APPROVED **[2021] IEHC 131**

THE HIGH COURT

2020 No. 809 J.R.

BETWEEN

JOHN McHUGH

APPLICANT

AND

LAOIS COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 22 February 2021

INTRODUCTION

1. This ruling addresses a number of procedural matters arising out of my earlier decision to refuse leave to apply for judicial review. In particular, this ruling addresses: (i) the question of whether leave to appeal is required; and (ii) the allocation of costs. The principal judgment was delivered on 1 February 2021, *McHugh v. Laois County Council* [2021] IEHC 21. The proceedings were then adjourned for a number of weeks to allow the parties to consider the judgment. The proceedings were ultimately listed before me this morning (22 February 2021) and the parties made submissions on the procedural matters.

LEAVE TO APPEAL TO COURT OF APPEAL

2. As appears from the principal judgment, the fact that these proceedings seek to challenge an administrative decision which was made as long ago as January 2006 has the consequence that the judicial review proceedings are subject to the "old" procedural regime. This outcome follows from the judgment of the High Court (Charleton J.) in *O'Reilly v. Galway City Council* [2010] IEHC 97.

3. The present proceedings are thus subject to conventional judicial review under Order 84 of the Rules of the Superior Courts rather than the special statutory judicial review procedure prescribed for legal challenges to planning decisions. This is because the decision sought to be impugned in these proceedings is of a type which, prior to the commencement of the Planning and Development (Amendment) Act 2006, had not been captured by the statutory judicial review procedure.

4. The practical consequence of this is that the time-limit applicable to the present proceedings is six months (as prescribed under Order 84 prior to its amendment in 2011), rather than the eight week time-limit prescribed under section 50 of the Planning and Development Act 2000 ("***the PDA 2000***").

5. As flagged in the principal judgment, an issue arises as to whether the "old" regime also applies to the procedure governing an appeal to the Court of Appeal. Had the impugned decision been made after the commencement date (17 October 2006), then it would undoubtedly have been subject to the statutory requirement to obtain leave to appeal from the High Court under section 50A(7) of the PDA 2000. The question for determination now is whether this requirement also applies to legacy proceedings such as the present proceedings.

6. Counsel on behalf of the local authority, Mr. Fennelly, made an attractive argument to the effect that the rationale of the judgment in *O'Reilly v. Galway City Council* does not

necessitate that an applicant be exempt from the requirement to obtain leave to appeal. The rationale had been to ensure that an individual's right of access to the courts was not interfered with retrospectively by the application *ex post facto* of a new and shorter time limit. (On the facts of *O'Reilly*, the chronology was such that were the time-limit to be applied retrospectively, the applicant would initially have had six months within which to institute proceedings only for that to be abruptly reduced to eight weeks midcourse).

7. Counsel submits that different considerations arise in the context of an application for leave to appeal; in particular, it is said that any right of appeal enjoyed by the applicant in the present proceedings would only have arisen following the refusal of leave to apply for judicial review in 2021. The applicant had no such vested "right" prior to the commencement of the amendments in 17 October 2006. It is said that there is no need "to fossilise", as counsel colourfully puts it, court procedures by reference to the law as it stood prior to 17 October 2006. The procedural rules governing an appeal to the Court of Appeal should, instead, be those applicable as of the date proceedings are instituted.

8. At the level of general principle, there might well be a logic to distinguishing between the application of a new and shorter time-limit, and the application of a new procedural rule which governs an appeal to the Court of Appeal. However, in the absence of express transitional provisions governing the application of the amendments to the judicial review procedure introduced under the Planning and Development (Amendment) Act 2006, it is not possible to separate out the various threads of the amendments. The fact of the matter is that, prior to 17 October 2006, a decision of the type impugned in these proceedings was excluded from the categories of decision subject to the statutory judicial review procedure prescribed in planning cases. As I read the judgment in *O'Reilly v. Galway City Council*, it is to the effect that the amended statutory judicial review procedure does not apply at all to decisions made prior to the commencement date of

17 October 2006. Whereas it may be correct to say that this interpretation was informed by an immediate concern to avoid applying a shorter time-limit retrospectively, the consequence of this interpretation is that no aspect of the amended statutory judicial review procedure applies. As Mr. McHugh, the applicant in the present proceedings, pithily put it, proceedings cannot be subject to two different sets of rules. The correct legal position therefore is that Order 84 applies to the present proceedings in all respects. Put otherwise, legacy cases, such as the present proceedings, benefit from a form of what is sometimes described as "grandfathering" whereby they are subject to the requirements of the old legislative regime.

9. Finally, in this regard, it should be recalled that whereas the constitutional right of access to the courts is a relevant consideration to be taken into account in interpreting legislation, so too is the constitutional right of appeal from the High Court to the Court of Appeal. Whereas the Oireachtas is authorised to regulate the right of appeal, it must do so in terms. Any ouster of the Court of Appeal's appellate jurisdiction must be "clear and unambiguous" (see, most recently, *North Westmeath Turbine Action Group v. An Bord Pleanála* [2020] IECA 355). Accordingly, it would seem inappropriate, in the absence of transitional provisions governing the introduction of the amended judicial review procedure provided for under the Planning and Development (Amendment) Act 2006, for a court to "read in" to the legislation an implicit restriction on the right of appeal.

10. I am satisfied, therefore, that the applicant does not require leave to appeal in circumstances where the present proceedings are not subject to the provisions of section 50A(7) of the PDA 2000.

LEGAL COSTS

11. The default position under Part 11 of the Legal Services Regulation Act 2015 is that a party who has been "entirely successful" in proceedings is entitled to a costs order as against the unsuccessful party. Subject always to his right of appeal, the applicant has been unsuccessful in that leave to apply for judicial review has been refused. Leave was refused, principally, on the grounds of delay. The present proceedings do not raise any question of law of general public importance such as might inform the court's discretion to depart from the default position. Mr. McHugh, the applicant, did not put forward any specific reason as to why a costs order should not be made against him. Mr McHugh did, however, request that a stay be placed on the cost order pending the hearing and determination of his intended appeal.

12. I am satisfied, therefore, that the appropriate order in this case is that an order of costs be made in favour of the local authority as against the applicant. A stay will be placed on the adjudication and execution of the costs order pending the hearing and determination of the intended appeal to the Court of Appeal and any application thereafter for leave to appeal to the Supreme Court.

13. Finally in this regard, it should be noted that counsel on behalf of the local authority indicated that his instructions were that, in the event that no appeal is filed, the local authority would not object to a *permanent* stay on the costs order.

CONCLUSION AND FORM OF ORDER

14. The following orders will be made. First, the application for leave to apply for judicial review is refused for the reasons set out in the written judgment of 1 February 2021.

15. Secondly, the court makes a declaration that leave to appeal pursuant to Section 50A(7) of the Planning and Development Act 2000 (as amended) is not required.

16. Thirdly, an order will be made in favour of the respondent requiring the applicant to pay the costs of and incidental to the proceedings. The costs order includes all reserved costs. Such costs are to be adjudicated by the Office of the Chief Legal Costs Adjudicator in default of agreement. A stay will be placed on the adjudication and execution of the costs order pending the hearing and determination of the intended appeal to the Court of Appeal and any application thereafter for leave to appeal to the Supreme Court.

17. Finally, the parties have liberty to apply in the event that, contrary to the declaration above, the Court of Appeal rules that leave to appeal is required.

18. For the avoidance of any doubt, it should be emphasised that the 28 day time-limit for the making of an appeal to the Court of Appeal does not begin to run until such time as the order, embodying the rulings made today, is drawn up by the High Court Registrar. Whereas this court had indicated earlier that the application for leave to apply for judicial review would be refused, the question of whether leave to appeal would be required had been deliberately left over for subsequent consideration. It is only now that this issue has been determined that the clock begins to run for the purposes of the 28 day time-limit. If and insofar as the earlier order of 28 January 2021 might suggest otherwise, it is superseded by the order to be drawn up this week.

Appearances

The applicant represented himself
John William Fennelly for the respondent local authority instructed by Murphy & Co. Solicitors (Abbeyleix)

Approved