THE HIGH COURT
JUDICIAL REVIEW

2022 No 1016 JR

IN THE MATTER OF S.50 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED and S.3 OF THE ENVIRONMENTAL (MISCELLANEOUS PROVISIONS) ACT 2011, AS AMENDED

Between:

MOYA POWER
WILD IRELAND DEFENCE CLG

Applicants

and

AN BORD PLEANÁLA
MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE
IRELAND AND THE ATTORNEY GENERAL

Respondents

and

KNOCKNAMONA WINDFARM LIMITED

Notice Party

JUDGMENT OF MR JUSTICE HOLLAND DELIVERED 1 May 2024.

Contents

INTRODUCTION, THE PROPOSED APPEAL, ARTICLE 6(3) OF THE HABITATS DIRECTIVE AND S.50A(7) PDA 2000

1. This judgment decides whether to certify for appeal in this matter in exercise of the discretion to so do, and in light of the restrictions thereon, created by s.50A (7) PDA 2000. That section provides that:

> *"The determination of the Court of an application for s. 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the [Court of Appeal] in either case save with the leave of the Court which leave shall only be granted where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal shall be taken to the [Court of Appeal]."*

2. In my substantive judgment[1] in this judicial review of a planning permission issued in September 2022 for amendments[2] to a windfarm permitted in 2016, I recorded that the State conceded in mid-trial a declaration that it had failed to fulfil its obligations under the Birds Directive[3] and the Habitats Directive[4] *"by failing to establish the necessary site specific conservation objectives and conservation measures in the Blackwater Callows Special Protection Area"*[5] ("the SPA"). The State conceded that declaration having argued with some force that the "Generic Conservation Objectives" dated 26 January 2022 issued by NPWS[6] as to the SPA were adequate to fulfil those obligations under the Birds and Habitats Directives. I had expressed during trial an anxiety to understand whether those Generic Conservation Objectives were or were not of a kind which the State had conceded to be inadequate in **Case C-444/21, Commission v Ireland**.[7] I cannot say whether that inquiry prompted or contributed to the State's concession of the declaration which, to the point of its concession, it had actively resisted. However, what is clear is that its concession of the declaration was a concession that those Generic Conservation Objectives were inadequate to fulfil its obligations under the Birds and Habitats Directives to adopt valid conservation objectives and conservation measures as to the SPA.

3. In the Impugned Permission, the Board had,

- purported to conduct an AA[8] in view of those Generic Conservation Objectives dated 26 January 2022,
- concluded that there was no reasonable scientific doubt but that the proposed development would not adversely affect the integrity of, inter alia, the SPA.

It is important to say that the substance of this conclusion of absence of adverse effect was not challenged. All accept, at least for the purposes of these proceedings, that the proposed windfarm will not adversely affect the integrity of, inter alia, the SPA. In light, inter alia, of that conclusion, the Board granted the impugned planning permission, which permission I refused to quash for reasons more particularly set out in my substantive judgment.

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[1] Power & Wild Ireland Defence v ABP, the State & Knocknamona Windfarm [2024] IEHC 108. Hereafter 'substantive judgment' or 'the substantive judgment'.

2 An increase in the uppermost rotor tip height from up to 126 metres to up to 155 metres and an increase of the height and amendment and of the design of the meteorological mast. Only the tip height increase is controversial.

[3] Directive 2009/147/EC on the conservation of wild birds. (replacing Directive 79/409/EEC).

[4] Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora as amended.

[5] Within the meaning of the Birds Directive.

[6] The National Parks & Wildlife Service – part of the Heritage Division of the Department of Housing, Local Government and Heritage.

[7] Case C-444/21, Judgment of 29 June 2023.

[8] Appropriate Assessment within the meaning of the Birds and Habitats Directives.

4. Amongst the arguments for certiorari which I rejected for reasons set out in my substantive judgment was an argument that the existence of valid conservation objectives for any SAC[9] or SPA to be subjected to AA was a jurisdictional precondition to performing such AA.

5. Having rejected the jurisdictional argument, I upheld the Board's conclusion in AA on the basis that it had proved possible on the particular facts of the matter before it, and despite the inadequacy of the conservation objectives, for the Board, without legal error, to

- identify the substantive content of site integrity of the SPA conceivably at risk – the whooper swan.
- identify the nature of that conceivable risk – collision with wind turbine rotors.
- conclude as a matter of reasonable scientific certainty, that the proposed development will not adversely affect the integrity of the SPA.

This conclusion had proved possible for the simple reason that the off-site effect[10] in question would require the physical presence of the whooper swan on the Knocknamona Windfarm Site and that presence has been discounted.

6. However, the Applicants' jurisdictional point, then and now, is that the Board ought never to have got to a consideration in AA of risk, or absence of it, to the whooper swan because, absent conservation objectives for the SPA, it had no jurisdiction to embark on or perform AA. This case is not, in my view, unstateable – if only because

- Article 6(3) of the Habitats Directive explicitly requires that AA be done "*in view of the conservation objectives*" of any Natura 2000 site[11] screened in for AA (as the SPA was) and,
- at the time of the Board's Impugned Permission and as the conceded declaration now establishes, there were no valid conservation objectives for the SPA.

7. Article 6(3), as relevant, provides as follows:

> *"3. Any … project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site …… the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."*

As outlined in the substantive judgment, the caselaw of the CJEU establishes that the Habitats Directive, in particular Article 6(3), requires Member States, before or when designating Natura 2000 Sites, such as SPAs, to set detailed and site-specific conservation objectives for those sites.

[9] Special Area of Conservation within the meaning of the Habitats Directive.
[10] i.e. off the SPA site – but on the windfarm site.
[11] i.e. SACs and SPAs.

8. Accordingly, the Applicants request my certification, pursuant to s.50A(7) PDA 2000, of the following point of appeal:

> *"Are valid conservation objectives for a Special Protection Area a pre-requisite to the Board's jurisdiction to carry out a valid Appropriate Assessment under Article 6(3) Habitats Directive and thus grant planning permission?"*

9. The State stands mute in this application for a certificate. The Board and the Notice Party oppose it.

CRITERIA FOR CERTIFICATION OF APPEAL AND TENSIONS WITHIN THEM

10. The criteria for certification of such an appeal are well-established and uncontroversial as statements of law, however controversial may be their true meaning and their application to a particular case. They are known as the Glancré Principles[12] and have often been recited and applied – including recently, and for example, in **Dublin Cycling**[13] and **MRRA**.[14]

11. While I have had regard to the detailed principles as recited in MRRA and mention some below, the view was expressed in MRRA that most, if not all of the Glancré Principles are particular expressions of some main principles – which I expand here a little as enabling a holistic approach to the issue of certification (an approach commended in its written submissions by the Board). Those principles are that

- the High Court's decision in most cases is to be final and unappealable – such that the jurisdiction to certify an appeal should be exercised sparingly and rarely. Accordingly, the default is refusal of certification and the onus is on the applicant for a certificate to demonstrate that the case meets the criteria for certification.

- the posited point of law must arise out of the decision of the High Court and be determinative of the proceedings, not one which, if answered differently, would leave the result of the case unchanged.

- the appeal, to be certified, must invoke a point of law of exceptional public importance as to which there is uncertainty in the law – that is a high hurdle. The point must be not merely important, but exceptionally so.

- for the appeal to be certified, it must be affirmatively desirable in the public interest that the appeal be taken.

[12] Glancré Teoranta v ABP [2006] IEHC 250.
[13] Dublin Cycling Campaign CLG v An Bord Pleanála (No.2) [2021] IEHC 146.
[14] Monkstown Road Residents Association v An Bord Pleanála [2023] IEHC 9.

12. There was a measure of agreement at hearing that there are internal tensions in the Glancré criteria as they have developed over time. Notably, I am not to assess the strength or weakness of the point proffered for appeal and I must take the intended appellant's case on the point at its height and assume my judgment to be at least possibly wrong on the proffered point – unless it is unstateable (e.g. **Dublin Cycling**[15]). One might think that such an assumption itself implies an assumption of uncertainty in the law. Yet the caselaw also emphasises the putative appellant's obligation to demonstrate such uncertainty. An obvious means of seeking to demonstrate such uncertainty would be to cite the judgment it is sought to appeal to demonstrate that its reasoning is poor or its analysis finely balanced or diffidently expressed – yet the Appellant is not supposed to re-fight the arguments decided in the judgment. It is said that a novel point decided in the judgment is not necessarily uncertain yet, as I have said, as long as the proffered point of law is not unstateable I must assume my judgment to be at least possibly wrong on that point. And while so assuming, and refraining from assessing the strength or weakness of the point proffered, I must yet refuse certification if I consider that the point is "well-established" law as opposed to uncertain. In my view, while some of the Glancré principles are discretely and readily applicable, others are an aid to decision-making but they are, as Barniville P has said, not set in stone.[16] Ultimately what is required is a holistic analysis focussed on the criteria expressly set by s.50A(7) PDA 2000 and I think, the exceptionality of certification.

THE CASE FOR CERTIFICATION

13. The Applicant's written submissions were devoted in considerable part to a recital of the arguments at trial as reflected in the substantive judgment and to submission, in effect, that the substantive judgment was wrong on this issue for various reasons. They emphasised the importance of conservation objectives as a cornerstone of Article 6 of the Habitats Directive and the reference standard for AA. They further note that AA in turn ensures stringent protection of Natura 2000 Site integrity and that an absence of certainty of no adverse effect requires refusal of development consent – citing **Waddenzee**.[17] They cite Ćapeta AG in **Case C-444/21 Commission v Ireland** to the effect that an SAC is not properly designated unless its conservation objectives have been set and they cite **R(RSPB) v Secretary of State for the Environment**[18] as an example of the importance attributed to conservation objectives. In RSPB, the impugned consent to a bird cull to facilitate the operation of an aerodrome was quashed as the Secretary of State had misinterpreted the applicable conservation objectives.

14. The Applicant's written submissions cite authority to the effect that I must assume my decision incorrect. Otherwise, attention in the written submissions to application of the Glancré principles is limited to the following:[19]

[15] Dublin Cycling Campaign CLG v An Bord Pleanála (No.2) [2021] IEHC 146 §29.
[16] Cork Harbour Alliance for a Safe Environment v An Bord Pleanála [2022] IEHC 231 §31.
[17] Case C-127/02 Waddenzee, Delivered 7 September 2004, §58.
[18] [2015] EWCA 277.
[19] §51 et seq. – I have reordered the content.

- *The issue here is one that "should not have arisen".*[20]
  - (It does not seem to me that this observation adds much to the case for a certificate).

- *It cannot be said that the result is "clear and unambiguous" or does not yield any "difficult point of law".*[21] *The court recorded §160 "It seems from counsels' researches that there is no authority directly on point of the question whether AA can proceed absent conservation objectives."*
  - (This passage invokes the Glancré requirement that the law be in a condition of uncertainty or evolution.)

- *The validity of an approach which is liable to jeopardise compliance with the requirements of Article 6(3) is a matter of exceptional public importance and it is desirable in the public interest to resolve it.*
  - (This is a reference to Commission Guidance[22] which says that a lack of conservation objectives jeopardises compliance with the requirements of AA.)

- *This case thus raises an important issue with potential implications for other development consents, existing and future. It goes beyond the individual facts and the parties in the case. The proposed question goes to "the practical operation of the planning system." (Sweetman XVII(No.2)). Further, the question is liable to be of widespread importance for many judicial reviews.*
  - (These propositions are recognised as capable of rendering an appeal desirable in the public interest. There is dispute as to whether they have adequate evidential basis.)

- *It is in the interests of the public at large, development consent authorities such as the Board and developers to know if such an approach is legitimate. It is not just important, but of unusual or untypical importance.*

- *The development does not yet have a grid connection."*
  - (The relevance of this observation is assumed to be self-evident – in fact it is made in diminution of the prospect that an appeal will delay the project.)

15. In oral submissions counsel for the Applicants essentially repeated and expanded somewhat on their written submissions. I will consider those and the other parties' submissions in addressing the application of the Glancré criteria.

[20] This is a reference to §155 of my judgment in which I said that "*it should not have arisen that AA would be required in the absence of conservation objectives and the Directive does not envisage such an eventuality*" – essentially because the Directive envisaged Member States setting conservation objectives before designating sites.
[21] This refers to the principle that A certificate should not be granted where the provision to be construed is "*clear and unambiguous*" and does not yield any "*difficult point of law*" (Dunnes Stores v ABP [2015] IEHC 387, §14).
[22] "Assessment of plans and projects in relation to Natura 2000 sites - Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC" (Brussels, 28.9.2021 C(2021) 6913 Final) – cited in the substantive judgment at §29 et seq.

APPLICATION OF THE GLANCRÉ CRITERIA

DOES THE POINT OF LAW ARISE FROM THE JUDGMENT, IS IT DETERMINATIVE AND DOES IT INVITE A "DISCURSIVE, ROVING, RESPONSE"?

16. It is not disputed in this case but that the posited point of law arises out of the decision in the substantive judgment and that a successful appeal would determine of the proceedings by changing their result.

17. I reject the Notice Party's submission that the proposed point of appeal invites a "*discursive, roving, response from the Court of Appeal*".[23] On the contrary, whatever the reasoning that may lead to it, the question itself invites a simple yes or no answer – either the Board had jurisdiction to perform AA absent conservation objectives, or it did not.

EXCEPTIONAL PUBLIC IMPORTANCE?

18. In **People over Wind**,[24] Haughton J opined as to habitats law that "*Almost by definition there is public importance in relation to points of law arising under the Directive".* There can be no doubt but that AA is a cornerstone of habitats and species protection and, indeed, of environmental law. It arises in many regulatory contexts in which development consents are sought and, importantly, its outcome can prohibit development. Indeed, in a very general sense, experience shows that the larger and more generally important the proposed development, the more likely it is that AA is required. Clarity as to any jurisdictional preconditions to the performance of AA is vital - both as a matter of law and as a matter of the practicalities of development concern processes.

19. Not least, given,

- the high level of protection identified in the TFEU[25] as both the base (Article 114(3)) and the aim (Article 191(2)) of EU policy and law on the environment,
- the binding effect on Ireland of the Habitats Directive as to the results it requires,
- the imperative of Article 6(3) of the Habitats Directive (as interpreted in the relevant caselaw) that development consents be refused unless it is established in AA as a matter of reasonable scientific certainty that the proposed project will not adversely affect the integrity of a Natura 2000 Site,
- and the express requirement of Article 6(3) that AA be done in view of the relevant conservation objectives,

I consider that the question whether the existence of valid conservation objectives is a jurisdictional precondition to the performance of AA is a point of law of exceptional public importance.

[23] Clifford v An Bord Pleanála [2021] IEHC 642.
[24] People Over Wind, Environmental Action Alliance Irl v An Bord Pleanála [2015] IEHC 393 §26.
[25] Treaty on The Functioning of the European Union.

20. I should say that the Notice Party suggested that the proffered point of law is not of exceptional public importance because the regime which I have outlined in my judgment guarantees the absence of adverse effect on Natura 2000 sites. I held that in the absence of conservation objectives, the Board will either find itself able despite their absence to make the necessary finding of certainty in the particular circumstances of the case (as in this case) or it will refuse the development consent application. I have taken that view in concluding that conservation objectives are not jurisdictional preconditions to AA. But the question here is a subtly different one. It is: Assuming I am wrong, is my error insufficiently important to require certification of the appeal? As to that question, the Notice Party's point is in my view inadequate to diminish the importance of the imperative that public bodies act only within their jurisdiction and that all stakeholders are enabled to clearly understand the scope and limits of the jurisdiction of such public bodies.

21. One might perhaps take a different view were one sure that the absence of valid conservation objectives will never arise in practice such that the jurisdictional question would not arise in practice. However, this very case and the declaration conceded by the State as to the SPA appear to me to preclude such a view, at least as yet. This consideration overlaps with the public interest criterion addressed below – but such overlap is not surprising. As was said in Glancré, the "*exceptional public importance*" and "*desirable in the public interest*" requirements are cumulative and require separate consideration – but "*they may overlap*".[26]

IS THE POINT OF LAW UNCERTAIN?

22. Given the question posed is capable of a net yes/no answer and as it is agreed there is no caselaw on point, it does not seem to me useful to ask if the law in question is evolving. Crudely put, the question is whether the law is uncertain or well-established. However there is a spectrum between high uncertainty and rock solid law. Certainty comes in degrees. The significance of a given degree of certainty is often both a relative concept and dependent on context. Assessment of such significance is like risk assessment – a product both of the degree of risk and the consequences of its eventuation. As to a point of law of lesser public importance a greater degree of uncertainty may be tolerable. While it will not much assist practical analysis to salami slice degrees of exceptionality, it may generally be said that the more important and consequential the point of law the lesser the degree of tolerable uncertainty.

23. In my view, the point of law in this case is one of considerable exceptionality as to which only a relatively low level of uncertainty is tolerable.

24. Both sides rely on the **European Commission's 2021 Guidance** on AA method.[27] Broadly, I regard such guidance as akin to a weighty legal textbook – not as formal precedent, which status such guidance itself generally disavows. In the substantive judgment, I gave reasons for reading the 2021 Guidance as implying that conservation objectives were not a jurisdictional prerequisite to AA. The Board notes that the 2021

[26] Glancré §6, citing Riau v Refugee Appeals Tribunal [2003] 2 IR 63.
[27] "Assessment of plans and projects in relation to Natura 2000 sites - Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC" (Brussels, 28.9.2021 C(2021) 6913 Final) – cited in the substantive judgment at §29 et seq.

Guidance had antecedents in 2018[28] and 2001[29] and analogises to the longevity of the Guidance the weight attributed by Finlay-Geoghegan J in **FitzPatrick**,[30] to the fact that an opinion of Gulmann AG[31] had not been questioned in 25 years and had been relied on often in practice in the interim.

25. The Board's point has merit but it should not be overstated. An Advocate General's opinion is not binding but differs from Commission Guidance in that it is overtly legal advice – and, for that matter, is the statutorily recognised advice of a high legal official of the CJEU, to the CJEU, recommending a particular decision of a particular dispute or preliminary reference. To the common lawyer at least, an Advocate General's opinion has the particular attraction of the focus brought by addressing a concrete dispute. Also, the present issue is one of interpretation of Article 6(3) as to the legal status of conservation objectives as they relate to AA. The advice of Gulmann AG on the issue with which he was concerned was direct and clear.[32] In contrast, and though for reasons set out in my judgment, I considered it supportive of the "non-jurisdictional" view, the Commission Guidance is not explicit on the issue with which this case is concerned. Another view of the proper interpretation and implications of the Commission's Guidance might be taken – perhaps especially of the passage (which I considered and to which I referred in the main judgment) which states:

> *"……. the decision as to whether the plan or project is likely to have significant impact on a Natura 2000 site should be taken in view of the site's conservation objectives ……* ***It is therefore essential that site-specific conservation objectives are set without delay for all Natura 2000 sites and that these are made publicly available****."*[33]

26. As long ago as the 2001 version of the Guidance, the following were stated of AA – indeed citing even earlier guidance:[34]

- The first step in this assessment is to identify the conservation objectives of the site.
- The integrity of a site involves its ecological functions. The decision as to whether it is adversely affected should focus on and be limited to the site's conservation objectives.
- The conservation objectives and status of the Natura 2000 site will outweigh any consideration of costs, delays or other aspects of an alternative solution.

My purpose is not to resile from or dilute my decision on the jurisdictional point. It is merely to observe that insofar as the Board mobilises the 2021 Guidance to demonstrate that my decision on that issue represents well established and certain law, another view than mine, of the interpretation of the 2021 Guidance is at least respectable. And it may explain both why the Guidance has, as counsel for the Board put it "*stood the test of time*" and the absence of caselaw challenging the view of the law taken in the Guidance.

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[28] Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, European Commission, 2018, European Commission, 2019. https://op.europa.eu/s/zHvj.

[29] Assessment of plans and projects significantly affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC, November 2001, European Commission, 2002. https://op.europa.eu/s/zHvk.

[30] FitzPatrick v An Bord Pleanála, Galway County Council & Apple [2019] IESC 23, [2019] 3 IR 617 §40.

[31] Bund Naturschutz in Bayern v Freistaat Bayeran (Case C-396/92)[1994] E.C.R. I-3717.

[32] He advised at §§67 & 68 that *"it is not possible to interpret the directive to the effect that it makes an environmental impact assessment mandatory for anything other than the specific projects submitted by developers* (seeking development consent) *– even if the actual application relates to only one part of a longer road link which, as normally happens in practice, is to be constructed in stages. The principle underlying the directive is unambiguous: an environmental impact assessment is to be carried out for projects in respect of which the public or private developer is seeking development consent …"*

[33] P6 – emphasis in original.

[34] Managing Natura 2000 Sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, 2000.

27. The Board and Notice Party in submissions all but ignored the ipissima verba of Article 6(3) in favour of a concentration on Article 4(5) of the Habitats Directive. Article 4(5) addresses sites listed by the Commission as Sites of Community Importance ("SCI") for designation *"as soon as possible and within 6 years at most"* as Natura 2000 Sites. The substantive judgment noted that SCIs require protection by AA even before designation and hence before the setting of conservation objectives.

28. The Board and Notice Party call in aid the opinion of Ćapeta AG in **Case C-116/22**, **Commission v Germany,**[35] citing that of Kokott AG in **CFE & Terre Wallonne**,[36] to the effect that:

> *"When sites are placed on the Community list, specific conservation objectives are not yet expressly established, but they are evident from all the habitats and species for which the site has been protected according to the information provided by the Member State in the proposal for the site.[37] The framework for development consent of projects set by the establishment of the area of conservation is thus generally created long before the designation of the special area of conservation".*

The Board and the Notice Party argue, and I agreed in my judgment, that these passages imply both the jurisdiction and the obligation to perform AA in the intermediate phase between listing as an SCI and designation as a Natura 2000 Sites despite the inevitable absence of conservation objectives during at least part of that intermediate phase.

29. The Board, properly, characterises the views of Kokott AG as dicta. I also observe that Ćapeta AG in the German case immediately followed her citation of Kokott AG as follows:

> *"Given that the conservation objectives reflect the reasons why the particular site is to be designated as an SAC in the first place, the Court's case-law has only logically demanded that those conservation objectives be expressed at the point at which an SAC is formally designated. The expression of conservation objectives is thus part of such formal designation of an SAC. Conservation objectives must accordingly be fixed within the same six-year deadline set out in Article 4(4) of the Habitats Directive."[38]*

The Commission's 2021 Guidance[39] cites case **C-849/19**, **Commission v Greece**[40] as confirming that site specific conservation objectives must be formally established. Ćapeta AG in **Case C-444/21, Commission v Ireland** cites the Greek case to the effect that *"the setting of conservation objectives constitutes a mandatory and necessary step in the designation of SACs and the implementation of conservation measures."*

30. Accordingly it does seem to me arguable that designation of a Natura 2000 site is a legal watershed

[35] Case C-116/22, Opinion of Ćapeta AG of 20 April 2023 §31.
[36] Joined Cases C-43/18 and C-321/18 CFE and Terre Wallonne, Opinion of Advocate General Kokott of 24 January 2019.
[37] Citing Case C-461/17 Holohan, Judgment of 7 November 2018, EU:C:2018:883, §37) (reported at [2019] PTSR 1054), and her own Opinion in Case C-127/02 Waddenvereniging and Vogelbeschermingsvereniging, Delivered on 29 January 2004, EU:C:2004:60, §97.
[38] Citing judgment of 17 December 2020, *Commission* v *Greece* (C-849/19, EU:C:2020:1047, §53). §51 of that case in turn cited Case c-461/17 Holohan.
[39] "Assessment of plans and projects in relation to Natura 2000 sites - Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC" (Brussels, 28.9.2021 C(2021) 6913 Final) p6
[40] judgment of 17 December 2020. Authoritative translation to English unavailable.

beyond which the explicit requirement of Article 6(3) that AA be done in view of conservation objectives is a mandatory requirement, based on the obligation and expectation that conservation objectives will have been adopted prior to or at designation and central to the system and architecture of the Habitats Directive. The cited passage from the opinion of Kokott AG was preceded in her opinion by the following:

> *"The establishment of an area of conservation with specific conservation objectives undoubtedly sets a strict framework for development consent of projects within and around the area of conservation, as such schemes …. can be approved only in accordance with Article 6(3) and (4) of the Habitats Directive. The criteria on which the necessary assessment is based are the conservation objectives established for the site.*
> *……*
> *The establishment of a special area of conservation in connection with Article 6(3) and (4) of the Habitats Directive thus results in a qualitatively significant body of criteria and detailed rules for the grant and implementation of one or more projects.*
> *However, such a framework is not necessarily[41] created for the first time with the designation of the special area of conservation."*[42]

31. Counsel for the Applicants points to the Commission's proceedings against Ireland (and for that matter, other member states) for failure to set conservation objectives and he submits that Kokott AG is very far from asserting that there is no need to bother adopting conservation objectives as "sure we all know what they are anyway". I do not think the Board and the Notice Party went that far but the observation may nonetheless be found telling in an appeal in which the Board and the Notice Party may be expected to rely, as they do now, on Kokott AG's use of the word "evident".

32. Given the centrality of the Natura 2000 network to the Habitats Directive regime and in support of such an argument that the adoption of conservation objectives is a prior imperative to the conduct of AA, the Applicants:

- say that Kokott AG, in her use of the word "*evident*", was considering a different issue to that arising here: whether the setting of conservation objectives should be subjected to SEA.[43] She should not be read as expressing a view that the adoption of valid conservation objectives is anything less than essential.

- cite Ćapeta AG in **Case C-444/21, Commission v Ireland**[44] to the effect that a Member State has not properly designated an SAC in substantive terms if it has not established its conservation objectives.

33. So, arguably as to a designated Natura 2000 Site, the existence of conservation objectives is jurisdictionally essential to embarking on AA. For reasons set out in my substantive judgment, I do not prefer that argument but it seems to me far from unstateable.

[41] Emphasis added.
[42] §72 et seq.
[43] Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment — commonly known as the Strategic Environmental Assessment (SEA) Directive.
[44] §48.

34. I bear in mind that the mere novelty of a point or the absence of authority on the point is not necessarily decisive of uncertainty in the law – **Callaghan.**[45] Some aspects of the law are inherently clear and obvious. But even if not necessarily decisive, novelty is a relevant consideration – e.g. **People over Wind**. In Callaghan, Costello J. expressed the view that she could not conclude that the law is clear simply because no challenge had been brought to the relevant provision in the nine years it was in being.[46] And in my substantive judgment I observed that "*It seems from counsels' researches that there is no authority directly on point of the question whether AA can proceed absent conservation objectives*."[47]

35. I have in the past expressed the view that there are undesirable aspects to the system in which the judge who decides the case also decides whether to certify an appeal – though it is an efficient use of judicial resources rather than having the judge deciding the certification issue come to the dispute for the first time. I must not confuse certainty in the law with amour propre to the effect that I have made it certain – or that I have merely stated what seemed to me to be the obvious. In that light and despite my dismissing the jurisdictional argument, it is useful to recollect the simple argument based on the text of Article 6(3) of the Habitats Directive to the effect that AA must be done "*in view of the conservation objectives*". The Applicants' was not an unstateable or illogical argument that it is impossible to perform AA in view of conservation objectives which do not exist.

36. In this context, I find a passage from **Dublin Cycling**[48] of particular assistance. McDonald J, citing the approach of Costello J in O'Callaghan as "*very helpful*", assumed that his own decision "*may well be wrong*" and observed:

> *"…. there must always be a first case where a point is raised. The 2016 Act has now been in operation for some years and the issue on which the applicant succeeded in this case does not appear to have been raised or debated previously. It is, therefore, an entirely novel point. It is true that, in contrast to Callaghan, there is no evolving jurisprudence in relation to the definition of "strategic housing development". However, in circumstances where my decision may well be wrong, I do not believe that it would be correct to suggest that the law is settled by my November judgment. As Costello J. identified in Callaghan, there may well be cases where, even without a decision of the court, there is no uncertainty as to the law. Conversely, there may also be cases where the first decision of the High Court on a particular issue does not eliminate uncertainty at least where there is a plausible argument to suggest that it is wrong. In this context, I do not believe that it is tenable to suggest that the argument made on behalf of Oxley as to the correct interpretation of "strategic housing development" is not arguable. Moreover, it was an argument that was supported by the Board at the hearing before me."*

McDonald J held that "*it would be wrong to regard my decision … as having brought certainty to the law*"[49] as envisaged in Glancré.

[45] Callaghan v ABP [2015] IEHC 493 §14. Also, Dublin Cycling Campaign v ABP [2021] IEHC 146.
[46] §28.
[47] §160.
[48] Dublin Cycling Campaign CLG v An Bord Pleanála (No.2) [2021] IEHC 146, §29. Citing Callaghan v ABP [2015] IEHC 493.
[49] §31.

37. While the elements cited by McDonald J that the Board's view that his interpretation was wrong is absent here, I do not see that absence as decisive. Nor do I see that McDonald J considered it decisive in Dublin Cycling. The Board's view of the meaning of the law is no weightier, by reason of its being the Board's view, than any other view. Nor, I hasten to add and as was proper, did the Board suggest that its view had such special weight. In my view, this is a case of interpretation of Article 6(3) of the Habitats Directive – in particular the effect of the phrase "*in view of its conservation objectives*". Of that it may be said, to paraphrase McDonald J, that the first decision of the High Court on a particular issue does not eliminate uncertainty at least where there is a plausible argument to suggest that it is wrong. In this context, while I have held it incorrect, I do not believe that the argument made for Moya Power and Wild Ireland Defence CLG as to the correct interpretation of Article 6(3) is implausible.

38. In that light, an observation of Baker J in **Ógalas**[50] bears repeating:

> *"There must be a public interest in requiring that the point of law be clarified for the common good, but to an extent, if there exists uncertainty in the law, and because clarity and certainty in the common law is a desirable end in itself, and important for the administration of justice, if it can be shown the law is uncertain the public interest suggests an appeal is warranted."*

39. I find that the law on the issue is uncertain in the degree necessary to justify certification of appeal of on a point of such exceptional public importance and that a certificate for appeal should not be refused for want of uncertainty in the law.

IS AN APPEAL DESIRABLE IN THE PUBLIC INTEREST?

40. The Applicants bear the onus of positive demonstration that an appeal is desirable in the public interest.

Delaying the Windfarm

41. The Board argues that an appeal is not desirable in the public interest as it would delay the construction of a windfarm which is an environmentally desirable development. It is renewable energy infrastructure capable of contributing to Ireland's GHG[51] emission reduction targets by diminishing the need for fossil fuel generated electricity. In a general sense, that the argument that delaying renewable energy infrastructure weighs against certifying an appeal is a good one is established in **Rushe**[52] and **Halpin**.[53] However, in my view, its weight should not be overstated and I should say that the Notice Party, while not

[50] Ógalas v An Bord Pleanála [2015] IEHC 205, §4.
[51] Greenhouse Gas.
[52] Rushe v An Bord Pleanála [2020] IEHC 429 §75.
[53] Halpin v An Bord Pleanála [2020] IEHC 218.

abandoning the point, pressed it lightly – in my view wisely and helpfully. I take this view for a number of reasons:

- First, in a general sense and as a matter of national policy, windfarms are environmentally desirable as contributing to GHG emission reduction. But as observed recently in **Planree**,[54] given the proliferation of windfarms, the extent of contribution of and importance of even a large windfarm to the attainment of national renewable energy targets must be kept in proper perspective. Haughton J took a similar view in **People over Wind**[55] – though I would prefer to ground mine in the extent of contribution of even a large windfarm to national targets rather than in the commercial nature of the venture. That is not to discount the view taken in the substantive judgment that the Board was entitled to regard the project as environmentally desirable or to ignore that factor in deciding whether to certify for an appeal. It is merely to keep it in perspective.

- Second, arguments as to delay are just that – as to delay. While in some cases it is argued that delay will kill the project, no such argument is made here. On that view, the renewable energy infrastructure will be realised – if late. The resultant diminution in GHG emission reduction is limited to the period of delay only – which lends yet further perspective of the kind described above.

- Third, in Rushe the time elapsed between the planning permission and the certificate decision was 4.5 years[56]. In Halpin, the equivalent time elapsed was a month short of 4 years. The equivalent time lapse in the present case is 1 year and 7 months.[57] I appreciate that context may affect the significance of absolute delays, but the observation is nonetheless worthwhile.

- Fourth, in Halpin the permission had only 1 year and 2 months to run. The position here is more complex. The parent permission was granted in 2016, yet the windfarm remains unbuilt 8 years later. The parent permission will expire in December 2026 but the windfarm can still be built as permitted in 2016 - albeit with lesser power output than that in effect permitted by the Impugned Permission granted in September 2022. That permission, for the amendments to the turbine tip heights and the meteorological mast as permitted in 2016, will expire in September 2032 as the Notice Party sought and got a 10-year permission for the amendments. It follows that the Notice Party contemplates at least the possibility of the construction, or part-construction, of the windfarm as originally permitted by 2026 with the amended turbines and mast being added in the following 6 years. Further, the planning permission for the grid connection, essential to the operation of the windfarm, was quashed in February 2023.[58] I was informed at trial that the local authority has since decided to grant a replacement permission for the grid connection which decision is, since November 2023, under appeal to the Board. When that appeal will be disposed of I do not know and, no doubt, it is at least possible that judicial review of the Board's decision will ensue. In all these circumstances, it is perhaps unsurprising that the Notice Party did not press the delay point too hard.

[54] Donegal County Council v Planree & Mid-Cork Electrical [2024] IEHC 194.
[55] §30.
[56] 19 February 2016 to 31 August 2020.
[57] 28 September 2022 to 25 April 2024.
[58] Due to an unfortunate typographical error the date is given as February 2024 at p11 of my main judgment. It is given correctly as February 2023 at p14 of my main judgment.

42. In my view, in this case, the prospect of delaying the construction of the windfarm weighs somewhat, but not greatly, against certifying for an appeal.

No Threat to the Integrity of the SPA

43. The Board and the Notice Party press the point that, in the absence of a substantive threat to the conservation interest of the SPA, an appeal cannot be desirable in the public interest, given the following content of my substantive judgment:

> *"I reject the submission of counsel for the Applicants that, in Article 6(3) of the Habitats Directive, the words "in view of the site's conservation objectives" represent the central requirement or element of AA. In my view these words represent an important – indeed, ordinarily essential – element of AA. But the vital issue in AA is clearly whether, as a matter of reasonable scientific certainty, the project "will not adversely affect the integrity of the site concerned".*[59]
>
> *"It has proved possible for the Board, without legal error and despite the absence of conservation objectives, to,*
>
> - *identify the substantive content of site integrity possibly at risk – the Whooper Swan – by way of an off-site effect.*[60]
> - *conclude as a matter of reasonable scientific certainty, that the project "will not adversely affect the integrity of the site concerned" – for the simple reason that the off-site effect in question would require the physical presence of the Whooper Swan on the Knocknamona Windfarm Site and that presence has been discounted.*
>
> *To put it crudely, if the Whooper Swan is not on the Knocknamona Windfarm Site it is impossible that it will collide with the Knocknamona Windfarm turbine rotors. … If the identified risk will not transpire, it is impossible that it will adversely affect the integrity of the site no matter in what terms site-specific conservation objectives are belatedly adopted. In their absence from the Knocknamona Windfarm Site there is no scenario in which, by reference to any such possible conservation objectives for the SPA, there could be a significant effect on the Whooper Swan."*[61]

44. The Board and the Notice Party say, and I agree and observed in my substantive judgment, that the undisputed fact that the windfarm poses no risk of adverse effect to the integrity of the SPA means that the purpose of the Habitats Directive, as it relates to this proposed windfarm and the integrity of the SPA, has been achieved and the outcome of the appeal will not affect that issue. On their view, as there is no risk to the integrity of the SPA which a successful appeal could obviate, there is no public interest in an appeal. In my view, that is too positive a proposition.

[59] §175.
[60] i.e. off the SPA site.
[61] §§184 & 185.

45. It is for the Applicants to demonstrate that an appeal is desirable in the public interest. I agree with the Board and the Notice Party that, as to the discrete public interest in protecting the integrity of the SPA, there is no public interest in an appeal. But the net effect is a negative one: the Applicants are deprived of the opportunity to call in aid a public interest which one might have expected an applicant for a certificate to mobilise in a more usual case in which a defective AA was at issue – a case in which the certainty of no adverse effect on site integrity was at issue. So, the Applicants cannot call in aid the primary purpose of AA as rendering an appeal desirable in the public interest.

46. But this factor does not weigh positively against certification of appeal:

- As to the discrete issue of risk to site integrity, whether an appeal occurs is a neutral issue. To state the obvious: if built, the windfarm will not affect site integrity; if not built, the windfarm will not affect site integrity.

- Even though deprived of this public interest argument, it remains open to the Applicants to identify a different factor rendering an appeal desirable in the public interest.

47. I should add a further observation: the Notice Party emphasised that I had held in the substantive judgment[62] – as I did – that conservation objectives were not purposively essential to protection of the integrity of a Natura 2000 by AA. However, it may be open to the Applicants to argue on appeal that AA is too narrow a prism through which to view the purposes of the Habitats Directive and the importance of conservation objectives. The purposes of the Directive are not limited to development control – though the form in which Directive issues often present in litigation might misdirect us into thinking so. The Applicants may argue that a purpose of the Directive is to ensure that conservation objectives are set. Or they may argue that the significance of conservation objectives goes well beyond AA. For example, Article 3 identifies the purpose of Natura 2000 Sites as being to *"enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range"* and the recitals to the Directive require that necessary positive conservation measures to maintain or restore the favourable conservation status of Natura 2000 sites as required by Article 6(1),[63] be taken "*having regard to the conservation objectives pursued*". One can envisage that such an argument might not be considered to bear – much or at all – on the issue of jurisdiction to perform AA, but that is not a conclusion to be drawn in considering certification of appeal.

Effect on other Processes

48. I can take judicial notice of the ubiquity of AA in planning and environmental practice. And in **People over Wind**[64] Haughton J readily and unsurprisingly accepted evidence that *"there are thousands of appropriate*

[62] See §177 & §178.
[63] Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, European Commission, 2018, European Commission, 2019. https://op.europa.eu/s/zHvj. p11 refers to the necessity of "positive conservation measures" – emphasis in original.
[64] §27.

assessments or screening[s] carried out each year."

49. The failure, even inadvertent, to heed a jurisdictional precondition to the exercise of a statutory power such as AA is a serious matter. It would be all the more serious should it have occurred:

- in a context in which permission or refusal of permission for desirable or undesirable development may turn directly on the capacity to perform, and outcome of, AA.

- by reason of a failure by the State to fulfil its EU law obligations to adopt valid conservation objectives.

50. In this context, it is relevant that, for an appeal to be certified as in the public interest, the point of law for appeal must transcend well beyond the circumstances of the case and so be capable of "*affecting a significant number of cases"* – **Arklow Holidays**.[65] In **Harding**,[66] the question posed was whether the point *"has the potential to be relevant in a great number of cases and to be of importance to many parties whether objectors or developers. It can undoubtedly be said that the point transcends the facts of this individual case."* In similar vein, Humphreys J in **Sweetman XVII (#2)**[67] considered it weighty that the resolution of the point to be certified could be expected to yield clarification of the practical operation of the planning system.

51. As recorded earlier, the Applicants' written submissions assert that the proffered point of law goes beyond the individual facts and the parties in the case and has potential implications for other development consents, existing and future. They say that it goes to "*the practical operation of the planning system*" and is also liable to be of widespread importance for many judicial reviews. The written submissions do not much elaborate but the issue was elaborated orally before me.

52. It is evident that "*the practical operation of the planning system*" is affected by the proffered point of law only to the extent that:
- Natura 2000 sites other than the SPA also lack valid conservation objectives or
- the SPA may be screened in in development consent applications for projects other than the windfarm.

53. The Board argued that the Applicants had adduced no evidence that such was the case and I should not assume it. I agree that I should not assume it. The question is whether I should infer a significant potential that it is so, such that it is in the public interest to have the jurisdictional issue decided by a higher court. Some sense of what is required, if perhaps at its outer edges, is seen in the observation by McDonald J in certifying for appeal in Dublin Cycling: *"While I sincerely hope that the existence of contradictions on this scale is rare, that does not mean that something similar will not arise again in the future."*[68]

[65] [2008] IEHC 2.
[66] Harding v Cork County Council [2006] IEHC 450.
[67] [2021] IEHC 662 §29.
[68] §45.

54. Relevant background is provided by **Case C-444/21, Commission v Ireland**.[69] It and other relevant legal instruments disclose the following chronology. I should say that, for brevity and given Ireland's admission of non-compliance in and the ultimate decision in **Case C-444/21**, I have omitted the content of Ireland's replies to the Commission as to its progress in meeting its EU law obligations:

Date	Event
1979	The Wild Birds Directive is adopted. It provides, inter alia, for the classification of SPAs.
	Note: It is replaced in 2009.[70]
1992	The Habitats Directive is adopted. • It informs member states of, inter alia, their impending obligations to designate SACs and adopt for those SACs, conservation objectives and conservation measures. • Article 3 established the Natura 2000 network to include SACs and SPAs. • Article 7 applied to SPAs, inter alia, the obligations to adopt conservation objectives and conservation measures.
To July 2004[71]	Member States, including Ireland, transmit to the Commission lists of proposed Sites of Community Importance ("SCI"). Ireland is aware that such proposals must culminate in due course in the designation of SACs and the adoption for those SACs, of conservation objectives and conservation measures.
2004	The EU Commission adopts[72] its first list of SCIs for Ireland (also known as cSACs[73]). This triggers for Ireland an obligation to designate those Sites as SACs and to adopt for those SACs, conservation objectives and conservation measures as soon as possible and at most 6-years thereafter.
	Note: Later updated lists were adopted,[74] as to which similar time limits applied. However, to put the time limit and any breach of it in some context, it is necessary to note in particular that the obligation to designate SACs (and hence to set conservation objectives) is to do so *"as soon as possible and within 6 years at most"*[75] after the Commission adopts its list of SCIs.
7 December 2010	The first of the 6-year time limits expires for Ireland to designate SACs and to adopt for those SACs, conservation objectives and conservation measures.
	Note: The judgment in Case C-444/21 held, and the principal judgment in the present case records, that member states were obliged to set site-specific and precise conservation objectives before designation of SACs and, so, within the 6-year time limit.

[69] Case C-444/21, Judgment of 29 June 2023.
[70] Directive 2009/147/EC on the conservation of wild birds.
[71] Updated by Decisions 2008/23 and 2009/96, merging, in respect of Ireland, 2 sites and adding 11, thus bringing the total number of sites located in the territory of that Member State to 423.
[72] 2004/813/EC: Commission Decision of 7 December 2004 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Atlantic biogeographical region - updated by Decisions 2008/23 and 2009/96, merging, in respect of Ireland, 2 sites and adding 11, thus bringing the total number of sites located in the territory of that Member State to 423.
[73] Candidate SACs.
[74] Commission Decisions 2004/813 and 2009/96.
[75] Habitats Directive Article 4(4). Cases C-43/18 and C-321/18 CFE and Terre Wallonne, judgment of 12 June 2019 §37.

Date	Event
	The time which has elapsed since that expiry is over double the maximum duration of the time limit itself.
23 April 2013	The Commission asked Ireland to provide it with information on the measures taken by it to comply with the Habitats Directive and, in particular, on its progress in designation of SACs and preparation of conservation objectives and measures.
27 February 2015	The Commission, having considered Ireland's reply to its letter of 23 April 2013, formally notified Ireland of its view that Ireland had failed to fulfil its obligations, described above, as to SACs.
29 April 2016	The Commission, having considered Ireland's reply to its formal Notice of 27 February 2015, issued to Ireland a reasoned opinion, pursuant to Article 258 TFEU, alleging that that Ireland had failed to • designate 401 sites as SACs. • set conservation objectives for 335 of those sites. • adopt conservation measures in respect of all of those sites.
9 November 2018	The Commission, having considered Ireland's reply to its reasoned opinion of 29 April 2016, issued to Ireland another reasoned opinion, alleging that that Ireland had failed to • designate 255 sites as SACs. • set conservation objectives for 198 of those sites. • adopt conservation measures in respect of all of those sites. It set a time limit of 9 January 2019 for compliance.
9 January 2019	Time limit expired pursuant to reasoned opinion of 9 November 2018.
	Note: In Case C-444/21, Ireland later admitted that, at this date, it had not set conservation objectives for 140 sites. This is the date by reference to which failure to fulfil obligations fell to be decided in Case C-444/21.
17 December 2020	In Case C-849/19 Commission v Greece,[76] the CJEU held that only site-specific and precise objectives may be regarded as 'conservation objectives' within the meaning of the Habitats Directive.
16 July 2021	The Commission started Case C-444/21 alleging Ireland's failure, as of 9 January 2019, to meet its obligations to: • designate 217 sites as SACs. • set conservation objectives for 140 of those sites. • adopt conservation measures in respect of all of those sites.
	Note: The 140 sites were those as to which Ireland had made admissions as described above.
20 January 2022	Ireland filed a rejoinder in Case C-444/21 in which it asserted that, at the date of the rejoinder, Ireland had, • designated 339 of the 423 sites. • set conservation objectives for all the sites.[77]

[76] Case C-849/19, Commission v Greece, Judgment of 17 December 2020, EU:C:2020:1047, §59.
[77] Case C-444/21, Judgment of 29 June 2023 §63.

Date	Event
	Note: Such submissions are commonly and properly made by member states in such proceedings. But they do not avail in the proceedings as they post-date the expiry of the time limit set in the relevant reasoned opinion – in this case 9 January 2019. For present purposes however, it is significant that Ireland asserted that it had set conservation objectives for all SACs.
26 January 2022	Date of exhibited "Generic Conservation Objectives" for the Blackwater Callows SPA.
9 November 2022	The CJEU heard Case C-444/21.
29 June 2023	The CJEU gave judgment in Case C-444/21. It held that Ireland had failed to meet its obligations to • designate 217 of 423 sites as SACs. • define detailed site-specific conservation objectives for 140 of the 423 sites. • adopt conservation measures for the 423 sites.

55. Case C-444/21 against Ireland was concerned with SACs and not with SPAs. But SACs and SPAs are, by Article 3 of the Habitats Directive, constituent elements of the *"coherent European ecological network … set up under the title Natura 2000".* So one would expect a coherent approach by the EU and by the State to both SACs and SPAs. In that light, it is notable that the "Generic Conservation Objectives" for the SPA proffered in these proceedings, were dated 6 days after Ireland had informed the CJEU that it had adopted valid site-specific and detailed conservation objectives for all SACs. That seems most likely explicable by a belief on the part of the State that those "*Generic Conservation Objectives*" constituted valid site-specific and detailed conservation objectives for the Blackwater Callows SPA despite what they said, as it were, on the tin – i.e. that they were generic. That such was the State's view was confirmed in these proceedings as the State defended and argued at trial that those Generic Conservation Objectives sufficed to meet the requirements of the Habitats Directive. That the State took that view is appreciably suggestive that those for the Blackwater Callows SPA are not the only instance of such generic objectives as to Natura 2000 sites. Indeed, that they are entitled as "Generic" suggests that similar conservation objectives may have been applied to other Natura 2000 Sites – informed by the view that such objectives sufficed to meet the requirements of the Habitats Directive.

56. Arguably, whether in a given case the conservation objectives were valid or not, would not affect the Board's obligation to ask in every case whether they were valid, if the answer to that question were a jurisdictional precondition to AA.

57. Accordingly, it seems to me that the point of law proffered for appeal does, as a matter of probability, have the capability or potential to bear on the resolution of multiple planning applications and judicial reviews.

Rare Cases?

58. I should record and reject a misconceived argument by the Notice Party. It observes, correctly, that in my substantive judgment I had put the facts and circumstances of this case into a class of rare cases in which it was possible for the Board to conclude, despite the absence of valid conservation objectives and as a matter of reasonable scientific certainty, that the project '*will not adversely affect the integrity of the site concerned*'. The Notice Party argues that rare cases do not transcend their facts. The flaw in that argument is that the rarity I identified will occur only if the jurisdiction exists to perform AA absent conservation objectives. Absent such a jurisdiction, the Board would be unable even to embark on the enquiry in AA whether the project to be assessed '*will not adversely affect the integrity of the site concerned*'. The prior question whether that jurisdiction exists has the potential to affect other cases for reasons I have given above. Also, and as I have noted, in Dublin Cycling McDonald J certified an appeal in a case of a kind which he hoped was rare but, as he said, "*that does not mean that something similar will not arise again."*

CONCLUSION

59. For the reasons set out above, I will certify the proposed point of law for appeal. I am provisionally of the view that the Applicants should have their costs of the certification application. I will list the matter for mention with a view to making orders on 13 May 2024. I would be grateful if the parties would liaise in the interim as to the form of such orders.

DAVID HOLLAND
1/5/24