Neutral Citation: [2014] IEHC 232

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 276 J.R.]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED

BETWEEN

MAURA HARRINGTON

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

INVER COMMUNITY DEVELOPMENT GROUP

FIRST NOTICE PARTY

AND

MAYO COUNTY COUNCIL

SECOND NOTICE PARTY

JUDGMENT of O'Neill J. delivered on the 9th day of May 2014

1. The applicant seeks an order of *certiorari* quashing the decision of the respondent dated 20th February 2013, to grant planning permission to the first named notice party for the development of a sports facility and community hall at Inver, Barnatra, Ballina, County Mayo. Further, an order of *mandamus* is sought compelling the respondent to conduct or to commission an independent assessment and evaluation to ascertain whether or not the proposed site for the development is an active blanket bog, therefore, a priority natural habitat within the meaning of the Council Directive 92/43/EEC ('the Habitats Directive'). Leave was granted on 15th April 2013.

Background

2. The first named notice party submitted an application to Mayo County Council for planning permission on 22nd September 2011, for the development of a sports hall with facilities for basketball, 5-a-side soccer and community functions; an outdoor soccer pitch; changing and showering facilities, a playground; floodlights; and related works including a roadway and car park to accommodate up to 90 cars. The proposed development site is a 1.38 hectare site at Inver, Barnatra, Ballina, County Mayo which is part of a larger holding owned by Údaras na Gaeltachta.

3. The applicant lodged an objection to this planning application on 25th October 2011, pursuant to which the second named notice party, on 15th November 2011, requested the first notice party to submit a Natura Impact Statement ('NIS') pursuant to s. 177T of Part XAB of the Planning and Development Act 2000, detailing the potential impact of the proposed development on one or more European sites as defined in s. 177R. The NIS was submitted on 28th February 2012. Having considered the applicant's objection and the notice party's response as well as the NIS, planning permission was granted on 23rd March 2012, subject to a number of conditions. The applicant appealed this decision to the respondent Board on 18th April 2012, claiming that the NIS was fundamentally flawed and stating that under Article 11 of the Habitats Directive, priority habitats are protected even if they have not been formally designated as a Special Area of Conservation (SAC), Site of Community Importance (SCI), or Special Protection Area (SPA).

4. On 19th April 2012 the respondent wrote to the first notice party seeking comments on the appeal. A reply was delivered on 15th May 2012. Pursuant to s.131 of the Planning and Development Act 2000, the respondent also sent notices to the Heritage Council, An Taisce, and the National Parks and Wildlife Service ('NPWS') requesting their submissions or observations. It was stated in these notices that "*If no submissions or observations are received before the end of the specified period, the Board will proceed to determine the appeal without further notice to you, in accordance with section 133 of the 2000 Act*". No response was received to these notices.

5. On 5th June 2012, a site inspection was carried out by Ms. Mairéad Kenny who issued an Inspector's Report on 14th August 2012. This report sets out the applicant's grounds of appeal as well as the response of the developer. Under the heading of 'Appropriate Assessment', the inspector states:

> *"Section 4.2 of the NIS screened the development proposed in terms of whether direct or indirect effects on the SAC and SPA would arise. Taking into account a range of possible impact types it was concluded that no direct or indirect effects arise in relation to the habitats at the closest European sites and that qualifying avian species would not be affected. In relation to otter it was noted that they are generally found within 80m of suitable habitat and that the Owenduff River is 90m away. There was no suitable habitat for other designated species. Other European sites are at too far a remove to be impacted.*
>
> *The appellant's main concerns include the impact on the habitat which it is stated is a 'priority habitat' under the terms of the Habitats Directive. In particular the site is said to contain a blanket bog…The NIS classifies the habitat as a wet heath as opposed to a blanket bog.*

I do not consider that any convincing evidence has been provided by third parties to demonstrate that the habitat is a blanket bog and the NIS indicates that the site is a wet heath, which is an Annex I habitat under the Habitats Directive but is not a priority habitat . . .

The NIS sets out a range of mitigation measures which are precautionary in nature. I consider that the applicant has provided sufficient scientific information to enable the Board to conclude that the development can be constructed and operated without adversely affecting a Natura 2000 site. In addition, I consider that the proposed development would not give rise to other wider ecological impacts of significance."

6. A Board meeting was held on 11th February 2013, and a decision to grant planning permission, subject to 12 specified conditions, was issued on 20th February 2013.

Statutory Provisions
7. Council Directive 92/43/EEC of 21st May 1992, on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive'), together with the Birds Directive, is said to form the cornerstone of Europe's nature conservation policy. Article 2 of the Directive states:

"The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies."

8. Article 3 establishes what is known as the Natura 2000 network, an EU wide network of nature protection areas|:

"1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall 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.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC.

2. Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1. To that effect each Member State shall designate, in accordance with Article 4, sites as special areas of conservation taking account of the objectives set out in paragraph 1.

3. Where they consider it necessary, Member States shall endeavour to improve the ecological coherence of Natura 2000 by maintaining, and where appropriate developing, features of the landscape which are of major importance for wild fauna and flora, as referred to in Article 10."

9. Article 4 provides:

"…each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory, the sites host. For animal species ranging over wide areas these sites shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction. For aquatic species which range over wide areas, such sites will be proposed only where there is a clearly identifiable area representing the physical and biological factors essential to their life and reproduction. Where appropriate, Member States shall propose adaptation of the list in the light of the results of the surveillance referred to in Article 11. . .

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. That information shall include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1) provided in a format established by the Commission in accordance with the procedure laid down in Article 21.

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the five biogeographical regions referred to in Article 1 (c) (iii) and of the whole of the territory referred to in Article 2 (1), the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5 % of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the sites of Community importance in their territory.

The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.

3. The list referred to in paragraph 2 shall be established within six years of the notification of this Directive.

4. Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.

5. As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6 (2), (3) and (4)."

10. Article 6 sets out the consequences of a site being designated under the Directive:

"1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if

need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or 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 and subject to the provisions of paragraph 4, 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.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

11. Article 11 refers to the need for Member States to carry out surveillance in relation to habitats:

"Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species."

12. Irish implementation of the Directive initially came in the form of the European Communities (Natural Habitats) Regulations 1997. The European Communities (Birds and Natural Habitats) Regulations 2011 updated the legal framework. Part XAB of the Planning and Development Act 2000 as inserted by section 57 of the Planning and Development (Amendment) Act 2010 deals with the issue of appropriate assessment where such is required under the EU Habitats Directive. Part XAB s.177T deals with natura impact reports and natura impact statements while s.177U deals with screening for appropriate assessments.

The Applicant's submissions

13. The applicant contends that the respondent has fundamentally misapplied the provisions of the Habitats Directive and that the proposed development could have serious and irreversible implications for what may be an Annex 1 priority habitat. It was submitted that the respondent had a reasonable scientific doubt as to the nature of the site and was obliged to dispel this doubt by commissioning or carrying out its own primary evaluation of the site and conducting an appropriate enquiry into the ecological characteristics of the site. It was submitted that this could have been done by carrying out their own evaluation or by commissioning an ecologist to conduct a primary assessment of the site. Alternatively, it was submitted that the Board could have sought more information from the developer in relation to the nature of the site. Instead, it was submitted that the respondent simply agreed with the contested findings of the NIS and that the NIS is inadequate as it did not provide enough information as to how it arrived at its conclusion that the site was wet heath and not active blanket bog, which is a protected habitat. The applicant asserts that the respondent also failed to consider whether the site is host to two heather types, namely, cross-leaved heath (*Erica Tetralix*) and Dorset heath (*Erica Cilaris*) which, if present, do characterise wet heath as an Annex I priority natural habitat.

14. Counsel for the applicant submitted that the respondent erred in finding that no "*convincing evidence had been provided by third parties*" as the primary obligation to investigate this matter rests on the respondent. It was submitted that once the applicant raised a legitimate concern in a valid appeal, it was incumbent on the Board to carry out its own evaluation and assessment. It was submitted that the applicant was precluded from carrying out an ecological assessment as the site is in private ownership and she had no access to it Reliance was placed on the case of *An Taisce v Ireland* [2010] IEHC 415, in which Charleton J. stated that:

". . . a planning application process is not a court process. Proofs are absent. The duty that is cast on a planning authority, or an Bord Pleanála on appeal, is to make an appropriate enquiry."

15. It was submitted that the Board's decision to issue three notices to the Heritage Council, An Taisce, and the NPWS indicates that there was a doubt on their part as to the nature of the site. The applicant contends that these notices failed to specify that the respondent required a determination as to whether the site for the proposed development was in fact active blanket bog. No response was received to these notices and counsel for the applicant argues that the Board went on to make its decision despite failing to dispel the doubts that it had as to the nature of the site. In such circumstances, the applicant submitted that the obligation to carry out an appropriate enquiry has not been discharged. The applicant relied on the precautionary principle, and in particular, the cases of *R. v Minister for Agriculture* [1998] ECR 1-1211, and *United Kingdom v. Commission* [1998] ECR 1-2265, as authority for this proposition. Further in *Artegodan a.o. v Commission* [2002] ECR II-4945, it was held that:

". . . the precautionary principle can be defined as a general principle of Community law requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests."

16. *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserhji* C-127/02 was also cited in support of the foregoing submission. In it, the court held:

"It follows that the first sentence of Art 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.

In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis

of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, inter alia Case C-180/96 United Kingdom v Commission [1998] ECR I-2265, paragraphs 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora."

17. The need to dispel a reasonable scientific doubt was also underlined by Hogan J. in *Sweetman v. An Bord Pleanála* [2010] IEHC 53:

"In view of the foregoing, the answer to the fourth question must be that, under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the sites conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the sites conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects."

18. In *Commission v. Spain* [2010] ECR 1-04281, it was held that:

"Under the Habitats Directive, Member States must take appropriate protective measures to preserve the characteristics of sites which host priority natural habitat types and/or priority species and which have been identified by Member States with a view to their inclusion on the Community list. Member States cannot therefore authorise intervention where there is a risk that the ecological characteristics of those sites will be seriously compromised as a result. That is particularly so where there is a risk that intervention of a particular kind will bring about the extinction of priority species present on the sites concerned."

19. Counsel for the applicant also referred the court to *Bund Naturschutz in Bayern eV & Others v Freistaat Bayern* [2006] ECR 1-08445, where it was held at para.43:

"It must be added that, in accordance with Annexe III, Stage 2, paragraph 1 of the Directive, 'all the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as sites of Community importance'. It is therefore correct that those sites appear on the list which the Commission must draw up.

Having regard to the foregoing considerations, the Member States must, as regards the sites identified with a view to their inclusion on the Community list, take appropriate protective measures in order to maintain the ecological characteristics of those sites.

In that regard, it must be remembered that, in accordance with the first part of Annexe III to the Directive, the ecological characteristics of a site identified by the competent national authorities must reflect the assessment criteria which are listed there, namely, the degree of representativity of the habitat type, its area, its structure and functions, the size and density of the population of the species present on the site, the features of the habitat which are important for the species concerned, the degree of isolation of the population present on the site and the value of the site for conservation of the habitat type and species concerned.

Member States cannot therefore authorise interventions which may pose the risk of seriously compromising the ecological characteristics of a site, as defined by those criteria. This is particularly the case when an intervention poses the risk either of significantly reducing the area of a site, or of leading to the disappearance of priority species present on the site, or, finally, of having as an outcome the destruction of the site or the destruction of its representative characteristics."

20. Counsel for the applicant also submitted that even where a site has not been formally designated as a European site under the Directive, priority habitats benefit from 'shadow protection' until a decision is made as to whether or not to designate the site. In *Sandymount and Merrion Residents Association v An Bord Pleanála* [2013] IEHC 542 Charleton J. considered the European case law in relation to shadow protection in the following terms:

"5.0 Finally, even before a site is designated, the issue finally arises whether there is some shadow protection that proceeds backwards from the designation so as to ensure that the obligations of the Regulations of 2011 apply, despite the fact that a relevant permission, albeit one applicable to only the built environment and not to any discharge from the site, has already been given? The answer appears to be that this is possible in some circumstances but that such circumstances do not arise in this case.

5.1 Three cases decided by the Court of Justice of the European Union are authority for two propositions. Firstly, that where a site is notified to the Commission, national authorities are not entitled to undermine the integrity of the site or the protection of flora and fauna for which notification is made, through authorising works which strike against that protection. This principle is applicable whether or not the issue is concerned with priority sites or priority flora and fauna. Secondly, where a site is central to the protection and maintenance of a priority species, and where there is no scientific disagreement between the Commission and the Member State, the procedure in article 5 of the Directive of bilateral consultation and decision by the Council becomes unnecessary due to the absence of a dispute, and protection of the site of priority natural habitat or priority species will arise and be enforceable for that reason alone. The first principle may be regarded as the application of logic; that no one is entitled to destroy the object for which one proposes legal protection. The second principle may be part of the general maxim that in failing to designate an area or a species which are listed in the annexes to the Directive as requiring priority protection, there can be no reliance on failure to comply with the law. The three cases in question are case C-117/03 Societá Italiana Dragaggi SpA and Others v. Ministero delle Infrastrutture e dei Transporti [2005] ECR I-167, case C-244/05 Bund Naturschutz in Bayern eV and Others v. Freistaat Bayern [2006] ECR I-8445, as to the first principle, and case C-103/10Commission v. Hellenic Republic [2012] ECR I-1 147 as to the second principle. Other cases have been cited but these are essential. A summary is appropriate in this context as to how the judgments united in ensuring that the Directive was not set at nought in its

aims of societal transparency, inclusivity and care for the environment."

21. Counsel for the applicant submitted that shadow protection exists in relation to all sites eligible to be designated under the Directive as a European site or as a priority habitat. If the site in question is a blanket bog, then it is an Annex I priority habitat eligible for designation and therefore protected until a decision is made. It was argued that in the present case there is a 'scientific disagreement' in relation to the nature of the site and it is contended that the respondent had this in mind when it sent out the s. 131 notices.

22. Furthermore, the applicant contends that Article 11 requires Member States to undertake ongoing surveillance and to continually seek out sites that are suitable for conservation and notification to the Commission until its obligations under Article 4 to draw up a list of proposed sites is exhausted. In *Sandymount and Merrion Residents Association v An Bord Pleanála* Charleton J. said that:

> *". . . on the basis of criteria set out in annexes to the Directive, the task of Ireland was to identify and propose a list of sites with species as set out in the annexes which were native to that territory."*

23. In *Commission v France (Basses Corbieres)* [2000] ECR I-10799, it was held that "*a Member state cannot derive an advantage from its failure to comply with its Community obligations*."

24. A further ground of complaint is that the respondent erred by referring to Broadhaven Bay as an SPA in the Board decision of 13th February 2013, and the decision of 20th February 2013, whereas it is also an SAC and is designated as such under the Directive. It was submitted that this raises doubts over the adequacy of the appropriate assessment due to the unique features of interest that justify a site's characterisation as an SAC. It was submitted that this is a very significant lacuna as it is not possible to know whether the Board addressed its mind to the issue of whether the conservation objectives of the SAC were addressed or considered in the appropriate assessment. In *Peter Sweetman & Ors v An Bord Pleanála* (Unreported judgement of the court (Third Chamber) 11th April 2013), it was held that:

> *". . . assessment carried out under article 6(2) of the habitats Directive…cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned."*

25. The applicant also raises a number of other concerns in relation to the appropriate assessment. It was submitted that there is doubt as to who carried out the appropriate assessment, and that according to s. 177s(2)(f) of the Planning and Development Act 2000, the competent authority for carrying out this assessment is the Board, and that must be distinguished from the assessment referred to in the Inspector's Report. It was also submitted that the respondent failed to make its determination available for inspection by members of the public as soon as possible as is required under s. 177V(6) of the Planning and Development Act 2000, as amended.

26. The applicant submitted that the notices issued by the Board to the Heritage Council, An Taisce and the NPWS, pursuant to s. 131 of the Planning and Development Act 2000, posed too ambiguous a question, and that this explains why the notified bodies issued no response. It was further submitted that the reference to Article 28 of the Planning and Development Regulations 2001 to 2011, was erroneous and misleading.

The Respondent's submissions

27. The respondent submitted that the applicant's claim that the site in question should be afforded some protection, despite the fact that it is not a designated 'European site', is completely misconceived. It was submitted that special protections only apply where a site is a European site and has undergone a process of designation as such by the relevant authorities, or where such a process has at least been commenced.

28. Counsel for the respondent submitted that the Habitats Directive can operate to prevent development permission being granted. In *Sweetman v. An Bord Pleanaála* [2010] IEHC 53, Hedigan J. stated:

> *"Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities taking account of the conclusions of the appropriate assessment…for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects."*

29. However, it was submitted, that in the present case, none of the special protections identified by Hedigan J. apply, as the site in question is simply not a 'European site' and therefore not a relevant site within the meaning of the Habitats Directive. It was submitted that this strand of the applicant's argument is entirely misconceived and that Article 5 of the Habitats Directive has a very specific remedy in relation to non-designation of sites. It was submitted that Irish implementing legislation, including Part XAB of the Planning and Development Act, follows the Habitats Directive and no *de facto* status attracts any special protection, which protections relate exclusively to European sites which are all subject to a formal listing process. Counsel for the respondent contended that in almost all of the cases relied upon by the applicant, including *Waddenzee* Case C-127/02; *Societá Italiana Dragaggi SpA and Others v Ministero delle Infrastructure e dei Transporti* [2005] ECR 1-167; *Bund Naturschutz; Commission v Spain; European Commission v Republic of Cyprus* (Unreported judgment of the court, Fourth Chamber, March 2012); *Sweetman and others v. An Bord Pleanála* (Unreported judgment of the court, Third Chamber, April 2013), the sites in question had already been designated as European sites or had been included on a list of prospective designated sites prepared by the relevant member state and were some way advanced along the designation process. It was submitted, that in the present proceedings, nobody other than the applicant, who has simply made a bald assertion, unsubstantiated by any evidence, has ever contemplated that the site in question is or should be a protected site.

30. Counsel for the respondent accepted that under the Habitats Directive, Item 7130 Annex I, being active blanket bog, and Item 4020, temperate Atlantic wet heaths with *Erica ciliaris* and *Erica tetralix*, are priority habitats. It was submitted that there was no evidence before the Board which suggested that the site in issue in this case fell within either of these categories. On the other hand, the Board did have ample evidence which supported the conclusion that no such priority habitat existed.

31. It was submitted that the applicant in these proceedings has sought to invert well established legal principles in relation to the burden of proof in judicial review proceedings. In this regard, in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, Finlay C.J. stated:

> *"It is clear from these quotations that the circumstances under which the court can intervene on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare. It is of importance and, I*

would think, of assistance to consider not only as was done by Henchy J in the Stardust case the circumstances under which the court can and should intervene, but also in brief terms and not necessarily comprehensively, to consider the circumstances under which the court cannot intervene.

The court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that: (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.

These considerations described by counsel on behalf of the appellants as the height of the fence against judicial intervention by way of review on the grounds of irrationality of decision are of particular importance in relation to questions of the decisions of planning authorities.

Under the provisions of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the board which are expected to have special skill, competence and experience in planning questions. The court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters.

I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."

32. Further reliance was placed by the respondent on *Weston v. An Bord Pleanála* [2010] IEHC 255, in which Charleton J. held:

"The burden of proof of any error of law, or fundamental question of fact, leading to an excess of jurisdiction, or of demonstrating such unreasonableness as flies in the face of fundamental reason and common sense, rests on Weston the applicant in these proceedings. Once there is any reasonable basis upon which the planning authority or An Bord Pleanála can make a decision in favour of, or against, a planning application or appeal, or can attach a condition thereto, the court has no jurisdiction to interfere. Furthermore, where, as a colourable device, a reason is chosen for refusing permission which does not give rise to an entitlement to compensation under the legislation, the burden of proving that a decision choosing such an incorrect reason for that improper purpose rests on the applicant. The presence in the planning file, including the report to the manager, or in the case of An Bord Pleanála, the report of the inspector, of any material which could rationally justify a refusal on a non-compensatory ground is sufficient to support the lawfulness of a decision. Of course, in an appropriate case, it might be possible to prove that a decision was made for an improper purpose or that a conclusion or recommendation in an inspector's report was not arrived at in good faith. That burden however, rests on the applicant for judicial review who seeks to impugn such a decision. Some material ground, upon which such an attack might reasonably be regarded as being capable of being mounted, must be shown in evidential terms before even leave to argue such ground would be granted. In accordance with the legislative circumscription of judicial review appeals against planning decisions, substantial grounds would have to be shown to justify granting leave on such a point"

33. In arriving at his decision, Charleton J. cited the following passage of McGuiness J. in *Lancefort Limited v. An Bord Pleanála* (Unreported, High Court, 12th March, 1998):

"It appears to me that this submission… is well founded. The onus of prove [sic] in establishing that An Bord Pleanála did not consider the question of environmental impact assessment… and thereby rebutting the presumption of validity of the Bord's decision, lies squarely on the Applicant. That burden of proof, it seems to me, has not been fully discharged."

34. In relation to the applicant's complaints regarding the adequacy of the NIS, counsel for the respondent submitted that the applicant did not raise any issue in relation to the content of the NIS in her appeal to the Board. It was submitted that following *Lancefort v. An Bord Pleanála* [1999] 2 IR 270, the applicant cannot now make these fresh arguments for the first time in judicial review proceedings. In any event, it is submitted that the applicant has failed to identify how the NIS was in any way deficient. It was submitted that the Board did not fail to consider the adequacy of the NIS and the decision of the Board records that it did carry out an appropriate assessment. The respondent contended that any assessment of the adequacy of the NIS is first and foremost a matter for the Board to consider and it is well established that in the absence of any evidence to the contrary, one must assume that statutory bodies such as the Board exercise their powers and discharge their functions in a lawful and proper manner.

35. In relation to the appropriate assessment, counsel for the respondent submitted that nothing by way of substantive evidential material which might even cast doubt on the validity of the assessment was put forward by the applicant, and the submissions made to the court amount only to surmise and observation. It was submitted that the approach to be followed by this court is that set out in *Sweetman v. An Bord Pleanála* [2010] IEHC 53, by Hedigan J. as follows:

"It lies with the national authorities to determine in the light of the conclusions of the assessment of the implications of the project whether this threshold has been met. This they may do only after having made sure there will be no adverse effect on the site. They should do this by reference to the assessment and a high degree of certainty is required. However the decision remains one for the Board as the competent authority. As has been repeatedly stated in a wide range of cases over the years, this Court should intervene in the decisions of administrative tribunals such as the Board only where it is satisfied that the decision was unlawful. Even where the Court was satisfied the tribunal was wrong it cannot intervene. The test is one of the legality of the decision and not its correctness. This approach was helpfully outlined in a case based on similar facts, Power v. An Bord Pleanála [2006] IEHC 454 where Quirke J. indicated that the Court should be slow to second guess the decisions of the competent authority on such an issue:

> *'Mr. Collins S.C. has argued eloquently that the decision of the Board is invalid because it has been made in violation of the provisions of Article 6 of the Habitats Directive and Regulation 28 of the Habitats Regulations.*
>
> *However it seems to me that his argument in relation to alleged breaches of the Habitats Directive is based upon the contention that the evidence and material before the Board did not support the Board's decision.*
>
> *The fundamental ground relied upon in support of the argument that the applicant should be granted leave to seek to quash the decision is, in fact, based upon that contention.*

The courts will not intervene by way of judicial review to quash decisions of administrative tribunals (such as the Board) in the absence of evidence of illegality. The function of the court in an application for judicial review is limited to determining whether or not an impugned decision was legal, not whether or not it was correct.

It is decidedly not a function of this court to substitute itself for the Board for the purpose of determining whether it believes that the decision made was the correct one. This court has neither the jurisdiction nor the competence to undertake such an exercise.""

36. In relation to the s. 131 notices, the respondent submitted that there is no legal basis on which the court can intervene in relation to such a notice simply where the applicant disagrees with the issues set out. In any event, it is denied that the notices were ambiguous and the respondent submits that sending them is discretionary and the Board was under no obligation to abide a response.

Decision

37. The applicant adopts a simple, straightforward approach in this challenge, by way of judicial review, to the decision of the respondent to allow permission to the first notice party to proceed with the development in issue. The applicant says that the site in question is, by virtue of being active blanket bog, a protected site under the provisions of the Habitat Directive and national implementing legislation; that there is scientific doubt as to the status of the site as such, and as to the impacts of the proposed development on the integrity of the site as a protected site; that the respondent was therefore under a duty to carry out its own independent ecological assessment to consider a matter of scientific doubt, and either establish the applicant's contentions in fact, or otherwise eliminate the doubt raised. The applicant then challenges the adequacy of the NIS. Additionally, the applicant calls in question the s. 131 notices to the relevant bodies, firstly challenging the questions posed in these notices as ambiguous, and secondly, citing the issuance of these notices as indicating that the respondent did have a scientific doubt on the questions raised by the applicant. The applicant then challenges the adequacy of the assessment carried out by the respondent before arriving at its decision.

38. The applicant, in her appeal to the respondent against the grant of planning permission in this case, claims that the site in issue is active blanket bog and is an Annex 1 priority habitat to be protected under the provisions of the Habitats Directive from any development which would mar the integrity of the site. The applicant criticises the respondent for accepting the content of the NIS, *inter alia*, on the basis that in the first instance, it failed to identify this site as "active blanket bog", and secondly, did not explain how it reached the conclusion that it was "wet heath", and thirdly, did not say whether or not there was on this site two types of heather which, if present, would have altered the status of the site as meriting Annex 1 priority habitat protection. Although not a designated "European site", because of its status as a priority habitat, the applicant submits that "shadow protection", as described by Charleton J. in the *Sandymount and Merrion Residents Association v. An Bord Pleanála* case, applied.

39. In making these claims, the applicant has not adduced any evidence to support her claims. The applicant contends that it is unnecessary for her to do this, in the first instance, but apart from that, because she did not have access to the site, she was not in a position to obtain evidence to support her contention as to the status of this site. What she has done is to make a bald assertion as to the status of the site. Although this site has been in public ownership (Údaras na Gaeltachta) for some time, it would appear that nobody, apart from the applicant, has considered that it might be either active blanket bog or wet heath land with the qualifying two heathers upon it, and thereby meriting protection as a priority habitat. It is clear from the evidence in the case that this site was never on a list of sites prepared by the National Authority with a view to designation, and it would appear nobody, apart from the applicant, appears to have considered it to be a site meriting consideration as a potential "European site".

40. Notwithstanding all this, the applicant submits that it is sufficient for her to assert her belief that this is a potential priority habitat, and merely by so doing, she has thereby given rise to a "scientific doubt" as to the true nature of this site, the consequence of that being that the respondent was then under a duty to have conducted an independent, ecological assessment of the site in order to eliminate the "scientific doubt" as to the true nature of the site. In this regard, she relies on the decision of Charleton J. in the case of An *Taisce v. Ireland* and she submits that an appeal to the respondent is not an adversarial process, that the duty rests upon the respondent to conduct appropriate enquiries before making its decision.

41. There is no doubt that in an appeal to the respondent, there is a duty resting upon the respondent to conduct appropriate enquiries. But there has to be a reason for those enquiries. In my opinion, such reason must be based on credible evidence. It is not sufficient for an objector to a planning permission merely to make a bald assertion, and no more, and thereby place on the respondent a duty to carry out such enquiries as would be necessary to counter that assertion. It would be unfair to applicants for planning permission if they were put to the considerable expense in meeting an objection to their application for planning permission, in an appeal before the respondents, of having to assemble expert evidence to counter mere assertion by an objector.

42. I am quite satisfied that the duty of the respondent to make appropriate enquiries does not go so far as to require them to respond to assertions unsupported by any credible evidence.

43. The making of a bald assertion without any evidence to support it could not be said to give rise to "a scientific doubt" which would require, in the case of a site potentially qualifying as a priority habitat, the respondents to do, by way of enquiry, whatever was necessary to eliminate that doubt. Thus, in my view, the applicant's reliance upon the extensive line of authority open to the court relating to the obligations of public authority, when confronted with a situation of "scientific doubt" relating to the status of either a "European site" or a site in the process of consideration for such status, is misconceived.

44. The applicant submits that the issuance by the respondent of notices under s. 131 of the Act, to the relevant bodies concerned, evidenced a "scientific doubt" on the part of the respondent. That is an inference from the evidence in the case that I would entirely reject. The bodies in question potentially had an interest in the proposed development on this site, and it was entirely appropriate that the respondent would issue to them notices inviting submission, on an open-ended basis, seeking to elicit from them such comment or submission as they might wish to make, if any. The fact that such notices were issued does not, in my view, indicate any "scientific doubt" on the part of the respondent. If any inference were to be drawn from this process, the fact that no responses were received from these bodies would seem to me to suggest that they did not share the applicant's opinions or concerns relating to this site.

45. Although the procedure in the appeal before the respondent was not an adversarial one, there is no doubt that the procedure in this judicial review is undoubtedly adversarial, and the onus of proof resting upon the applicant in these proceedings is well-settled. The foregoing *dicta* from the cases of *O'Keeffe v. An Bord Pleanála, Westin v. An Bord Pleanála* and *Lancefort Ltd. v. n Bord Pleanála* clearly establish that the applicant carries the burden of proof of establishing the grounds in respect of which leave for judicial review was granted.

46. I have come to the conclusion that the respondent did not fail in any way in its duty to conduct an appropriate inquiry, as required of them by statute, by failing to carry out their own independent ecological assessment. The applicant failed to adduce any evidence whatsoever to support her contention that the site in question was a priority habitat, warranting, on the basis of the "precautionary principle", the elimination of "scientific doubt" by the carrying out of an independent ecological assessment. Thus, in these judicial review proceedings, I am quite satisfied that the applicant has failed to discharge the onus of proof resting on her to establish that the respondent failed in its legal duty, as she contends, in that regard.

47. In these judicial review proceedings, the applicant advances a number of criticisms of the NIS and the respondent's reliance upon it.

48. In the appeal proceedings before the respondent, the only matter raised with regard to the NIS was its failure to identify the site in question as "active blanket bog" meriting a status as a priority habitat. In these proceedings, the applicant makes a number of additional criticisms, largely concerning the methodology leading to the conclusions in the NIS and failures to identify in the site those characteristics which, the applicant says, are determinative of the site being a priority habitat. These additional criticisms seem to me to be largely disputes of fact relating to the content and conclusions of the NIS. The respondent objects to these matters being litigated on the basis that they were not raised in the appeal before the respondent, and hence, pursuant to the judgment of Keane C.J. in the *Lancefort* case, cannot now be raised on this appeal. In my opinion, there is merit in this submission. Clearly, matters which are not raised in the appeal cannot be raised in a judicial review as a basis for impugning the decision challenged, as to permit this would be obviously unfair to the decision maker who did not have an opportunity to consider these matters.

49. Apart from that, however, it is obvious that these additional disputes raised in these judicial review proceedings are purely factual disputes. Even if contrary evidenced had been put before the respondent in the appeal, there could be no grounds for challenging a decision of the respondent which preferred the conclusions of the NIS, in judicial review proceedings. Manifestly, where no evidence at all was adduced by the applicant, there is not the slightest basis for criticising an acceptance by the respondent of the conclusions of the NIS.

50. The original ground of complaint in the appeal before the respondent relating to the NIS, namely, that there was not a conclusion that the site was an active blanket bog is a contention of fact, and in the absence of any evidence to have supported that contention, there was nothing to cause the respondent to consider any conclusion other than that contained in the NIS, namely, that the site was wet heath.

51. I am quite satisfied that there was ample material before the respondent to support the conclusion reached in its decision, and in the absence of any evidence of failure to carry out its function correctly in accordance with law, thus, applying the decision of the Supreme Court in *O'Keeffe v. An Bord Pleanála*, there is no basis in this case put forward by the applicant, upon which the determination of the respondent can be challenged in these judicial review proceedings.

52. The applicant highlighted the reference in the respondent's direction of 13th February 2013, and its decision of 20th February 2013, to Broadhaven Bay as a Special Protection Area (SPA), whereas it is also a Special Area of Conservation (SAC). It was submitted that this obvious mistake gave rise to a concern that the appropriate assessment relative to an SAC was not carried out in respect of potential impacts on Broadhaven Bay. I am quite satisfied that the error in question was merely a clerical error and it can be traced back to the Inspector's Report where, in the recommended 'REASONS AND CONSIDERATIONS', the same error is to be found. Having regard to all of the material that was before the Board, it would seem to me to be quite erroneous to conclude that this minor clerical error gave rise to an inference that the Board had not carried out the correct or appropriate assessment with regard to Broadhaven Bay.

53. The applicant further submitted that the respondent had failed to carry out an appropriate assessment, as required under s. 177V(1) of the Act of 2000. The applicant has failed to adduce any evidence to support this contention, nor does such a contention derive any support from any reasonable inference drawn from the evidenced before the court. Bearing in mind that the onus of proof that rests on the applicant in these judicial review proceedings, I am quite satisfied that the applicant has wholly failed to establish this ground.

54. The applicant complained that the respondent had failed to make its determination on the proposed development and the notice of the determination available for inspection as soon as may be after the making of the same, as required under s. 177V(6) of the Act of 2000. I am satisfied on the evidence that this ground has not at all been made out by the applicant.

55. For all of the above reasons, I have come to the conclusion that the applicant is not entitled to the relief claimed in these judicial review proceedings.