

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 2
[2020 No. 568 JR]

BETWEEN

HELLFIRE MASSY RESIDENTS ASSOCIATION

APPLICANT

AND

**AN BORD PLEANÁLA, THE MINISTER FOR HOUSING, HERITAGE AND LOCAL
GOVERNMENT (BY ORDER), IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

AND

SOUTH DUBLIN COUNTY COUNCIL

NOTICE PARTY

(No. 4)

JUDGMENT of Humphreys J. delivered on Friday the 14th day of January, 2022

Subject matter of the dispute

1. The applicant challenges the validity of the Irish legislation regarding strictly protected species set out in regulations adopted to give effect to the habitats directive 92/43/EEC and the birds directive 2009/147/EC. This challenge to the legislation arose in the context of a challenge to a development consent granted, with conditions, on 25th June, 2020 by An Bord Pleanála (“the board”) to South Dublin County Council (“the council”) for two buildings comprising a visitor centre at Montpelier Hill in County Dublin, a tree canopy walk/pedestrian bridge over the R115, conversion of conifer forest to deciduous woodland and conservation works to existing structures.

Facts

2. Under s. 120(3)(b) of the Planning and Development Act 2000, the council requested the board to determine whether it was required to carry out an environmental impact statement (EIS). The inspector recommended that the council should not be required to prepare an EIS.
3. On 8th May, 2017, the board decided that an EIS was required, referring to the impact of the increase in visitors on the historical and archaeological heritage of the area.
4. On 16th May, 2017, the deadline for transposition of directive 2014/52/EU fell due. However, the directive was not in fact transposed until 1st September, 2018.
5. In lieu of an EIS, an environmental impact assessment report (EIAR) was submitted ultimately with the application.
6. On 12th June, 2017, a further presentation to elected members was made and the council agreed that an application for permission would be submitted to the board.
7. In July 2017, the Dublin Mountains Visitor Centre Business Plan final report was prepared by CHL Consulting Company Ltd. This document included a summary of demand projections based on an estimated pre-existing cohort of local amenity users of 100,000 per year and a “prudent estimate” of growth to 225,000 per year with a target for 300,000 for the subsequent five-year period.

8. The document divides the public into "consumer segments" such as the "culturally curious (overseas)", "social energisers (mainly UK)", "connected families (domestic)" and "great escapers (overseas)". It states that a number of assumptions have been made to model the performance of the visitor's centre which "for the most part are drawn from CHL's experience of trends and norms in the visitor attraction sector. In most cases the assumptions made tend to err on the side of caution". Caution here means that the report is not tending to overstate visitor numbers or revenue.
9. The formal application for a visitor's centre and associated works was submitted directly to the board under s. 175 of the 2000 Act on 31st July, 2017. The lands concerned are owned by Coillte, which is consenting to the application. No part of the development is within a European site.
10. The main elements of the application are for two buildings comprising the visitor centre, a tree canopy walk/pedestrian bridge over the R115, conversion of conifer forest to deciduous woodland and conservation works to existing structures.
11. On 5th September, 2017, the board requested the council to submit additional information by way of a shapefile showing the red-line boundary.
12. On 9th October, 2017, the board requested further information in relation to potential impacts on fauna and habitats which had been raised in a submission from the Department of Culture, Heritage and the Gaeltacht on 25th September, 2017.
13. The council responded to this request in November 2017, and that response was subjected to a round of public consultation.
14. On 7th February, 2018, the board requested additional information in relation to potential impacts on specified matters, in particular the Wicklow Mountains Special Protection Area (SPA).
15. An oral hearing took place over six days between 20th and 27th November, 2018.
16. On 9th January, 2019, the inspector prepared a first report which was negative in nature. It indicated that the inspector was satisfied with the issues of proper planning, zoning and design, but considered that the impact of the bridge had not been fully assessed. The inspector thought that very little surveying had been carried out in Massy's Woods (para. 10.3.11). Certain aspects of the design were queried.
17. An issue had been raised as to the identity of the applicant, but the inspector concluded that the applicant was the council, not the Dublin Mountains Partnership or Coillte (see para. 10.6.5 to 10.6.8).
18. The ownership of one small piece of land was queried, but the inspector thought that that could be worked around if it became a problem (para. 10.6.10 to para. 10.6.11).

19. She noted that the car park, footpaths and cycle lanes would be a planning gain and addressed existing safety issues (para. 10.8.4).
20. Under environmental impact assessment (EIA) and consideration of alternatives, she noted at para. 11.2.12 that the design statement refers to similar buildings such as the Wordsworth Centre in Grasmere in the Lake District of England, the Sliabh Gullion Visitor Centre near Newry in County Armagh and the Rosmuc Visitor Centre in County Galway.
21. Her main concerns were with biodiversity, noting the impact on squirrels from both clear-felling for the car park and replacement of coniferous trees with deciduous trees. The latter would give the invasive grey squirrel the advantage in its ongoing battle with the native red squirrel (see para. 11.6.5).
22. She notes that a squirrel drey was recorded (para. 11.6.16) and also referred to mitigation measures (para. 11.6.17). Observers provided evidence of other dreys in Massy's Woods (para. 11.6.19) and she noted the intention to conduct a pre-construction survey.
23. The report noted that the EIAR table 6.16 notes that there will be a loss of a drey and a further information response notes that a derogation licence would be sought to destroy one drey (para. 11.6.20). The inspector said that this was contradicted at the oral hearing in that it was stated that the design of the car park was arranged to avoid the drey.
24. Regarding bats, she had concerns regarding the lack of baseline survey data (para. 11.6.25) and had similar issues regarding otters (para. 11.6.32). The lack of information regarding birds was of "significant concern" (para. 11.6.34).
25. She considered there was insufficient assessment of the impact on merlin and generally was not satisfied that there had been assessment of the full impact on habitats.
26. Mention is made of bryophytes and of the impact of introducing horses on an equestrian trail through the habitats concerned. She was also concerned regarding the impact on adjacent Natura 2000 sites due to the potential increase in footfall, but overall the environmental impacts were acceptable apart from in relation to biodiversity (para. 11.16.2).
27. On appropriate assessment (AA) she concluded that a stage 2 assessment was needed having noted the screening report. She said that in the absence of a Natura Impact Statement (NIS) she could not conclude that there would be no significant impact on European sites, making specific mention of the Glenasmole Valley Special Area of Conservation (SAC) (001209), the Wicklow Mountains SAC and the Wicklow Mountains SPA.

28. Following this report, the board requested additional information on 6th February, 2019 in particular an additional bird survey, the preparation of an NIS and an additional survey of habitats and an updated EIAR.
29. That further information was submitted in December 2019. The revised EIAR referred at para. 6.9.3.1 to the impact on and mitigation measures for red squirrels as a key environmental receptor among other species.
30. The council also submitted an NIS dated November, 2019 and an updated operational management and monitoring commitments document. It also included a walkers survey from summer 2019 and surveys of fauna and habitats taken over the period April to September 2019.
31. A red squirrel conservation management plan was submitted dated November 2019 as well as a paper by Amy Haigh, Fidelma Butler, Ruth M. O’Riordan and Rupert Palme, “Managed parks as a refuge for the threatened red squirrel (*Sciurus vulgaris*) in light of human disturbance”, *Biological Conservation* 211, (2017), pp. 29 to 36. This information was subjected to an additional round of public information.
32. The National Parks and Wildlife Service (NPWS) said that their concerns regarding merlins and the impact on European sites had been addressed in the further information.
33. The applicant made a submission dated 7th February, 2020.
34. The inspector then produced an addendum to the report on 6th May, 2020. This noted that the further bryophytes survey indicated a number of notable findings including two species not previously recorded in Dublin and five not recorded in Dublin since 1959. No larval webs of Marsh Fritillary were found (para. 5.4.17) although it was noted that this was disputed by an observer.
35. The inspector thought that “there were obvious gaps in the information initially provided”, but “I am satisfied that those lacunae have been addressed” (para. 5.4.26). She noted that the NPWS was of the same view and generally considered that matters had been adequately addressed.
36. Under the heading of appropriate assessment, various objections to the new information were noted, but the inspector considered them not to have been borne out.
37. On foot of that addendum and the original report, the board decided to approve the application, with conditions, on 25th June, 2020.
38. The board’s decision states that it had regard, among other things, to the habitats directive 92/43/EEC, the birds directive 79/409/EEC, the water framework directive 2000/60/EC and the EIA directive 2014/52/EU amending directive 2011/92/EU. That is a mis-reference in that it should be to the 2011 directive as amended *inter alia* in

2014. Regard was also had to national, regional and local policy to the objectives and interests of the Wicklow Mountains SPA (004040) and the Wicklow Mountains SAC (002122).

39. The board completed an appropriate assessment exercise and concluded there was no adverse effect on European sites. It also completed an environmental impact assessment and concluded that the main direct and indirect effects would be mitigated as set out in the decision. The conclusion was that "subject to the implementation of the mitigation measures proposed ... and subject to compliance with the conditions set out ... the effects on the environment of the proposed development ... would be acceptable".
40. While the inspector had recommended to omit the tree-top bridge and canopy and bridleway in Massy's Woods, the board decided not to omit that element, essentially on the basis of the further ecological information and surveys.
41. The board concluded that the proposed development would be in accordance with proper planning and sustainable development. Nine conditions were imposed including applying the mitigation measures in the EIAR (condition 2) and the NIS (condition 3), a revised forestry management plan to retain the majority of mature conifers on the Hellfire plantation to support the red squirrel (condition 5), and the engagement of an ecological clerk of works (condition 7).

Relevant legal materials

42. A list of the relevant EU, international and domestic legal material is summarised is set out in the appendix to the judgment together with web links.

The relevant grounds of challenge

43. In *Hellfire Massy Residents Association v. An Bord Pleanála (No. 1)* [2021] IEHC 424, [2021] 7 JIC 0201 (Unreported, High Court, 2nd July, 2021), I dismissed the proceedings save insofar as they concerned a challenge to the validity of regs. 51 and 54 of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) regarding the process to be adopted after the grant of development consent. That is the only currently live issue in the proceedings.
44. The regulations were adopted to give effect to the birds directive 2009/147/EC and the habitats directive 92/43/EEC. They were amended by the European Union (Birds and Natural Habitats) (Sea-fisheries) Regulations 2013 (S.I. No. 290 of 2013), the European Communities (Birds and Natural Habitats) (Amendment) Regulations 2013 (S.I. No. 499 of 2013) and the European Communities (Birds and Natural Habitats) (Amendment) Regulations 2015 (S.I. No. 355 of 2015), but those amendments do not appear immediately relevant to the issue here.
45. The essential ground of challenge to the legislation is that firstly the procedure for grant of development consent is not integrated with the system of strict protection for the purpose of art. 12 of the habitats directive, and secondly that the system of strict protection as implemented in Ireland does not provide for proper public participation.

46. In *Hellfire Massy Residents Association v. An Bord Pleanála (No. 2)* [2021] IEHC 636, [2021] 10 JIC 1302 (Unreported, High Court, 13th October, 2021), I refused leave to appeal in relation to the aspects of the case that I had dismissed.
47. In *Hellfire Massy Residents Association v. An Bord Pleanála (No. 3)* [2021] IEHC 771 (Unreported, High Court, 14th December, 2021), I joined An Taisce and Save Our Bride Otters as *amici curiae*.

Questions of European law arising

48. As discussed in the No. 1 judgment, four questions of European law that relate to the interpretation of EU law and that are necessary for the decision arise from the substantive grounds identified above, and I consider it appropriate in all circumstances to make a reference to the Court of Justice under art. 267 TFEU.

The first question

49. The first question is:

whether the general principles of EU law arising from the supremacy of the EU legal order have the effect that a rule of domestic procedure whereby an applicant in judicial review must expressly plead the relevant legal provisions cannot preclude an applicant who challenges the compatibility of domestic law with identified EU law from also relying on a challenge based on legal doctrines or instruments that are to be read as inherently relevant to the interpretation of such EU law, such as the principle that EU environmental law should be read in conjunction with the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998 as an integral part of the EU legal order.

50. The applicant's position is that the question should be answered "Yes". Allowing domestic procedural rules to preclude an applicant, in the manner described, from raising a point of European law would be inconsistent with the principle of supremacy; and such domestic procedural rules should be disapplied if they cannot be interpreted in a manner that gives full effect to the protections contained in the habitats directive, particularly where the referring court has accepted that the point raised by the applicant is "acceptably clear" and no prejudice arises to the position of the other parties. European law is an integral part of the domestic legal system, not an alien and unfamiliar system which requires it to be spelt out to the very institutions which are supposed to be administering or implementing it. The principle of effectiveness, or effective judicial protection, obliges Member State courts to ensure that national remedies and procedural rules do not render claims based on EU law impossible in practice or excessively difficult to enforce. The elaborate pleading envisaged by the question in respect of points of European law infringes that requirement; the issue becomes not whether the argument is sufficiently clear but whether the argument reaches a standard which is disproportionate to the purpose of pleadings. The principle of equivalence requires the same remedies and procedural rules to be available to

claims based on European Union law as are extended to analogous claims of a purely domestic nature. Claims of a purely domestic nature do not require the elaborate pleading envisaged by the question in respect of points of European law; accordingly, such elaborate pleading requirements are inconsistent with the principle of equivalence.

51. The board's position is that "No", the question is premised on a hypothetical scenario which does not arise on the facts of this case. Domestic procedural rules governing pleading in judicial review did not operate to preclude the applicant from raising a point of European law or relying on the Aarhus Convention in this case. Rather, the applicant did not properly plead the case which it now seeks to advance. No obstacle or issue was raised by the applicant in respect of a pleading point here. In this case, there is no evidence that domestic procedural law governing pleadings rendered it any more difficult for the applicant to plead and/or rely on a European law argument.
52. The State respondents' position is that the question should be answered "No". The State proposed an elaborate answer which significantly exceeded the word count allowed, is too long to conveniently reproduce *verbatim* and defies easy summarisation, but essentially makes the following points. Firstly that the issue is hypothetical. Secondly that the applicant didn't plead the case properly and that the principles of equivalence and effectiveness are not infringed. The State goes on to say that it is a matter for the domestic court to determine the scope of the relief the applicant can seek within the pleadings.
53. The *amici curiae's* position is that the answer to this question is "Yes". An applicant has the right to rely on the rules of national law implementing EU environmental law as well as provisions of EU environmental law which are directly effective, it does not have to expressly plead a specific interpretation if it alleges at least an infringement of the relevant provisions of EU law.
54. My proposed answer to the question is "Yes". EU law has a single indivisible meaning, so where an instrument of EU law is to be read in conjunction with another instrument, such as the Aarhus convention, such an interpretation must be implied and does not have to be expressly pleaded. To permit national rules to cut across the single indivisible meaning of EU law would create a situation where a national court would be giving an EU law instrument something other than its true meaning. As regards the State's objection, I don't accept that in the sense that the fact situation is such as to create a reasonable possibility of issues under the habitats directive arising, and it is the State's own objection to the applicant's pleadings that creates an interface between pleading rules and EU law. As regards effectiveness and equivalence, I have framed the question in terms of supremacy rather than effectiveness and equivalence as such. As regards the State objection that this is a matter for the domestic court, here the State respondents have specifically objected to the applicant's pleadings being interpreted in a way that allows reference to EU instruments to be read as a reference to those instruments as read in the light of the Aarhus convention. Under those

circumstances it seems to me to be appropriate to seek guidance as to whether this argument is in effect precluded by general principles arising from the supremacy of EU law. If the CJEU were to decline to answer this question or the second question as urged by the State, that will in practice have the effect of legitimising and encouraging narrow and hyper-technical pleading objections of the type advanced by the State here, and thereby impairing the implementation of EU law.

55. The reason for the reference of this question is that the State respondents have objected to the reliance by the applicant on the Aarhus Convention because the convention is not expressly referenced in the pleadings. If the question is answered in a sense favourable to the applicant then the objection fails at the outset.

The second question

56. The second question is:

whether arts. 12 and/or 16 of directive 92/43/EEC and/or those provisions as read in conjunction with art. 9(2) of the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998 and/or in conjunction with the principle that member states must take all the requisite specific measures for the effective implementation of the directive have the effect that a rule of domestic procedure whereby an applicant must not raise a "hypothetical question" and "must be affected in reality or as a matter of fact" before she can complain regarding the compatibility of the domestic law with a provision of EU law cannot be relied on to preclude a challenge made by an applicant who has invoked the public participation rights in respect of an administrative decision and who then wishes to pursue a challenge to the validity of a provision of domestic law by reference to EU law in anticipation of future damage to the environment as result of an alleged shortcoming in the domestic law, where there is a reasonable possibility of such future damage, in particular because the development has been authorised in an area which is a habitat for species subject to strict protection and/or because applying the precautionary approach there is a possibility that post-consent surveys may give rise to a need to apply for a derogation under art. 16 of the directive.

57. The applicant's position is that the question should be answered "Yes". Without prejudice to the applicant's position that the question is not hypothetical, and that it is sufficiently affected, allowing domestic procedural rules to preclude an applicant, in the manner described, from raising a point of European law would be inconsistent with the principle of supremacy, the precautionary principle and the principle that preventive action should be taken (art. 191 TFEU) and the judgment of the CJEU in Case C-183/05 *Commission v. Ireland*; such domestic procedural rules should be disapplied if they cannot be interpreted in a manner that gives full effect to the protections contained in the habitats directive. It should not be necessary to allow any alleged breach to occur before the court could effectively intervene.

58. The board's position is that "No", the question is premised on a hypothetical scenario which does not arise on the facts of this case. The public participation provisions contained in art. 6 of the Aarhus Convention are not applicable to such a hypothetical scenario where decisions have not and may never be taken in respect of possible activities which may never arise. Properly construed, neither the precautionary principle nor the principle that preventative action should be taken are of relevance in the context of the said hypothetical scenario upon which this question is premised. No such rule of domestic procedure as described in the question was relied on in opposition to the applicant's case. Rather, the applicant, without any supporting evidence, asserted that the proposed development would give rise to a breach of art. 12 of the Habitats Directive. In opposition to this assertion, the point was made that there was no evidence before the board to suggest that the grant of development consent for the proposed development would result in any breach of art. 12 of the Habitats Directive, and that no need for a derogation licence under reg. 54 of the 2011 regulations was identified at all. No possible application could have been made for such a derogation licence because nothing specific had been identified that would involve a breach of art. 12 of the Habitats Directive. There was nothing in the development consent process that raised an art. 12 issue.
59. The State respondents' position is that the question should be answered "No". The public participation provisions contained in art. 6 of the Aarhus Convention apply to decisions on proposed permits or proposed activities and are only triggered when the relevant decision-making procedures are engaged. They are not applicable in hypothetical circumstances where decisions have not and may never be taken in respect of possible activities which may never arise. The court itself acknowledges that there is no more than a reasonable possibility that a derogation licence may be applied for. It is submitted that this is not sufficient to engage the provisions of art. 6 of the Convention in the manner suggested by the applicant or as the second question suggests. Neither the precautionary principle nor the principle that preventative action should be taken, properly construed, are of relevance in the context of the hypothetical circumstances which comprise the factual matrix of the within proceedings. The State goes on to object to the question as inadmissible and hypothetical.
60. The *amici curiae's* position is that the answer to this question is "Yes". It is noted that the referring court has found as a matter of fact that effects on strictly protected species from the project cannot be ruled out. As a matter of EU law, the applicant in the main proceedings, must therefore be able to rely in legal proceedings on the rules of national law implementing EU environmental law and the rules of EU environmental law having direct effect.
61. My proposed answer to the question is "Yes". It would severely undermine the attainment of the objectives of EU environmental law if an applicant had to wait for actual damage to the environment, or for such damage to occur as a matter of high probability. It follows from the very nature of EU environmental law rules that recourse

can be had to the domestic courts to seek effective remedies in relation to such rules where there is a reasonable possibility of such damage, even if it remains a matter of uncertainty. As regards the State objection of inadmissibility, as with the first question, since the question arises from the State's own pleading objection to the applicant's case, it is appropriate to seek guidance as to whether that objection is precluded by EU law. The question is a response to the State's objections and in the circumstances that arise here is not hypothetical or otherwise inadmissible.

62. The reason for the reference of this question is that the State respondents have objected to the reliance by the applicant on possible future harm to strictly protected species. If the question is answered in a sense favourable to the applicant then the objection fails at the outset.

The third question

63. The third question is:

whether arts. 12 and/or 16 of directive 92/43/EEC and/or those provisions as read in conjunction with arts. 6(1) to (9) and/or 9(2) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998 and/or with the principle that member states must take all the requisite specific measures for the effective implementation of the directive have the effect that a derogation licence system provided in domestic law to give effect to art. 16 of the directive should not be parallel to and independent of the development consent system but should be part of an integrated approval process involving a decision by a competent authority (as opposed to an ad hoc judgement formed by the developer itself on the basis of a general provision of criminal law) as to whether a derogation licence should be applied for by reason of matters identified following the grant of development consent and/or involving a decision by a competent authority as to what surveys are required in the context of consideration as to whether such a licence should be applied for.

64. The applicant's position is that the question should be answered "Yes". The approach to strict protection in Ireland is merely a collection of instruments that is the antithesis of a system of strict protection. Indeed one of those instruments requires the establishment of a system of strict protection, which suggests that the system has not yet been established by the legislation in question. Further, the directive is aimed at all organs of the Member States. Leaving the decision on whether and how to apply for a derogation licence to the developer, after the grant of development consent, and on the basis of information selected by it and in respect of which the public have no right of participation is inconsistent with a system of strict protection and the requirements of Aarhus. Articles 12 to 16 also seek to ensure a high level of environmental protection. Some of the derogations are based on "public health and public safety, or for other imperative reasons of overriding public interest" – which underline the importance of public participation. A necessary part of a system of strict

protection is the adequacy of the surveys which are carried out for the annex IV species. Integration into the planning process is of vital importance in ensuring the adequacy of such surveys, by subjecting them to public scrutiny and involving the competent authority in an assessment of their adequacy. While the Minister decides whether a derogation licence should ultimately be granted, the Minister has no role in deciding whether a derogation should be sought in the first place.

65. The board's position is that "No", there is no requirement under arts. 12 or 16 of the Habitats Directive, either express or implied, or whether by themselves or as read in conjunction with arts. 6(1) to (9) and/or 9(2) of the Aarhus Convention, which requires that the derogation system provided by art. 16 of the Habitats Directive be part of an integrated approval process conducted by a single competent authority. While it is non-binding, it is of note that the recently published guidance from the European Commission, dated 12th October, 2021 titled *Commission notice, Guidance document on the strict protection of animal species of Community interest under the Habitats Directive*, does not support the assertion that an integrated approval process by a single competent authority is required (see section 3.3.2 of same). Indeed, it clearly indicates the Commission's position is that such an integrated system is not obligatory. It is clear, *inter alia*, from the CJEU's judgment in Case C-183/05 *Commission v. Ireland* (ECLI:EU:C:2007:14) that a strict protection regime can include more than a "hard" legislative framework and can for instance include a national network of full-time rangers and officers responsible for monitoring and protecting species. Question 3 appears to pre-suppose that regs. 51 to 54 of the 2011 regulations comprise the total extent of the 'system' of strict protection, which is not a proven case. In that regard, the applicant adduced *no evidence* as to the practical effectiveness or otherwise of the operation of the 'system' of strict protection (including the derogation licensing under the 2011 regulations). It is simply not open to the applicant at this stage to attempt to advance arguments as to the effectiveness of the system - *which are not pleaded* - by way of submission and unsubstantiated assertion on this reference to the CJEU.
66. The State respondents' position is that the question should be answered "No". There is no requirement under Articles 12 or 16 of the Habitats Directive, either express or implied, which requires that the derogation system provided by Article 16 of the Habitats Directive be part of an integrated approval process conducted by a single competent authority. Neither Article 12 or 16 of the Habitats Directive, properly construed, require such an integrated approval process or mandate that it be conducted by a single competent authority. Similarly, Arts. 6(1) to (9) and/or 9(2) of the Aarhus Convention, whether by themselves or read in conjunction with Articles 12 or 16 of the Habitats Directive, do not require an integrated approval process or mandate that it be conducted by a single competent authority.
67. The *amici curiae's* position is that the question should be answered "Yes". A system that permits post-consent assessment and derogation is contrary to EU law. An effect prohibited under Article 12 of the Habitats Directive is a significant effect on the

environment by its very nature and must be assessed as part of the EIA procedure. The public concerned must be given the opportunity to make its views known at an early stage. If the EIA procedure identifies that the project is incompatible with Article 12 of the Habitats Directive then consent must be refused. Therefore, the derogation decision must precede development consent. However, the derogation decision cannot constitute the final determination on effects on strictly protected species which must be determined as part of the EIA procedure.

68. My proposed answer to the question is "Yes". A system of strict protection in the proper sense of the directive is lacking because the initiative to seek derogation rests with the developer, subject only to a very general provision of criminal law. In addition, the concept of a system of strict protection requires detailed co-ordination between decision-makers and detailed and consistent independent scrutiny of the level of survey of protected species to be undertaken, whether before or after the grant of consent. The development consent decision-maker has a role in determining the adequacy of studies and surveys carried out prior to the grant of permission, for the purposes of EIA and AA, but no role in the scientific standard of surveys for post-consent derogations. Hence the system is lacking in integration. The system is also lacking in transparency.
69. As regards the State objection of lack of clarity, this confuses the issue here because the reference relates only to the question of how derogation should be granted after the grant of development consent. Hence it is clearly irrelevant that no derogation licence is currently required as of the time of grant of the development consent. I don't accept that where the No. 1 judgment refers to some level of integration of the derogation system with the development consent system, that this is unacceptably unclear. The concept is phrased as a question in general terms because it is the very question on which guidance from the CJEU is sought. The board's argument that this point was not pleaded is without merit and I am satisfied that the pleadings adequately cover this issue.
70. The reason for the reference of this question is that the Irish derogation licence system is independent of the planning consent system and thus the process of surveys and scrutiny for the purposes of EIA and AA does not carry over into any post-consent developments. If the question was answered Yes then the Irish system would need to be integrated so that the development consent decision-maker would have a role in scrutinising any subsequent derogation application or at least in determining what level of surveys and measures would have to be undertaken for such an application.

The fourth question

71. The fourth question is:

whether arts. 12 and/or 16 of directive 92/43/EEC and/or those provisions as read in conjunction with arts. 6(1) to (9) and/or 9(2) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25

June 1998 have the consequence that, in respect of a development where the grant of development consent was subjected to appropriate assessment under art. 6(3) of directive 92/43/EEC, and in a context where a post-consent derogation may be sought under art. 16 of directive 92/43/EEC, there is a requirement for a public participation procedure in conformity with art. 6 of the Aarhus Convention.

72. The applicant's position is that the question should be answered "Yes". The reasons set out in relation to the third question also apply here.
73. The board's position is that "No", there is no requirement under arts. 12 or 16 of the Habitats Directive, either express or implied, or whether by themselves or as read in conjunction with arts. 6(1) to (9) and/or 9(2) of the Aarhus Convention, which requires that, where a grant of development consent was subjected to appropriate assessment under art. 6(3) of the Habitats Directive, and in a context where a possible post-consent derogation may be sought under art. 16 of the Habitats Directive, there be a consequential public participation procedure in conformity with Article 6 of the Aarhus Convention. The question is premised on a hypothetical scenario which does not arise on the facts of this case and in respect of an application for a derogation licence under the 2011 regulations which may never materialise. There is no basis in law nor any legal authority that supports the proposition that such a public participation system is required in respect of such a post-consent derogation. Nothing in the text of arts. 12 or 16 of the Habitats Directive provides for or could be construed as providing for such a requirement.
74. The State respondents' position is that the question should be answered 'No'. Subject to the following, the reasons set out in relation to the third questions also apply here. Neither arts. 12 and/or 16 of the Habitats Directive read in conjunction with arts. 6(1) to (9) and/or 9(2) of the Aarhus Convention require that, where the grant of development consent was subjected to appropriate assessment under art. 6(3) of the Habitats Directive and in a context where a possible post-consent derogation may be sought under art. 16, there be a consequential public participation procedure in accordance with art. 6 of the Aarhus Convention. For reasons already set out in respect of the proposed answer to questions two and three above, the public participation procedures of art. 6 of the Aarhus Convention do not apply in hypothetical circumstances in respect of an application for a derogation licence which may never materialise. The public participation requirements of art. 6 of the Aarhus Convention applicable in respect of the AA conducted under art. 6(3) of the Habitats Directive have been discharged by virtue of the AA conducted in accordance with the provisions of the Planning and Development Act 2000.
75. The *amici curiae's* position is that the question should be answered "Yes". A derogation decision is a decision which comes within Article 6(1)(b) of the Aarhus Convention since the effect of a derogation under Article 16 is to permit an activity having the effect otherwise prohibited by Article 12 which is a significant effect by its very nature.

Therefore, a derogation decision is one which requires a public participation procedure under Article 6 of the Aarhus Convention and the right to access a review procedure under Article 9(2).

76. My proposed answer to the question is “Yes”. Reading the habitats directive in the light of the Aarhus convention leads to a clear conclusion that a public participation procedure is required. This is lacking from the Irish system which involves the grant of a derogation licence, allowing death, injury or disturbance to strictly protected species, without any adequate form of public notice, participation or objection, or detailed scrutiny of reasons. This fails to meet the minimum standard that would constitute a system of strict protection, and lacks minimum standards of transparency and objectivity and is generally contrary to the principles of good administration.
77. Insofar as the State seeks to condemn the question as hypothetical, I do not accept that characterisation. It would not be appropriate to have to await a breach or potential breach of EU environmental law before this issue could be addressed. The applicant’s complaint is directed to the very lack of public participation regarding post-consent derogation. If derogation were to occur it would by definition not involve public participation within any legal framework or context that guarantees legal certainty. Hence there is no effective alternative but to make this point in advance at the level of the deficiency in the system overall.
78. The reason for the reference of this question is that if a public participation procedure is required then the Irish regulations are not in conformity with EU law insofar as they fail to provide such a procedure.

Order

79. Accordingly, the order will be as follows:
- (a). I will direct that the order on foot of the present judgment and the No. 1 judgment be perfected forthwith and that the applicant lodge hard copy books of all pleadings by making direct contact with the Principal Registrar within 28 days of the delivery of this judgment for transmission to the CJEU and I will adjourn the balance of the matter pending the decision of the CJEU.
- (b). I will refer the following questions to the CJEU pursuant to art. 267 TFEU:
- (i). The first question is:
- whether the general principles of EU law arising from the supremacy of the EU legal order have the effect that a rule of domestic procedure whereby an applicant in judicial review must expressly plead the relevant legal provisions cannot preclude an applicant who challenges the compatibility of domestic law with identified EU law from also relying on a challenge based on legal doctrines or instruments that are to be read as inherently relevant to the interpretation of such EU law, such as the principle that EU environmental law should be read in**

conjunction with the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998 as an integral part of the EU legal order.

(ii). The second question is:

whether arts. 12 and/or 16 of directive 92/43/EEC and/or those provisions as read in conjunction with art. 9(2) of the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998 and/or in conjunction with the principle that member states must take all the requisite specific measures for the effective implementation of the directive have the effect that a rule of domestic procedure whereby an applicant must not raise a "hypothetical question" and "must be affected in reality or as a matter of fact" before she can complain regarding the compatibility of the domestic law with a provision of EU law cannot be relied on to preclude a challenge made by an applicant who has invoked the public participation rights in respect of an administrative decision and who then wishes to pursue a challenge to the validity of a provision of domestic law by reference to EU law in anticipation of future damage to the environment as result of an alleged shortcoming in the domestic law, where there is a reasonable possibility of such future damage, in particular because the development has been authorised in an area which is a habitat for species subject to strict protection and/or because applying the precautionary approach there is a possibility that post-consent surveys may give rise to a need to apply for a derogation under art. 16 of the directive.

(iii). The third question is:

whether arts. 12 and/or 16 of directive 92/43/EEC and/or those provisions as read in conjunction with arts. 6(1) to (9) and/or 9(2) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998 and/or with the principle that member states must take all the requisite specific measures for the effective implementation of the directive have the effect that a derogation licence system provided in domestic law to give effect to art. 16 of the directive should not be parallel to and independent of the development consent system but should be part of an integrated approval process involving a decision by a competent authority (as opposed to an ad hoc judgement formed by the developer itself on the basis of a general provision of criminal law) as to whether a derogation licence should be applied for by reason of matters identified following

the grant of development consent and/or involving a decision by a competent authority as to what surveys are required in the context of consideration as to whether such a licence should be applied for.

(iv). The fourth question is:

whether arts. 12 and/or 16 of directive 92/43/EEC and/or those provisions as read in conjunction with arts. 6(1) to (9) and/or 9(2) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998 have the consequence that, in respect of a development where the grant of development consent was subjected to appropriate assessment under art. 6(3) of directive 92/43/EEC, and in a context where a post-consent derogation may be sought under art. 16 of directive 92/43/EEC, there is a requirement for a public participation procedure in conformity with art. 6 of the Aarhus Convention.

APPENDIX – RELEVANT LEGAL MATERIALS

European law

- (i). Article 191 of the Treaty on the Functioning of the European Union (Part Three - Union Policies and Internal Actions, Title XX – Environment, Article 191 (ex Article 174 TEC), OJ C 115, 9.5.2008, p. 132–133).
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2008:115:FULL&from=EN>
- (ii). Directive 79/409/EEC of 2nd April, 1979 on the conservation of wild birds.
<https://eur-lex.europa.eu/eli/dir/1979/409/oj>
- (iii). Directive 92/43/EEC of 21st May, 1992 on the conservation of natural habitats and of wild fauna and flora.
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31992L0043&from=EN>
- (iv). Directive 2000/60/EC of the European Parliament and of the Council of 23rd October 2000, establishing a framework for Community action in the field of water policy.
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0060>
- (v). Directive 2009/147/EC of the European Parliament and of the Council of 30th November 2009 on the conservation of wild birds.
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009L0147&from=EN>
- (vi). Directive 2011/92/EU of the European Parliament and of the Council of 13th December, 2011 on the assessment of the effects of certain public and private projects on the environment (as amended by council directive 2014/52/EU).
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0092&from=EN>
- (vii). Directive 2014/52/EU of the European Parliament and of the Council of 16th April, 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (OJ L 124, 25.4.2014, p. 1–18).
<https://eur-lex.europa.eu/eli/dir/2014/52/oj>

European Caselaw

- (i). Case C-33/76 *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland* (European Court of Justice, 16th December, 1976, ECLI:EU:C:1976:188).

<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=89192&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=40051902>

- (ii). C-312/93 *Peterbroeck, Van Campenhout & Cie v. Belgian State* (Court of Justice of the European Union, 14th December, 1995, ECLI:EU:C:1995:437).

<https://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=312/93&td=ALL>

- (iii). Case C-415/93 *Union royale belge des sociétés de football association ASBL v. Bosman* (Court of Justice of the European Union, 15th December, 1995, ECLI:EU:C:1995:463, [1995] ECR I-04921).

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61993CJ0415&qid=1636631803633&from=EN>

- (iv). Case C-103/00 *Commission of the European Communities v. Hellenic Republic* (Court of Justice of the European Union, 30th January, 2002, ECLI:EU:C:2002:60, [2002] ECR I 1147).

<https://curia.europa.eu/juris/liste.jsf?language=en&num=c-103/00>

- (v). Case C-318/00 *Bacardi-Martini SAS v. Newcastle United Football Company Ltd.* (Court of Justice of the European Union, 21st January, 2003, ECLI:EU:C:2003:41).

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62000CJ0318&from=en>

- (vi). Case C-98/03 *Commission of the European Communities v. Federal Republic of Germany* (Court of Justice of the European Union, 10th January, 2006, ECLI:EU:C:2006:3).

<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=57288&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=21601664>

- (vii). Case C-6/04 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* (Court of Justice of the European Union, 20th October, 2005, ECLI:EU:C:2005:626).

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=60655&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=21616103>

- (viii). Case C-183/05 *Commission of the European Communities v. Ireland* (Opinion of Advocate General Bobek, 21st September, 2006, ECLI:EU:C:2006:597).

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=195752&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=21611062>

- (ix). Case C-183/05 *Commission of the European Communities v. Ireland* (Court of Justice of the European Union, 11th January, 2007, ECLI:EU:C:2007:14).
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=64738&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=21613489>
- (x). Case C-220/05 *Auroux v. Commune de Roanne* (Court of Justice of the European Union, 18th January, 2007, ECLI:EU:C:2007:31).
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62005CJ0220>
- (xi). Case C-222/05 *van der Weerd v. Minister van Landbouw, Natuur en Voedselkwaliteit* (Court of Justice of the European Union, 7th June, 2007, ECLI:EU:C:2007:318).
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62005CJ0222&qid=1636632546963&from=EN>
- (xii). C-342/05 *Commission of the European Communities v. Republic of Finland* (Court of Justice of the European Union, 14th June, 2007, ECLI:EU:C:2007:341).
<https://curia.europa.eu/juris/liste.jsf?language=en&num=C-342/05>
- (xiii). Case C-2/07 *Abraham v. Région wallonne* (Court of Justice of the European Union, 28th February, 2008, ECLI:EU:C:2008:133).
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=69435&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=21611062>
- (xiv). Case C-240/09 *Lesoochránárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* (Court of Justice of the European Union, 8th March, 2011, ECLI:EU:C:2011:125).
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=80235&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=21623408>
- (xv). Case C-420/11 *Leth v. Republik Österreich, Land Niederösterreich* (Court of Justice of the European Union, 14th March, 2013, ECLI:EU:C:2013:166).
<https://curia.europa.eu/juris/liste.jsf?num=C-420/11&language=EN>
- (xvi). Case C-137/14 *European Commission v. Federal Republic of Germany* (Court of Justice of the European Union, 15th October, 2015, ECLI:EU:C:2015:683).
<https://curia.europa.eu/juris/liste.jsf?language=en&num=C-137/14>
- (xvii). Case C-504/14 *European Commission v. Hellenic Republic* (Court of Justice of the European Union, 10th November, 2016, ECLI:EU:C:2016:847).
<https://curia.europa.eu/juris/liste.jsf?language=en&num=C-504/14>

- (xviii). Case C-243/15 *Lesoochránárske zoskupenie VLK v. Obvodný úrad Trenčín* (Court of Justice of the European Union, 8th November, 2016, ECLI:EU:C:2016:838).
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=185199&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=40051902>
- (xix). Case C-644/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd* (Court of Justice of the European Union, 20th December, 2017, ECLI:EU:C:2017:987).
<https://curia.europa.eu/juris/liste.jsf?num=C-664/15>
- (xx). Case C-112/16 *Persidera SpA v. Autorità per le Garanzie nelle Comunicazioni* (Court of Justice of the European Union, 26th July, 2017, ECLI:EU:C:2017:597).
<https://curia.europa.eu/juris/liste.jsf?language=en&num=C-112/16>
- (xxi). Case C-142/16 *Commission v. Federal Republic of Germany* (Court of Justice of the European Union, 26th April 2017, ECLI:EU:C:2017:301).
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=190143&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=21623408>
- (xxii). Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* (Court of Justice of the European Union, 15th March, 2018, ECLI:EU:C:2018:185).
<https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-470%2F16>
- (xxiii). Case C-526/16 *European Commission v. Republic of Poland* (Court of Justice of the European Union, 31st May, 2018, ECLI:EU:C:2018:356).
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0526&qid=1634837396872>
- (xxiv). Case C-117/17 *Comune di Castelbellino v. Regione Marche* (Court of Justice of the European Union, 28th February, 2018, ECLI:EU:C:2018:129).
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CJ0117>
- (xxv). Case C-441/17 *European Commission v. Republic of Poland* (Court of Justice of the European Union, 17th April, 2018, ECLI:EU:C:2018:255).
<https://curia.europa.eu/juris/liste.jsf?num=C-441/17>
- (xxvi). Case C-674/17 *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo – Kainuu ry v. Risto Mustonen* (Court of Justice of the European Union, 10th October, 2019, ECLI:EU:C:2019:851).
<https://curia.europa.eu/juris/liste.jsf?num=C-674/17>

(xxvii). Case C-535/18 *IL v. Land Nordrhein-Westfalen* (Court of Justice of the European Union, 28th May, 2020, EU:C:2020:391).

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0535>

(xxviii). Case C-621/18 *Wightman v. Secretary of State for Exiting the European Union* (Court of Justice of the European Union, 10th December, 2018, ECLI:EU:C:2018:999).

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0621>

(xxix). Case C-826/18 *LB v. College van burgemeester en wethouders van de gemeente Echt-Susteren* (Court of Justice of the European Union, 14th January, 2021, ECLI:EU:C:2021:7).

<https://curia.europa.eu/juris/liste.jsf?num=C-826/18>

(xxx). Case C-254/19 *Friends of the Irish Environment Limited v. An Bord Pleanála* (Opinion of Advocate General Kokott, 30th April 2020, ECLI:EU:C:2020:320).

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=226000&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=298959>

(xxxi). Case C-473/19 *Föreningen Skydda Skogen v. Länsstyrelsen i Västra Götalands län* (Court of Justice of the European Union, 4th March, 2021, ECLI:EU:C:2021:166).

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=238465&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=21625577>

(xxxii). Case C-463/20 *Namur-Est Environnement ASB v. Région wallonne* (Opinion of Advocate General Kokott, 21st October, 2021, ECLI:EU:C:2021:868).

<https://curia.europa.eu/juris/document/document.jsf?docid=247882&text=&doclang=EN&part=1&occ=first&mode=LST&pageIndex=0&cid=40051902>

International law

(i). The UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus (Denmark) on 25th June, 1998 ('the Aarhus Convention').

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXVII-13&chapter=27

Domestic legislation

(i). The Planning and Development Act 2000, as amended.

<https://revisedacts.lawreform.ie/eli/2000/act/30/revised/en/pdf?annotations=true>

(ii). The European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011).

<http://www.irishstatutebook.ie/eli/2011/si/477/made/en/pdf>

- (iii). The European Union (Birds and Natural Habitats) (Sea-fisheries) Regulations 2013 (S.I. No. 290 of 2013).

<https://www.irishstatutebook.ie/eli/2013/si/290/made/en/print>

- (iv). The European Communities (Birds and Natural Habitats) (Amendment) Regulations 2013 (S.I. No. 499 of 2013).

<https://www.irishstatutebook.ie/eli/2013/si/499/made/en/print>

- (v). The European Communities (Birds and Natural Habitats) (Amendment) Regulations 2015 (S.I. No. 355 of 2015).

<https://www.irishstatutebook.ie/eli/2015/si/355/made/en/print>

- (vi). Order 84 of the Rules of the Superior Courts.

<https://www.courts.ie/rules/judicial-review-and-orders-affecting-personal-liberty>

Domestic caselaw

- (i). *Cahill v. Sutton* [1980] I.R. 269.

<https://app.justis.com/case/cahill-v-sutton/overview/c4Gto3Cdm2Wca>

- (ii). *O'Keefe v. An Bord Pleanála* [1993] 1 I.R. 39.

<https://app.justis.com/case/okeeffe-v-an-bord-pleanla/overview/c5aJm4CZnWWca>

- (iii). *I. v. Minister for Justice, Equality and Law Reform* [2003] IESC 42, [2003] 3 I.R. 197.

https://www.courts.ie/acc/alfresco/e6990028-e990-4c62-a3a4-366ed45b141d/2003_IESC_42_1.pdf/pdf#view=fitH

- (iv). *Arklow Holidays Ltd. v. An Bord Pleanála* [2006] IEHC 102, [2007] 4 I.R. 112.

https://www.courts.ie/acc/alfresco/3809d283-04bc-43b7-9eaa-fa40bbcff05c/2006_IEHC_102_1.pdf/pdf#view=fitH

- (v). *A.P v. D.P.P.* [2011] IESC 2, [2011] 1 I.R. 729

<https://app.justis.com/case/ap-v-dpp/report-irish-reports/c5Gtn0itn1Wca>

- (vi). *JC Savage Supermarket Ltd. v. An Bord Pleanála* [2011] IEHC 488, [2011] 11 JIC 2205 (Unreported, High Court, Charleton J., 22nd November, 2011).

https://www.courts.ie/acc/alfresco/a61c8626-c36f-4f0a-94ae-8bcf8364689a/2011_IEHC_488_1.pdf/pdf#view=fitH

- (vii). *Omega Leisure Ltd. v. Barry* [2012] IEHC 23, [2012] 1 JIC 1205 (Unreported, High Court, Clarke J., 12th January, 2012).
- https://www.courts.ie/acc/alfresco/c698cc22-8bc9-4dea-9c68-12945edcab91/2012_IEHC_23_1.pdf/pdf#view=fitH
- (viii). *The People (D.P.P.) v. Rattigan* [2013] IECCA 3, [2013] 2 I.R. 221 at 245.
- <https://app.justis.com/case/dpp-v-rattigan/overview/aXadn1GJm0edl>
- (ix). *Schrems v. Data Protection Commissioner (No. 2)* [2014] IEHC 351, [2014] 2 ILRM 506.
- https://www.courts.ie/acc/alfresco/7f06c782-28e8-4ae1-abc2-5af136c74dda/2014_IEHC_351_1.pdf/pdf#view=fitH
- (x). *JTI Ireland Limited v. Minister for Health* [2015] IEHC 481, [2015] 7 JIC 0708 (Unreported, High Court, Cregan J., 7th July, 2015).
- https://www.courts.ie/acc/alfresco/07acd200-3ab9-4501-8ce3-d8ba09389f8a/2015_IEHC_481_1.pdf/pdf#view=fitH
- (xi). *Ross v. An Bord Pleanála (No. 2)* [2015] IEHC 484, [2015] 7 JIC 2107 (Unreported, High Court, Noonan J., 21st July, 2015).
- https://www.courts.ie/acc/alfresco/4e2534a0-d34b-4e4f-9945-480c0fe59aea/2015_IEHC_484_1.pdf/pdf#view=fitH
- (xii). *Data Protection Commissioner v. Facebook Ireland Limited* [2016] IEHC 414, [2016] 7 JIC 1906 (Unreported, High Court, McGovern J., 19th July, 2016).
- https://www.courts.ie/acc/alfresco/04331413-7978-495e-9aee-002c8fab6f55/2016_IEHC_414_1.pdf/pdf#view=fitH
- (xiii). *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646, [2016] 11 JIC 1404 (Unreported, High Court, 14th November, 2016).
- https://www.courts.ie/acc/alfresco/9061ac50-4450-4cc3-9efd-fe4aa463b834/2016_IEHC_646_1.pdf/pdf#view=fitH
- (xiv). *Conway v. Ireland* [2017] IESC 13, [2017] 1 I.R. 53.
- https://www.courts.ie/acc/alfresco/027345d1-98b6-4bcf-ac25-c0c84cdfb196/2017_IESC_13_1.pdf/pdf#view=fitH
- (xv). *Callaghan v. An Bord Pleanála (No. 1)* [2017] IESC 60, [2017] 7 JIC 2706 (Unreported, Supreme Court, Clarke J. (MacMenamin and Dunne JJ. concurring), 27th July, 2017).

- https://www.courts.ie/acc/alfresco/cefd1393-683a-423a-917c-2ef74e9fbdf6/2017_IESC_60_1.pdf/pdf#view=fitH
- (xvi). *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 311, [2017] 5 JIC 1211 (Unreported, High Court, Costello J., 12th May, 2017).
- https://www.courts.ie/acc/alfresco/98cebcad-771d-449e-a176-d9a19f69164c/2017_IEHC_311_1.pdf/pdf#view=fitH
- (xvii). *Connelly v. An Bord Pleanála* [2018] IESC 31, [2018] 2 I.L.R.M. 453.
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