



**THE SUPREME COURT  
DETERMINATION**

**BETWEEN**

**M28 STEERING GROUP**

**APPLICANT**

**AND**

**AN BORD PLEANÁLA**

**RESPONDENT**

**AND**

**CORK COUNTY COUNCIL**

**NOTICE PARTY**

**Neutral Citation:** [2021] IESCDET 27

**Supreme Court record no:** S:AP:IE:2021:000004

**Court of Appeal record no:** none

**High Court record no:** 2018 No. 708 JR

**Date of Determination:** Monday, 1<sup>st</sup> March 2021

**Composition of Court:** Clarke C.J., O'Malley J., Baker J.

**Status:** Approved

**APPLICATION FOR LEAVE TO APPEAL TO WHICH ARTICLE 34.5.4° OF THE  
CONSTITUTION APPLIES**

**RESULT:** The Court does not grant leave to the Applicant to appeal to this Court directly from the High Court.

**REASONS GIVEN:**

**ORDER SOUGHT TO BE APPEALED**

<b>COURT:</b> High Court
<b>DATE OF JUDGMENT OR RULING:</b> 17 <sup>th</sup> November, 2020
<b>DATE OF ORDER:</b> 17 <sup>th</sup> November, 2020

<b>DATE OF PERFECTION OF ORDER:</b> 16 <sup>th</sup> December, 2020
<b>THE APPLICATION FOR LEAVE TO APPEAL WAS MADE ON 6<sup>th</sup> January, 2021 AND WAS IN TIME.</b>

### **General Considerations**

1. The general principles applied by this Court in determining whether to grant or refuse leave to appeal, having regard to the criteria incorporated into the Constitution, as a result of the 33<sup>rd</sup> Amendment, have now been considered in a large number of determinations, and are fully addressed in both a determination issued by a panel consisting of all of the members of this Court in *B.S. v. Director of Public Prosecutions* [2017] IESC DET 134, and in a unanimous judgment of a full Court delivered by O'Donnell J. in *Price Waterhouse Coopers (A Firm) v. Quinn Insurance Ltd. (Under Administration)* [2017] IESC 73. The additional criteria required to be met in order that a so-called "leapfrog appeal", direct from the High Court to this Court, can be permitted were addressed by a full panel of this Court in *Wansboro v. Director of Public Prosecutions* [2017] IESCDET 115. It follows that it is unnecessary to revisit the new constitutional architecture for the purposes of this determination.
2. Furthermore, the application for leave and the respondents' notices are published along with this determination (subject only to any redaction required by law) and it is therefore unnecessary to set out the position of the parties.
3. Any ruling in a determination concerns whether the facts and legal issues meet the constitutional criteria identified above, is particular to that application, and is final and conclusive only to that extent and as between the parties.
4. The respondent and notice party oppose the application for leave to appeal.

**The Application**

5. This is the application of M28 Steering Group ("the applicant") for leave to appeal directly to this Court pursuant to the provisions of Article 34.5.4° of the Constitution from the order of 17 November 2020 of MacGrath J. ([2019] IEHC 929) refusing its application for judicial review of the decision of An Bord Pleanála ("the respondent") to approve a road/motorway scheme, part of the M28 Cork Ringaskiddy Project, pursuant to ss. 49 and 51 of the Roads Act 1993-2015.
6. In a supplementary judgment delivered on 17 November 2020 ([2020] IEHC 706), MacGrath J. refused leave to appeal as the issues raised were fact specific and did not give rise to points of law of exceptional public importance. He was not satisfied that any point of law arose in respect of the contention that the requirements of Article 11 of the Environmental Impact Assessment Directive had not been met. He further found that it was not necessary to make a reference to the CJEU as the proposed questions were predicated on a factual basis which he had not accepted.
7. The applicant now seeks leave to appeal to this Court and submits as a matter of general public importance its view that the road scheme and the operations of the Raffeen Quarry ("the Quarry") are to be assessed as a unitary project.
8. The Quarry has the benefit of a planning permission granted in 2008 which was reviewed in 2012 pursuant to section 261A of the Planning and Development Act 2000, and at that point in time it was determined that the quarry did not require an appropriate assessment. That decision must be presumed to be valid and unassailable, as it was not the subject of any relief sought in the judicial review and the owner of the Quarry was not a party thereto.
9. Materials from the Quarry are intended to be used for the construction of the road, and part of the road will run across the Quarry. It is argued in

those circumstances that the planning permission under which the Quarry operates, granted in 2008, needs to be further assessed in the light of the role of the Quarry in this road development, and that the Board permission carried an implied authorisation for the extraction of materials from the Quarry at an intensified and accelerated rate, but where no assessment has been made of the effects of this use and works.

10. It is argued that the trial judge erred in his assessment of the relevant "project" for the purposes of the planning permission, that the correct characterisation of that project is the combined road and quarry project, and that an appropriate assessment is now required to be carried out on the extraction rate and methods proposed to supply the road works and the development of part of the Quarry.

### **Decision**

11. The application for leave to appeal takes as its starting point the factual argument that operations in the Quarry must as a matter of implication from the Board's decision be carried out in breach of the terms and conditions of the 2008 planning permission. It is the case that it is intended to use materials from the Quarry, but the road permission did not contain a condition that all construction materials were required to be so sourced, or an implication that the supply of materials from the Quarry could be done by an impermissible intensification.
12. No factual basis was found by the trial judge to support the contention that the road permission by necessary implication meant that the Quarry would be worked in breach of its planning permission. Any appeal to this Court in that context would take that finding, and those facts, as a starting point. The Court does not believe in those circumstances that the proposed appeal as formulated could be said to raise a matter of general legal importance, as the consideration of the appeal will be confined to,

and be had against, that factual background. The primary basis of the application for leave therefore, is one confined to the facts of the case, and those found by the High Court.

13. While the applicant argues that the trial judge failed to make a determination as to whether the use of the Quarry for the provision of construction and infill materials for the road was permitted by the permission of 2008, that contention is met by the fact that the 2008 permission must be assumed to be valid, and that any works or use thereon will be carried out lawfully. Any challenge to the use of the Quarry, whether by reason of intensification or otherwise, may be made by proceedings under section 160 of the Planning and Development Act, and are not, and could not be, part of the judicial review of the road permission.
14. The applicant argues, wrongly in the Court's view, that the trial judge did not make an assessment of what was to be treated as the relevant project for the purposes of the judicial review, and the Court considers that even if he were incorrect in his view that the relevant project was the road development, that error, if it be such, was one made on the facts and is not one that gives rise to a matter of general public importance or which it is in the interests of justice to consider on an appeal.
15. The applicant submits that a direct appeal to this Court is necessary in light of the trial judge's refusal to issue a certificate granting leave to appeal to the Court of Appeal. It has been established *inter alia* in *O'Brien v. An Bord Pleanala* [2018] IESCDET 158 that the fact that leave to appeal was refused by the High Court where a statutory regime requires such leave is not in itself sufficient to establish exceptional circumstances.
16. Leave to appeal will therefore be refused.

**And it is hereby so ordered accordingly.**