

THE HIGH COURT  
JUDICIAL REVIEW

[H.JR.2021.888]

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT

AND

THE GOVERNMENT OF IRELAND, MINISTER FOR AGRICULTURE, FOOD AND THE MARINE,  
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

**JUDGMENT of Humphreys J. delivered on the 19th day of October, 2023**

**1.** For the past 20 years or so, the agri-food sector has been guided by strategy documents led by stakeholders, with Government support. The approach has been one of 10 Year plans, reviewed and replaced mid-way through the life of each plan.

**2.** On 31st July, 2019, an initial public consultation process commenced in relation to what is now the current plan. The applicant did not make a submission.

**3.** In November, 2019, the Agri-Food Stakeholder Committee was established by the Department of Agriculture, Food and the Marine as a non-statutory unincorporated body with 32 members representing various interests in the sector. On its establishment, the Committee was tasked with the preparation of a new strategy to replace a document entitled Food Wise 2025, published in 2015.

**4.** On 27th May, 2020, RSK (Ireland) Ltd and RSK ADAS Ltd consultants were engaged by the Department on behalf of the Committee to prepare assessment exercises.

**5.** On 4th June, 2020, an Environmental Analysis Steering Group (EASG) was established by the Department to work with the Committee and the consultants at a technical level.

**6.** On 11th August, 2020, a Strategic Environmental Assessment (SEA) scoping consultation exercise took place, in purported compliance with the SEA directive 2001/42/EC. Again the applicant failed to make a submission.

**7.** In February, 2021, the Environmental Pillar withdrew from the Committee, complaining *inter alia* that the approach being taken was insufficiently ambitious in terms of climate goals. Save insofar as relates to SEA or appropriate assessment (AA) under the habitats directive 92/43/EEC, that complaint isn't an issue in these proceedings – the applicant hasn't challenged the strategy by reference to climate obligations other than insofar as they arise as part of more traditional assessments.

**8.** This raises a contextual point which is that it isn't for the court to assess the merits of any given strategy or other action or omission under challenge, or to agree or disagree with any policy criticisms of it. The role of the court, to state the obvious no doubt, is only to assess any given act or omission, including the adoption or endorsement of a strategy or plan, against such justiciable benchmarks as may be properly pleaded in any given case. The fact that a given act might fail the test of legal benchmarking doesn't mean it isn't a good idea in principle, and likewise the fact that the act might pass any pleaded justiciable standards doesn't amount to endorsement. A court just doesn't have either the expertise or the investigative instruments at its disposal to hazard a view as to how ambitious any given policy should be, and nor is that the court's role under our system of separation of powers.

**9.** On 19th April, 2021, public consultation on the draft strategy began for the purposes *inter alia* of AA and SEA. The applicant finally enters the picture with a submission at this stage. National dialogues on Ireland's food system also began in April, 2021.

**10.** On 2nd July, 2021, the Committee finalised the new strategy, called Food Vision 2030 (FV2030).

**11.** On 16th July, 2021, the Minister made an AA determination in respect of the strategy.

**12.** On 21st July, 2021, a Government Decision was adopted which:

- (i) approved the publication of the strategy FV2030;
- (ii) agreed that the Minister for Agriculture, Food and the Marine would express Government support for the broad policy thrust of FV2030, and in particular the vision that Ireland will become a world leader in Sustainable Food Systems, and
- (iii) agreed that the Government would utilise the Strategy and its food systems approach as the theme of Ireland's engagement with the UN Food Systems Summit (which was held in New York on 23rd September, 2021 during the UN General Assembly that week).

**13.** FV2030 was launched on 3rd August, 2021 by the Government and the Agri-Food Stakeholder Committee.

**14.** On 10th August, 2021, the applicant's solicitors made a request to the Department of the Taoiseach under the European Communities (Access to Information on the Environment) Regulations 2007 transposing the Access to Information on the Environment (AIE) directive 2003/4/EC for copies of (a) the cabinet minutes recording the Government's consideration of Food Vision 2030; (b) all Government decisions in relation to Food Vision 2030; and (c) of any other records of the Government relating to Food Vision 2030.

**15.** This request was refused on 8th September, 2021 although it did identify the government decision dated 21st July, 2021. An internal review was requested on the same day but there was no response to this request. An appeal was filed with the Commissioner for Environmental Information on 10th October, 2021. The appeal was put on hold by the Commissioner on 28 October, 2022 because it involved an issue that is pending before the Court of Justice of the European Union in *Right to Know v. An Taoiseach*, Case C-84/22, on reference from Simons J. (see Opinion of Advocate General Kokott delivered on 17 May 2023, ECLI:EU:C:2023:421).

#### **Procedural history**

**16.** The proceedings were filed on 22nd October, 2021. Leave was granted on 1st March, 2022. A statement of opposition was filed on 30th June, 2022.

**17.** On 9th November, 2022, the Supreme Court gave judgment in a challenge by this applicant to the National Development Plan, *FOIE v. Government of Ireland* [2022] IESC 42, [2022] 11 JIC 0903 (Baker J.), and decided to refer certain matters to the CJEU. That earlier case will have some relevance as we shall see.

**18.** On 30th January, 2023, the matter was admitted to the Commercial Planning and Environmental List and liberty to amend the statement of grounds was given. On 8th May, 2023, a further amendment was permitted.

**19.** On 22nd May, 2023, it was ordered that core grounds 1 and 2 be modularised (the detail of this was later revisited) by reason of a reference to the CJEU by the Supreme Court in *Friends of the Irish Environment v. Government of Ireland* [2022] IESC 42. The questions before the CJEU in what became Case C-727/22 are:

"1: Must Article 2(a) of the SEA Directive, read in conjunction with Article 3(2)(a), be interpreted to mean that a measure adopted by the executive arm of a Member State, other than by reason of a legislative or administrative compulsion, and not on the authority of any regulatory, administrative or legislative measure, is capable of being a plan or programme to which the Directive applies, if the plan or programme so adopted sets a framework for downstream grant or refusal of development consent and thus satisfies the test from Article 3(2) of the Directive 2(a): Must Article 3(1) read in conjunction with Article 3(8) and (9) of the SEA Directive be interpreted to mean that a plan or programme which makes specific, albeit described as "indicative", provision for the allocation of funds to build certain infrastructure projects with a view to supporting the spatial development strategy of another plan, itself forming the basis of downstream spatial development strategy, could itself be a plan or programme within the meaning of the SEA Directive?

2(b): If the answer to 2(a) is yes. does the fact that a plan which has as its objective the allocation of resources, mean that it must be treated as a budgetary plan within the meaning of Article 3(8)?

3(a): Must Article 5, and Annex 1, of the SEA Directive be interpreted to mean that where an environmental assessment is required under Article 3(1), the environmental report for which provision is made therein should, once reasonable alternatives to a preferred option are identified, carry out an assessment of the preferred option and the reasonable alternatives on a comparable basis?

3(b): If the answer to question (a) is yes, is the requirement of the Directive met if the reasonable alternatives are assessed on a comparable basis prior to the selection of the preferred option, and thereafter the draft plan or programme is assessed and a more complete SEA assessment then carried out in regard to the preferred option only?"

**20.** On 9th October, 2023, the matter was called over and it was directed that a further affidavit on behalf of the State could be filed without prejudice to objections as to relevance or admissibility.

**21.** The present matter was listed for hearing commencing on 10th October, 2023. At the outset, following discussion with the parties, it was directed that the modularisation would be confined to any issues that depended on the questions referred by the Supreme Court. The effect of that was that it would be open to the applicant to argue that any particular point was dependent on those questions and should not be decided, whereas it would also be open to the State to argue otherwise and to the court to find that any point was not so dependent and should therefore be addressed at this stage. The net effect is that core grounds 1 and 2 would not be fully modularised but only insofar as determining those grounds depends on an answer to the questions referred by the Supreme Court.

**22.** The hearing was enlivened by a great deal of confusion emanating from the applicant's side of the house. The applicant appeared befuddled by everything from the time allocation for submissions (despite my outlining that at the outset), to the alleged need for further information to be provided by the State, to what happened in the previous Supreme Court appeal involving the same parties, to the meaning and scope of an offer from the State to permit a technical amendment of the applicant's pleadings. These misunderstandings were perched on the sadly not unfamiliar ledge of defective and inadequate pleadings, which quickly gave way under the weight of argument to reveal a yawning precipice where there should have been detailed engagement with the statutory scheme and the details of the strategy under challenge. While there wasn't anything much to be done about the latter problem, with a fair amount of co-operation and patience all round we managed to get through the other little misunderstandings, but a couple of them will call for brief further comment now and later in the judgment.

**23.** The time issue did not turn out to be a problem in the end because the applicant did make its point within the normal time period; so much so that it did not take up an offer of further time made at the end of the hearing. That said, parties to litigation generally should not make the assumption that lengthy submissions equate to effective submissions. A sort of legal entropy can set in - even strong propositions can start to look questionable if a court is given enough time to think of objections to them, and weak propositions look weaker the more they are scrutinised. That certainly applied here - no fault on the applicant's side but before the applicant's submissions began, I thought, based on the written submissions its points might have some potential. As five hours of submissions wore on, that prospect seemed to diminish in lustre, and by the stage when the applicant's time allocation was exhausted, we got to the point that it just seemed that there was no "there" there. Of course any tentative and flexible impressions formed during any stage of the process are subject to continuous review and possible displacement by further thought and counter-argument. In the present case nothing critical emerged later to shift the needle decisively back to the applicant's side. To repeat, that isn't criticism - it is more an illustration of the point that lengthy oral submissions, especially when in substantial part repetitive of the points in written submissions, don't necessarily have an edge over short, powerful and focused submissions.

**24.** The issue of amendment of relief 1 arose because Practice Direction HC119 encourages parties to avoid duplicative and roundabout prolixity in pleading. Hence in the typical case when one is challenging a document, one seeks certiorari of the document rather than the decision to adopt, publish or accept it. That is premised on the maker and the promulgator being the same legal person. The applicant tried to comply with that here by deleting reference in relief 1 to the decision of the respondents approving the plan, but on the false premise of its misunderstanding that the entity that made the document was the same as the one that decided to give it broad policy support. In fact that isn't the case (FV2030 was adopted by the Committee but supported by the Government Decision), so the general approach in the Practice Direction doesn't in fact apply. I was concerned that the applicant might have inadvertently and accidentally narrowed its case due to a good faith attempt to comply with the normal procedure in the List, so I suggested that perhaps the State might consider not pushing any objection to the pleading, or alternatively that an amendment could be considered in fairness to the applicant. At a very late stage in the day - in fact just after I had announced I was reserving judgment, and it normally doesn't get much later than that - the State came back in to say that it would not object to such an amendment. Surprisingly, instead of leaping on this offer immediately, the applicant appeared to construe it as a leisurely invitation to leaf generally through the pleadings to see what else it might have second thoughts about. That was unfortunately a misunderstanding of what was, or could ever reasonably have been, on offer, but instructions were provided to get the matter back on track quickly enough, and the amendment was allowed on the basis that a third amended statement of grounds would be filed by 12th October, 2023, and a third amended statement of opposition by 11:00 on 18th October, 2023.

#### **Relief sought**

**25.** In the third amended statement of grounds, the reliefs are as follows:

"1. An Order of Certiorari by way of application for judicial review quashing ~~Food Vision 2030 and/or the decision of the Respondents to adopt, publish or otherwise approve the strategy for the agriculture and marine sector entitled, "Food Vision 2030" published on 3rd August 2021.~~ and/or the decision of the Respondents to adopt, publish or otherwise approve the strategy for the agriculture and marine sector entitled "Food Vision 2030" published on 3rd August 2021.

2. Such Declaration(s) of the legal rights and/or legal position of the Applicant and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the respondent as the court considers appropriate.

~~2. A Declaration that the decision of the Respondents, in adopting Food Vision 2030 was not subject to an adequate environmental assessment for the purposes of the Strategic~~

~~Environmental Assessment Directive (2001/42/EC) and/or the Strategic Environmental Assessment Regulations 2004 (S.I. 436 of 2004).~~

~~3. A Declaration that the Respondents, in adopting Food Vision 2030, erred in law in failing to consider adequately, or at all, reasonable alternatives for the purposes of the Strategic Environmental Assessment Directive and/or Article 12 of the Strategic Environmental Assessment Regulations 2004.~~

~~4. A Declaration that the Respondents, in adopting Food Vision 2030, erred in law in failing to include adequately or at all, monitoring for the purposes of the Strategic Environmental Assessment Directive and/or Article 17 of the Strategic Environmental Assessment Regulations 2004.~~

~~5. A Declaration that the Respondent's erred in law in not subjecting the decision to replace Food Wise 2025 with Food Vision 2030 to assessment for the purposes of Article 9 of the Strategic Environmental Assessment Regulations 2004.~~

~~6. A Declaration that the Respondents erred in law in failing to subject Food Vision 2030 to Appropriate Assessment as required, or at all, and erred in law in failing to conclude that it would not adversely affect the integrity of European Site(s) for the purposes of the Habitats Directive (1992/43/EEC) and/or Article 42 of the European Communities (Birds and Natural Habitats) Regulations 2011.~~

~~7. A Declaration, if necessary, that the assessments conducted by the Respondents for the purposes of the SEA Directive and the Habitats Directive were mandatory for the purposes of the Strategic Environmental Assessment Regulations 2004 (S.I. 436 of 2004) and Article 42 of the European Communities (Birds and Natural Habitats) Regulations 2011.~~

~~8. A Declaration that the Respondents breached Article 7(1) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (the "AIE Directive") and/or Regulation 5 of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the "AIE Regulations") by failing to publish all relevant decisions and supporting materials in relation to the adoption of Food Vision 2030 including the decision of the First Respondent and the Memorandum for the Government of 21 July 2021.~~

~~9. A Declaration that Article 7(1) of the AIE Directive has direct effect and/or that the Applicant is entitled to rely on this provision in these proceedings.~~

~~10. A Declaration that the Third and Fourth Respondents have failed to adequately transpose Article 7(1) of the AIE Directive by failing to make provision in Irish law for the publication of all relevant decisions and supporting materials in relation to the adoption of Food Vision 2030 including the decision of the First Respondent and the Memorandum for the Government of 21 July 2021.~~

~~10. A Declaration that (to the extent that it is not capable of bearing a conforming construction) that Article 5(1) of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (SI 133 of 2007) inadequately transposes Article 7(1) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (the "AIE Directive").~~

11. An extension of time, if necessary, within which to bring these proceedings.

12. An Order providing for the costs of the application and, where appropriate, an Order pursuant to sections 3 and 7 of the Environment (Miscellaneous Provisions) Act 2011 and/or Section 50B of the Planning and Development Act 2000 in respect of the costs of this application.

13. Such further or other Order as this Honourable Court deems appropriate."

### **Grounds of challenge**

**26.** The third amended statement of grounds sets out the following grounds:

"1. Food Vision 2030 ('FV2030') is invalid as it does not comply with the requirements of Article 12 (when read with Article 5(2) and Annex I) of the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations S.I. No. 435 of 2004 (as amended) and/or the Respondents had regard to irrelevant considerations and/or failed to provide adequate reasons and/or the Respondents acted irrationally and unreasonably, further particulars of which are contained at Part 2 below.

2. FV2030 is invalid as it does not comply with the requirements of Article 17 of the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations S.I. No. 435 of 2004 (as amended), further particulars of which are contained at Part 2 below.

3. FV2030 is invalid as the Respondents erred in law in not subjecting the decision to replace Food Wise 2025 with Food Vision 2030 to assessment for the purposes of Article 9

of the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations S.I. No. 435 of 2004 (as amended), further particulars of which are contained at Part 2 below.

4. FV2030 is invalid as the Respondents erred in law in not subjecting FV2030 to any or any adequate Appropriate Assessment for the purposes of section 177 of the 2000 Act and/or the Respondents could not have screened out the possibility of significant effects on European Sites from FV2030 in the absence of Site Specific Conservation Objectives and Measures, further particulars of which are contained at Part 2 below.

5. FV2030 is invalid as the Respondents erred in law in characterising the assessments undertaken by the Respondents for the purpose of the Strategic Environmental Assessment Directive and the Habitats Directive (1992/43/EC) are [sic] voluntary and/or devoid of legal consequence, further particulars of which are contained at Part 2 below.

6. ~~FV2030 is invalid as it relied on Regulation 5 of the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations S.I. No. 435 of 2004 (as amended) which is invalid, further particulars of which are contained at Part 2 below.~~

~~Validity Ground~~

7. ~~Regulation 5 of the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations S.I. No. 435 of 2004 (as amended) is invalid since it actively contravenes Article 7(1) of Directive 2003/4/EC on Public Access to Environmental Information, further particulars of which are contained at Part 2 below.~~

6. The Respondents have failed adequately to transpose Article 7(1) of Directive 2003/4/EC on Public Access to Environmental Information by failing to provide for active dissemination of environmental information as required by the Directive. The purported transposition set out in Article 5 of the European Communities (Access to Information on the Environment) Regulations 2007 does not achieve the objective in Article 7(1) of the Directive as it does not provide for such active dissemination, further particulars of which are contained at Part 2 below."

27. Insofar as concerns core ground 4, the State did not contest the legal robustness of the AA actually conducted, but rather disputed the premise that AA was legally required. If AA is required then the State accepted that it was not correctly conducted.

#### **The status of FV2030**

28. The status of FV2023 is set out by Seán Bell on behalf of the respondents at paras. 17-32 of his affidavit. The applicant, who bears the burden of proof, has not displaced any of that.

29. In such circumstances I would uphold the plea in the second amended statement of opposition:

"14. ... the assertion at paragraph 48 that the status of FV2030 is unclear is denied. FV2030 is a voluntary stakeholder-led strategy, which outlines an agreed vision for the Irish agri-food sector and recommends goals and actions to achieve that vision. It does not have any statutory basis and it does not create legal obligations, whether for stakeholders, the public, the Respondents or otherwise."

30. It follows that FV2030 is a voluntary stakeholder-led strategy, outlining an agreed vision for the Irish agri-food sector, and recommending goals and actions for that vision. It has no statutory basis, or mandatory or binding down-stream effects. It does not authorise or limit any activities, nor bind any party (including the Government). Nor does it establish binding (or non-binding) criteria for the granting of development consent, or for the adoption of subsequent plans, programmes or strategies.

31. That said, the Government Decision broadly approving FV2030 is a form of governmental policy, albeit similarly non-statutory and non-binding. As such policy it is not devoid of legal effects in planning law, even though such effects are not themselves binding. We will return to that later.

#### **Preliminary issue – disclosure of material**

32. At the opening of the hearing, the applicant complained that the State had not set out the *travaux préparatoires* for the habitats directive in full, and in effect requested additional material, although that was more addressed to the other side over the court's head rather than in the form of any cognisable request to the court to do anything specific.

33. Hegel (*Vorlesungen über die Philosophie der Weltgeschichte* (1837)) as paraphrased by Karl Marx (*Der achtzehnte Brumaire des Louis Bonaparte* (1852), 115) might have anticipated that history would repeat itself, because the applicant had made a similar unfounded last-minute demand for documents at the hearing in the Supreme Court. As the State notes in written submissions (para. 41), "[o]n the morning of the substantive hearing, ... the Applicant requested disclosure of the SEA screening decision (which it had never sought previously)". This was not humoured by the Supreme Court. I didn't feel particularly inclined to humour an analogous complaint here, although no particularly formal request to me to do anything was made. The issue was more in the nature of a

general complaint directed at the State. If the applicant wanted to dig into this issue it could have done so on the basis of its own research and efforts long ago.

**34.** This was made even clearer when the State voluntarily provided a public link at which the *travaux* were set out. The applicant counter-attacked by complaining that some of the links within that link were dead. So be it, but that was the case all along and didn't call for any particular action by me or anyone else in mid-hearing.

**35.** This link is not exactly top secret. The main EUR-Lex page for the habitats directive is at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992L0043>. On the left-hand side of that page is a menu of Text, Document information, Procedure, National transposition and Document summary. Clicking "Procedure" brings up the legislative history (<https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:31992L0043>) which is the link on which the State were relying.

**36.** In any event none of this matters because I didn't find the State's *travaux préparatoires* argument particularly compelling. It seemed to be drawing a hyper-literal distinction between plans and policies that doesn't properly represent the legal fault-line. We will return to this later.

#### **Preliminary issue – non-justiciability**

**37.** In the statement of opposition, the State launches a general initial objection that "4. Further and/or in the alternative, FV2030 is not justiciable and/or amenable to judicial review. It is a stakeholder-led strategy that is without statutory basis or legal effect. As detailed below, it was not adopted by the Respondents or any other public body. It does not and could not have any material effect on the rights of any person or body, including the Applicant. At its height, it is a non-binding policy document and therefore not justiciable and/or amenable to judicial review. The Court should, in the circumstances, decline to determine this matter."

**38.** However merely because something is to be characterised as policy does not render it immune from judicial scrutiny, as long as there is a justiciable standard. The issue then is whether there is such a standard, so the acts and omissions of the State need to be addressed by reference to whether SEA, AA and AIE directives and implementing legislation apply in the manner pleaded or not. If they apply then there is a justiciable standard, and if not there isn't (by reference to the matters pleaded at least). As the State appeared to accept, that isn't something one can address as a preliminary issue because it requires consideration of the substance of the grounds.

**39.** I will deal next with the argument that this is not a public law process at all.

#### **Preliminary issue – identity of decision-maker**

**40.** The State identified a related issue with the applicant's case in para. 5 of the statement of opposition:

"5. Further and/or in the alternative, the real target of the Applicant's challenge is the content of FV2030, and the relief of certiorari is in respect only of FV2030, in circumstances where FV2030 is a report comprising a strategy that was prepared by the Stakeholder Committee convened to develop Ireland's Agri-Food Strategy to 2030 ("the Stakeholder Committee"); it was not prepared by the Respondents.

The Stakeholder Committee, which was comprised of 32 members representative of the agri-food sector, has no legal personality and is not and could not constitute a respondent to these or any other proceedings."

**41.** This seems to make two points. Firstly there is a suggestion of an implication that FV2030 is not a public law decision amenable to *certiorari* at all, and secondly one infers that the applicant has identified the wrong respondents to the proceedings.

**42.** As regards the complaint that this is not a public law act at all, that is overblown. FV2030 was adopted by a committee set up by the Minister, a fact that brings its policy actions within the public law sphere so as to be potentially open to judicial review, but of course the committee in some acceptable form would have to be a respondent to such an action

**43.** As regards who the correct respondents should be, I think the State is correct here as far as the policy itself is concerned. FV2030 as a strategy is not an act of central government, but of the Committee. The members of the committee are not respondents, so *certiorari* (or any relief) in relation to the strategy does not arise.

**44.** However, in view of the amendment to the wording of relief 1, that problem doesn't in fact preclude the applicant from making its point, because it can challenge the decision of the Government to give broad policy support to that strategy. The logic is that if the applicant is right that the legal process might have gone astray in adopting the plan, then the Government decision was also infirm, and the applicant has at least named the correct respondents to challenge that decision.

#### **Preliminary issue - objection to the State's additional affidavit**

**45.** The applicant objected to the affidavit of Ms Jennifer McCann of the CSSO which exhibited certain documents relating to the Supreme Court appeal in the earlier *FOIE v. Government of Ireland* [2022] IESC 42 case.

**46.** The issue arose because the applicant's written legal submissions dated 31st August, 2023 contain the following:

"87. There is no suggestion that the State exceeded its statutory powers in determining that FV required SEA and AA. Instead they, now make the argument that it was applied on a voluntary basis and that non-compliance with the requirements of the Directive have no legal effect. The Applicant contends this comes within the principles identified by the Privy Council in *Attorney-General of Hong Kong v. NG Yuen Shiu* where Lord Fraser of Tullybelton held:

'When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.'

88. This argument was raised but not considered in *FIE v. Government of Ireland* [2022] IESC 42 –

"I do not propose to consider this point further for the purpose of this appeal, as it is well established that as the question of scope is one of European law, and must therefore be determined in a conforming manner and objectively, and not from the fact that Government did take an approach or may be considered to have represented that a particular approach was appropriate." However, in the current case, there is a formal AA screening determination which has never been challenged."

**47.** One point needs to be noted here immediately – the words "[t]his argument" with which para. 88 commences can only properly mean the argument set out in para. 87. Those words don't mean whatever new argument the applicant can think of subsequently, which was in effect the unstated premise of much of the applicant's attempt in oral argument to explain away this problem.

**48.** Ms McCann's affidavit contends that "this argument is incorrect, and is a mischaracterisation of what occurred before that Court, and of the decision of that Court. The relevant arguments were clearly before the Supreme Court and were rejected by that Court" (para. 3). She then exhibits the applicant's submissions, a communication from the court, and the transcript.

**49.** The applicant's objection to this affidavit is spurious. If the applicant has correctly represented the position, then the additional material will reinforce that. If in its written legal submission in the present proceedings it has misrepresented what happened in the Supreme Court then it is in the interests of the correct disposal of these proceedings in particular that this should be brought to light.

**50.** On that basis and particularly because it arises directly from the applicant's own submissions it seems to me that Ms McCann's affidavit should stand and the objection be dismissed.

**Preliminary issue – estoppel/ collateral attack**

**51.** The applicant argues that the Respondents are debarred from arguing that that FV2030 is not a "plan or project" within the meaning of the habitats directive, by reason of having carried out SEA and AA on FV2030, whether one chooses to characterise that as involving so-called "binding" screening assessments or otherwise (of course they aren't binding – that rhetorical term just begs the question).

**52.** There are multiple reasons why this argument is dead on arrival.

**53.** The first problem is that the Supreme Court has already rejected this argument.

**54.** As appears from the exhibits to Ms McCann's affidavit, the request for clarification issued by the Supreme Court to the parties included the following:

"(ii) Is the appellant arguing that the respondent is in some way estopped from now saying that the NPF is not subject to the requirements of an SEA assessment by reason of the fact that it carried out an AA assessment and prepared the Environmental Report etc and by reason of the recitals in the introduction to the document? If so, what is the legal basis of that argument? What arguments and authorities do the respondents say are engaged here?"

**55.** That indicates that the court had a lively interest in the question of whether the estoppel issue was well-founded.

**56.** In the *ex tempore* ruling of the Supreme Court set out on transcript, the court said that it was "not at all clear to the Court how or why the argument [about the validity of SEA] would be advanced" if the SEA screening determination were to be produced. The tenor of the exchanges with the court was to the effect that the official views as to the necessity or otherwise of assessment would not be determinative as to the actual legal situation.

**57.** All of that adds context to a reading of the Supreme Court's ultimate judgment.

**58.** At para. 35 of the court's judgment, Baker J. said:

"35. The first question to be resolved is whether, the NPF is a plan of the type governed by the SEA Directive. The respondents argue that Court of Appeal was correct that an SEA assessment is not required, albeit the respondents did carry out an environmental assessment before adopting the NPF on 29 May 2018. What is in issue is whether the NPF required SEA assessment, and that is not answered merely by reason of the fact that one was conducted. No assessment was carried out before the adoption of the NDP."

**59.** It was in this context that the court went on to say the following:

"64. The appellant argues that the State went through the process of preparing an Environmental Report, public consultation, farmers' boundary consultation, the publication of an SEA statement and of a statutory notice and that it therefore acted on the basis that an SEA assessment was required before the NPF was adopted. The appellant derived from that fact the proposition that the respondents had "promised" to follow a certain procedure and that therefore it should implement that promise: *Attorney General of Hong Kong v. NG Yuen Shiu* [1983] 2 AC 629 at p. 635 cited with approval by Keane J. in *Wiley v. Revenue Commissioners* [1994] 2 I.R. 160 at pp. 173–174. I do not propose to consider this point further for the purpose of this appeal, as it is well established that as the question of scope is one of European law, and must therefore be determined in a conforming manner and objectively, and not from the fact that Government did take an approach or may be considered to have represented that a particular approach was appropriate.

65. In conclusion, therefore, the general and vague language used in the Circular and in the preamble to the NPF itself does not assist in identifying the legal authority under which the plans were adopted. There can however be no doubt that Government expressed the view that the NPF was to replace the NSS, for which provision had been made in the earlier legislation of 2000, and that the replacement was itself effected by the legislation. This is, however, not the actual source of the authority to adopt the NPF and s. 2 was not a legislative basis for its adoption, and operates as an interpretation section only.

66. The fact that the Government believed it was adopting the plan by reason of a legislative power or obligation cannot determine its legislative basis, nor can the fact that an SEA assessment was carried out or that public consultation was subsequently conducted on this basis."

**60.** What is obvious from this, against the background we have seen, is that the applicant's argument based on *Attorney General of Hong Kong v. NG Yuen Shiu* [1983] 2 AC 629, [1983] 2 All ER 346, [1983] 2 WLR 735 was considered. But it is equally obvious that that argument was rejected because the objective EU law nature of the requirement for SEA or otherwise meant that this argument didn't get the applicant anywhere. In that context when the court said "I do not propose to consider this point further", what that meant was not that the point was being left undecided but that the point was being rejected *in limine* as irrelevant to such an EU law context, so it did not need to be discussed in further detail.

**61.** Even acknowledging that the applicant's submission did draw attention to a passage of the judgment that on its face undermined its claim, and even bearing in mind the applicant's explanations (which I have considered, but which misunderstand the Supreme Court judgment, especially when placed in the context of the material now exhibited and particularly the ruling rejecting any order regarding disclosure and expressing scepticism about the relevance of the screening determination), I agree with Ms McCann that in saying that its "argument was raised but not considered" by the Supreme Court, the applicant has advanced an argument that "is incorrect" and has engaged in "a mischaracterisation of what occurred before that Court, and of the decision of that Court". As Ms McCann correctly states, "[t]he relevant arguments were clearly before the Supreme Court and were rejected by that Court". The attempt to re-run this point now is procedurally inappropriate but not intentionally so. The mischaracterisation in the applicant's submissions is not down to an intent to mislead but in effect to the all-too-human problem of wishful thinking or believing one's own propaganda. But this isn't a case where there are two plausible alternative interpretations of what the Supreme Court did, such that reasonable people could disagree. The State's version is the only reasonable way to construe how the court approached matters.

**62.** Turning to the second fatal obstacle to the estoppel claim, the legal conditions for estoppel or similar doctrines of preclusion are nowhere near being met here. There was no representation that SEA or AA was legally required and the applicants did not rely on that process in some way that would make it unfair for the State to now claim that it was really voluntary. This sort of situation doesn't constitute a "promise" to apply a particular procedure, a concept that involves at least implicit interaction with a promisee. There is no factual evidence of the sort that would be even capable in principle of creating an enforceable legitimate expectation. Anyway, the State didn't fail to purportedly implement AA – the issue is one of how what it did do should be characterised legally.



**63.** Thirdly, not that it matters, this applicant can't make that point because core ground 5 makes the (confused and misconceived) argument that the policy is void because it was said by the State to be subjected to a voluntary AA. That is based on legal reliance on the State's claim and is logically inconsistent with a contention that the State is debarred from making such a claim.

**64.** There is a fourth issue. The applicant's point isn't a close call. But if it was, I would have some regard to the problem that the applicant's argument would be counter-productive environmentally, as it would create a chilling effect that would dissuade anybody from voluntarily conducting environmental assessments because that would preclude them from relying later on the voluntary nature of the exercise. That would tend to limit environmental assessments to cases where they were seen as strictly obligatory, an approach that would not serve goals of a high level of environmental protection. However we don't even get to that problem of perverse incentives because the applicant's complaint of estoppel and related doctrines is implausible to begin with.

**65.** Finally, the applicant's attempt to rephrase this issue as a collateral attack on the AA is illogical and misconceived. It is answered with devastating simplicity and elegance in the State's submissions at para. 38: "The Respondents do not argue that the AA screening decision was invalid, only that it was unnecessary".

#### **Substantive issues**

**66.** There are in essence three categories of substantive issues:

- (i) Whether AA applies – if so it is agreed that AA requirements were not complied with;
- (ii) Whether SEA applies and if so whether SEA requirements were complied with; and
- (iii) Whether the applicant's complaints about non-transposition of the AIE directive properly arise and if so whether those complaints are made out.

**67.** It makes sense to deal with the AA requirements first for the simple reason that the applicability or otherwise of SEA is partly dependent on the outcome of that analysis. In broad summary, SEA is required if certain criteria are satisfied and if either the plan is binding or if AA is required. Thus determining the applicability or otherwise of AA feeds into the SEA analysis.

#### **Core ground 4 - AA**

**68.** As noted above, the key issue in core ground 4 is not the adequacy of the actual AA but the question of whether it was required. This in effect depends on whether FV2030 is a "plan or project" within the meaning of the habitats directive.

**69.** Article 6(3) of the habitats directive refers to European sites and provides:

"3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

**70.** The State unconvincingly tries to distinguish a plan or project on the one hand from a policy on the other by combing through the possibly loose preambular language of the directive and extracting fine linguistic distinctions from varying wording in the draft directive and *travaux préparatoires*. That is meagre fare and is an inappropriately literal approach to a context where purposive interpretation is paramount. If a "policy" is capable of impacting on specific European sites then it is a "plan" for the purposes of the directive. The directive must be "interpreted broadly", as the CJEU said in the analogous SEA context in the judgment of 27 October 2016, *D'Oultremont and Others v. Région Wallonne*, Case C 290/15, ECLI:EU:C:2016:816:

"40 Consequently, given the objective of Directive 2001/42, which is to provide for a high level of protection of the environment, the provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly (see, to that effect, judgments of 22 March 2012, *Inter-Environnement Bruxelles and Others*, C-567/10, EU:C:2012:159, paragraph 37, and of 10 September 2015, *Dimos Kropias Attikis*, C-473/14, EU:C:2015:582, paragraph 50)."

**71.** The State also submits that "a policy document, or a document with no mandatory or binding effect, is not a 'plan or project' within the meaning of Article 6(3)" (written submissions para. 65). But while one can appreciate the postulated analogy with SEA, that particular broad proposition has not been made out, at least on the basis of the arguments presented in this case. It may have to be debated further or even referred in some future case in which it might make any difference – but it doesn't make any difference in this case.

**72.** A further red herring emerged in the form of the question as to whether the plan would trigger the requirement in s. 34(2)(a)(iv) of the Planning and Development Act 2000. The State's submission poses the issue thus:

"96. In the correspondence referenced, the Applicant asks: "Is Food Vision 2030 a policy that a planning authority must have regard to under section 34(2)(ia) and/or (iv) of the Planning and Development Act 2000". The response of the Minister was: "No, a planning Authority is not obliged to have direct regard to Food Vision 2030 under section 34(2)(ia) and/or (iv) of the Planning and Development Act 2000...".

97. This reflects the fact that FV 2030 is a stakeholder led strategy, not a strategy reflecting "the policy of the Government" to which s. 34(2)(iv) applies, and certainly not a Ministerial Guideline to which s. 34(2)(ia) applies."

**73.** Section 34(2)(a) provides as follows:

"(2) (a) When making its decision in relation to an application under this section, the planning authority shall be restricted to considering the proper planning and sustainable development of the area, regard being had to—

(i) the provisions of the development plan,

(ia) any guidelines issued by the Minister under section 28,

(ii) the provisions of any special amenity area order relating to the area,

(iii) any European site or other area prescribed for the purposes of section 10(2)(c),

(iv) where relevant, the policy of the Government, the Minister or any other Minister of the Government,

(v) the matters referred to in subsection (4), ...

(va) previous developments by the applicant which have not been satisfactorily completed,

(vb) previous convictions against the applicant for non-compliance with this Act, the Building Control Act 2007 or the Fire Services Act 1981, and

(vi) any other relevant provision or requirement of this Act, and any regulations made thereunder."

**74.** Sometimes people can simplistically take labels at face value, like the proverbial tin of Ronseal. His Honour Judge McAleese skewered this approach beautifully in his recently judgment in *Keane v. Central Statistics Office* [2023] IECC 7 at para. 21:

"The Courts regularly encounter situations where the description of something is at variance with the legal reality of the matter. Common examples: when something described as a licence transpires to carry all the attributes of a lease; when something described as a contract for services transpires to carry all the attributes of an employment contract; when a document headed "Contract" doesn't contain the ingredients necessary for a contract, and so forth. In such scenarios, the Court looks at the matter in the round and applies both common sense and the applicable law. It does not blithely accept what is said on the tin."

**75.** So the fact that the State for the purpose of the present proceedings is claiming that FV2030 is not Government policy doesn't mean that its contents are not policy for the purposes of s. 34. Perhaps technically it is the Government decision broadly endorsing FV2030 that constitutes policy for the purposes of s. 34 rather than FV2030 itself, but the two are close to functionally equivalent.

**76.** While I don't find the State's attempt to distance itself from the policy particularly plausible here, that conclusion doesn't make any difference in terms of the relief sought. The fact that the decision endorsing FV2030 seems to constitute policy for the purposes of s. 34 isn't in itself sufficient to trigger an obligation to carry out AA.

**77.** Leaving aside these various unpromising side-shunts, the real problem with the claim of breach of the habitats directive is that it is not capable of being operated if the plan or project is of such generality that it does not relate to any site capable of analysis in terms of the site's conservation objectives.

**78.** As put in the Commission notice, "Managing Natura 2000 sites The provisions of Article 6 of the Habitats' Directive 92/43/EEC", 21 November 2018, C(2018) 7621 Final at para. 4.4.2:

"Of obvious relevance under the Habitats Directive are land-use or spatial plans. Some plans have direct legal effects for the use of land, others only indirect effects. For instance, regional or geographically extensive spatial plans are often not applied directly but form the basis for more detailed plans or serve as a framework for development consents, which then have direct legal effects. Both types of land-use plan should be considered as covered by Article 6(3) to the extent that they are likely to have significant effects on a Natura 2000 site. The Court upheld this view (C-6/04 paragraph 52) stating that although land-use plans do not always authorise developments and planning permission must be obtained for development projects in the normal manner, they have great influence on development decisions. Therefore land-use plans must be subject to appropriate assessment of their implications for the site concerned (see also C-418/04). Sectoral plans should also be considered as covered by the scope of Article 6(3), again in so far as they are likely to have a significant effect on a Natura 2000 site. Examples might include transport network plans, energy plans, waste management plans, water management plans or forest management plans (see C-441/17, 122-124). However, a distinction needs to be made with 'plans' which

are in the nature of policy statements, i.e. policy documents which show the general political will or intention of a ministry or lower authority. An example might be a general plan for sustainable development across a Member State's territory or region. It does not seem appropriate to treat these as 'plans' for the purpose of Article 6(3), particularly if any initiatives deriving from such policy statements must pass through the intermediary of a land-use or sectoral plan (C 179/06, paragraph 41). However, where the link between the content of such an initiative and likely significant effects on a Natura 2000 site is clear and direct, Article 6(3) should be applied. Where one or more specific projects are included in a plan in a general way but not in terms of project details, the assessment made at plan level does not exempt the specific projects from the assessment requirements of Article 6(3) at a later stage, when much more details about them are known." [footnotes omitted]

**79.** This is also reflected in the analogous EIA context as held by the CJEU in the judgment of 28 July 2019, *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v. Conseil des ministres*, C-411/17, ECLI:EU:C:2019:622:

"85 Furthermore, where national law provides that the consent procedure is to be carried out in several stages, the environmental impact assessment in respect of a project must, in principle, be carried out as soon as it is possible to identify and assess all potential effects of the project on the environment (judgments of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 52, and of 28 February 2008, *Abraham and Others*, C-2/07, EU:C:2008:133, paragraph 26).

86 Where one of those stages is a principal decision and another an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of the latter procedure (judgments of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 52, and of 28 February 2008, *Abraham and Others*, C-2/07, EU:C:2008:133, paragraph 26)."

**80.** The court then went on to apply this principle to the habitats directive context:

"140 The second sentence of Article 6(3) of the Habitats Directive specifies that following an appropriate assessment, the competent national authorities are to 'agree' to the project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

141 It follows that the assessment must be conducted before agreement is given.

142 Furthermore, while the Habitats Directive does not define the conditions governing how the authorities 'agree' to a given project under Article 6(3) of that directive, the definition of 'development consent' in Article 1(2)(c) of the EIA Directive is relevant in defining that term.

143 Accordingly, by analogy with the Court's findings on the EIA Directive, if national law provides for a number of steps in the consent procedure, the assessment under Article 6(3) of the Habitats Directive, should, in principle, be carried out as soon as the effects which the project in question is likely to have on a protected site are sufficiently identifiable.

144 Consequently, for reasons similar to those set out in paragraphs 87 to 91 of the present judgment, national legislation such as the Law of 28 June 2015 has the characteristics of an agreement given by the authorities in respect of the project concerned, for the purposes of Article 6(3) of the Habitats Directive, and the fact that subsequent acts must be adopted in order to proceed with that project, specifically a new specific consent for production of electricity for industrial purposes at one of the two power stations in question, does not justify the failure to conduct an appropriate assessment of those effects before the adoption of that legislation. Moreover, as regards the work that is inextricably linked to the measures at issue in the main proceedings, if its nature and potential effects on the protected sites are sufficiently identifiable, a finding which it is for the national court to make, an assessment must be conducted of that work at that stage of the consent procedure.

145 In the light of the foregoing, the answer to Question 8(a) to (c) is that Article 6(3) of the Habitats Directive must be interpreted as meaning that measures such as those at issue in the main proceedings, together with the work of upgrading and of ensuring compliance with current safety standards, constitute a project in respect of which an appropriate assessment of its effects on the protected sites concerned should be conducted. Such an assessment should be conducted in respect of those measures before they are adopted by the legislature. The fact that the implementation of those measures involves subsequent acts, such as the issue, for one of the power stations in question, of a new specific consent for the production of electricity for industrial purposes, is not decisive in that respect. Work that is inextricably linked to those measures must also be subject to such an assessment

before the adoption of those measures if its nature and potential impact on the protected sites are sufficiently identifiable at that stage, a finding which it is for the referring court to make.”

**81.** The message of that decision is that impacts that are not identifiable don’t need to be assessed until the stage when they are identifiable.

**82.** In the judgment of 12 June 2019 *Terre wallonne ASBL v. Région wallonne*, C-321-18, ECLI:EU:C:2019:484, the CJEU said:

“30. In the present case, it is clear from the order for reference that the Decree of 1 December 2016 is directly connected to the management of all sites in the Walloon region. It therefore does not concern a particular site, for the purposes of Article 6(3) of the Habitats Directive and, accordingly, nor does it require an environmental assessment pursuant to Article 3(2)(b) of the SEA Directive.

31. That being said, the fact that a measure, such as that at issue in the main proceedings, need not be preceded by an environmental assessment on the basis of the combined provisions of Article 6(3) of the Habitats Directive and Article 3(2)(b) of the SEA Directive does not mean that it is exempt from any obligation in that regard, since it is not excluded that such a measure could enact rules which lead to it being placed on the same footing as a plan or programme for the purposes of the latter directive, in respect of which an environmental impact assessment may be mandatory.”

**83.** This is reinforced by the transposing legislation, the European Communities (Birds and Natural Habitats) Regulations 2011. Regulation 2 defines plan as follows:

“‘plan’, subject to the exclusion, except where the contrary intention appears, of any plan that is a land use plan within the meaning of the Planning Acts 2000 to 2011, includes— (a) any plan, programme or scheme, statutory or non-statutory, that establishes public policy in relation to land use and infrastructural development in one or more specified locations or regions, including any development of land or on land, the extraction or exploitation of mineral resources or of renewable energy resources and the carrying out of land use activities, that is to be considered for adoption or authorisation or approval or for the grant of a licence, consent, permission, permit, derogation or other authorisation by a public authority, or (b) a proposal to amend or extend a plan or scheme referred to in subparagraph (a);”

**84.** The key point is “in one or more specified locations or regions”. The applicant doesn’t plead this provision of domestic law. Nor does it plead any impact on specified locations or regions here.

**85.** Nor does the applicant plead any inadequate transposition of the habitats directive by the 2011 regulations. So it can’t argue that the 2011 regulations don’t faithfully reflect the EU law obligation. The fact that in certain defined circumstances the habitats directive may be directly effective (see the judgment of 7 September 2004, *Landelijke Vereniging tot Behoud van de Waddenzee*, C-127/02, ECLI:EU:C:2004:482, (CJEU (Grand Chamber)) paras. 65-70) doesn’t assist the applicant. Apart from not having pleaded any inadequacy in the 2011 regulations that can be cured by direct effect, and not having pleaded that the habitats directive has direct effect in this respect, the discussion of direct effect by the court in *Waddenzee* is premised on there being a specific European site in question. That doesn’t arise here.

**86.** The basic problem for the applicant is that in the absence of any specifically identifiable site being capable of being addressed by reference to FV2030 (and none is pleaded), the AA process is just not practicable or even possible. The impacts on European sites, if any, are not “sufficiently identifiable at [this] stage, a finding which it is for the [national] court to make.” The applicant hasn’t come forward with anything plausible to show how any possible doubt could arise as to the fundamental obstacle. Nor by definition is there anything to refer – what is involved is the application by the national court of EU law which is *acte éclairé* to particular facts.

**87.** The AA complaint is just totally misconceived. Judged by reference to the pleadings, FV2030 is just too general and contains nothing relevant to any identifiable site that would allow an AA to be carried out by reference to the site’s conservation objectives. That is the only available conclusion from the pleadings. Were one to turn to the strategy itself, who knows whether one could comb through it and find something site-specific – that just isn’t the job of the court in an adversarial system. The applicant has to put in the hard yards and think the case through before the statement of grounds is signed. In circumstances such as this, that would involve pleading how the strategy relates to identifiable European sites capable of being assessed in terms of their conservation objectives. The applicant hasn’t done this – and hasn’t even attempted it.

**88.** That seems to me to be the distinction between this case and *FOIE v. Government of Ireland*, Case C-727/22, on reference from the Supreme Court, which challenges the National Development Plan 2021-2030 (Project Ireland 2040). While that plan isn’t binding either, it is site-specific in certain respects which could be enough to trigger AA obligations which in turn would trigger SEA obligations. In the present case neither criterion has been demonstrated to be satisfied. Indeed the

criteria weren't even engaged with by the applicant in the pleadings in any meaningful way. Much like the litigant who is strong on quantum but light on liability, the applicant focused on the content of the demanded assessments, skirting over the question of whether there was a need for assessment in the first place.

#### **Core ground 5 – mischaracterisation of assessments as voluntary**

**89.** Core ground 5 in its own terms complains that the SEA and AA are "invalid as the Respondents erred in law in characterising the assessments [as] voluntary and/or devoid of legal consequence". That is nonsense obviously – that which is valid does not become invalid merely because the person doing it is under the hypothetically erroneous impression that they are acting voluntarily rather than under compulsion.

**90.** Confoundingly, the pleaded sub-grounds don't actually make this point but make a different point which ultimately comes down to the proposition that SEA/AA standards apply. That is equally unfounded and is dealt with elsewhere in this judgment.

#### **Core ground 1 – failure to conduct lawful SEA**

**91.** With AA addressed, we can now turn to the SEA complaints. The centre of gravity of core ground 1 is that the impugned policy was required to be, and was not, lawfully subjected to SEA. Everything else related to SEA flows from that.

**92.** The first point to note is that on closer analysis, and contrary to what might have appeared superficially to be the case when modularisation was first mooted, the jurisdictional question of whether SEA applies does not in fact depend on the answer to the first question referred by the Supreme Court, which is premised on a situation where "the plan or programme so adopted sets a framework for downstream grant or refusal of development consent and thus satisfies the test from Article 3(2) of the Directive". That doesn't apply here.

**93.** The test for SEA is set out in art. 3(2) of the SEA directive:

"2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,

(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC."

**94.** Insofar as para. (b) is concerned, success for the applicant under that heading is dependent on success under the AA heading, which doesn't arise as set out above.

**95.** Insofar as para. (a) is concerned, the critical point is the judgment of 9 March 2023, *NJ v. An Bord Pleanála*, C-9/22, ECLI:EU:C:2023:176, (CJEU), where the court held in the first curial paragraph that:

"Article 2(a) and Article 3(2) and (3) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, must be interpreted as meaning that a plan comes within the scope of that directive where (i) it has been prepared by an authority at local level in collaboration with a developer of the project concerned by that plan and has been adopted by that authority, (ii) it has been adopted on the basis of a provision in another plan or programme and (iii) it envisages developments distinct from those envisaged in another plan or programme, provided, however, that it is at least binding on the authorities with competence to grant development consent."

**96.** The present plan does not satisfy that final rider. It is not binding and thus (in view of the failure of the AA argument) doesn't require SEA. There is nothing to refer because this is *acte éclairé* having been decided by the CJEU very recently.

**97.** In the light of the fact that the SEA complaint doesn't get out of the starting gate, I don't need to consider the State's objection that the applicant didn't make its complaint during the process (statement of opposition, paras 2 and 3).

#### **Core ground 2 – monitoring**

**98.** Core ground 2 complains about a failure to comply with SEA monitoring requirements and fails for similar reasons. If SEA did apply then one would have to pause this point pending developments in the Supreme Court, but the applicant doesn't even get to that stage.

#### **Core ground 3 – SEA regarding termination of previous plan**

**99.** Again, core ground 3 is logically dependent on the misconceived assertion of an obligation to comply with SEA. This also fails to get out of the starting gate. The previous plan wasn't binding either so termination of it doesn't raise SEA issues, and the applicant certainly hasn't demonstrated that the previous plan was so site-specific that SEA was legally required because AA was legally required.

**100.** Even if SEA did apply, the assessment here did benchmark the plan against the *status quo*, which was the previous plan. That seems sufficient consideration and there is no logical reason why a separate document or exercise would be required for that part of a plan that involves the termination of a previous plan.

**Core ground 6 – AIE transposition – preliminary issues**

**101.** Before we get to the substance of core ground 6, there are a number of further preliminary issues within this ground that need to be addressed.

**What is the scope of core ground 6?**

**102.** The context of core ground 6 is a claim that the State has failed to transpose a provision of EU law. That is a serious complaint which needs to be pleaded with a great deal of specificity. Furthermore it is not an issue that the court should blunder into merely because someone raises it – the point should properly arise within the factual matrix of any given case.

**103.** In *Sweetman v. An Bord Pleanála* [2020] IEHC 39, [2020] 1 JIC 3104 (“Sweetman XV”), McDonald J. said as follows at para 103:

“103. In my view, the case against the State respondents was never properly pleaded in Part E of the statement of grounds. As Costello J. observed in *Alen-Buckley* [[2017] IEHC 311, [2017] 5 JIC 1211] at para. 43 (quoted above), an applicant for judicial review is required to advance the case he or she wishes to make in full in the statement of grounds. It is not sufficient to plead a case of alleged failure to transpose an EU Directive without properly setting out full particulars of the basis on which it is contended that a specific provision of Irish law fails to comply with a specific obligation imposed by the Directive concerned. An allegation of a failure to transpose an obligation of EU law is a serious and significant allegation and accordingly it is particularly important, in such a case, that the requirements of O. 84 r. 20 (3) should be observed. It is unacceptable that an applicant should make an allegation of failure to transpose purely on the basis that the applicant apprehends that the relevant competent authority (in this case the Board) may be in a position to demonstrate, in an area of activity ultimately governed by European law that it has acted fully in compliance with its obligations under the relevant Irish law implementing the EU law measure in question. That is precisely the form of procedure which was condemned by Costello J. in *Alen-Buckley*.”

**104.** Barniville J. said as follows in *Rushe v. An Bord Pleanála* [2020] IEHC 122, [2020] 3 JIC 0502:

“111. McDonald J. also had cause to consider the requirements of O. 84, r. 20(3) and the principles in AP in *Sweetman/IGP Solar* [[2020] IEHC 39, [2020] 1 JIC 3104]. He concluded that in that case the applicant had failed properly to plead his case against the State respondents in relation to the alleged failure by the State to properly transpose the EIA Directive. McDonald J. held that the case against the State respondents had not been properly pleaded in the statement of grounds. In particular, he held that it was not sufficient to plead a case of alleged failure to transpose an EU Directive without properly setting out full particulars of the basis on which it was being contended that a particular provision of Irish law failed to comply with a specific obligation imposed by the EU Directive concerned. He stressed that it was particularly important, in the case of an allegation of a failure properly to transpire an obligation under EU law, that the requirements of O. 84, r. 20(3) be observed. McDonald J. dismissed the applicant's claim against the State respondents on the ground that the statement of grounds failed properly to plead a case against those respondents as required by Order 84, rule 20(3).

112. The obligation upon an applicant (and indeed also upon a respondent who wishes to oppose an application for judicial review) to plead its case with particularity, as described in the authorities just referred to, applies with even greater force in the case of a planning judicial review having regard to the requirements of s. 50A(5) of the 2000 Act. That subsection provides that if a court grants leave to apply for judicial review in respect of a planning decision, “no grounds shall be relied upon in the application for judicial review” under O. 84 RSC “other than those determined by the court to be substantial” under s. 50A(3)(a), on the application for leave. An applicant is, therefore, under an even greater obligation than in ordinary judicial review cases, by reason of this additional statutory provision, to ensure that any ground relied upon by it at the hearing is one which the court granting leave to apply for judicial review has determined to be substantial. That does not necessarily preclude an applicant from seeking to amend its statement of grounds, either before or at the hearing, subject, of course, to the time limits and provision for an extension of time provided for in ss. 50(7) and 50(8) of the 2000 Act, and the attitude of the opposing party or parties and the court.

113. In my view, these pleading obligations imposed upon an applicant in planning judicial review proceedings are particularly important where those cases involve issues of very

considerable complexity and give rise to issues under EU Directives, such as the Habitats Directive and the EIA Directive. It is especially important in those types of cases, involving such complex issues, that the applicant's case is clearly and precisely pleaded in order that the parties opposing the application (whether they be the respondents or the notice parties or both) are clearly aware prior to the hearing of the application for judicial review of what precisely the case is. Such precision is also required, as Murray C.J. pointed out in *A.P. v. D.P.P.* [2011] IESC 2, [2011] 2 I.L.R.M. 100, 1 I.R. 729, [2011] 1 JIC 2501, to ensure that there is no doubt, ambiguity or confusion as to what the applicant's case is before the High Court, in the context of any appeal from the judgment of that Court to the Court of Appeal or the Supreme Court. It is not appropriate that a case brought on a particular basis, in which reliefs are sought on stated grounds is, when the case comes on for hearing, transformed into one in which different or additional grounds are sought to be advanced in support of the reliefs sought or new and additional reliefs are sought. Such a course would be unfair on the parties opposing the application for judicial review and on the court."

**105.** The sum total of the applicant's written submissions in relation to core ground 6 is as follows: "Core Ground 6.

142. The State should have published all materials relevant to the adoption of FV including the Memorandum for the Government of July 2021 - Article 7(1) of the AIE Directive and/or Regulation 5 of the European Communities (Access to Information on the Environment) Regulations 2007-2018 (the 'AIE Regulations').

143. On 8 September 2021, the Applicant learned that a decision had been taken on 21 July 2021 in relation to FV following a response to a request under the AIE Regulations. As identified in the correspondence, the State refused to grant access to the associated information on which it was based.

144. EU law makes express provision in Article 7(1) AIE Directive for the active dissemination of environmental information by public authorities, including authorisations with a significant impact on the environment (Article 7(2)(f)). One of the objectives of this Directive is to give effect to the Aarhus Convention, which requires that there be compatibility between the information, public participation and access to justice provisions (Article 3, Paragraph 1). Bearing this in mind, Article 7(1) of the AIE Directive therefore required the State to ensure that all relevant decisions and supporting information was published as soon as possible following the final adoption of FV and certainly when there was sufficient time for the Applicant to consult this information and decide whether to access a judicial remedy.

145. Regulation 5 AIE Regulations does not adequately transpose Article 7 AIE Directive. Article 7(1) AIE Directive requires *inter alia* Member States to ensure that public authorities "organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its active and systematic dissemination to the public in particular by means of computer telecommunication and/or electronic technology, where available."

146. On the other hand, Regulation 5 of the AIE Regulations provides only that a public authority "shall make all reasonable efforts to maintain environmental information held by or for it in a manner that is readily reproducible and accessible by information technology or by other electronic means".

147. Furthermore, Article 7(2) AIE Directive identifies seven categories of information which must be made available and disseminated. This includes category 7(2)(f) - authorisations with a significant impact on the environment. Regulation 5(2) AIE Regulations provides only four mandatory categories and does not include a category equivalent to Article 7(2)(f) AIE Directive.

148. Proper transposition would have resulted in publication of the information relevant to the Government decision."

**106.** While not part of the pleaded case as such, these points do indicate what the applicant thought it was doing when raising core ground 6. The wording is confused and is a jumble of factual and legal assertions, contextual comments and propositions that could conceivably be grounds for relief, although what relief exactly isn't always totally obvious. The pleadings and submissions also confuse two completely separate exercises, the correct transposition of the directive and the correct implementation of the directive as so transposed.

**107.** That can be a fine line in the sense that on the one hand, a member state is not obliged to transpose a directive word for word, so it follows that not everything in the directive has to be express within the transposing legislation. More generally, the State isn't required to transpose everything in the same piece of legislation. A combination of provisions in different Acts and regulations may amount to valid transposition. On the other hand, the member state has to ensure in practice the implementation of the directive: see judgment of 9 April 1987, *Commission v. Italy*,

C-363/85, ECLI:EU:C:1987:196, para. 7 and judgment of 5 March 2009, *R. (Age Concern England) v. Secretary of State for Business*, Case C-388/07, ECLI:EU:C:2009:128, (CJEU), paras. 41-42.

**108.** So if something is left out, the question may arise as to whether transposition is sufficient. That question is not automatically answered against an applicant merely because a conforming interpretation is possible, as the State appeared to suggest in written submissions. The problem with that is two-fold. Firstly it collapses the distinction between invalidity and non-transposition. And secondly it ignores the need for transposition to ensure the achievement of the aims of the directive in practice.

**109.** Firstly, if domestic law can't be interpreted in a conforming manner then it is in direct conflict with EU law and may be invalid on that basis (or should be set aside or disregarded, which amount to the same thing, and any of which warrant a declaration of invalidity). But just because domestic law is valid doesn't mean it properly transposes a directive. The State's postulate that a conforming interpretation saves them from any transposition claim would collapse this distinction and basically eliminate any review for adequacy of transposition, leaving only declarations of invalidity. That would be an erroneous approach.

**110.** Secondly and relatedly, EU law has to be transposed in a way that will achieve its aims in practice. This isn't just a matter of having a legal framework that is so general that in theory EU law will apply. Transposition has to be effective, and law requires a certain minimum level of specificity in order to ensure that it is actually effective. That isn't at all to minimise the distinction between proper transposition and proper implementation of the transposing legislation, but it is to emphasise that the form of the transposing legislation must be such as to ensure likely adherence to EU law in practice.

**111.** An example of general wording being held to be insufficiently specific to amount to proper transposition is the judgment of 13 December 2007, *Commission v. Ireland*, Case C-418/04, ECLI:EU:C:2007:780, which was a decision where the CJEU held that there had been a failure to transpose and give effect to art. 4(4) of the birds directive. The court said at para. 187:

"Lastly, with regard to the Wildlife Act, it is clear that the only provision of that act relevant in this context and referred to by Ireland during the proceedings is section 11(1). However, that provision is not *sufficiently specific* to be regarded as guaranteeing the transposition of the second sentence of Article 4(4) of the Birds Directive." [emphasis added]

**112.** Thus one has a gradient of transposition from the safest, most granular form which sticks closely to the text, up to a more hazardous general wording. As the State ascends that gradient there comes a point in a given situation where the results of the directive are jeopardised. Identifying that point is perhaps more art than science. But on the part of any given applicant, the exercise requires a very precise particularisation and analysis, which is lacking here.

**113.** One odd feature (among others) of the applicant's pleadings here is that even though the possibility of a conforming interpretation doesn't in itself mean that transposition is adequate, the applicant's pleaded relief in that regard hobbles itself at the outset because, as drafted, it only arises "to the extent that [reg. 5] is not capable of bearing a conforming construction". Given that some form of conforming interpretation might be possible, one could dismiss that relief on that basis alone.

**114.** That said, insofar as one can untangle it, there appear to be three questions raised by the applicant:

- (i) Paragraphs 142 to 144 make the complaint that the failure to publish supporting documentation was a breach of the directive, specifically because the plan was an authorisation (para. 144).
- (ii) Paragraphs 145 and 146 claim an (unspecified) mis-match between reg. 5(1) and art. 7(1).
- (iii) Paragraph 147 in the context of para. 148 complains that the supporting documentation sought comes within the concept of "authorisations" under art. 7(2)(f) and the absence of transposition of this paragraph meant that this supporting documentation was not published.

#### **Does this issue properly arise?**

**115.** At para. 145 of its written submissions, the State intervenes commandingly to say that "the Court should decline to determine the transposition issue raised based on the principle of judicial self-restraint. The transposition of Article 7 of the AIE Directive does not properly arise in these proceedings, and therefore should not be determined by the Court."

**116.** I am all for the principle of judicial self-restraint, but we need to be clear on what this means. One has to turn to public domain material for a definition. The term does not seem to be included in Murdoch and Hunt's *Law Dictionary*, 6<sup>th</sup> ed. or the *Oxford Dictionary of Law*, 5<sup>th</sup> ed. The State isn't referring here to what is sometimes called "substantive" restraint, that is deferring to decisions of other branches of government. Rather it is appealing to "procedural" restraint, which is helpfully defined by the *Encyclopaedia Britannica* (<https://www.britannica.com/topic/judicial-restraint>) as follows:



“As a procedural doctrine, the principle of restraint urges judges to refrain from deciding legal issues, and especially constitutional ones, unless the decision is necessary to the resolution of a concrete dispute between adverse parties.”

**117.** In other words, a court only decides points that are not academic, and that are properly pleaded and actually in dispute between the parties, and even then only when it is necessary and appropriate to do so. For example, if a case can be resolved on an administrative law point, the court doesn't need to go on to ponder issues of constitutionality, even if pleaded and disputed. This is a fairly solid principle and exceptions should be relatively infrequent.

**118.** The question then is whether the principle precludes determination of the art. 7 claim here, or in other words, as put by the State, whether the point “properly arise[s]”.

**119.** I think that construing the pleadings in a manner consistent with the applicant's written legal submissions as above, yielding three questions for the court, is a fair and reasonable interpretation, and that on such an interpretation, the three questions identified do properly arise, but only by reference to the actual facts of this case and the particular infirmity identified on the pleadings, namely the allegation that material about the plan should have been published because it was an authorisation covered by art. 7(2)(f) of the AIE directive. However getting over that hurdle doesn't get the applicant very far, because the immediately next hurdle is whether para (f) applies at all, which I deal with below.

#### **Does this issue go to the validity of FV2030?**

**120.** Contrary to what is set out in the State's written submissions (para. 2), the applicant does not plead that the plan is invalid by reference to the AIE directive. Even if the applicant were to belatedly attempt to make such an unpleaded complaint, it would separately fail on its merits. AIE relates to after-the-event publication of plans and other documents and by definition cannot affect the validity of the adoption of the plan in the first place. In any event the applicant confirmed that this was not being pursued.

**121.** The State thus is correct at a later stage in submissions where it says that:

“151. Finally, even if there had been a failure to transpose Article 7(2)(f) and/or a failure to disseminate contrary to that Article, that would not invalidate FV2030. The Applicant has not pleaded that Article 7(2)(f) has direct effect ...”

#### **Core ground 6 – substance**

**122.** Article 7(1) to (3) of the AIE directive 2003/4/EC provide as follows:

“Dissemination of environmental information

1. Member States shall take the necessary measures to ensure that public authorities organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology, where available.

The information made available by means of computer telecommunication and/or electronic technology need not include information collected before the entry into force of this Directive unless it is already available in electronic form.

Member States shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunication networks.

2. The information to be made available and disseminated shall be updated as appropriate and shall include at least:

(a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;

(b) policies, plans and programmes relating to the environment;

(c) progress reports on the implementation of the items referred to in (a) and (b) when prepared or held in electronic form by public authorities;

(d) the reports on the state of the environment referred to in paragraph 3;

(e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;

(f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found in the framework of Article 3;

(g) environmental impact studies and risk assessments concerning the environmental elements referred to in Article 2(1)(a) or a reference to the place where the information can be requested or found in the framework of Article 3.

3. Without prejudice to any specific reporting obligations laid down by Community legislation, Member States shall take the necessary measures to ensure that national, and, where appropriate, regional or local reports on the state of the environment are published

at regular intervals not exceeding four years; such reports shall include information on the quality of, and pressures on, the environment."

**123.** This is transposed by the European Communities (Access to Information on the Environment) Regulations 2007 (S.I. No. 133 of 2007) as amended by S.I. No. 662 of 2011, S.I. No. 615 of 2014 and S.I. No. 309 of 2018.

**124.** Regulation 5 of the 2007 regulations as amended (see [https://www.ocei.ie/legislation-and-resources/legislation/EC-\(AIE\)-Regulations-2007-2014-\(Current-Version\)-Unofficial-Consolidated-DECLG-Version.pdf](https://www.ocei.ie/legislation-and-resources/legislation/EC-(AIE)-Regulations-2007-2014-(Current-Version)-Unofficial-Consolidated-DECLG-Version.pdf)) provides:

"5 (1) A public authority shall- (a) inform the public of their rights under these Regulations and provide information and guidance on the exercise of those rights, (b) make all reasonable efforts to maintain environmental information held by or for it in a manner that is readily reproducible and accessible by information technology or by other electronic means, (c) ensure that environmental information compiled by or for it, is up-to-date, accurate and comparable, (d) maintain registers or lists of the environmental information held by the authority and designate an information officer for such purposes or provide an information point to give clear indications of where such information can be found.

(2) The environmental information specified in sub-article 5(1)(b) shall include at least:

(a) the texts of international treaties, conventions or agreements and legislation pertaining to them,

(b) policies, plans and programmes,

(c) progress reports on the implementation of items specified in sub-articles (a) and (b), where these have been prepared by the public authority or are available in electronic form, and

(d) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment, where such information is directly relevant to the function of that public authority and is environmental information within the meaning of Article 3."

**125.** We will now turn to the three questions raised by the applicant.

**Sub-issue 1 - Alleged failure to publish details of an authorisation/ non-implementation of reg. 5(1)/ art. 7(1)**

**126.** In summary the pleaded complaint seems to be that the State failed to publish the following:

(i) the Government decision;

(ii) the Memorandum for Government; and

(iii) all (other) (supporting) materials (unspecified).

**127.** It is implicit in the way that this challenge was pleaded and argued that what generates the obligation to publish the supporting material is the theory that FV2030 is an authorisation, and that the alleged lack of transposition of requirements to publish authorisations has inhibited publication of this supporting material.

**128.** That is a complete canard. Insofar as the applicant's pleading emphasises the reference in the AIE directive to publication of "authorisations" relating to the environment by reference to the implication that FV2030 is such an authorisation, that plea is confused and misconceived. The plan is not an authorisation, and indeed isn't binding at all, which is a pre-requisite for the whole concept of an authorisation.

**129.** That's before we even get to the State's objection (written submissions para. 144) that:

"as detailed in the Second Amended Statement of Opposition, publication of the Government Decision and the Memorandum for Government were not required where: (i) they are not environmental information, and (ii) subject to the balancing test under Article 4, they are exempt from release."

**130.** The applicant hasn't seen fit to engage with art. 4 at all on the pleadings, the assumption apparently being that if something is environmental information, then publication is automatic. That assumption is incorrect.

**131.** Article 4(2)(a) of the directive provides that

"2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:

(a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law"

**132.** That seems tailor-made to cover documents such as internal cabinet memoranda, albeit not necessarily non-confidential decisions, depending on whether and to what extent the decision was publicised. The applicant hasn't engaged with that and certainly hasn't shown as a matter of fact that the documents sought were not exempt from disclosure. Whether these particular documents should be exempt under that provision will be definitively determined in due course by the Commissioner following developments in the CJEU. That brings us to a separate point.

**133.** There is an even more serious obstacle to the applicant succeeding under this heading. The applicant's assumption is not only misconceived but (as with the argument we have already seen

that was previously rejected by the Supreme Court and improperly sought to be revived here) the point has already been decided against the applicant. The whole premise of the non-transposition argument is that if there had been proper transposition then the requested background documents would have been disclosed. That argument doesn't arise if the documents would in any event be non-disclosable under the regulations. But (as with the issue decided by the Supreme Court – history repeating itself yet again) that issue has already been determined in favour of the State. The applicant made a formal application for access to those documents under AIE regulations, which was refused. That is currently under appeal to the Information Commissioner for Environmental Information (paused due to the reference to the CJEU in the judgement of 8 February 2022, *Right to Know v. An Taoiseach*, C-84/22). The AIE refusal is a *prima facie* valid public law decision which is subject to appeal. To contend in the present proceedings that that decision was incorrect is to embark on an impermissible collateral challenge to that decision, a decision which for good measure is currently under active appeal at the suit of this very applicant. Contrary to this contrived procedure, the statutory process of AIE appeal should determine that issue. That is how matters have been provided for legislatively. The court should not usurp that process, collaterally invalidate a decision under the AIE regulations, and cut across the current appeal under those regulations, merely because the applicants have inserted exotic grounds in that regard in the present proceedings.

**Sub-issue 2 - Alleged conflict between reg. 5(1) and art. 7(1)**

**134.** The focus of oral submissions was on the lack of "active and systematic" dissemination of environmental information in Irish law as required by art. 7. That does not seem to be included in reg. 5, but one has to ask whether this complaint properly arises here. That specific point isn't actually expressly identified in the grounds, although one can infer it from the relief sought. Rather the two wordings are set out in the grounds with no identification as to what exactly is the problematic difference. Even if that had been properly pleaded, the whole argument seems to be premised on the failure to actively and systematically disseminate authorisations. But this isn't an authorisation. No other specific provision of art. 7(2) was cited apart from para. (f). Judicial restraint applies and I don't think it is appropriate to engage in some more roving type of inquiry into transposition beyond the particulars actually alleged and properly arising on the facts. That does not rule out some future case that was properly pleaded and related to something that actually was an authorisation, or related to documents other than authorisations, provided that the case was properly set up and the complaint properly particularised.

**Sub-issue 3 – Alleged lack of transposition of art. 7(2)(f) / conflict between reg. 5(2) and art. 7(2)**

**135.** The applicant's complaint as to how reg. 5(2) falls short of proper transposition is inadequate and unparticularised. The only definite thing one can say is that the complaint is made that there is a lack of obligation in the 2007 regulations to transpose the requirement to publish authorisations, which would have had the effect of requiring the supporting documentation for this plan to be published. Article 7(2)(f) is the only specific provision cited. But that doesn't get the applicant anywhere here because FV2030 is not an authorisation. Judicial restraint applies here and I don't think I can or should engage in some kind of line-by-line comparison of the directive and the regulations unharnessed from any particular factual context or from any detailed and particularised pleaded case. If the applicant wants to impugn the adequacy of transposition more broadly in some future case it will have to identify very precisely particular legal contexts where any shortcomings have an impact, endeavour to relate those to particular factual situations of relevance, and plead those shortcomings with clarity and specificity. Or to put it another way, in an adversarial context, going through things line-by-line is on the applicant, not on the court. Again the applicant has to do the heavy lifting in the first instance when drafting the pleadings. That didn't happen here.

**136.** If it were to happen in some future case, one might dare suggest, having had to compare the provisions for the purposes of this case, that such an exercise might not be inherently implausible in itself, given that there are some arguable mis-matches between art. 7 and reg. 5 that would warrant further debate and discussion. So while the State dodges a potential bullet due to the applicant's very vague and inadequate pleadings, they shouldn't take entirely unqualified comfort from the outcome here.

**137.** Even if I am wrong on the foregoing however there is a further pleading problem which is that the declaration sought only complains of non-transposition of art. 7(1) of the directive, not art. 7(2) (relief 10). So the complaint about art. 7(2) never gets off the ground because no relevant relief is claimed. Admittedly where justice so requires the court can grant an unpleaded relief provided there is a pleaded ground, but one should be somewhat slower to do this where complex questions of transposition of EU law arise, consistently with the comments of Barniville J. in *Rushe v. An Bord Pleanála* [2020] IEHC 122.

**138.** That reinforces the problem that the applicant hasn't engaged in the pleadings with how exactly the transposition is defective insofar as it relates to these particular facts. But the applicant's

problem is wider than that. Arguments about non-transposition are serious and solemn issues that need to be expressly claimed, not only fully identified mid-hearing. The fact that art. 7(2) refers back to art. 7(1) doesn't suffice here to haul the applicant out of the hole created by its own defective pleadings. An applicant has to be clear on what exactly it is challenging when it launches a non-transposition claim.

**139.** I return to and agree with the point made by Barniville J. in *Rushe*. That said, there may be individual cases where a generally-worded plea is nonetheless acceptably clear to opposing parties and the court as to the point being made, but this certainly isn't one of them. The only specific complaint of non-transposition is in relation to art. 7(2)(f), which doesn't apply. This isn't an authorisation. Furthermore no relief is sought corresponding to any grounds complaining of non-transposition of art. 7(2)(f). The applicant hasn't engaged at all with the wider statute book but has assumed that if something isn't in the 2007 regulations, there isn't proper transposition. That is not a correct legal approach. It is up to the State to decide what form any given transposing legislation should take, and there is no obligation to put everything in the same enactment. As the applicant hasn't engaged with any other legislation, it would be inappropriate of me to start going through that to see whether and to what extent art. 7(2)(f) is complied with. That could only arise if there was a properly detailed analysis on the pleadings, which is wholly absent here.

**140.** In *Reid v. An Bord Pleanála (No. 2)* [2021] IEHC 362 I noted the following regarding transposition claims:

- (i) If an EU law measure requiring transposition has not been transposed at all, the applicant can plead the EU law measure against the State or its emanations insofar as that provision is directly effective. The State proper (Ireland and the Attorney General) is not a necessary party to that claim.
- (ii) If an EU law measure requiring transposition has not been transposed adequately, the applicant can plead the non-transposed element of it against the State or its emanations insofar as it directly effective. The applicant should also particularise the issue in respect of which the directive is inadequately transposed, although that may be implicit and apparent. Again, the State proper is not a necessary party to that claim.
- (iii) If an EU law measure requiring transposition has not been transposed at all or has been inadequately transposed, an applicant can also seek declaratory relief (and perhaps, if necessary, mandatory relief, although that is a point remaining to be fully explored) regarding non-transposition. That does not in itself render the impugned decision invalid, in the absence of a directly effective provision of EU law binding on the decision-maker. However non-transposition or inadequate transposition does give rise to an entitlement to a declaration, which should be sought as a separate and distinct relief in the statement of grounds, particularising in what respect there is a failure of transposition. Ireland and the Attorney General are necessary respondents
- (iv) If an EU law measure requiring transposition has been transposed adequately, but not applied adequately, either in any particular case or more systemically, an applicant can plead the EU law measure as against the State and its emanations insofar as the provision that has not been properly applied is unconditional and sufficiently clear and precise. Again the applicant should particularise why the measure was not adequately applied although that may be implicit and apparent. The State proper is not a necessary party to such a claim. In such a plea, an applicant does not have to identify the corresponding national implementing measure because this argument presupposes adequate transposition. However, it is preferable, although not essential, to also refer in the pleadings to the domestic legislation and to contend that such legislation should be construed in a manner compatible with EU law.

**141.** The present case illustrates the need to clarify what is meant by "particularising" the claim, particularly as referred to in para. (iii) above when seeking declaratory relief. Without suggesting that each and every one of the following steps is essential, the ideal pleading when seeking to make a non-transposition complaint would be as follows:

- (i) to compare the directive and the legislation line-by-line and identify with precision the exact words and provisions not transposed;
- (ii) to address whether or not such non-transposed provisions are transposed in other legislation apart from that being analysed, which may also involve a line-by-line review of any such other relevant legislation;
- (iii) if an omission remains, to explain how the absence of transposition would give rise *in practice* to a potential failure to ensure the achievement of the aims of the

- directive, due for example to a lack of sufficient specificity, even if a conforming interpretation might be available at the level of *legal theory*; and
- (iv) to explain how any such potential failures relate to the fact situation of the given case, particularly in terms of past, present or likely future impacts on the applicant, on persons generally including the applicant, or on the legal order in the absence of impacts on any individual.

**142.** In relation to the question of whether an omission might interfere with ensuring the achievement of the aims of the directive in practice, it may be that more general language may pass muster if it is not such as to lead to likely non-compliance. That might suffice if for example the general language guides a decision-maker such as a court, or possibly central government in some situations, that can be taken to be likely to be acutely aware of the EU law parameters, especially where the decision-making framework is inherently general and where it is not a case that all criteria are spelled out in domestic law other than the omitted provision. On the other hand, if the omission is glaringly inconsistent with what would otherwise be a detailed framework in domestic law (and hence could mislead merely by its absence), or concerns the work of a subordinate agency outside central government that is more removed from direct engagement with EU institutions and law-making, or relates to the actions of private law actors, the omission of some wording contained in the directive might give rise to a risk *in practice* of non-implementation even if the actors concerned *should* apply a conforming interpretation *at a normative level*. In such a situation the omission would constitute non-transposition.

**143.** Of course the applicant didn't even attempt any of this in the pleadings.

**144.** The State submitted that "a declaration ought not be given in a vacuum" and (allowing for occasional exceptions) that is a generally valid principle. This is consistent with the concept of procedural judicial restraint. In general terms, the court isn't there just to clarify the law by means of orders. If clarification is required, it can normally be provided in a judgment. Declarations aren't normally necessary for that. Nor are declarations required if an order of *certiorari* is granted because that would be pointlessly duplicative. Normally a declaration would be called for if a measure of general application is being impugned, or if some actual legal wrong such as a misinterpretation of statute law has occurred in a given case on the particular facts of that case and in a manner captured by the pleadings, in a way that impacted on the applicant or the overall legal order but that doesn't warrant an order of *certiorari*. A classic example is if procedures for public participation were not complied with, but where such non-compliance didn't prevent the given applicant from herself participating. The non-compliance could be marked with a declaration, but it would be overkill to quash a decision that didn't actually breach the applicant's rights, either at all or in a way that caused actual harm.

**145.** Even if non-transposition was otherwise made out, which it hasn't been, to grant a declaration here would be a classic *in vacuo* exercise. No lack of transposition has been demonstrated on the pleaded facts, or in relation to the pleaded provision of EU law (art. 7(2)(f)). To accept the implicit invitation by the applicant to go beyond that would be to launch oneself into the void with the announcement that one may be gone for some time.

#### **Order**

**146.** For the foregoing reasons, it is ordered that:

- (i) the objection to the affidavit of Jennifer McCann be dismissed and that affidavit be admitted;
- (ii) the proceedings be dismissed; and
- (iii) unless the parties apply otherwise by written submission within 7 days, the foregoing order be perfected forthwith thereafter on the basis of no order as to costs.