

THE HIGH COURT

JUDICIAL REVIEW

2009 202 JR

BETWEEN

PETER SWEETMAN

APPLICANT

AND

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

RESPONDENTS

AND

WEXFORD COUNTY COUNCIL, KILKENNY COUNTY COUNCIL AND THE NATIONAL ROADS AUTHORITY

NOTICE PARTIES

Judgment of Mr. Justice Hedigan delivered on the 2nd day of March, 2010.

1. The applicant seeks leave to apply for judicial review of a decision of the first named respondent hereinafter, the Board, of the 22nd December, 2008 to grant approval to the notice parties to construct a road known as the New Ross Bypass. On the consent of the parties the Court is hearing this application as a “telescoped” hearing whereby the application for leave to seek judicial review and the application itself will be heard together. Although initially raising many issues, the applicant has now narrowed his complaint down and focuses simply on the ground raised by him in connection with the Habitats Directive (62/43/EEC) and specifically with Article 6 thereof.

The statutory framework

2. Council Directive 92/43/EEC on the Conservation of Natural Habitats and Wild Fauna and Flora (the Habitats Directive) is transposed into Irish law by the European Communities (Natural Habitats) Regulations 1997/2002 (the Habitats Regulations). The Habitats Directive seeks to protect wildlife most significantly through a system of site designation and restrictions on land use that impacts on those designated sites. The Directive establishes a network of sites across Europe known as Natura 2000. This consists of sites designated under the Habitats Directive and of sites classified under Directive 79/409/EEC on the Conservation of Wild Birds (the Birds Directive). The site designation process under the Habitats Directive and the Habitats Regulations is a complex one. For the purposes of the present case it is accepted by the first named respondent that the proposed road crosses a site of community importance (SCI) under the Directive and a European site under the Regulations. It is also sometimes referred to as a candidate special area of conservation (cSAC). It therefore has the benefit of the site protection rules established by Article 6(2) – (4) of the Directive as transposed by Article 30 of the Habitats Regulations.

Article 6 of the Habitats Directive is as follows:

“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 1 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.”

3. This Article was considered by the European Court of Justice in Case C – 127/02 *Waddenzee*. The following extracts from that judgment are relevant to this case and are as follows:

"54 . Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear from Articles 3 and 4 of the Habitats Directive, in particular Article 4(4), be established on the basis, *inter alia*, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I to that Directive or a species in Annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed.

55. As regards the conditions under which an activity such as mechanical cockle fishing may be authorised, given Article 6(3) of the Habitats Directive and the answer to the first question, it lies with the competent national authorities, in the light of the conclusions of the assessment of the implications of a plan or project for the site concerned to approve the plan or project only after having made sure that it will not adversely affect the integrity of that site.

56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.

57. So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.

58. In this respect, it is clear that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle (see Case C – 157/96 *National Farmers Union and Others* [1998] ECR I 2211, paragraph 63) and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision.

59. Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities taking account of the conclusions 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 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 (see, by analogy, Case C – 236/01 *Monsanto Agricoltura Italia and Ors.* [2003] ECR I – 000, paragraphs 106 and 113).

60. Otherwise, mechanical cockle fishing could, where appropriate, be authorised under Article 6(4) of the Habitats Directive, provided that the conditions set out therein are satisfied.

61. 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."

4. This test was applied by the European Court of Justice in Case C – 239/04 *Commission v. Portugal*:

"21. In the present case the Environmental Impact study mentions the presence, in the Castro Verde SPA, of seventeen species of bird listed in Annex I to Directive 79/409 and the high sensitivity of certain of them to the disturbance and/or the fragmentation of their habitat resulting from the planned route of the section of the A2 motorway between the settlements of Aljustrel and Castro Verde.

22. It is also apparent from that study that the project in question has a "significantly high" overall impact and a "high negative impact" on the avifauna present in the Castro Verde SPA.

23. The inevitable conclusion is that, when authorising the planned route of the A2 motorway, the Portuguese authorities were not entitled to take the view that it would have no adverse effects on the SPA's integrity.

24. The fact that, after its completion, the project may not have produced such effect is immaterial to that assessment. It is at the time of adoption of the decision authorised an implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question (see, to that effect, Case C 209/02 *Commission v. Austria* [2004] ECR I 1211, paragraphs 26 and 27, and *Waddenvereniging & Vogelbeschermingsvereniging*, at paragraphs 56 and 29).

25. In those circumstances, the Portuguese authorities had the choice of either refusing authorisation for the project or of authorising it under Article 6(4) of the Habitats Directive, provided that the provisions laid down therein were satisfied (see, to that effect, *Waddenvereniging & Vogelbeschermingsvereniging*, paragraphs 57 and 60).

5. This application is brought seeking leave under s. 50 and s. 50A of the Planning and Developments Acts 2000 – 2006. In order to be granted relief the applicant must satisfy the Court that he has substantial grounds and a substantial interest. The issue of the applicant's substantial interest has been set aside by the respondents and the notices parties

for the purposes of this case. The question of whether there are substantial grounds is therefore the one question that the Court must address in this regard. In *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125, Carroll J. dealt with the meaning of substantial grounds;

"In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous. However, I am not concerned in trying to ascertain what the eventual result would be. I believe I should go no further than satisfy myself that the grounds are "substantial". A ground that does not stand any "chance of being sustained" (for example, where the point has been decided in another case) could not be said to be substantial. I draw a distinction between the grounds and the arguments put forward in support of those grounds. I do not think I should evaluate each argument and say whether I consider it sound or not. If I consider a ground, as such, to be substantial, I do not also have to say that the applicant is confined in this argument at the next stage to those which I believe may have some merit."

6. In this case the applicant claims that the decision made was irrational because:

"(i) There were no conservation objectives in relation to this European site set by the Minister or some such authority. In the absence of such conservation objectives the Board could not properly assess the possible impact on the immediate environment.

(ii) There was a scientific doubt raised in the inquiry by Ms. Dubskey and that should have been such as to create a reasonable scientific doubt such that the authority could not grant permission (see *Waddenzee* above).

(iii) A stepwise approach to making the decision was not adopted as a result of which the Board did not ask itself the right question, i.e. was there a reasonable scientific doubt.

7. The respondents and the notice parties argue the decision was not irrational and argue further that there is no requirement for conservation objectives to be set in relation to a site such as this by any authority. They argue that the conservation objectives may be established in the course of the Environmental Impact Assessment (EIA) and are in fact clearly set out in the Environmental Impact Statement (EIS) which is the first step or point of departure in the EIA process. They argue this is what happened in this case and the environmental objectives for the site in question are clearly and site specifically set out in the EIS. They further argue that there was no scientific doubt raised in the inquiry by Ms. Dubskey who did not in fact engage with the proposal as set out in the EIS because she took no account of the mitigation provisions contained therein and which subsequently were embodied as conditions in the planning permission granted. They further argue that there is no need for the Board to set out its decision in any formulaic way. What is required is that where a project is likely to have a significant effect on a site, then it should be subject to appropriate assessment of its implications for that site in view of the site's conservation objectives and agreed to only where it has been ascertained that it will not adversely affect the integrity of the site concerned.

The Court's decision

8. It is clear there is a high threshold for the authorisation of plans or projects under Article 6(3) of the Directive. A plan or project can only be authorised by a competent authority if it has made certain that it will not adversely affect the integrity of the site. This can only be the case where no reasonable scientific doubt remains as to the absence of such effects. I accept that a "reasonable scientific doubt" cannot be equated with mere concerns expressed in opposition to the project. A hypothetical risk or a supposition unverified by scientific evidence cannot constitute such a reasonable scientific doubt. See *Monsanto*.

9. 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."

10. In this case the Board had before it the EIS and the Inspector's report. The former established at Appendix B 2.4.2 the conservation objectives for the site. These are site specific and seem thoroughly comprehensive. No objection was raised in any submissions or in evidence as to the validity or relevance of these conservation objectives. I have not been pointed to any legislative requirement for these objectives to be set out in respect of this site which is not an SAC in any

way other than has been done herein. Indeed it may be noted that the State respondents herein have not been challenged for their failure to establish such a statement of objectives. The Inspector in his report addressed these conservation objectives and then examined the project in the light thereof. In my view, the requirement implicit in Article 6(3) for conservation objectives was met by their inclusion in the EIS. The complaint made in this regard has no substance.

11. The Board Inspector by reference to this comprehensive EIS identified a range of problems relevant to the Habitats Directive with which this Court is concerned herein. His function was to determine whether the project would adversely affect the integrity of the site. In his report at pages 80 to 84 he outlines the evidence which was given by Ms. Dubsky upon which the applicant herein has relied. It is clear from the evidence that she identified potential problems in relation to fish, otter, bats, woodland and the pink lagoon. The Inspector then outlines the answers given by respectively Mr. Murphy for the Council and Mr. Olan Howell. Their response was in general that all of the concerns raised by her had in fact already been identified in the EIS and mitigation measures proposed. It seems clear from this account of Ms. Dubsky's evidence which has not been gainsaid in these proceedings that whilst she correctly identified certain potential adverse impacts, she did not address much less criticise the mitigation provisions proposed in the EIS. Ms. Dubsky has never given evidence either at the hearing or in these proceedings to the effect she fears this development project might adversely affect the integrity of this site.

12. The Inspector's assessment at pages 100 to 102 of his report dealt with Ms. Dubsky's evidence taking it fully into account. He does address the mitigation measures proposed and considers them to be "detailed and onerous" and such that the road would not create a threat to habitats or species. He considers that an appropriate assessment as required by the EU Habitats Directive has been carried out. He also considered that the development would not affect the integrity of any European site. In my judgment in the light of this report what doubts had been raised were comprehensively dealt with and it was open to the Board to conclude that no reasonable scientific doubt remained that the project would not adversely affect the integrity of the site. Merely raising a scientific doubt alone cannot preclude the Board from considering whether those doubts are in fact reasonable. Doubt is the stock in trade of science. Good science identifies doubt, addresses it and resolves it. That, in my view, is what has happened here. The resolution of such doubt seems to me to be classically the role of the specialist tribunal established herein i.e. the Board

I conclude, on the basis of the evidence before the court, that the project in question was the subject of an appropriate assessment in the light of the conservation objectives for the site and that there was relevant (indeed ample) evidence before the Board upon which it could properly rely in order to ascertain there would be no likely adverse effect on the site and that no reasonable scientific doubt remained in relation thereto.

13. I have dealt with this case as a "telescoped" hearing dealing with leave and substance together. I conclude that the grounds raised are insubstantial and therefore I refuse leave to apply for judicial review.