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ENVIRONMENTAL & PLANNING

Hellfire Massy Residents' Association v An Bord Pleanála and ors [2021] IEHC 424

The Irish High Court has referred four legal questions to the Court of Justice of the European Union (CJEU). These questions relate to the validity of aspects of the Birds and Natural Habitats Regulations 2011 (the **2011 Regulations**), which transpose the EU Habitats Directive in Ireland.

The key substantive referral question relates to the process under the 2011 Regulations for obtaining a "derogation licence" to disturb protected wildlife. In particular, Mr Justice Humphreys has asked the CJEU whether the 2011 Regulations, to the extent they allow for a developer to obtain a derogation licence after the grant of planning permission, are consistent with the Habitats Directive.

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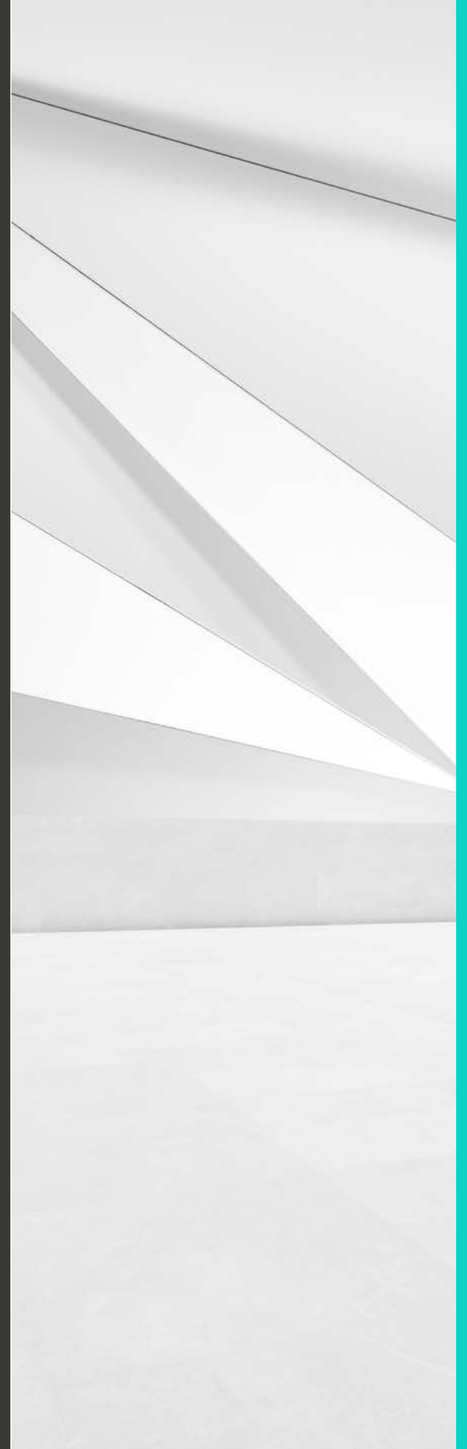

Background

The relevant Irish proceedings were a judicial review of the planning permission for the proposed Dublin Mountains Visitor Centre, in the vicinity of the Hellfire Club at Montpelier Hill, which was granted in June 2020. The applicant for judicial review was a Residents' Association, which had objected to the initial application for planning permission. The key reliefs sought in the proceedings were:

- **Relief one:** an order of certiorari quashing the permission
- **Relief three:** a declaration that Section 175 of the Planning and Development Act 2000 (the **PDA**) (which sets out requirements for Environmental Impact Assessment of development carried out by or on behalf of local authorities) is invalid on the basis that it does not adequately provide for public participation
- **Relief four:** a declaration that Regulations 51 and 54 of the European Communities (Birds and Natural Habitats) Regulations 2011 (relating to protection of species and the derogation process) are incompatible with EU law

Rejected reliefs

The High Court refused most of these reliefs. In particular, the Judge held that:

- There was no error of domestic or European law that would support an order of certiorari being made
- The Residents' Association did not have standing to claim that Section 175 was invalid. As noted, this argument was based on inadequate provision for public participation in Section 175. The Judge noted that the Association had been able to submit on the application, so even if there was some deficiency in the provision, it had not interfered with the Association's rights. As the Judge put it, "*[one] cannot assert the fair procedures rights of some other person who is not an applicant save in exceptional circumstances that do not apply here*"
- There was no decision that had been made "under" the 2011 Regulations, because there was no current, established, or likely requirement for a derogation licence, and accordingly no such derogation had been sought. Consequently, the Court refused to declare that the 2011 Regulations are invalid to the extent they allow for a derogation to be obtained prior to the grant of development consent.

Referral of certain questions to CJEU

Having made the above findings, the High Court went on to hear further submissions on the validity of the 2011 Regulations to the extent they apply to the situation after the grant of development consent.

A key feature of the Irish system for obtaining a derogation licence is that this authorisation is not required as a matter of course (ie, not every development needs to obtain a derogation licence). Instead, the requirement to seek a derogation only arises where a development would actually disturb or interfere with protected species in contravention of the "strict protection" rules for particular species set out in the 2011 Regulations. In some situations, a developer might not practically be in a position to confirm that this obligation applies, and proceed to seek a derogation licence, until after the grant of planning permission.

As the High Court noted, in deciding whether a derogation is necessary in those circumstances, "*the council ie, the developer in this instance must rely on its own judgement as to whether it would be violating the criminal law*". The application and validity of this process has been raised in a number of recent judicial review proceedings. In the *Hellfire Club* case, the Residents' Association asserted in particular that:

- The "ex-post grant" of derogation licences is incompatible with the requirements for strict protection for the purposes of the Habitats Directive
- The 2011 Regulations do not respect Article 6 of the Aarhus Convention because they do not provide for a system of public consultation in relation to the grant of a derogation licence under Regulation 54 of the 2011 Regulations
- Regulations 51 and 54 of the 2011 Regulations fail to adequately implement Articles 12 and 16 of the Habitats Directive

The Court identified the following procedural and substantive questions arising from these grounds, which it has referred to the CJEU for determination:

1. Whether the reference to "EU law" in the Residents' Association's fourth relief should be read as including by implication a reference to the Aarhus Convention
2. Whether domestic procedural rules against "hypothetical" challenges are valid in the context of challenges based on EU law
3. Whether the 2011 Regulations are invalid due to a lack of integration between the ("post-consent") derogation system, and the process for granting planning permission. The Judge in particular framed this process as requiring an "ad hoc" assessment on the part of the developer as to the need to obtain a derogation
4. Whether the 2011 Regulations are invalid due to the lack of opportunity for public participation in the derogation licence process

Comment

A CJEU referral based on the validity of the 2011 Regulations appears to have been "on the cards" for some time, given the reliance that objectors to planning applications have increasingly been placing on arguments based on the need to obtain, and the process for obtaining, a derogation licence.

In particular, the need for some sort of "interlinkage" between the planning permission process and the derogations process, and the possibility that developers might only obtain a derogation licence after the grant of planning permission, have become issues of contention.

In a separate judgment issued after the Hellfire Club case, Humphreys J has emphasised that he does not believe that EU law requires developers to obtain a derogation licence before they can be granted planning permission. However, the Judge has again stated that there is an open question as to whether EU law requires the planning permission and derogation licence processes to be linked.

Against that background, the CJEU referral should clarify the lawfulness or otherwise of the derogation system under the 2011 Regulations.

For further information, please contact Alison Fanagan, Consultant, Jason Milne, Partner or any other member of the Environmental and Planning team.

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