[2021] IEHC 70

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 275 JR]

BETWEEN

C. O'C.

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on Wednesday the 10th day of February, 2021

1. National guidelines provide that new one-off rural housing is to be considered only in particular circumstances. That reflects the planning policy view that such one-off housing is frequently not "sustainable" in the environmental sense, subject to the possibility of clearly defined social or economic need. Planning obligations, like legal obligations generally, should be applied in an objective fashion and not set aside at the mere discretion of statutory decision-makers (still less that of the High Court on judicial review) just because a sympathetic applicant comes forward. That said, I do wish to fully acknowledge the difficulties experienced by the applicant in this particular case, but that doesn't take from the fact that she can only be facilitated in meeting her housing needs in a way that the law in general and environmental and planning considerations in particular will permit.

Facts

2. The applicant was born in 1982 in Dublin. From 1983 to 2008 she lived with her parents and a sibling in a rural area in K., Co. Wicklow. She experienced particular mental health difficulties in 2000 and 2005.

3. In April 2005 the Department for the Environment issued the Sustainable Rural Housing Guidelines for Planning Authorities which placed an emphasis on limiting housing development to those with a requirement to live in a rural community and directing urban development towards those areas designated as cities, towns and villages within any particular development plan.

4. In 2008 the family moved to G., Co. Wicklow, which, while a rural area, seems to be under urban influence.

5. In 2011 the applicant's parents moved back to K. and the applicant remained living in G. with her sibling.

6. The Wicklow County Development Plan was adopted in 2016 and provides for a number of relevant housing objectives, including in particular objective HD23 which provides that rural residential development of the kind at issue here will only be considered for "those with a definable social or economic need to live in the open countryside", with 16 specific situations listed in which that will be considered.

7. On 20th March, 2018 the applicant sought planning permission for a separate dwelling on a residential site owned by her sibling. She said she would comply with any condition that the dwelling would only be sold as part of the overall landholding.

8. On 30th April, 2018 the Assistant Planner reported on the application. While the applicant attempted some criticisms of that report, it has been superseded by the decision under challenge and doesn't furnish any independent ground for judicial review of the board's decision.

9. Further information was provided on 25th June, 2018. A revised planning report was issued on 22nd August, 2018, and on 3rd September, 2018 the council refused the application for two reasons:

   (i). that it was contrary to the County Development Plan; and

   (ii). that it would constitute a second dwelling on the site.

10. On 20th September, 2018, the applicant appealed to An Bord Pleanála.

11. The inspector recommended refusal on 5th February, 2019. The report *inter alia* sets out the applicant's housing history, notes the ministerial guidelines and county development plan, and sets out relevant provisions, including all 16 categories of need in the development plan which are recited in full. The board refused the appeal on 29th March, 2019.

12. The statement of grounds in the present proceedings was filed on 10th May, 2019, the primary relief sought being *certiorari* of the board's decision.

13. Leave was granted by Noonan J. on 13th May, 2019. That order prohibited the identification of the applicant due to her having a mental health condition. The applicant has been instructing her lawyers directly and not through a next friend, and her legal advisers consider that she has sufficient capacity to do so.

14. I have now received helpful submissions from Mr. Mark de Blacam S.C. (with Ms. Grainne Lee B.L.) for the applicant and from Ms. Aoife Carroll B.L. for the respondent. Having heard the matter on 18th December, 2020 I informed the parties of the order being made and indicated that reasons would be given later.

UN Convention

15. In legal submissions, the applicant alleged that the board's decision should have been informed by the United Nations Convention on the Rights of Persons with Disabilities, done at New York on 30th March, 2007. That claim falls outside the pleadings and thus is not something that can be the basis of a finding in favour of the applicant. In any event, the convention is not part of Irish law, so the decision is not invalid for failure to consider it.

Ground 8

16. Ground 8 regarding breach of category 15 in planning objective HD23 was not pursued at the hearing.

Ground 1

17. Ground 1 is a catch all complaint that, "[t]he decision of the Respondent and findings in the Inspector's Report dated 5 February 2019 are irrational and unreasonable, inconsistent with the evidence furnished on behalf of the Applicant and are based on an erroneous interpretation of the County Development Plan and in particular HD23."

18. A judicial review applicant must plead with specificity. Order 84, r. 20(3) RSC requires an applicant to "state precisely each … ground, giving particulars where appropriate". While this ground doesn't comply with that, it doesn't particularly matter because the various sub-points are dealt with elsewhere.

19. Irrationality is pleaded more specifically in grounds 5 and 6. Inconsistency with the evidence isn't really a separate ground from irrationality, but is dealt with in grounds 2 and 6. And erroneous interpretation of the County Development Plan is dealt with in grounds 3, 5 and 6-9. So ground 1 doesn't add anything tangible in any event.

Merits are not a matter for the court

20. Before turning to the more specific grounds it is worth emphasising under this heading that whether a particular development is in accordance with proper planning and sustainable development is a matter within the particular competence and expertise of the planning authority or, as the case may be, the board. The merits or correctness of a decision, as opposed to its legality, are not a matter for the court, which reviews merits-type issues only where they intersect with grounds such as unreasonableness or irrationality: *O'Keefe v. An Bord Pleanála* [1993] 1 I.R. 39, *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701, *per* McGovern J. in *Navan Co-Ownership v. An Bord Pleanála* [2016] IEHC 181 (Unreported, High Court, 12th April, 2006), *per* Haughton J. in *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 541 (Unreported, High Court, 26th September, 2017), *per* MacGrath J. in *Kenny v. An Bord Pleanála* [2020] IEHC 290 (Unreported, High Court, 12th March, 2020).

Ground 7 – consideration of applicant's parents

21. Ground 7 contends that, "... the Respondent's decision and the Inspector's Report erroneously interpreted category 1 as applying in this case only if one assumes that the Applicant's parents were the permanent native residents seeking to build the house for the Applicant. The said decision and Report erroneously failed to consider that the Applicant herself was a "permanent native resident seeking to build a house …"".

22. Mr. de Blacam complains that the inspector treated the application as one made by the parents of the applicant because of the reference to the parents having lived in the area only for three years. I don't accept such a reading. The inspector was writing in the context of both the Development Plan and the national guidelines. Page 24 of the guidelines specifically refers to intergenerational situations such as sons and daughters of farmers. Thus, reference to the applicant's parents spending three years in the specific

area concerned is not stated to be determinative, but "the question therefore arises" whether the criteria for being an intrinsic part of the local community for the purposes of the national guidelines is satisfied having regard to the lack of intergenerational residence.

23. The intergenerational element is also referenced in objective HD23 of the County Development Plan. Thus, reference to the parents' residence is a perfectly valid point to consider. More specifically, the wording of sub-para. 1 at HD23 refers to "[a] permanent native resident seeking to build a house for his/her own family". That implies something more than just moving into an area where one has a resident sibling. It implies some established family member building a house, inferentially on their own land, for the benefit of another family member, inferentially a dependant. Not only does that make the intergenerational aspect entirely relevant, but also makes it entirely reasonable for the board to have decided that para. 1 of objective HD23 does not apply here.

Ground 2

24. Ground 2 contends that "[t]he Respondent's decision that the Applicant does not have "strong ties to the area" is inconsistent with the evidence."

25. The problem with that allegation is that the board didn't decide that the applicant didn't have strong ties to the area. The decision merely notes the policy of the Council that rural housing should only serve the needs of certain defined categories of persons "including those engaged in agriculture or with strong ties to the area. It is considered that the Applicant does not come within the scope of the housing need criteria in the development plan or set out in the document "Sustainable Rural Housing Guidelines for Planning Authorities"."

26. The reference to "strong ties to the area" is just a thumbnail sketch of the Development Plan and is not a phrase actually used in the Development Plan. Reference to it is not an intention to change or misstate the Development Plan. Rather it is an attempt to summarise it. It's treated by the statement of grounds as being some kind of legal test, but it is just a description.

Ground 4

27. Ground 4 contends that "[t]he Respondent wrongly failed to have due regard to the exceptional nature of the Applicant's case, including her mental illness and need for family support, particularly with regard to the interpretation of the County Development Plan."

28. That is not a ground for relief by way of judicial review in the sense pleaded. It essentially comes down to the argument that one could make a humanitarian case for the applicant. But that in itself doesn't make the decision invalid. The board didn't fail to "have due regard" to anything. It considered all the circumstances. There is a presumption that material has been considered if the decision says so: *per* Hardiman J. in *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418, [2002] 1 I.L.R.M. 401. This isn't a case where some submission about the exceptional nature of the case, the applicant's illness, or her need for family support, was disregarded. Such submissions

were in effect merely held not to be determinative. To challenge that conclusion is an impermissible merits-based complaint.

29. The inspector's report sets out all matters including the sixteen sub-examples of rural housing needs in full. The fact that the board didn't make an exception for the applicant doesn't make the decision unlawful. It would turn the court into a planning-related higher-appeal tribunal if one were to get into the merits or correctness of that sort of question. The issue is not whether the applicant can represent herself as having a need, but rather whether that need is, in the lawful opinion of the planning decision-maker, of the type that is sufficiently pressing as to outweigh the policy against unnecessary one-off rural housing. That's a matter of planning judgement, and it would be a complete distortion of the process for me to say that she has a need and that therefore refusal of the application was unlawful.

Interpretation of the County Development Plan

30. Grounds 3, 5 and 6 in particular major on the interpretation of the County Development Plan and the question of whether the applicant had a definable social or economic need and whether she came within para. 1. As noted above, para. 1 is directed to more immediate intergenerational provisions by persons established in the area concerned who wished to provide for their dependents, as opposed to a type of sibling-joining-sibling situation as here.

31. Independently of that, even if she had persuaded the board that she came within para. 1, she still had to get over the ultimate test which was that such housing was only "for those with a definable social or economic need to live in the open countryside". As noted above, that is not to be read as meaning simply that the person has demonstrated a need. It must be a need that in the opinion of the decision-maker is sufficient to outweigh the general policy against unnecessary one-off rural housing which follows from the national guidelines and the County Development Plan.

32. The concept of a definable social or economic need is in the first instance one for the planning decision-maker to assess. It is not some kind of quasi-legal test that is up for *de novo* reconsideration on judicial review. This is certainly not a case where the applicant has "clearly demonstrated" the unlawfulness of the decision that her need was not of the kind contemplated by the development plan. As Ms. Carroll very effectively puts it in para. 23 of her written submissions, "the flaw in the argument presented by the Applicant is that she simply seeks to have this Honourable Court assess the evidence that was put before the Board and reach a different factual conclusion than that which was reached by the Board. That is clearly not permitted, having regard to the manner in which the principles derived from *O'Keeffe* are framed."

Ground 9

33. Ground 9 contends that "[i]nsofar as the Respondent's decision was that the applicant was in "conflict with the policy Objective HD23 of the Wicklow County Development Plan", it was based on a misinterpretation of the Objective and was inconsistent with the evidence."

34. That is in substance repetitive of earlier grounds and doesn't particularly add anything further. The board didn't misinterpret the plan. Inconsistency with the evidence in the sense relied on is a merits-based allegation. Not accepting the applicant's submission is not to be equated to acting inconsistently with the evidence. But insofar as a complaint of inconsistency with evidence is intended as a complaint of irrationality, it fails because the decision isn't irrational.

Order

35. Accordingly, the proceedings are dismissed.