VOLUME 29 ISSUE 1 2017

ENVIRONMENTAL LAW & MANAGEMENT

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LAWTEXT PUBLISHING

Case Commentary

What is required of An Bord Pleanála in giving 'reasons' for EIA and AA decisions after *Connolly*?[1]

Connolly v An Bord Pleanála
[2016] IEHC 322 (14 June 2016)

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This article considers the decision of Barrett J in the High Court of *Connolly v An Bord Pleanála,*[2] and in particular, what implications the decision may have for An Bord Pleanála (and other competent authorities) in formulating decisions relative to proposed developments that involve Environmental Impact Assessment (EIA) and Appropriate Assessment (AA). It should be noted at the outset that an Application seeking Leave to Appeal was lodged by An Bord Pleanála with the Supreme Court on 18 January 2017. On 14 June 2017, the Supreme Court confirmed that it would grant Leave to Appeal on all grounds proposed, and sought legal submissions from both parties within 14 days. It appears the Supreme Court is aiming to prioritise the hearing of this appeal, and the appeal will probably be heard in 2018.

The decision was made by Mr Justice Barrett on 14 June 2016. He granted certiorari quashing a decision of An Bord Pleanála (the Board) to grant permission for a four-wind-turbine development in County Clare. Ms Connolly's complaints centered on compliance with statutory obligations owed by the Board, under certain sections of the Planning and Development Act 2000 (as amended). Those obligations require competent authorities, in certain circumstances, to carry out a screening assessment for AA, to carry out an AA, and to carry out an EIA. These obligations arise under section 177U(6a), section 177V(1) and section 172(1J).[3]

The Board's decision in *Connolly* concluded as follows, relative to AA:

> Having regard to the nature, scale and design of the proposed development, the Natura impact statement, the environmental impact statement submitted with the application, the documentation and submissions on file generally, and the significant further information submitted to An Bord Pleanála on the 9th day of August, 2013, and notwithstanding the Inspector's assessment of impacts on European Sites, which is noted, the Board completed an Appropriate Assessment in relation to the potential impacts of the proposed development on the Carrowmore Point to Spanish Point and Islands Special Area of Conservation (Site Code number 001021) and on the Mid-Clare Coast Special Protection Area (Site Code number 004182). Subject to the implementation of the identified mitigation measures, the Board concluded that the proposed development, by itself, or in combination with other plans or projects, would not adversely affect the integrity of these European sites, in view of the conservation objectives for the sites.

Mr Justice Barrett commented on that wording as follows:

> Despite the eloquent wording, the just-quoted text amounts in effect to nothing more than an assertion that 'Having considered all the material put in front of it, the Board has reached the following conclusion …'. If this Court was to say in judgment 'Having considered all the material put in front of it, the court has reached the following conclusion …' and then give a ruling, its judgment would undoubtedly be criticised on appeal, and rightly so. … When it comes to the obligations imposed on An Bord Pleanála pursuant to s 177V(1), does the above-quoted text suffice by way of compliance? The short answer to this question is 'no'.

Similar wording was used relative to EIA. It is important before we go any further to look at some of the key facts in this case. The Applicant, Ms Connolly, lived close to the proposed wind-farm site. Clare County Council refused Planning Permission for a six-turbine wind farm on 12 July 2011. This decision was appealed by the developer to the Board on 8 August 2011. The Inspector's Report, dated 30 November 2011, recommended refusal on a number of grounds including AA concerns, eg relative to hen harrier habitat. No Natura Impact Statement had been submitted with the Application, but the Inspector was not satisfied that the development could be screened out for AA. The matter came before the Board, and it decided to issue a section 132 Further Information Request, in particular seeking submission of a Natura Impact Statement. A Response from the developer was submitted on 9 August 2013 and included a Natura Impact Statement. Revisions to the development, including a changed layout and a reduction in the number of turbines from six to four, were submitted on 10 October 2013, and 25 February 2014 and submissions invited and received from third parties. No further report was sought or obtained from the Inspector. The Board granted Planning Permission on 6 June 2015 for the revised layout, four-turbine wind farm.

The Board's decision runs to some 16 pages. Twenty-six conditions were attached, listed on pages 7–16 inclusive, including a condition requiring that all environmental mitigation measures set out in the EIS, NIS and associated documentation be implemented in full, with a specific condition, condition 4, in relation to hen harrier conservation. In the earlier pages of the decision, the Board, over three pages, notes the Inspector's recommendation to refuse and

1 This article is based on a presentation made by Alison Fanagan to the UCC 'Law and Environment' Conference in April 2017. With grateful thanks to Brendan Curran, Solicitor A&L Goodbody for his assistance in researching this article.
2 [2016] IEHC 322.
3 The full text of theses sections can be found online at http://revisedacts.lawreform.ie/eli/2000/act/30/revised/en/pdf?annotations=true.

comments on its alternative conclusions on a variety of issues. In overall terms, the Board's decision noted and generally adopted the Inspector's assessment of environmental impacts, with the exception of the matters set out in the decision, and concluded that the proposed development would not have unacceptable effects on the environment – the wording referenced above.

Mr Justice Barrett was critical of the Board's approach to the hearing of the case. He criticised the extensive cross references made by Counsel for the Board to the documentation relative to the proposed development. He noted as follows:

> However, it seemed to the court, with respect, that in taking the court with such abundant detail through what An Bord Pleanála had done, counsel rather overlooked the requirement that when it comes to, inter alia, section 177V(1) what is required is not just that An Bord Pleanála has done right but that a party who comes to the decision of An Bord Pleanála, and who wants to know whether or not to challenge same is able readily to gauge in an informed manner whether An Bord Pleanála has done right … or gone wrong.

He also noted that the Board argued at the hearing that Ms Connolly was 'opportunistic' and had no interest in ecology. He commented as follows: 'But all the court sees is an applicant – Ms Connolly – who is rightly insistent that there be full compliance with the law before a wind farm is planted by her homestead'.

Section 177V(1) requires that a determination under Article 6(3) of the Habitats Directive[4] is made as to whether or not a proposed development would adversely affect the integrity of a European Site and that an AA is carried out by a competent authority. Section 177V(5) requires that reasons are given for the determination. Section 172(1)J states that when a competent authority has decided to grant or refuse consent, it shall inform the applicant and the public, and it shall make information available regarding the decision, the conditions imposed, an evaluation of the direct and indirect effects, and the main reasons and considerations for its decision relative to compliance with the EIA Directive.[5]

The court went on to consider what 'reasons' are required, and focused in particular on the decision in *Kelly v An Bord Pleanála*,[6] which concerned an alleged failure by the Board to carry out an AA, and its failure to give reasons for same. That decision relied on decisions of the CJEU in *Mellor*,[7] which was concerned with a reference from the UK courts as to whether adequate reasons had been given for a Screening decision in relation to EIA. In particular, paragraphs 57 to 60 of the CJEU judgment stated as follows:

> 57. It is apparent, however, that third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority has actually determined, in accordance with the rules laid down by national law, that an EIA was or was not necessary.
> 58. Furthermore, interested parties, as well as other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with the competent authority's screening obligation. That requirement may be met, as in the main proceedings, by the possibility of bringing an action directly against the determination not to carry out an EIA.
> 59. In that regard, effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general, that the court to which the matter is referred may require the competent authority to notify its reasons. However where it is more particularly a question of securing the effective protection of a right conferred by Community law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request (see Case 222/86 Heylens & Others [1987] ECR 4097, paragraph 15).
> 60. That subsequent communication may take the form, not only of an express statement of the reasons, but also of information and relevant documents being made available in response to the request made.

The Judgment in *Kelly* also relied on the decision of Clarke J (then a Judge of the High Court), in *Christian v Dublin City Council*.[8] This case concerned a challenge to a variation by Dublin City Council of its Development Plan, and in circumstances where there was no explicit requirement to give reasons in the relevant legislation. In that Judgment at page 540, Clarke J commented as follows:

> The underlying rationale of cases such as *Meadows v Minister of Justice* [2010] IESC3 (in that respect) and Mulholland v An Bord Pleanála (No 2) [2005] IEHC 306 is that decisions which affect a person's rights and obligations must be lawfully made. In order to assess whether a relevant decision is lawful, a party considering a challenge, and the court in the event of a challenge being brought, must have access to a sufficient amount of information to enable an assessment as to lawfulness to be made. What the information may be, may vary enormously depending on the facts under consideration or the nature of the decision under challenge. However, the broad and underlying principle is that the court must have access to sufficient information to enable the lawfulness of the relevant measure to be assessed.

In the *Kelly* case, Finlay Geoghegan J favoured this *Mellor/Christian* approach. She noted that AA is not a planning decision, and the Planning Authority has a much

4 Council Directive 92/43/EEC.
5 85/337/EEC.
6 [2014] IEHC 400, a Decision of Finlay Geoghegan J.
7 Case C–75/08 [2009] ECR I–3799.
8 [2012] 2 IR 506.

narrower discretion than it does in a planning context. It goes to jurisdiction. Unless the Board can be satisfied that it can be excluded, on the basis of objective information, that the proposed development (individually and in combination with other plans or projects) will not have a significant effect on a European Site, it cannot go any further. She noted as follows:

> 77. For the reasons already set out, whilst the Board is entitled to rely upon an appropriate assessment conducted by its Inspector, and whilst it has generally adopted the Inspector's Report, the findings made and conclusions reached by the Inspector in relation to the matters identified as potentially affecting the integrity of the Natura 2000 sites concerned, are such that the appropriate assessment in the Inspector's Report could not support a determination that the proposed development would not adversely affect the European sites concerned, having regard to their conservation objectives when considered by the Court in accordance with established judicial review principles.

Barrett J, in the *Connolly* decision, considered that the *Kelly* decision was not authority for the Board being entitled to 'generally adopt' an Inspector's Report. The Board must set out complete, precise and definitive findings and conclusions with a sufficient degree of specificity so a person can understand the references 'rather than simply being told that somewhere in an ocean of documentation is some stream of logic that An Bord Pleanála favours'. He commented that Ms Connolly would have needed expert help to have understood the reasoning of the Board when he stated as follows 'proper planning was never intended to be, nor can it be allowed to become, a perk reserved for the few who can afford expert lawyers, with something less than best being the lot of the many who cannot'.

Barrett J noted that, despite all of this, the Judicial Review proceedings had been issued within the eight-week time limit so that Ms Connolly did 'somehow manage to arrive at some level of understanding as to the complete rationale for An Bord Pleanála's decision', but the 'lock, stock and barrel' approach to the Judicial Review suggested to him. That was still a considerable level of uncertainty. He also identified other deficiencies.

In addition to the AA deficiencies, (a failure to give reasons for determining an AA was needed, and a failure to detail how it had carried out a lawful AA), he considered that the obligation to give reasons relative to the EIA had not been complied with. He held that the Board had, in his opinion, relied on generic reason and a 'rather contrary' Inspector's Report, relative to a different development to that applied for and reviewed by the Inspector. He did not consider that the Board was entitled to incorporate separate materials generically, and expressed the view that the Applicant should not have to 'fish in that ocean' of material. The Order of *Certiorari* sought was granted.

A Certificate pursuant to section 50A(7) was sought by the Board and, in a judgment delivered on 8 November 2016,[9] Barrett J refused the Certificate. In essence, he determined that the questions raised were either not truly points of law or, if they were, had been answered in his Judgment of 14 June. As an aside, it will be of interest that he commented, obiter, on the practice of applying to the trial judge for a Certificate and expressed the view that it may be better in future for such applications to be made to another Judge. He stated as follows:

> So if the process of section 50 applications is not to be perceived by would-be appellants as inherently coloured against them, notwithstanding that judges may themselves know such perception to be unfounded, there seems, to this Court, to be good reason why the present practice as to the hearing of section 50 applications should change, with such applications typically being heard by a judge other than the judge who issued the original judgment. In that way, any sense on the part of a disappointed applicant that s/he would have fared better with a judge other than the judge who issued the original judgment can be (and it needs to be) avoided. This is especially important when one recalls that, thanks to section 50A(7) of the Act of 2000, a refusal of a section 50 application effectively closes out any prospect of an appeal. The court's comments in this part V are, of course, entirely obiter.

The Board sought Leave to Appeal to the Supreme Court pursuant to Article 34.5.4 of the Constitution on the basis that this decision involved a matter of general public importance and/or that it was in the interests of justice to allow the appeal. The Board contended that if the level of reasoning required for compliance with section 172(1)J and section 177V(1) was as described by Barrett J in the decision under Appeal, it would have serious consequences for the Board. It commented in its Application that in 2014, more than 15 per cent of Inspectors' recommendations were not 'generally accepted' by the Board. It also commented that there were a very significant number of Judicial Review challenges of the Board's decisions, eg 42 in 2014. It sought clarification that the Board should be entitled to make reference in its defence of such cases to the material before the Board at the time it made its decision.

It contended that Barrett J's decision in *Connolly* is at variance with a long list of established case law, thus creating considerable uncertainty. It referenced *O'Keeffe v An Bord Pleanála*[10] going back to 1991 (which is the 'standard of review' on which Judicial Review cases have been based since then). It referenced the decision in *O'Neill v An Bord Pleanála*,[11] where the Board's decision was upheld, despite the fact that the Inspector recommended a refusal and there had been an amendment to the development as applied for. Reference was made to Charleton J's decision in *McGrath Limestone v An Bord Pleanála*[12] in 2014, and Haughton J's decisions in *Ratheniska*[13] and *People Over Wind v An Bord Pleanála*,[14] where the Inspector's Report had been adopted and an AA found to have been validly

9 [2016] IEHC 624.

10 [1993] 1 IR 39.
11 [2009] IEHC 202.
12 [2014] IEHC 382.
13 [2015] IEHC 18.
14 [2015] IEHC 271.

carried out. In *Ahern v An Bord Pleanála*,[15] a decision of Noonan J in 2014, the Inspector had recommended refusal but Noonan J was satisfied that the Board had carried out a valid EIA and that he was entitled to look at the decision *as a whole* in reaching that conclusion.

A similar point was made in *Buckley v An Bord Pleanála*,[16] a decision of Cregan J in 2013. The Board considered that Finlay Geoghegan J's decision in *Kelly*[17] was distinguishable (as that was a case concerned with the failure to provide any reasons for the Board's disagreement with the Inspector on key AA issues), whereas in *Connolly* the Board had explained in six lengthy paragraphs why it was satisfied that the Inspector's reasons for refusal had been addressed. The Board's Application notes that there is some support for *Connolly* in Barton J's decision in *Balz*[18] in 2016, and references that this adds to the uncertainty rather than assists in resolving it.

The Board queried why reasons would be required for its screening decision (section 132 Notice) when it had determined that a full AA was required. It commented that the full decision should have been examined, rather than merely the conclusions. It contended that the adequacy of its reasons should be judged by reference to the material before the Board at the time as explained to the Judge, and adequacy should be viewed from the standpoint of an intelligent person who has participated in the process and is appraised of the broad issues involved. The Board relied on the decisions in *O'Keeffe*, *McGrath*, *O'Neill*, *Ahern* and *Buckley* for support in this.

Leave to appeal has been granted and the clarity that a Supreme Court decision can bring is to be welcomed. In the meantime, uncertainty continues. In a decision of McGovern J in *North Kerry Wind Turbine Awareness Group v An Bord Pleanála*[19] the application was refused, despite the fact that the Inspector had not carried out an AA, and yet the Board granted permission, relying in part as it did so on the Inspector's Report even though it had determined that an AA *was* required. In that decision, McGovern J was satisfied that the 'intelligent person' was the correct test. No date for hearing of the appeal has been fixed.

15 [2015] IEHC 606.
16 [2015] IEHC 572.
17 [2014] IEHC 400.
18 [2016] IEHC 134.
19 [2017] IEHC 126.