C-254/19 - 1

THE HIGH COURT
JUDICIAL REVIEW

2018 No. 734 J.R.

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

SHANNON LNG LIMITED

NOTICE PARTY

ORDER FOR A REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION

1. THE REFERRING COURT

1. This request for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union ("TFEU") is made by the High Court of Ireland (Mr Justice Simons). The contact details for communications from the Court of Justice are as follows.

Principal Registrar
The High Court
Four Courts, Inns Quay
Dublin 7, Ireland.

2. THE PARTIES TO THE MAIN PROCEEDINGS AND THEIR REPRESENTATION

Friends of the Irish Environment Ltd. represented by Fred Logue Solicitors, 8 – 10 Coke Lane, Smithfield, Dublin 7, Ireland.

An Bord Pleanála represented by McDowell Purcell Solicitors, The Capel Building Suite 238, Mary's Abbey, Smithfield, Dublin 7, Ireland.

Shannon LNG Ltd. represented by Matheson Solicitors, 70 Sir John Rogerson's Quay, Grand Canal Dock, Dublin 2, Ireland.

3. THE SUBJECT MATTER OF THE DISPUTE IN THE MAIN PROCEEDINGS AND THE RELEVANT FACTS

Overview

2. The dispute in the main proceedings centres on whether a decision to extend the duration of a development consent engages Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ("*the Habitats Directive*").[1] More specifically, the dispute centres on whether the procedural requirements under Article 6(3) of the Habitats Directive apply only on the occasion of the original grant of a development consent, or, alternatively, whether they also apply to a subsequent decision which extends (prolongs) the duration of the development consent but which decision does not authorise any physical change to the project as originally permitted.

Factual background

3. Development consent for a liquefied natural gas regasification terminal ("*the gas terminal*") was granted by An Bord Pleanála (the Irish Planning Board) on 31 March 2008 ("*the 2008 planning permission*").

4. As part of its decision-making process, An Bord Pleanála was obliged under national law to carry out an environmental impact assessment ("*EIA*") of the proposed development. An EIA was also required as a matter of EU law in circumstances where the project falls within one of the categories of project prescribed under Annex II of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment ("*the EIA Directive*").[2]

5. The proposed project is to be located adjacent to what are now two Natura 2000 sites, namely (i) the Lower River Shannon Special Area of Conservation (Site Code IE0002165), and (ii) the River Shannon and River Fergus Estuaries Special Protection Area (Site Code IE0004077).

---

[1] OJ L 206, 22.7.1992, p. 7–50.
[2] OJ L 26, 28.1.2012, p. 1–21.

6. As of the date of An Bord Pleanála's decision to grant planning permission on 31 March 2008, national law did not properly transpose the Habitats Directive. The principal implementing regulations, namely the EC (Natural Habitats) Regulations 1997 (S.I. No. 94 of 1997) incorrectly assimilated the carrying out of an appropriate assessment for the purposes of the Habitats Directive with the carrying out of an environmental impact assessment for the purposes of the EIA Directive.

7. This approach to transposition was condemned by the CJEU in its judgment in Case C-418/04 *Commission v. Ireland* (ECLI:EU:C:2007:780). See, in particular, paragraphs [230] and [231].

8. The judgment in Case C-418/04 was delivered on 13 December 2007, some three months prior to An Bord Pleanála's decision to grant the 2008 planning permission.

9. In summary, therefore, the 2008 planning permission was granted pursuant to a national legislative regime which did not properly transpose the Habitats Directive. The formal decision to grant planning permission makes no reference to the Habitats Directive at all nor does it refer to the two European Sites. Accordingly, the decision cannot be said to contain "complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the site concerned" as required under Case C-404/09 *Commission v. Spain* (ECLI:EU:C:2011:768).

10. The 2008 planning permission imposed a ten-year time-limit on the carrying out and completion of the proposed development works ("*construction phase*"). The permission does not purport to impose a time-limit on the operation of the gas terminal thereafter ("*operational phase*").

11. In the event, no development works were ever commenced during this ten-year period. In brief, the developer explains that delays arose *inter alia* as a result of changes to the Irish policy on access to the national gas transmission grid, and, more generally, as a result of the economic situation from 2008.

12. In September 2017, the Developer made an application to alter the terms of the development so as to extend the construction phase for a further five years. An Bord Pleanála made a decision granting this application, with the result that the construction phase will now expire on 31 March 2023.

13. This decision was challenged by way of judicial review proceedings before the High Court. The High Court has decided to refer a number of questions to the CJEU.

4. THE RELEVANT LEGAL PROVISIONS

EU legislation

14. Article 6(3) of the Habitats Directive is the principal provision of EU law in respect of which an interpretation is sought from the CJEU.

Irish national legislation

15. The following provisions of the Planning and Development Act 2000 (No. 30 of 2000) ("*the PDA 2000*") are relevant.

16. Section 40(1) of the PDA provides that after the expiration of the construction phase of a planning permission, the permission shall cease to have effect.

> "40.—(1) Subject to subsection (2), a permission granted under this Part, shall on the expiration of the appropriate period (but without prejudice to the validity of anything done pursuant thereto prior to the expiration of that period) cease to have effect as regards—
>
> (a) in case the development to which the permission relates is not commenced during that period, the entire development, and
>
> (b) in case the development is commenced during that period, so much of the development as is not completed within that period."

17. Section 42 of the PDA 2000 provides for the extension of the duration of a planning permission. In brief, section 42 provides two alternative bases upon which an application for an extension of duration can be made. The first is where substantial works have been carried out pursuant to the planning permission during the period sought to be extended, and the development will be completed within a reasonable time. The second is where there were considerations of a commercial, economic or technical nature beyond the control of an applicant which substantially militated against either the commencement of the development or the carrying out of substantial works pursuant to the planning permission.

18. In the case of the second basis, i.e. commercial, economic or technical considerations, there are a number of safeguards built into section 42 in order to ensure that stale planning

permissions do not undermine the evolution of planning policy. For example, an extension of duration cannot be granted if there have been significant changes in development objectives in the development plan since the date of the permission such that the development would no longer be consistent with the proper planning and sustainable development of the area. It is also necessary that there not be an inconsistency with Ministerial guidelines.

19. Relevantly, a further safeguard is built-in to ensure compliance with both the EIA Directive and the Habitats Directive. More specifically, *where the development has not commenced*, the local planning authority must be satisfied that an environmental impact assessment, or an appropriate assessment, or both of those assessments, if required, was or were carried out before the planning permission was granted. (Section 42(1)(a)(ii)(IV)).

20. Section 42 contains a further safeguard in terms of the length of time for which an extension of duration can be granted. It is expressly provided that the additional period cannot exceed five years. Moreover, an application for an extension of duration can only be made once.

21. Sections 146B and 146C of the PDA 2000 provide a procedure whereby a particular type of planning permission, available in the case of strategic infrastructure development, can be altered. No express provision is made under these sections for the carrying out of screening or appropriate assessment for the purposes of the Habitats Directive.

22. Section 50 of the PDA 2000 (as amended) provides that a person shall not question the validity of a planning decision other than by way of an application for judicial review. An application for judicial review is subject to an eight-week time-limit. The High Court has a discretion to extend time in certain specified circumstances.

23. The existence of this time-limit has been interpreted by the national courts as precluding a litigant from raising—in judicial review proceedings directed to a *subsequent* planning decision—complaints that are, in substance, directed to an *earlier* planning decision in respect of which the time-limit has long since expired. A court may strike out judicial review proceedings on this basis. In this regard, the court will look to the *substance* of the challenge rather than merely its form. Thus the absence of a formal plea seeking to set aside the earlier planning decision is not conclusive.

24. There appears to be a tension between (i) the domestic jurisprudence on time-limits, and (ii) the case law of the CJEU which identifies a remedial obligation on a competent authority. This remedial obligation had been identified in the judgments in Case C-201/02 *Wells* (ECLI:EU:C:2004:12), and Case C-348/15 *Stadt Wiener* (ECLI:EU:C:2016:882). The case law of the CJEU appears to distinguish between (i) the setting of a time-limit for the bringing of proceedings against development consents alleged to have been issued in breach of the EIA Directive, and (ii) the (continued) remedial obligation on a competent authority. Presumably, similar principles apply to the Habitats Directive: certainly, the judgment in Case C-399/14 *Grune Liga* (ECLI:EU:C:2016:10)—albeit in the context of Article 6(2) of the Habitats Directive—accepts that the adequacy of an appropriate assessment may have to be reviewed subsequently.

25. The national legislation implementing the Habitats Directive was overhauled following the judgment of the CJEU in Case C-418/04 *Commission v. Ireland* (ECLI:EU:C:2007:780). The two principal pillars of the new regime are Part XAB of the PDA 2000 (as inserted by the Planning and Development (Amendment) Act 2010), and the Birds and Natural Habitats Regulations 2011 (S.I. No. 477 of 2011). The intention seems to be that the two regimes should be mutually exclusive, i.e. environmental decision-making will be subject to one or the other, but not to both regimes. As discussed, however, An Bord Pleanála maintains that there is a *third* category of environmental decision-making which falls outwith either regime.

26. In the case of each regime, the legislation establishes a general framework which fulfils the procedural requirements of the Habitats Directive, and then identifies the type of environmental decision-making which is subject to the general framework. This has the advantage of avoiding the necessity of introducing amendments to numerous pieces of individual legislation.

27. The range of decisions subject to Part XAB of the PDA 2000 is narrower than the Birds and Natural Habitats Regulations 2011. Part XAB applies to decisions defined as "consent for proposed development" under section 177U(8) of the PDA 2000 as follows.

> "(8) In this section 'consent for proposed development' means, as appropriate—
>
> (a) a grant of permission,
> (b) a decision of the Board to grant permission on a planning application or an appeal,

(c) consent for development under Part IX,
(d) approval for development that may be carried out by a local authority under Part X or Part XAB or development that may be carried out under Part XI,
(e) approval for development on the foreshore under Part XV
(f) approval for development under section 43 of the Act of 2001,
(g) approval for development under section 51 of the Roads Act 1993, or
(h) a substitute consent under Part XA."

28. These are all decisions which are either made under the PDA 2000, or by An Bord Pleanála exercising a function which has been transferred to it such as, for example, under the Roads Acts.

29. Relevantly, this list of decisions does not include a decision under either section 42 or section 146B of the PDA 2000.

30. The Birds and Natural Habitats Regulations 2011 are much broader in their scope. Their range is determined by the related definitions of "consent" and "project" under regulation 2 thereof.

31. A "consent" is defined as follows.

> "'consent' includes any licence, permission, permit, derogation, dispensation, approval or other such authorisation granted by or on behalf of a public authority, relating to any activity, plan or project that may affect a European Site, and includes the process of adoption by a public authority of its own land use plans or projects;"

32. A "project" is defined as follows.

> "'project', subject to the exclusion, except where the contrary intention appears, of any project that is a development requiring development consent within the meaning of the Planning and Development Acts 2000 to 2011, includes—
>
> (a) land use or infrastructural developments, including any development of land or on land,
>
> (b) the extraction or exploitation of mineral resources, prospecting for mineral resources, turf cutting, or the exploitation of renewable energy resources, and
>
> (c) any other land use activities,
>
> that are to be considered for adoption, execution, authorisation or approval, including the revision, review, renewal or extension of the expiry date of previous approvals, by a public authority and, notwithstanding the generality of the preceding, includes any project referred to at subparagraphs (a), (b) or (c) to which the exercise of statutory power in favour of that project or any approval sought for that project under any of the enactments set out in the Second Schedule of these Regulations applies;"

33. An attempt has been made in the definition of "project" to ensure that there is no overlap between the Birds and Natural Habitats Regulations 2011 and the provisions of Part XAB of the PDA 2000. As appears, if a "project" is a development requiring "development consent" within the meaning of the PDA 2000, then it falls outwith the scope of the 2011 Regulations. The difficulty with the statutory language, however, is that the term "development consent" is not actually a defined term under the PDA 2000. The closest one comes to finding such a definition under the PDA 2000 is the definition of "consent for proposed development" under section 177U(8). The term "development consent" is, of course, defined under European law, and, in particular, under the EIA Directive.

34. One might have assumed that the two regimes, i.e. Part XAB and the 2011 Regulations, would be mutually exclusive. On this assumption, the inclusion of reference to development consents under the PDA 2000 in the definition of "project" under regulation 2 of the 2011 Regulations was intended to indicate that if a particular decision-making procedure is subject to Part XAB of the PDA 2000, then there is no need to duplicate those requirements under the 2011 Regulations. However, the statutory language actually used is imprecise.

5. THE GROUNDS FOR THE REFERENCE

35. The principal issue in dispute in these proceedings is whether an extension or prolongation of the construction phase of a development consent engages Article 6(3) of the Habitats Directive. A similar issue is before the CJEU in Case C-411/17 *Inter-Environnement Wallonie ASBL*. Advocate General Kokott delivered her Opinion on 29 November 2018: ECLI:EU:C:2018:972.

36. For the following reasons, the High Court has concluded that the anticipated judgment in Case C-411/17 is unlikely to address all of the issues which the High Court has to resolve in the main proceedings before it. First, the nature of the extension of duration being sought is different as between the two sets of proceedings. Case C-411/17 is concerned with a time-limit on the *operational phase* of a project. Specifically, the production of electricity would have been required to cease by 2015 but for the amendment subsequently made to Belgian national legislation. The main proceedings before the High Court, conversely, are concerned with a time-limit on the *construction phase* of a

project. It can be anticipated, therefore, that even if the CJEU were to hold in Case C-411/17 that the Habitats Directive was engaged on the facts of that case, there would be an outstanding issue before the High Court as to whether different principles apply to a time-limit on a construction phase.

37. Secondly, the underlying facts of Case C-411/17 involve a nuclear power station. The case thus presents issues in respect of *transboundary* impacts, and this gives rise to issues in relation to the Espoo Convention which are inapplicable to the main proceedings before the High Court. It also potentially raises issues under the Treaty establishing the European Atomic Energy Community.

38. Thirdly, the fact that An Bord Pleanála carried out a screening exercise on an *ad hoc* basis means that it may be necessary to determine the question of what considerations a decision-maker is required to take into account in carrying out a screening assessment in the context of an application to extend the duration of a development consent. The question then becomes what precisely has to be assessed. Is it sufficient that the competent authority identifies changes in the regulatory background, e.g. (i) the designation of European Sites in the interim; (ii) altered environmental conditions in the surrounding area; and (iii) new scientific findings; or, alternatively, is the competent authority required to reconsider the very principle of the project. It will also be necessary to examine whether the answer to this question might be different in circumstances where there had not been proper compliance with the requirements of the Habitats Directive at the time of the grant of the original planning permission. (cf. Case C-201/02 *Wells*, and Case C-399/14 *Grune Liga*).

39. Fourthly, the fact that the 2008 planning permission had ceased to have effect *prior* to An Bord Pleanála making its decision to extend the duration of the permission may be relevant to the analysis of the CJEU in an Article 267 reference from the High Court. It is at least arguable that a decision to *revive* a planning permission which has expired is more akin to the grant of a "development consent" than is a decision to prolong a subsisting planning permission.

40. Fifthly, there is already provision made under Irish national law which would appear to be intended to ensure compliance with the requirements of the Habitats Directive in the context of an application to extend the duration of a planning permission, namely section 42 of the PDA 2000. The High Court considers that, on the correct interpretation of the

PDA 2000, an application to extend the duration of a planning permission can only be made pursuant to section 42, and cannot be made pursuant to section 146B and 146C. The Developer contends that the High Court is not entitled to rely on this interpretation of national legislation in circumstances where the applicant for judicial review has not included an argument in its pleadings to the effect that the decision to extend the planning permission was made pursuant to the incorrect section. An issue arises as to whether the obligation upon a national court, such as the High Court, to interpret national law in the light of EU law can be made contingent on the parties to the main proceedings having raised an *express plea* in that regard.

41. Finally, An Bord Pleanála and the Developer contend that it is not open to an objector, in the context of an application for judicial review challenging the validity of a decision to grant an extension of duration of a development consent to contend that the initial decision to grant development consent was invalid for failure to comply with the Habitats Directive. This issue gives rise to the sixth question below.

6. *PROPOSED QUESTIONS FOR ARTICLE 267 REFERENCE*

(1). Does a decision to extend the duration of a development consent constitute the agreement of a project such as to trigger Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (hereinafter "*the Habitats Directive*")? [1]

(2). Is the answer to Question (1) above affected by any of the following considerations?

(A) The development consent (the duration of which is to be extended) was granted pursuant to a provision of national law which did not properly implement the Habitats Directive in that the legislation incorrectly equated an appropriate assessment for the purposes of the Habitats Directive with an environmental impact assessment for the purposes of the EIA Directive (Directive 2011/92/EU).[2]

(B) The development consent as originally granted does not record whether the consent application was dealt with under Stage 1 or Stage 2 of Article 6(3) of the Habitats Directive, and does not contain "complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the site concerned" as required under Case C-404/09 *Commission v. Spain.*

(C) The original period of the development consent has expired, and as a consequence the development consent has ceased to have effect in respect of the entire development. No development works can be carried out pursuant to the development consent pending its possible extension.

(D) No development works were ever carried out pursuant to the development consent.

---

[1] OJ L 206, 22.7.1992, p. 7–50.
[2] OJ L 26, 28.1.2012, p. 1–21.

(3). In the event that the answer to Question (1) is "yes", what considerations are the competent authority required to have regard to in carrying out a Stage 1 screening exercise pursuant to Article 6(3) of the Habitats Directive? For example, is the competent authority required to have regard to any or all of the following considerations: (i) whether there are any changes to the proposed works and use; (ii) whether there has been any change in the environmental background, e.g. in terms of the designation of European Sites subsequent to the date of the decision to grant development consent; (iii) whether there have been any relevant changes in scientific knowledge, e.g., more up-to-date surveys in respect of qualifying interests of European Sites? Alternatively, is the competent authority required to assess the environmental impacts of the entire development?

(4). Is there any distinction to be drawn between (i) a development consent which imposes a time-limit on the period of an activity (operational phase), and (ii) a development consent which only imposes a time-limit on the period during which construction works may take place (construction phase) but, provided that the construction works are completed within that time-limit, does not impose any time-limit on the activity or operation?

(5). To what extent, if any, is the obligation of a national court to interpret legislation insofar as possible in accordance with the provisions of the Habitats Directive and the Aarhus Convention subject to a requirement that the parties to the litigation have expressly raised those interpretive issues? More specifically, if national law provides two decision-making processes, only one of which ensures compliance with the Habitats Directive, is the national court obliged to interpret national legislation to the effect that only the compliant decision-making process can be invoked, notwithstanding that this precise interpretation has not been expressly pleaded by the parties in the case before it?

(6). If the answer to Question (2)(A) above is to the effect that it is relevant to consider whether the development consent (the duration of which is to be extended) was granted pursuant to a provision of national law which did not properly implement the Habitats Directive, is the national court required to disapply a rule of domestic procedural law which precludes an objector from questioning the validity of an earlier (expired) development consent in the context of a subsequent application for development consent?

Is such a rule of domestic procedural law inconsistent with the remedial obligation as recently restated in Case C-348/15 *Stadt Wiener*?

Mr Justice Garrett Simons
High Court of Ireland

Dated 13 March 2019.