

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 1
[2021 No. 89 JR]

**IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT
ACT 2000, AS AMENDED**

BETWEEN

BALLYBODEN TIDY TOWNS GROUP

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

SOUTH DUBLIN COUNTY COUNCIL

NOTICE PARTY

(No. 2)

JUDGMENT of Humphreys J. delivered on Friday the 7th day of January, 2022

1. In *Ballyboden Tidy Towns Group v. An Bord Pleanála (No. 1)* [2021] IEHC 648 (Unreported, High Court, 20th October, 2021), I dismissed the applicant's proceedings challenging flood relief works in the Whitechurch Stream catchment area in Rathfarnham, Co. Dublin. The applicant now applies for leave to appeal.

The law in relation to leave to appeal

2. There are already a large number of cases on the criteria for leave to appeal, and that is a phenomenon that can only get worse over time. I have taken into account the caselaw set out in submissions and other caselaw insofar as it seems relevant to me. Of particular note is the principle identified in *Ross v. An Bord Pleanála (No. 2)* [2015] IEHC 484, [2015] 7 JIC 2107 (Unreported, High Court, Noonan J., 21st July, 2015) that it is not generally appropriate to grant leave to appeal on a point that has not been pleaded: see also *Hellfire Massy Residents Association v. An Bord Pleanála (No. 2)* [2021] IEHC 636, [2021] 10 JIC 1302 (Unreported, High Court, 13th October, 2021) at para. 6(iv).
3. This point was also emphasised by the Supreme Court in the determination in *Moore v. An Bord Pleanála* [2021] IESCDT 124 citing *Casey v. Minister for Housing Planning and Local Government* [2021] IESC 42, [2021] 7 JIC 1606 (Unreported, Supreme Court, Baker J. (Clarke C.J., O'Donnell, MacMenamin and Dunne JJ. concurring), 16th July, 2021), regarding the importance of pleadings in judicial review. Admittedly, a determination is technically non-precedential, but here its logic is compelling and of course totally consistent with the formal jurisprudence such as *Ross v. An Bord Pleanála*.
4. Insofar as the Supreme Court might occasionally grant leave to appeal on a point that has been held by the High Court not to have been properly pleaded (see for example *An Taisce v. An Bord Pleanála* [2021] IESC 79, [2021] 12 JIC 0704 (Unreported, Supreme Court, Hogan J. (Dunne, Charleton, O'Malley and Woulfe JJ. concurring), 7th December, 2021) at para. 28) that is a slightly different situation. In my respectful view, the jurisprudence can be reconciled as follows. The logic of the Supreme Court determination in *Moore* suggests that the approach of allowing leave to appeal on points that have not been pleaded cannot be correct as a matter of principle. But an appellate court allowing leave to appeal on points

that have been held by the High Court not to have been pleaded must be justifiable as a matter of pragmatism in certain circumstances in a context where the pleading point is complex and it is easier to finally determine that point at appellate level only after one has evaluated the whole case. But that commendably pragmatic approach (if I may respectfully say so) has no relevance to the grant of leave to appeal by the High Court, which by definition *has* evaluated the whole case and thus has come to a definite view about the scope of the pleadings.

Applicant's proposed questions

5. The applicant's proposed questions of exceptional public importance are as follows:

- "(i) Was the Court correct to hold that the indefinite duration point could only go to the validity of the decision if the directive was directly effective in this respect?
- (ii) Was the Court correct to hold that any implied rule as to the duration of development consent is not sufficiently clear, precise and unconditional as to be capable of having direct effect.?
- (iii) Was the Court correct to hold that any implied rule as to the duration of development consent needed to be sufficiently clear, precise and unconditional as to be capable of having direct effect?
- (iv) Was the Court correct to hold that any implied rule as to the duration of development consent did not have direct effect?
- (v) In the light of the principle of conforming interpretation, should 177AE be read as requiring the imposition of a time limit on a permission granted thereunder?"

The applicant's problem

- 6. As the board points out in written submissions, the applicant's basic problem is that "the application for a Certificate ignores the central finding made by the High Court, i.e. that the case which the Applicant wished to make in respect of the obligation to impose a temporal limitation was not properly pleaded. Where a point has not been pleaded, it cannot meet the threshold for certification".
- 7. There wasn't anything stopping the applicant from pleading non-transposition or pleading that a specific provision of the directive was directly effective. Not only was the applicant's point not pleaded, but insofar as it relates to validity as opposed to non-transposition, it was a wholly implausible point for the reasons set out at para. 36 of the No. 1 judgment. Leave to appeal is a non-starter in such circumstances. As put by the council in oral submissions, "the case never gets off the ground on that point". The council also submits persuasively that the core question "answers itself" - calling the obligation an "implied obligation" renders it implausible that it is sufficiently clear, precise and unconditional as to be directly effective.
- 8. The applicant claimed that the question of conforming interpretation arises first before considering direct effect, relying on *S. v. Minister for Justice* [2020] IEHC 632, [2020] 12

JIC 1105 (Unreported, High Court, Simons J., 11th December, 2020). Broadly, I agree with that proposition which is the major premise of the applicant's argument, but it doesn't actually help the applicant here. That illustrates a general problem for would-be appellants, which would merit a place in the literature if anyone were to sit down and write a manual of appellants' logic (assuredly, there is a corresponding work to be written on respondents' logic). The particular technique exemplified here is that all one has to do to get leave to appeal is to represent any proposition in the judgment as being in contradiction to any contention of law for which there is authority, and the more abstract the better. In short, the argument is that the jurisprudence says X, the judgment says Y, and therefore the judgment is not only wrong but creates uncertainty requiring appellate clarification and correction. That is quite easy to do (since, apart from anything else, there are so many authorities that jurisprudence can be cherry-picked to suit), and sounds very plausible. The problems with that approach require thought, and are therefore frequently overlooked, but they normally boil down to one or both (here, both) of two logical fallacies, firstly an incorrect minor premise (less circumspectly – a mis-characterisation of the judgment) and secondly a conclusion (of leave to appeal and a verdict to be granted at appellate level) that doesn't in fact follow logically. Sometimes an appellant goes for the hat-trick with a major premise that is wrong as well, although I wouldn't say that here.

9. As I said, thought is required, so I need to spell that out. I'll accept the major premise of the applicant's argument here that one has to address a conforming interpretation first before direct effect (assuming the former is possible). The incorrect minor premise is that the judgment rules this out. That essentially involves shearing off from the judgment its explicit and implicit contextual assumptions, in particular the vitally important context that the legislation here reproduces the text of the directive faithfully. The applicant's logic here also involves an incorrect implication that conforming interpretation was actually argued at the substantive hearing either in any meaningful way at all or at least in the form it was argued at the leave to appeal stage. The final logical problem is that there is no "therefore the judgment is in conflict with the jurisprudence" punchline because the jurisprudence deals with a context – where a conforming interpretation is possible and appropriate – that doesn't apply here.
10. *S. v. Minister for Justice* was a completely different situation which concerned the meaning of the term "sentence" in the Transfer of Sentenced Persons Act 1995. The meaning of a word in an enactment implementing EU law invariably has to have regard to the meaning of that word in EU law. That has nothing to do with the notion that national legislation or decisions are invalid because of a failure to set out or address some alleged obligation that is not articulated in EU law and has not as yet been implied in it. There is no word, phrase or sentence in the national legislation here that was identified at the hearing as requiring a particular interpretation in the light of EU law.
11. Insofar as I said in the No. 1 judgment that the point at issue here could only go to the validity of the decision if the directive was directly effective in this respect, that was in the context of circumstances such as those here, namely where the legislation faithfully reproduces the directive and where what is in issue is the alleged omission of a separate

procedure for limiting the duration of a permission which is not expressly provided for by the directive and has not as yet been implied into it. That does not involve any question of the validity of the legislation or in reality of its interpretation, conforming or otherwise. It is in substance and in reality a non-transposition argument.

12. To put it another way, the applicant is generally correct that if one can interpret legislation conformingly one doesn't need to consider the question of direct effect, but that simply is not relevant here because this is not a case in which the procedure of conforming interpretation applies, given the nature of the point.
13. Furthermore, even if the argument of conforming interpretation could in theory apply, one has to ask whether that would actually be plausible in practice. The applicant's arguments are pitched at a highly academic and abstract level (another technique straight out of the manual on appellant's logic), but the argument needs a reality check. What is the conforming interpretation that I should have applied? This turns out to be a high-level academic argument that simply does not bite on the facts.
14. As the State pointed out in oral submissions, the applicant never identified at the substantive hearing what provision had to be conformingly interpreted. It only did so at the leave to appeal stage. It eventually identified s. 177AE(3) which refers to Part XAB of the 2000 Act and therefore impliedly to s. 177V(1).
15. That provision states as follows: "An appropriate assessment carried out under this Part shall include a determination by the competent authority under Article 6.3 of the Habitats Directive as to whether or not a draft Land use plan or proposed development would adversely affect the integrity of a European site and an appropriate assessment shall be carried out by the competent authority, in each case where it has made a determination under section 177U(4) that an appropriate assessment is required, before — (a) the draft Land use plan is made including, where appropriate, before a decision on appeal in relation to a draft strategic development zone is made, or (b) consent is given for the proposed development."
16. As is obvious, this provision concerns the assessment process, not the ultimate development consent. The argument now made is that the reference to art. 6(3) of the habitats directive 92/43/EEC means that the ultimate decision, not just the appropriate assessment, must involve a time limit. That is a totally implausible interpretation and on no view could be implied into the requirement dealt with in art. 6(3) for appropriate assessment. The applicant's interpretation imposes a substantive obligation regarding the development consent itself, not the assessment as part of the consideration process, and thus falls well outside even the wildest shores of the doctrine of conforming interpretation.
17. The applicant creatively suggested in oral submissions that art. 6(3) possibly involved a requirement to "consider whether there should be a time limit", but then said that it would "jettison" that point if it was an extension of the case. Unfortunately, it would be an extension of the case. Core ground 4 states: "[t]he Decision is invalid as it granted indefinite permission for the proposed development. Insofar as section 177AE provides for

indefinite planning permission the Section is incompatible with Article 6(3) of the Habitats Directive.” There is nothing there about “considering” whether to impose a time limit. Indeed, more broadly, the pleaded grounds make no reference whatsoever to conforming interpretation, good, bad or indifferent. The only reference in any part of the pleadings is a negative one in two of the reliefs, but, without detailed corresponding grounds, that doesn’t get the applicant very far. Indeed, what the conforming interpretation was was never specified in any way in the pleadings. It has only been suggested at this point, in an exercise in *esprit d’escalier*.

18. The State says that the applicant’s conforming interpretation argument is “not just evolution but a changed case”; the board in oral submissions calls it as “an entirely recast case”; and I agree with both characterisations. But even if I am wrong about that, the point is totally unfounded on the merits when one actually asks what the conforming interpretation would be, and dissolves when one moves away from the abstract academic level to look at the actual practicality here. Although the conforming interpretation claim is going nowhere, even if pleaded, the duration point as a non-transposition argument might not be a non-starter if it had been properly pleaded, and I would say the same about the new point, now introduced for the first time, that the board should have considered the question of a time limit (assuming one isn’t automatically required and assuming someone raises something before the board to make this an issue and that the board has jurisdiction to impose a time limit if the statute does not). But since those points weren’t pleaded, I don’t need to consider them further beyond noting them as not unarguable. Under those circumstances I also don’t need to consider the public interest aspect.

Order

19. The application for leave to appeal is dismissed.