear on the face of section 50A(7) and is copper fastened by the principles established by the authorities to the effect that any ouster of this Court’s appellate jurisdiction must be “*clear and unambiguous*”.

46. It follows that the State's application to dismiss the Appellants' appeal from the Judge's refusal to amend the Statement of Grounds is misconceived and must be rejected.
47. Before leaving that application, I observe that, had the application to amend been allowed by the Judge, the State would have been free to appeal that decision, without any requirement to obtain the leave of the High Court. Thus, the State's argument, if accepted, would result in precisely the "*unfair anomaly*" identified by the Supreme Court in *AB*. That is a further reason to reject it, if one was needed.
48. I turn to the appeal from the decision to strike out the proceedings as against the State. As already noted, the decision in *A* appears to present an obvious difficulty for the State's application to strike out that appeal. At a minimum, *A* establishes that appeals from *some* decisions to dismiss fall outside the scope of section 50A(7). Furthermore, the application for leave in *A* had been dismissed on the basis that it was bound to fail, which was also the basis on which the application for judicial review as against the State was struck out by the Judge here.

49. To this, the State argues that not all decisions to dismiss fall within the same category. Some fall outside the parameters of section 50A(7) (as demonstrated by *A*) but others fall within its scope. In response to a question from the Court, Mr Dodd acknowledged that the “*dividing line*” was “*hard to draw*” and required a case-by-case assessment. He returned to that issue in reply, saying that the “*clear-cut distinction*” was whether or not there was, in substance, a determination of the application for leave/judicial review. It was, it was said, a matter of substance rather than form. Here, the State says that the effect of the Judge’s decision was to substantively determine the Appellants’ application for judicial review as against the State and therefore the decision came within section 50A(7).
50. The immediate and obvious difficulty with that argument is that, if it is correct, it seems inevitably to follow that *A* (and *AB* also) were wrongly decided. In *A*, the decision of the High Court “*substantively determined*” the application for leave to the same extent as the decision of the Judge determined the application for judicial review against the State here. Indeed, as Mr Bland emphasised in his submissions, in *A* the High Court appears to have entered into the merits of the application to a greater extent than the Judge did here. Here, it is common case that the Judge did not

engage with the merits of the grounds at paragraphs E26 and E41-44 of the Statement of Grounds at all. Thus, Mr Bland says, even if there is a spectrum of dismissal decisions – and he says that there is not - the decision here is at the far end of the spectrum from the decision in *A* and it is clearer still that it does not come within the scope of section 50A(7).

51. That point appears to me to be well-made. However, when it comes to applying section 50A(7), I do not think that there is any room for case-by-case assessment or for the sort of subjective judgment that the State contends for. Section 50A(7) must be construed in a way which identifies precisely and predictably what decisions it applies to. Otherwise, it could not satisfy the constitutional imperative that any ouster of this Court’s appellate jurisdiction must be “*clear and unambiguous*”. As already observed, that principle applies to the issues concerning the scope of any legislative ouster as it does to the existence of such an ouster.

52. The State also rely on the observation of Geoghegan J in *AB* to the effect that the issues in an application for an extension of time may be “*substantially different*” from those involved in an application for leave and relied on the similar observation made by Denham CJ in *A* referring to

applications to dismiss and applications for leave. Citing the decision of the High Court (Haughton J) in *McDonnell v An Bord Pleanala* [2017] IEHC 366, the State submits that, where a decision to refuse time or a decision to dismiss is based on an assessment of the merits of the application, then it falls within the scope of section 50A(7).

53. I cannot agree. In my view, when Geoghegan J observed in *AB* that the issues in an application for an extension of time may be “*substantially different*” from those involved in an application for leave, he was explaining why decisions relating to extension of time could not properly be regarded as decisions on an application for leave. His observations cannot, in my opinion, be read as suggesting that, in any individual case where it could be said that the issues were not “*substantially different*”, leave to appeal might be required. Rather, as I read it, *AB* decides that decisions to refuse an extension of time, *as a category*, fall outside section 5(3).

54. The same is true of the observations of Denham CJ in *A*. Nothing in her judgment suggests that some, but not all, decisions to dismiss fall outside Section 5(3) (and by extension outside the scope Section 50A(7)). Rather,

the clear import of that judgment, as I read it, is that decisions to dismiss, *as a category*, fall outside the scope of those provisions.

55. As I have said, any suggestion that the application of section 50A(7) might properly involve a case by case consideration of individual decisions to refuse an extension of time and/or to dismiss proceedings for the purpose of making a judgement as whether such decisions involved sufficient consideration of the “*merits*” so as to amount “*in substance*” to the determination of an application for leave or application for judicial review as the case may be, is wholly at odds with the jurisprudence.
56. On the basis of that analysis, the correctness of the decision of the High Court in *McDonnell v An Bord Pleanala* may be open to question. However, it does not appear necessary to express any more definitive view about that decision, given that it involved a refusal to extend time which is not the type of decision before the Court here.
57. A variant of the same argument was advanced by the State by reference to the recent decision of the High Court (McDonald J) in *Sweetman v An Bord Pleanala* [2020] IEHC 39. On the basis of that decision, the State argued

that the defect that led to the dismissal of the proceedings against them here was fundamental. But even if that is so – and it is not obvious to me that it is – it is *nihil ad rem* in light of the conclusions expressed above as to the correct construction and application of Section 50A(7).

58. One final argument advanced by the State needs to be addressed, however. It says that, in the event that the application for judicial review here had proceeded to a hearing and the High Court had dismissed the proceedings as against the State on the same basis as the Judge struck out those proceedings here, section 50A(7) would clearly have been engaged. Again, the State prays in aid the decision in *Sweetman v An Bord* in support of this argument. In *Sweetman*, it is said, the application for judicial review against the State was dismissed on grounds similar to the grounds here. There can be no argument– so it was said – that the decision of the High Court in *Sweetman* was a determination within the scope of section 50A(7). No doubt that is so. But that decision was made on the hearing of the application for judicial review not, as here, on foot of a motion to strike out.
59. It seems clear that, if no application to dismiss the application for leave as

bound to fail had been made in *A*, and if instead the application for leave was heard and refused on the same basis, section 5(3) would indeed have been engaged. But the State's argument - which is entirely hypothetical - misses the point. The central holding in *A* is that a decision to dismiss proceedings is not the same as a decision to refuse leave (or to refuse judicial review). The decisions in *A* (and in *AB*) emphasise what is apparent in any event from the language of section 50A(7) - form matters in this context because section 50A(7) captures only certain specific forms of decision.

60. In my opinion, it follows that the decision of the Supreme Court in *A* dictates the refusal of the State's application to strike out the Appellants' appeal from the Judge's decision to strike out the judicial review proceedings against the State.
61. Even if the matter were *res integra*, I would conclude, without hesitation, that the Appellants' appeal from the High Court's strike out order does not come within section 50A(7). The decision to strike out here was not one made by the High Court on the hearing of the Appellants' application for judicial review. It was a different decision made on the basis of a quite

different application brought by the State, not the Appellants. In my view, on its natural construction, - “*as a matter of ordinary grammar and syntax*” - section 50A(7) has no application to the strike out decision. In any event, there is no plausible basis for contending that the sub-section “*clearly and unambiguously*” applies to such a decision.

62. Furthermore, despite the State’s assertion to the contrary, it is clear that, in the event that the State had failed in that application, it could have brought an appeal to this Court without any requirement for leave. As the Supreme Court stressed in *AB*, such an asymmetrical operation of section 50A(7) would be anomalous and unfair. It is clear from *AB* that it is legitimate and proper for the Court to seek to construe Section 50A(7) so as to avoid such unfairness.

63. Insofar as the conclusions above might be said to be at odds with the underlying policy of section 50A(7), the Court cannot refashion the sub-section by reference to policy considerations. That is clear from *AB*. Any reform of the provision is a matter for the legislature not the courts. In this context, it is notable that in the period since the decisions in *AB* and *A*, the Oireachtas has not in fact taken any steps to expand the scope of 50A(7) or

section 5(3) of the Illegal Immigrants (Trafficking) Act 2000.

64. In light of the conclusions I have reached, it is not necessary to address the scenario whereby the amendment appeal was permitted to proceed but the dismissal appeal was not. It is difficult to see how the Court could readily countenance a scenario where, notwithstanding the Appellants' clear constitutional right to appeal the amendment decision, that right might be practically denied on the basis that the High Court's decision to dismiss is beyond the reach of this Court. That is especially so in circumstances where (as already noted) the amendment application, if allowed, would "*self-evidently*" result in the refusal of the dismissal application. Fortunately, the Court does not have to wrestle with that conundrum.
65. The States' applications must in my view be dismissed and the Appellants are therefore entitled to have their appeals heard and determined by this Court in the ordinary way.