

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 256
RECORD No. 2020 967 J.R.

BETWEEN:

VAL MARTIN

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENTS

AND

CAVAN COUNTY COUNCIL

AND

RARAGH DEVELOPMENTS LIMITED

NOTICE PARTIES

Judgment of Mr Justice Cian Ferriter delivered this 27th day of April 2022

Introduction

1. This is the applicant's application for leave to apply for an order of *certiorari* by way of judicial review of a decision of An Bord Pleanála ("the Board") of 23 October 2020 upholding the grant by Cavan County Council of planning permission to Raragh Developments Limited ("the notice party") for the retention and completion of a meteorological mast and associated works at a wind farm known as the Raragh Wind Farm, Corrinshigo, Co. Cavan ("the wind farm"). In the event that he is successful with his leave application, the applicant seeks an order of *certiorari* of the Board's decision. The matter proceeded before me by way of a telescoped hearing.

Background

2. The applicant is a farmer who owns a house on a site adjoining the wind farm. He acted in person on the application. He is the Irish spokesperson for the "European Platform Against Wind Farms" and an environmental campaigner.
3. The applicant previously took a judicial review against an earlier decision of the Board declaring the connecting cables for the wind farm to be exempted development and was successful in that judicial review on the basis that the project required an Environmental Impact Assessment ("EIA") assessing the cumulative effects of the whole project on the environment. The applicant seeks to run an equivalent argument in these proceedings i.e. that the application for permission to relocate the mast (which mast had been the subject of the original permission for the wind farm project) required a fresh EIA to assess the cumulative effects of the project as a whole. However, as we shall see, the factual and legal context of the issues arising in these proceedings is very different to that arising in his previous judicial review.
4. The wind farm comprises 5 turbines and associated development located in the townland of Corrinshigo, Co. Cavan. Permission for the wind farm had been granted by the Board following appeal, on 15 December 2010. That grant of planning permission included provision for the construction of an 85m high meteorological mast at a specified location on the site.

5. The construction of the wind farm began in February 2019 and the wind farm became operational in December 2019. No meteorological mast was built at that time. An application for permission for completion of the mast at a different location on the site, and retention of associated works, was made to Cavan County Council ("the Council") who granted that permission on 16 March 2020 following a Council planner's report recommending same.
6. The Council's decision was appealed to the Board by two third parties, one of whom was the applicant. The application was the subject of a report by a Board planning inspector, who recommended that permission be granted for the development subject to a schedule of four conditions. The Board accepted the inspector's recommendation and the decision of the Board granting the permission is recorded in the Board's Direction dated 19 October 2020 and the Board's Order dated 23 October 2020.

Reliefs sought

7. In his statement of grounds, the applicant seeks "*a declaration that the main wind farm was stage 1 of the project granted planning permission [by Cavan County Council and the Board] and that the grid connection was stage 2 of that project assessed with the cumulative effects of stage 1 [by Cavan County Council and the Board] and that the meteorological mast applied for is stage 3 of that project requiring an Environmental Impact Assessment Report and Environmental Impact Assessment under section 172 of the Planning and Development Act 2000, Directives 2011/92/EU amended by 2014/52/EU and the Habitats Directive requires the assessment of the cumulative effects of all of its stages*".
8. Directive 2011/92/EU as amended by Directive 2014/52/EU is titled "of the assessment of the effects of certain public and private projects on the environment" and is commonly known as the EIA directive.
9. The applicant also seeks a related declaration "*that the proposed meteorological mast described as a development the subject of this judicial review is not a development, but is a project under [the EIA directive] to which section 172 of the Planning and Development Act, 2000 applies*".
10. In relation to the question of public notification, the applicant seeks "*a declaration that the advice provided by Fintan Coffey of Cavan County Council in a memorandum of 13 May 2020 to [the Board] that Corrinshigo Lane is a private road is in error based on supporting affidavits of Val Martin, Eoin Martin and John Gargan that the lane is a public road and right of way which required public notices at each end.*"
11. It is important to note that the applicant sought to shift his case at hearing where he sought to contend that, irrespective of the fact that Corrinshigo Lane may be a private road, there were entrances *from* public roads at either end of the lane such as to require public notices at these entrances in accordance with article 19(1)(c) of the Planning and Development Regulations 2001 ("article 19(1)(c)" and "the 2001 Regulations", respectively). I will come to this contention later in the judgment.

12. A related declaration was sought "*that the advice provided by Fintan Coffey of Cavan County Council in a memorandum of 13 May 2020 to [the Board] was not in compliance with any facts existing on the ground in relation to Corrinshigo Lane and may have misled the Board in assessing the requirements of article 19(1)(c) of the Planning and Development Regulations 2001.*" He also sought a declaration "*that the opinion of the Board's inspector to the Board does not reflect that Corrinshigo Lane is public road requiring 2 notices in order to comply with the regulations.*"
13. On the basis of those two essential grounds i.e. that consideration of the application for planning permission for retention and completion of the mast and associated works required an EIA report and an EIA under s.172 of the 2000 Act and the EIA directive, and that the lane was a public road and therefore two public notices of the application for permission were required on the road, the applicant sought a declaration that the Board acted ultra vires and erred in law in granting permission.
14. The statement of grounds also sought reliefs related to an absence of a procedure to change the location of a consented development to another location but this aspect of the matter was withdrawn by the applicant prior to the hearing upon receipt of further information which suggested that the point was not sustainable.
15. Finally, the applicant sought a declaration that s.50B of the Planning and Development Act 2000 as amended applies to these proceedings. S.50B refers to protective costs orders. It was agreed at the hearing that consideration of this issue, if required at all, should be held over until after I had given judgment on the telescoped application for leave/judicial review.
16. The Board and notice party contend that none of the grounds advanced by the applicant meets the threshold of substantial grounds as defined by *McNamara v. An Bord Pleanala (No. 2)* [1996] IEHC 60 or, in the alternative, that they are grounds of challenge which should be rejected as being unfounded.

Applicant raising grounds not pleaded

17. The applicant also served a document entitled "Response to Intended Statement of Opposition". In this document, the applicant sought to raise arguments as to alleged non-compliance with the requirements of s.34(12) of the 2000 Act ("s.34(12)") to the effect that the planning authority must refuse to consider an application to retain unauthorised developments of lands where the authority decides that if an application had been made before the unauthorised developments commenced an EIA or preliminary screening for an EIA would have been required. This point was not pleaded in his statement of grounds. No application was made either at or prior to the hearing to amend his statement of grounds to include this point. The applicant sought to contend that the point under s.34(12) was a matter of legal argument that did not require to be pleaded. I do not accept that submission. If the applicant wishes to rely on alleged non-compliance with the requirements of s.34(12), he was required to plead same and give the notice party and the Board sufficient opportunity to deal with any issues arising by way of replying evidence and submission.

18. As noted by Clarke C.J. in *Dowling v Minister for Finance* [2012] IESC 32 at paragraph 4.7 while the courts will generally endeavour to ensure that unrepresented parties are not unfairly prejudiced through lack of representation, *"it nonetheless remains the case that parties cannot expect to benefit by being unrepresented to the extent of being permitted to conduct the proceedings in a way that would not be allowed to a represented party."* The applicant very ably presented his case and as he stated in his pleadings, he has acted in person in previous judicial reviews, including successfully.
19. In light of the strict requirements of pleading in judicial review challenges of this nature, as set out in the jurisprudence (helpfully summarised in *People Over Wind v An Bord Pleanala* [2015] IEHC 271), I do not believe that the applicant should be permitted to run arguments in relation to s.34(12).
20. In the circumstances, I will proceed to consider only those matters which were included in the applicant's statement of grounds.

Location of site notices

21. The first ground of challenge relates to the location of the site notices in respect of the application for planning permission.
22. A site notice in respect of the application for planning permission was erected at the entrance to the wind farm on the R162-4 public road. It is alleged by the applicant that it was necessary for a site notice to be erected at either end of Corrinshigo Lane as this lane was said to be a "public road" within the meaning of article 19(1)(c) of the 2001 Regulations and that therefore the notice party was in breach of its legal obligations.
23. Article 19(1)(c) of the 2001 Regulations requires that a site notice erected or fixed on any land or structure shall be:

"(c) subject to sub-article (2), securely erected or fixed in a conspicuous position on or near the main entrance to the land or structure concerned from a public road, or where there is more than one entrance from public roads, on or near all such entrances, or on any other part of the land or structure adjoining a public road, so as to be easily visible and legible by persons using the public road, and shall not be obscured or concealed at any time."
24. Article 19(2) states:

"(2) Where the land or structure to which a planning application relates does not adjoin a public road, a site notice shall be erected or fixed in a conspicuous position on the land or structure so as to be easily visible and legible by persons outside the land or structure, and shall not be obscured or concealed at any time."
25. "Public road" is defined by s.2 of the 2000 Act as having the same meaning as in the Roads Act, 1993 ("the 1993 Act"). Section 2 of the 1993 Act defines public road as "a road over which a public right of way exists and the responsibility for the maintenance of which lies on a road authority".

26. The notice party accepted for the purposes of the hearing that there was a public right of way across the lane. However, it submitted that the lane was not a "public road" within s.2 of the 2000 Act as it was not taken in charge by the local authority and therefore could not satisfy the second part of the two-part definition of "public road" contained in s.2 of 1993 Act.

27. In relation to the question of site notices, the Council's planning official, Fintan Coffey, submitted a memorandum to the Board dated 13 May 2020, in which he stated:

"In this case, the site notice was placed at the main entrance to the land concerned for the public road (regional road R162-4). This is the main entrance to the wind farm within which the proposed development is located. This is also the only point at which the wind farm adjoins a public road. Corrinshigo Lane, which traverses the wind farm site and is 180 m of the nearest point to the application cycle mast, is not a public road and is not used for accessing the wind farm. It is not passable due in part to the windfarm development. The other public roads referred to in the third party appeal, are more remote from the application site and are not used to access it." (emphasis added).

28. The case made by the applicant in his statement of grounds (at paragraph 6) and in his supporting affidavits is that Mr. Coffey was wrong in his advice to the Board that Corrinshigo Lane was a private road.

29. The applicant sought to contend at the hearing that there were two entrances to the site from public roads other than Corrinshigo Lane, being the public roads which connected to either end of the lane. This was not his pleaded case and in my view it is not legitimate for him to seek to make a case other than his pleaded case at the hearing.

30. In any event, article 19(1)(c) requires that there be "more than one entrance from public roads" to the "land or structure concerned". The evidence demonstrates that there was not more than one entrance to the site from public roads within the proper meaning of the term "public road".

31. The evidence before the Court from Karl Byrne, a director of the notice party, in an affidavit sworn by him on 30 July 2021, is that:

"neither Corrinshigo Lane as a whole, nor any relevant section thereof, has at any relevant time been taken in charge by the Council. The Council, in a letter dated 27 April 2021, confirmed that the eastern part of Corrinshigo Lane has not been taken in charge by the Council and is not a public road. While the Council confirmed that the western part of Corrinshigo Lane has been taken in charge and is a public road (number L35251-0), there was no entrance to the site from this part of Corrinshigo Lane that has been taken in charge, nor does the public road adjoin the site."

32. Mr. Byrne further averred that there was no public access to the site from the lane.

33. There was no application to cross-examine Mr. Byrne or to otherwise suggest that the above averments were incorrect.
34. In light of these averments, it is clear that a site notice was erected on the main entrance to the wind farm from the public road R162-4. There was no other entrance to the wind farm from a public road and no such entrance to it from that part of the lane that had been taken in charge by the Council. Accordingly, in my view, article 19(1)(c) did not require more than one notice and its terms were complied with in the circumstances.
35. The applicant made a subsidiary argument in his written submissions, not pushed in oral argument at the hearing, that the notification of the development did not comply with article 6 of the EIA directive. Article 6 relates, *inter alia*, to notification of applications for planning permission. However, article 6 of the EIA directive does not mandate that notice be given in a particular form or that site notices be erected in any particular locations. In my view, the erection of site notices in accordance with article 19 of the 2001 Regulations meets the requirements of the EIA directive. As the applicant has made out no substantial grounds under article 19, it follows that he has no substantial grounds under article 6 of the EIA directive either.
36. Accordingly, the applicant has made out no substantial grounds for leave on this issue.

Alleged requirement for EIA in relation to the development

37. The applicant pleaded (at paragraph 10 of his statement of grounds) that Annex II (3) (i) of the EIA directive as amended:

"sets out the minimum criteria for wind farms as being more than 2 turbines or above 5 MW capacity. Raragh wind farm comprises 5 turbines and is 12 MW capacity. It is therefore a project which is covered by the Directive. The planning application 09/270 [the original planning application for the project as a whole] included an Environmental Impact Statement when lodged and an Environmental Impact Assessment was completed by both the Council and the Board. A meteorological mast was included in the application without location on the map, but was never built. The connecting cables were granted consent for compliance with the [EIA directive as amended] in a second application as is also required under section 172 of the PDA 2000. The applications for consent for the Raragh wind farm has 3 stages to date. 1) the wind farm assessed as a project under the EIA directive, 2) the connecting cabling assessed under the EIA directive and 3) the relocated meteorological mast assessed under the Planning and Development Act alone. This amounts to project splitting known as salami slicing. In allowing this to happen the Board erred in law."

38. The applicant went on to plead that as the application did not include an EIA report, the grant of consent was made in breach of articles 2, 3 and 4 and annex II (3) (i) of the EIA directive and in breach of s.172 of the 2000 Act. He pleaded that the EIA directive "commands the cumulative effects be assessed". He pleaded that it followed that in granting the application the Board erred in law and acted *ultra vires*.

39. The applicant also asserted (at paragraph 15 of the statement of grounds) that “the screening which was carried out determined that this was not an EIA project. This determination was an endorsement of project splitting or salami slicing. The Board’s decision to rely on this determination was therefore beyond its power.”
40. The applicant also sought to contend that it was wrong of the Board to “consider that a part of the project can revert to a development for the purposes of granting consent”.
41. Project splitting involves an attempt to circumvent the requirements of the EIA Directive by splitting a project which as a whole would require an EIA, into smaller parts which of themselves would not. The CJEU, understandably, has made clear that project splitting is impermissible: see *Commission v Spain* (Case C-227/01 16 September 2004) at paragraph 53; Case C-392/96 *Commission v. Ireland* [1999] ECR I 5091 at paragraph 76 and *Ecologistes en Accion – COAD v Madrid* (Case C-142/07 25 July 2008) at paragraph 44.
42. The applicant alleged that impermissible project splitting was involved in the application the subject of the Board’s decision here. In order to put applicant’s “project-splitting” arguments in context, it is necessary to briefly describe the relevant legal framework.
43. One of the purposes of the provisions of the EIA directive is to ensure that projects with the potential for significant effects on the environment should be the subject of careful assessment to prevent such effects. Such projects are split in the directive between those (typically large-scale) projects in respect of which an EIA is mandatory (set out in Annex I of the directive) and those projects which will require an EIA if they exceed a certain threshold of size or scale, or are otherwise likely to have a significant effect on the environment (Annex II of the directive).
44. The classes of development in respect of which an EIA is required in Ireland are contained in Part 1 and Part 2 of Schedule 5 of the 2001 Regulations, which transpose the classes of development contained in Annex I and II of the EIA Directive.
45. Class 3(i) of Part 2 of Schedule 5 of the 2001 Regulations requires an EIA for:
“installations for the harnessing of wind power for energy production (wind farms) with more than 5 turbines or having a total output greater than 5 megawatts”.
46. Class 13(a) of Part 2 of Schedule 5 of the 2001 Regulations requires an EIA for:
“(a) Any change or extension of development already authorised, executed or in the process of being executed (not being a change or extension referred to in Part 1) which would:-
(i) result in the development being of a class listed in Part 1 or paragraphs 1 to 12 of Part 2 of this Schedule, and
(ii) result in an increase in size greater than –

- 25 per cent, or
 - an amount equal to 50 per cent of the appropriate threshold,
- whichever is the greater."*

47. Class 15 of Part 2 of Schedule 5 of the 2001 Regulations requires an EIA for:

"Any project listed in this Part which does not exceed a quantity, area or other limit specified in this Part in respect of the relevant class of development but which would be likely to have significant effects on the environment, having regard to the criteria set out in schedule 7."

48. The Council's assessment of the application for retention/permission in relation to the mast structure and associated works was assessed in its planner's report dated 13 March 2020 and the report of an executive scientist dated 28 February 2020.

49. The Board's planning inspector provided a report dated 28 September 2020 in which she recommended that permission be granted for the development subject to four conditions.

50. The inspector stated as follows at paragraph 8.1.2 of her report:

"the planning permission granted for Raragh Wind Farm was subject to environmental impact assessment. The proposed development, which modifies the development by relocating the permitted meteorological mast, provides no increase in wind energy production or increase in size of the development. Consequently, there is no statutory requirement for environmental impact assessment. The development is also proposed on agricultural land, removed from any sensitive receptors and construction and operation are unlikely to give rise to significant environmental impacts."

51. At paragraph 8.1.3 she stated:

"it is therefore evident from the characteristics, location and potential impact of the development that it would not be likely to have significant effects on the environment, so a sub-threshold environmental impact assessment would not be warranted under the criteria set out in schedule 7 to the planning regulations."

52. In my view, the findings in each of these paragraphs are correct in law. There was no statutory requirement for an EIA as the matter did not come within class 13(a) (the potential class addressed in paragraph 8.1.2 of the inspector's report) or class 15 (the potential class addressed in paragraph 8.1.3 of that report) or any other class in Part 2 of Schedule 5 of the 2001 Regulations. The relocation of the mast was a modification of the original permitted development which did not of itself result in the development being in a listed class with an increased size. It had no likely significant effect on the environment. It did not therefore require an EIA.

53. The findings of the Board's inspector are also consistent with the report of the Council's planner, Fintan Coffey of 13th March 2020 in which he stated:

"the proposed development is to reposition a meteorological mast but just over 377 m from this location. No significant change would occur to the permitted design of the mast, its dimensions, base foundations, structure or materials. My assessment is, based on the characteristics of the development, that no change has occurred in terms of the actual development characteristics. On this basis, I am satisfied that the proposed development is not likely to result in any significant environmental effect not already assessed."

54. The Board considered the submissions on file and the inspector's report at its meeting of 19 October 2020. It decided at that meeting to grant planning permission in accordance with the inspector's recommendation. The Board made its formal order granting permission on 23 October 2020.

55. The Board's decision to grant permission states in its "reasons and considerations" that:

"having regard to the nature and scale of the meteorological mast previously permitted under planning register reference number 09/270... To the location and elevation of the mast as now proposed, to the pattern of development in the area including the windfarm within which the development is located, it is considered that, subject to compliance with the conditions set out below, the development for which retention permission is sought and the proposed development would not seriously injure the amenities of the area or the amenities of property in the vicinity, would be acceptable in terms of visual impact and would constitute an appropriate form of development at this location within an established wind farm. The development for which retention permission is sought and the proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area."

56. In my view, neither the Board nor its inspector erred in law in holding that the proposed development of the completion of the mast and retention of associated works was not within the classes of development set out in Part 2 of Schedule 5 of the 2001 Regulations and that therefore no EIA or preliminary examination was required. The findings of the Board's inspector and the Board are unimpeachable in law.

57. The applicant sought to rely on the fact that the notice party in an EIA "pre-screening" form ticked "yes" to the question "does the proposed development constitute an EIA project?" but ticked "no" to the question as to whether the proposed development or part of it fell within any class of development set out in Part 1 or Part 2 of Schedule 5 of the 2001 Regulations. I think the "yes" answer to the first question can probably be seen as a reference to the wind farm development as a whole. The answer to the second question was correct as a matter of law in light of analysis set out above. In any event, the more material legal question is whether the Board erred in law in its decision and in my view, for the reasons set out above, it did not so err.

58. With respect, the fundamental flaw in the applicant's case on compliance with the EIA directive is that it fails to properly acknowledge that the EIA regime permits a change or extension to a project or development which has already been authorised and which has already been the subject of an EIA, where that change or extension does not exceed certain thresholds or, if sub-threshold, the change or extension would not be likely to have significant effects on the environment. The applicant's case proceeds on the basis that any change to an EIA project development, irrespective of the impact of that change on the project as a whole, must of itself lead to a fresh EIA, including the lodging of a fresh EIAR, absent which the developer is engaged in unlawful project splitting. In my view, that is not a correct legal analysis.
59. Crucially, the mast was part of the original project which was the subject of planning permission and EIA. It did not constitute a further or separate stage of the project. All that is addressed in the planning decision the subject of this challenge is a retention/completion of the same mast in a different location on the same wind farm. That scenario, being sub-threshold and not (in accordance with the expert view of the various experts who looked at the matter including the Council's planner and the Board's inspector) having significant effects on the environment, is not one which of itself requires an EIA as it is not with any of the classes in Annex II of the Directive or Part 2 of Schedule 5 of the 2001 Regulations that require an EIA.
60. I do not accept the contention that a change in location to an element of the original EIA-assessed project renders that development a new project within paragraph 3(i) of Annex II of the EIA directive or class 3(i) of Part 2 of Schedule 5 of the 2001 Regulations. The relocation of the mast is itself manifestly not an "*installation for the harnessing of wind power for energy productions (wind farms) with more than 5 turbines or having a total output greater than 5 megawatts*" per class 3(i) of Part 2 of Schedule 5 of the 2001 Regulations. If any change to the original project/development was to be considered as a fresh entire project irrespective of the potential effect on the environment of the change itself, the provisions of paragraph 13 of Annex II of the EIA Directive and classes 13 and 15 of Part 2 of Schedule 5 of the 2001 Regulations would be otiose and would make no sense.
61. This interpretation is also consistent with the spirit of the EIA directive which is to ensure that developments which have are likely to have significant effects on the environment are the subject of EIA. Here, the experts were of one view that the relocation of the mast in a project which had already been passed as EIA-compliant did not itself have such a likely effect; an EIA was not therefore required. Accordingly, no question of project splitting or other inappropriate attempt to circumvent the provisions of the EIA directive arises; the EIA does not apply to the development the subject of the permission (i.e. the relocated mast and its associated works). The mast was always a part of the project as a whole and an EIA was conducted by reference to the project as submitted containing a mast. The circumvention of the objectives of the EIA directive which is involved in project splitting simply does not arise here.

62. The applicant sought to distinguish a “project” under the EIA directive from a “development” under the 2000 Act. However, a project which requires EIA is within the definition of “development” in the 2000 Act, just as the matter of relocating and constructing a mast (which does not of itself require an EIA) is a “development” for the purposes of the 2000 Act. I do not see that any legal issues arises from this contention.
63. The authorities relied upon by the applicant all arose in very different contexts which did not deal with sub-threshold changes to an EIA project which would not be likely to have significant effects on the environment. The principal authority relied upon by the applicant, *O’Grianna v An Bord Pleanála* [2014] IEHC 632 (which was applied by Baker J. in *Daly v Kilronan Wind Farms* [2017] IEHC 308), concerned a situation where a significant and necessary phase of a wind farm project, being the works necessary to connect the wind farm to the national grid, had not been the subject of an EIA at all when the wind farm project was originally the subject of planning permission. The High Court (Peart J.) held that the connection to the national grid was an integral part of the overall development of which the constructions of the turbines was the first part (paragraph 27). As no EIA had been done referable to the connection to the national grid, Peart J. held that an EIA for the entire project needed to be completed and submitted so that a cumulative assessment of the likely impact of the project could be carried out to ensure compliance with the EIA directive. The facts of the case before me are readily distinguishable; the mast was a part of the project as originally assessed for EIA; it is simply being relocated and the development consisting of that relocation does not give rise to any likely significant effects on the environment.
64. In the circumstances, in my view the applicant’s case in relation to non-compliance with the EIA directive does not disclose substantial grounds.

Conclusion

65. For the reasons set out above, I refuse the applicant’s application for leave to apply for judicial review.