#[2024] IEHC 630

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2021.00000251]

IN THE MATTER OF SECTIONS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000 AND
IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL TENANCIES ACT 2016

BETWEEN
ALICE O'DONNELL, COLIN ACTON, SEÁN GOFF, EVELYN CAWLEY, DECLAN MORRIS, CIARA MAN, GARETH MADDEN, AILEEN LENNON, KEITH SCANLON AND CARINA HARTE-HOLMES

APPLICANTS

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

RESPONDENT

AND
DRUMAKILLA LIMITED

NOTICE PARTY

(No. 4)

JUDGMENT of Humphreys J. delivered on Friday the 8th day of November 2024

1. In *O'Donnell v. An Bord Pleanála (No. 1)* [2023] IEHC 381, [2023] 7 JIC 0501 (Unreported, High Court, 5th July 2023), I dismissed an application for *certiorari* of a planning permission for a housing development and adjourned for further submissions a challenge to a derogation licence in connection with that development.

2. In *O'Donnell v. An Bord Pleanála (No. 2)* [2023] IEHC 594, [2023] 11 JIC 0102 (Unreported, High Court, 1st November 2023), I directed further submissions on the EU law issues relating to the derogation licence challenge.

3. In *O'Donnell v. An Bord Pleanála (No. 3)* [2023] IEHC 715, [2023] 12 JIC 2105 (Unreported, High Court, 21st December 2023), I referred certain questions to the CJEU.

4. Following circulation of Written Observations by the parties and the European Commission, the matter was listed on 9th September 2024, when I raised with the parties the possibility of clarifying the reference in relation to certain queries in the Commission submissions. The parties agreed to consider that on the basis that I would circulate the text of the queries that arose and that the parties would then propose answers.

5. A set of draft queries was transmitted to the parties on 14th October 2024. The State suggested that there might be benefit in a clarification and furnished replies on 21st October 2024. The applicants replied with their own wording, and the matter was listed on 4th November 2024 for a brief oral hearing, at which point there was no objection from any party to a clarification, which I can now give on the following basis.

Issue 1

6. The first issue arises from the following in the Written Observations of the Commission (para. 39):

> **Whether the development consent application, together with the derogation licence was still published or available to third parties" as of 21 October 2020 and relatedly raises the question of "whether and when the [EIA] screening decision was published".**

7. The applicant submitted that I could clarify the reference along the following lines:

> "The development consent application which included a report with the derogation licence as an appendix was first published on 21 October 2020.
>
> The EIA Screening determination was made simultaneously with the decision to grant development consent on 15 February 2021 and became publicly available three working days later.
>
> [NOTE: The court did not raise a query about the pleadings. But since the State has made a comment on the pleadings and for the avoidance of doubt several legal grounds were pleaded relating to the lawfulness of the EIA Screening including grounds 39 and 41 in relation to strict protection of bats.]"

8. The State submitted that I could clarify the reference along the following lines:

> "The referring court wishes to clarify that the development consent application documentation, which contained the derogation licence, was published and available to third parties as of 21 October 2020. In addition, the State parties' position is that, to the extent to which the Applicants refer to 'EIA Screening' under Core Ground 7, the Applicants do not

plead any breach in this regard and the issue of EIA screening goes beyond the ambit of the matters pleaded in respect of that core ground, namely, an alleged breach of the obligations under Article 12 of, and/or Annex IV to Council Directive 92/43/EC (and certain provisions of Irish national legislation). In any event, the evidence establishes that An Bord Pleanála ('the Board') completed a screening for environmental impact assessment and considered that the Environmental Impact Screening Report ('EIA Screening Report') submitted by the developer identified and described adequately the direct, indirect, secondary and cumulative effects of the Proposed Development on the environment. The Board therefore decided that an environmental impact assessment report [EIAR] for the Proposed Development was not necessary. The EIA screening decision was published in the Order of An Bord Pleanála dated 15 February 2021."

9. My decision is as follows. Firstly I can postpone the pleading complaint which doesn't need to be decided under this heading but it does come up in the next issue.

10. Under the current heading I conclude that (a) the development consent application, together with the derogation licence was published or available to third parties as of 21st October 2020 and (b) the EIA screening decision was published as part of the decision to grant development consent on 15th February 2021 and became publicly available three working days after the latter date.

Issue 2

11. The second issue arises from the following in the Written Observations of the Commission (para. 40):

> **Whether there was compliance with the principle that "in the context of the EIA Directive, the public concerned must be informed of the consent procedure and of its opportunities to participate in it adequately and sufficiently in advance".**

12. The applicant submitted that I could clarify the reference along the following lines:

> "The public was informed through a site notice, newspaper notice and in the weekly notices on the website of the Board and Wicklow County Council of the consent procedure. A copy of the site notice is at Tab 4, page 201 of the book of exhibits. This notice described the proposed works and invited submissions and observations from the public. It made no reference to the derogation licence, nor did it give notice that the derogation licence could only be challenged by way of judicial review within three months. There was no public notice of either the making of the derogation licence application or the decision to grant the licence."

13. The State submitted that I could clarify the reference along the following lines:

> "The referring court wishes to clarify that, whilst this is a matter for legal interpretation, the State parties' position is that the public was informed of the consent procedure (and indeed the Applicants in these proceedings were able to exercise that right by participating in the development consent process and in the judicial review proceedings)."

14. My decision is as follows. Insofar as concerns the State's pleading objection raised under the previous issue, the applicants' argument that they did plead lack of impact on bats is correct up to a point, but the only specific thing pleaded in that regard insofar as concerns the habitats directive refers to art. 12 of and Annex IV to the directive. There is absolutely no plea that the EIA assessment was defective because of not including an assessment of the derogation licence, and expanding the case now to include such a complaint would impermissibly introduce a new point that is neither express in the grounds nor acceptably clear therefrom. Indeed it is quite clear that this point wasn't included and the applicants have only thought of it recently (in the context of the present exercise).

15. So my decision is that (a) in the context of the EIA directive, the public concerned were informed of the consent procedure and of its opportunities to participate in it adequately and sufficiently in advance, (b) the notifications to the public concerned did not include reference to the derogation licence, (c) however the applicants have not pleaded any ground contending that the notification to the public concerned was defective due to the absence of any reference to the derogation licence, and so cannot advance any such ground in the main proceedings and (d) there is no statutory procedure for public participation in the derogation licence process (see the judgment of 6 July 2023, *Hellfire Massy Residents Association v An Bord Pleanala and Others*, C-166/22, ECLI:EU:C:2023:545) but the applicants have not pleaded any ground relating to the invalidity of the legislation under which the derogation licence was granted, and so cannot advance any such ground in the main proceedings.

Issue 3

16. The third issue arises from the following in the Written Observations of the Commission (para. 41):

> **Whether it can be concluded that "the project at hand was not subject to an environmental impact assessment and that Art. 6(2)(d) of the EIA-Directive would thus not apply".**

17. The applicant submitted that I could clarify the reference along the following lines:

"The competent authority decided in its EIA Screening determination, made simultaneously with the decision to grant development consent, that an EIA was not required. This decision was also challenged by the Applicants in the proceedings before the referring court and this issue remains subject to the possibility of an appeal following the ruling of the Court of Justice."

18. The State submitted that I could clarify the reference along the following lines:

"The referring court wishes to clarify that, as recorded in the the Order of An Bord Pleanála dated 15 February 2021, the project was not subject to Environmental Impact Assessment [EIA] but was subject to EIA screening as a sub-threshold project and the competent authority concluded that the proposed development would not be likely to have significant effects on the environment and that the preparation and submission of an environmental impact assessment report [EIAR] would not, therefore, be required."

19. First of all, the fact that any order made by a first-instance court may be hypothetically subject to an appeal or in this case an application for leave to appeal at some future point is irrelevant to a reference made by that court.

20. My decision on the issue here is that the project at hand was not subject to EIA and that art. 6(2)(d) of the EIA directive would thus not apply. The applicants' challenge to the EIA screening decision has been dismissed by the referring court.

Issue 4

21. The fourth issue arises from the following in the Written Observations of the Commission (para. 41):

"Whether the assumption that the applicants could have been aware of the derogation licence on 21 October 2020, holds true in view of the factual circumstances of the main proceedings."

22. The applicant submitted that I could clarify the reference along the following lines:

"The Applicants could have been partially aware of the derogation licence since it was included as an appendix to a report submitted with the application for development consent which was made publicly available on 21 October 2020. However the terms of the licence refer to information that they could not have been aware of including the contents of the documents supporting the derogation licence, which contained details of mitigation measures. The developer's justification for the licence which appears to have been adopted as the reasons for granting the derogation are also contained in this unpublished report. This report was only made available to a third party on 7 December 2020 after it was requested."

23. The State submitted that I could clarify the reference along the following lines:

"The referring court wishes to clarify that, on the evidence before the Court, it is the position of the State parties that the Applicants were on notice of the fact that the Derogation Licence had been granted when the development consent application was submitted to An Bord Pleanála on 21 October 2020, in circumstances where the Derogation Licence was included in the documentation submitted with the development consent application and made available for public consultation."

24. My decision is that the conclusion the applicants could have been aware of the derogation licence on 21st October 2020 does hold true in view of the factual circumstances of the main proceedings. As and from that date the applicants could have been aware of the licence and could have been put on inquiry to seek background documentation that was not published on that date. The fact that an NGO, Right to Know, made a request for further documentation relating to the derogation licence under Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (the AIE directive) and received such additional documentation on 7th December 2020 illustrates that further information could have been obtained to progress any judicial review proceedings brought within three months of the publication of the existence of the derogation licence on 21st October 2020, if further background information was required to commence the proceedings above and beyond the information that was to hand on 21st October 2020, something that has not been demonstrated in any event. The applicants did not instruct solicitors within that time period but they could have done so.

Issue 5

25. The fifth issue arises from the following in the Written Observations of the Commission (para. 42):

"From the referring judgment, it appears (but it is not entirely clear) that the legal basis for the derogation decision was the national provision transposing Art. 16(1)(a) Habitats Directive."

26. The applicant submitted that I could clarify the reference along the following lines:

"This statement is correct."

27. The State submitted that I could clarify the reference along the following lines:

"In that regard, the referring court wishes to clarify that Article 16(1) of the Habitats Directive is transposed in Irish law by Regulation 54 of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No.477 of 2011), which was the relevant legal basis for the derogation decision."

28. My decision is that the legal basis for the derogation decision was the national provision transposing art. 16(1)(a) of the habitats directive.

Issue 6

29. The sixth issue arises from the following in the Written Observations of the Commission (para. 43):

"[T]he question arises whether under Irish law there is a possibility to raise severe errors in law that may lead to nullity- for example the use a wrong legal basis- even after the usual deadline for legal challenges" and relatedly at paragraph 45 that there was a question whether "Irish courts were to have discretion, under domestic law, to allow the applicants to challenge the derogation licence due to the use of a wrong legal basis, despite the fact that the 3 month time limit has elapsed".

30. The applicant submitted that I could clarify the reference along the following lines:

"It is possible to bring a challenge outside of the usual deadline.

The applicable rules (Order 84 Rule 21(3) to (6)) provide that the referring Court may extend time:

'(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either:

(i) were outside the control of, or

(ii) could not reasonably have been anticipated by the applicant for such extension.

(4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party.

(5) An application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons.

(6) Nothing in sub-rules (1), (3), or (4) shall prevent the Court dismissing the application for judicial review on the ground that the applicant's delay in applying for leave to apply for judicial review (even if otherwise within the period prescribed by sub-rule (1) or within an extended period allowed by an order made in accordance with sub-rule (3) has caused or is likely to cause prejudice to a respondent or third party'.

The interpretation of this rule is summarised in the judgment of the Court of Appeal in *Arthropharm* [2022] IECA 109 §87"

31. The State submitted that I could clarify the reference along the following lines:

"The referring court wishes to clarify that, under Irish law, administrative decisions are subject to national time limits, which are subject to applicable extension of time provisions, regardless of the nature or severity of the error of law asserted to arise."

32. My decision is that under domestic law, there is a discretion to extend time, which depends on there being good and sufficient reason to do so and also on it being established that the failure to bring the proceedings within the time was outside the control of the applicant. The question of good and sufficient reason does not depend on the severity of the error of law asserted to arise. The Supreme Court has stated in *Krikke v. Barranafaddock Sustainable Electricity Limited* [2022] IESC 41, [2023] 1 I.L.R.M. 81, [2022] 11 JIC 0303 that "The provisions of s. 50 govern the questioning of the validity of planning decisions on any legal grounds, including grounds that a decision is bad on its face and/or exhibits an error of law, and no exception for any such grounds was carved out by the Oireachtas." A similar approach would, in my view, apply to a challenge to the derogation licence. In any event, the applicants in the main proceedings did not apply for an extension of time.

Issue 7

33. The seventh issue arises from the following in the Written Observations of the Commission (para. 57):

Therefore, it is for the referring court to assess whether the rules in the Irish legal order that decide which deadlines for challenging a derogation decision as in the

main proceedings apply, is sufficiently foreseeable to comply with the principle of effectiveness. In that context, the referring court will also have to look into whether the fact that the applicants challenged the development consent in time, but not the derogation decision, indicates that the applicable legal framework is not sufficiently clear.

34. The applicant and State addressed this at the brief oral hearing on 4th November 2024.

35. My decision is that it is inherent in my conclusion that the derogation licence was a separate legal decision, to be challenged separately, that this point was sufficiently foreseeable so as to be in compliance with EU law. The fact that these applicants did not subjectively comply with that approach does not mean that that approach was not foreseeable objectively. In addition, the applicants did not plead that the applicable legal framework was not sufficiently clear, or in particular that the legal instrument (Order 84, Rules of the Superior Courts) providing for a three month time limit to challenge the derogation decision was invalid by reference to EU law.

Order

36. For the foregoing reasons, it is ordered that:

(i) the clarification of the reference set out in the appendix to this judgment be transmitted by the Principal Registrar to the CJEU for its consideration; and

(ii) costs associated with the reference and not already reserved (including the costs of the parties' draft clarifications and the hearing on 4th November 2024) be reserved.

APPENDIX

C-58/24 Drumakilla
CLARIFICATION OF REFERENCE
Issued by the Referring Court to the CJEU, November 2024

Subject to the CJEU being prepared to admit the following clarifications, the referring court considers that it may be of assistance to provide the CJEU with clarification of the reference in respect of certain points of fact and domestic law, in the light of the Written Observations of the Commission dated 27 May 2024.

1. At paragraph 39 of its Written Observations, the Commission states that it is unclear "whether the development consent application, together with the derogation licence was still published or available to third parties" as of 21 October 2020 and relatedly raises the question of "whether and when the [EIA] screening decision was published".
   In that regard, the referring court wishes to clarify that (a) the development consent application together with the derogation licence was published or available to third parties as of 21 October 2020 and (b) the screening decision under Directive 2011/92 was published as part of the decision to grant development consent on 15 February 2021 and became publicly available three working days after the latter date.

2. At paragraph 40 of its Written Observations, the Commission raises the issue of whether there was compliance with the principle that "in the context of the EIA Directive, the public concerned must be informed of the consent procedure and of its opportunities to participate in it adequately and sufficiently in advance".
   In that regard, the referring court wishes to clarify that (a) in the context of Directive 2011/92, the public concerned were informed of the consent procedure and of its opportunities to participate in it adequately and sufficiently in advance (b) the notification to the public concerned did not include reference to the derogation licence (c) however the applicants have not pleaded any ground contending that the notification to the public concerned was defective due to the absence of any reference to the derogation licence, and so cannot advance any such ground in the main proceedings (d) there is no statutory procedure in domestic law for public participation in the derogation licence process (see Case C-166/22 Hellfire Massy) but the applicants have not pleaded any ground relating to the invalidity of the legislation under which the derogation licence was granted, and so cannot advance any such ground in the main proceedings.

3. At paragraph 41 of its Written Observations, the Commission raises the question of whether it can be concluded that "the project at hand was not subject to an environmental impact assessment and that Art. 6(2)(d) of the EIA-Directive would thus not apply".
   In that regard, the referring court wishes to clarify that the project at hand was not subject to an environmental impact assessment and that it was determined in the administrative procedure that Article 6(2)(d) of Directive 2011/92 would thus not apply. The applicants' challenge to the environmental impact assessment screening decision has been dismissed by the referring court.

4. Also at paragraph 41 of its Written Observations, the Commission raises the question of "whether the assumption that the applicants could have been aware of the derogation licence on 21 October 2020, holds true in view of the factual circumstances of the main proceedings".
   In that regard, the referring court wishes to clarify that the conclusion that the applicants could have been aware of the derogation licence on 21 October 2020 does hold true in view of the factual circumstances of the main proceedings. As and from that date the applicants could have been aware of the licence. Awareness of the licence would have put the applicants on inquiry to seek background documentation that was not published on that date. The fact that an NGO (Right to Know) made a request for further documentation relating to the derogation licence under the Directive 2003/4 and received such additional documentation on 7 December 2020 illustrates that further information could have been obtained at that time to progress any judicial review proceedings brought within 3 months of the existence of the derogation licence being published on 21 October 2020, if further background information was required to commence the proceedings above

and beyond the information that was to hand on 21 October 2020, something that has not been demonstrated in any event. The applicants did not instruct solicitors within that time period but they could have done so.

5. At paragraph 42 of its Written Observations, the Commission states "From the referring judgment, it appears (but it is not entirely clear) that the legal basis for the derogation decision was the national provision transposing Art. 16(1)(a) Habitats Directive."
In that regard, the referring court wishes to clarify that the legal basis for the derogation decision was the national provision transposing Article 16(1)(a) of Directive 92/43.

6. At paragraph 43 of its Written Observations, the Commission states "the question arises whether under Irish law there is a possibility to raise severe errors in law that may lead to nullity- for example the use a wrong legal basis- even after the usual deadline for legal challenges" and relatedly at paragraph 45 that there was a question whether "Irish courts were to have discretion, under domestic law, to allow the applicants to challenge the derogation licence due to the use of a wrong legal basis, despite the fact that the 3 month time limit has elapsed".
In that regard, the referring court wishes to clarify that under domestic law, there is a discretion to extend time, which depends on there being good and sufficient reason to do so and also on it being established that the failure to bring the proceedings within the time was outside the control of the applicant. The question of good and sufficient reason does not depend on the severity of the error of law asserted to arise. The Supreme Court has stated in Krikke v. Barranafaddock Sustainable Electricity Limited [2022] IESC 41 that "[t]he provisions of s. 50 govern the questioning of the validity of planning decisions on any legal grounds, including grounds that a decision is bad on its face and/or exhibits an error of law, and no exception for any such grounds was carved out by the Oireachtas." The referring court concludes that a similar approach would apply to a challenge to a decision such as the derogation licence at issue in the main proceedings. In any event, the applicants in the main proceedings did not apply for an extension of time so the question does not arise.

7. At paragraph 57 of its Written Observations, the Commission states "Therefore, it is for the referring court to assess whether the rules in the Irish legal order that decide which deadlines for challenging a derogation decision as in the main proceedings apply, is sufficiently foreseeable to comply with the principle of effectiveness. In that context, the referring court will also have to look into whether the fact that the applicants challenged the development consent in time, but not he derogation decision, indicates that the applicable legal framework is not sufficiently clear."
In that regard, the referring court wishes to clarify that it is inherent in the referring court's decision that the derogation licence was a separate legal decision, to be challenged separately, that this conclusion was sufficiently foreseeable so as to be in compliance with EU law and with the principle of effectiveness specifically. The fact that these applicants did not subjectively comply with that approach does not mean that that approach was not objectively foreseeable. In addition, the applicants did not plead that the applicable legal framework was not sufficiently clear, or in particular that the relevant legal instrument (Order 84, Rules of the Superior Courts) providing for a three-month time limit to challenge the derogation decision was invalid by reference to EU law.

8. In the foregoing clarifications, the referring court has attempted to address any issues of fact or domestic law that appear to arise from the Commission's observations. While entirely a matter for the CJEU, if there are any residual uncertainties, the referring court remains at the disposal of the CJEU in that regard, and also understands that the parties have requested an oral hearing which may commend itself to the CJEU in that event.