[2019] IEHC 685

THE HIGH COURT
JUDICIAL REVIEW

2019 No. 222 J.R.

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT LIMITED

APPLICANT

AND

MINISTER FOR COMMUNICATIONS, CLIMATE ACTION AND ENVIRONMENT
MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERNMENT
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 18 October 2019.

INTRODUCTION

1. This supplementary judgment addresses the precise form of order to be made in these proceedings. The principal judgment was delivered on 20 September 2019, *Friends of the Irish Environment Ltd v. Minister for Communications, Climate Action and the Environment* [2019] IEHC 646.

2. The judicial review proceedings had sought to challenge the validity of two statutory instruments, namely (i) the EU (Environmental Impact Assessment) (Peat Extraction) Regulations 2019 (S.I. No. 4 of 2019), and (ii) the Planning and Development Act (Exempted Development) Regulations 2019 (S.I. No. 12 of 2019) ("*the Ministerial Regulations*").

3. The conclusions were summarised at paragraph [206] of the principal judgment as follows.

> "206. For the reasons set out herein, I have concluded that the Ministerial Regulations are invalid. This conclusion is premised on two principal findings as follows. First, the Ministerial Regulations are inconsistent with the requirements of the EIA Directive and the Habitats Directive. Secondly, even if—contrary to the first finding—the Ministerial Regulations could be said to be consistent with the EIA Directive and the Habitats Directive, the use of *secondary* legislation to introduce the legislative amendments required to give effect to the new licensing regime is *ultra vires.* This is because if the EIA Directive and Habitats Directive do, indeed, afford the very broad discretion to Member States contended for on the part of the State Respondents, then the policy choices should have been made by the Oireachtas through the enactment of primary legislation."

4. Subsequent to delivery of the principal judgment, the parties were invited to make submissions as to the precise form of the order. These submissions were made at a short hearing on 10 October 2019.

5. Whereas there was some measure of agreement between the parties, there is a significant dispute as to the *jurisdictional basis* upon which the Ministerial Regulations made pursuant to the Planning and Development Act 2000 ("*the PDA 2000*") should be set aside. In particular, there is a dispute as to whether the order should be predicated

on a finding that those regulations were *ultra vires* Section 4(4A) of the PDA 2000. The State respondents make the objection that a challenge to the validity of the regulations on this basis had not been included as part of the Statement of Grounds.

6. I propose to address the less controversial aspects of the order before returning to the central dispute between the parties.

EU (ENVIRONMENTAL IMPACT ASSESSMENT) (PEAT EXTRACTION) REGULATIONS 2019

7. The first set of regulations had been made pursuant to Section 3 of the European Communities Act 1972 (as amended). In circumstances where this court has found that these regulations are inconsistent with the requirements of the EIA Directive and the Habitats Directive, it follows that the regulations were *ultra vires* the European Communities Act 1972 for the reasons set out at paragraph [157] of the principal judgment.

> "157. [...] For the reasons set out in detail earlier in this judgment, I have concluded that the discretion afforded to the Member States to provide for a regularisation procedure is limited, and that the Ministerial Regulations exceed that discretion. It follows that the Ministerial Regulations are inconsistent with the EIA Directive and the Habitats Directive. If this conclusion is correct, then the making of the Ministerial Regulations is *ultra vires* the European Communities Act 1972. Secondary legislation which is inconsistent with EU legislation cannot be said to give effect to the "principles and policies" contained in the EU legislation. Nor can it be said to be "incidental, supplementary and consequential" to the EU legislation or "necessitated" by the Irish State's membership of the European Union. Rather, it is contrary to EU law."

8. The State respondents have sought to subordinate the finding that the first set of regulations is *ultra vires* the European Communities Act 1972 to the earlier finding that the regulations were in breach of the two EU Directives. This approach is set out in a draft form of order which was handed in to the court on 10 October 2019 as follows.

> "An order setting aside Regulation 4/2019 and Regulations 12/2019 on the basis that they are inconsistent with the EIA Directive and the Habitats Directive and accordingly that
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> — in the case of Regulation 4/2019, it is *ultra vires* Section 3 of the European Communities Act 1972 as amended, and
> — in the case of Regulation 12/2019, it is inconsistent with Section 2 of the European Communities Act 1972 as amended."

9. As appears, the draft order commences with an overarching statement to the effect that the regulations are inconsistent with the EIA Directive and the Habitats Directive, and that "accordingly", i.e. as a consequence, same are being set aside as *ultra vires* Section 3 of the European Communities Act 1972.

10. With respect, I do not think that an order along these lines would fully reflect the findings of the principal judgment. As explained in the principal judgment, the finding of invalidity was premised on two planks as follows. First, that the regulations were inconsistent with the requirements of the EIA Directive and the Habitats Directive. Secondly, that, in any event, the use of *secondary* legislation to introduce the legislative amendments required to give effect to the new peat extraction licensing regime is *ultra vires*. The policy choices set out in the regulations should instead have been made by the Oireachtas through the enactment of primary legislation. This second plank is not contingent on a finding that the regulations were inconsistent with the two EU directives. Rather, as explained in detail at paragraphs 154 and onwards of the principal judgment, a set of regulations which are consistent with EU law may nevertheless be invalid as a matter of national constitutional law precisely because they take the form of *secondary* rather than *primary* legislation.

11. Given these two-fold findings, I think that the appropriate order to make is an order *simpliciter* setting aside the EU (Environmental Impact Assessment) (Peat Extraction) Regulations 2019 on the basis that same are *ultra vires* Section 3 of the European Communities Act 1972. This order should not be subordinated to the finding that the regulations are inconsistent with the two EU Directives. That was only one of the two planks upon which the finding of invalidity was made.

PLANNING AND DEVELOPMENT ACT (EXEMPTED DEVELOPMENT) REGULATIONS 2019

12. The position in respect of the second set of regulations, i.e. the Planning and Development Act (Exempted Development) Regulations 2019, is more complicated. These regulations were made pursuant to Section 4(4A) of the PDA 2000.

13. As discussed in the principal judgment, one *potential* jurisdictional basis for setting aside the second set of regulations would be to say that same were made *ultra vires* Section 4(4A). See paragraphs 208 to 216 of the principal judgment.

14. Counsel for the State respondents argues forcefully that the court should not make an order on this jurisdictional basis in circumstances where an argument that the regulations were *ultra vires* Section 4(4A) had not formed part of the case as pleaded in the Statement of Grounds.

15. As discussed at paragraph 213 of the principal judgment (by reference to the judgment in *Callaghan v. An Bord Pleanála (No. 1)* [2017] IESC 60), the entitlement of a court to rely on EU law to interpret national law—even when not expressly pleaded—is more nuanced than the State respondents' submissions might perhaps suggest. The Supreme Court has recently returned to this theme in *Friends of the Irish Environment Ltd. v. An Bord Pleanála* [2019] IESC 53.

16. Having said all that, there is some merit in counsel's submission that the point had not been pleaded, and that it is not necessary for the purposes of setting aside the regulations to rely on Section 4(4A).

17. I have concluded that the appropriate form of order is to rely on the court's inherent jurisdiction to disapply national legislation which is inconsistent with EU law. The existence of this jurisdiction has recently been reiterated in emphatic terms by the CJEU in Case C 378/17, *Commissioner of An Garda Síochána v. Workplace Relations Commission.*

> "35. On the other hand, in accordance with the Court's settled case-law, the primacy of EU law means that the national courts called upon, in the exercise of their jurisdiction, to apply provisions of EU law must be under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and without requesting or awaiting the prior setting aside of that provision of national law by legislative or other constitutional means (see, to that effect, judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraphs 17, 21 and 24, and of 6 March 2018, *SEGRO and Horváth*, C 52/16 and C 113/16, EU:C:2018:157, paragraph 46 and the case-law cited)."

18. For the purpose of disposing of the present proceedings, it is sufficient to make orders declaring that the Planning and Development Act (Exempted Development) Regulations 2019 are inconsistent with the EIA Directive and the Habitats Directive, and setting aside the regulations on that specific basis.

19. In the event that there is an appeal to the Court of Appeal or the Supreme Court, it will ultimately be a matter for the appellate court to decide whether the Applicant should be permitted to make an *additional* argument based on Section 4(4A) of the PDA 2000. It has been unnecessary for the High Court to make a final determination on this issue in circumstances where it is sufficient to resolve the proceedings to make orders along the lines indicated above. Depending on how the appellate court approaches the matter, the Section 4(4A) issue may achieve a greater level of significance at that stage.

LEGAL COSTS

20. The parties had been invited to file short written submissions addressing the question of whether the costs of these proceedings are governed by the general rule under Order 99 of the Rules of the Superior Courts, or, alternatively, by the special rules applicable to certain types of environmental litigation under Section 50B of the PDA 2000.

21. The State respondents have since taken the very sensible approach in open correspondence that they will not object to an order for costs in favour of the Applicant. This is being done to avoid yet further costs being incurred in determining the incidence of the costs of the proceedings.

22. This pragmatic approach has the consequence that it is unnecessary for this court to make a formal finding on the precise jurisdictional basis on which costs are to be awarded. This is because, on either version of the costs rules, the Applicant would be entitled to an order for costs in circumstances where it has succeeded in obtaining the principal relief sought in the proceedings, i.e. the setting aside of the Ministerial Regulations.

PROPOSED ORDERS

(1). An order setting aside the EU (Environmental Impact Assessment) (Peat Extraction) Regulations 2019 (S.I. No. 4 of 2019) on the basis that same are *ultra vires* Section 3 of the European Communities Act 1972.

(2). A declaration that the Planning and Development Act (Exempted Development) Regulations 2019 (S.I. No. 12 of 2019) are inconsistent with the Environmental Impact Assessment Directive (Directive 2011/92/EU) and the Habitats Directive (Directive 92/43/EC).

(3). An order setting aside the Planning and Development Act (Exempted Development) Regulations 2019 (S.I. No. 12 of 2019) on the basis that same are inconsistent with the Environmental Impact Assessment Directive (Directive 2011/92/EU) and the Habitats Directive (Directive 92/43/EC).

(4). An order directing that the Respondents do pay the Applicant's costs of and associated with the proceedings, to include all reserved costs. The costs are also to include the costs of two sets of written legal submissions, i.e. on the application for an interlocutory injunction and on the substantive application for judicial review. The costs are allowed on the basis of two counsel, i.e. senior and junior counsel. Costs to be taxed in default of agreement.