[2024] IEHC 639

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2023.0000975]

IN THE MATTER OF SECTIONS 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

ALEX AND SHAHLA THOMPSON

APPLICANTS

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL (BY ORDER)

RESPONDENTS

AND

KATHY AND BARRY O'DONNELL

NOTICE PARTIES

(No. 2)

JUDGMENT of Humphreys J. delivered on Friday the 8th day of November 2024

1. In broad terms, the law as to time limits in judicial review of planning cases is clear. An applicant has eight weeks from the date of the decision, not the date of knowledge or notification, to challenge a planning outcome, and cannot obtain an extension of time unless she was first of all unable to bring the proceedings within that period – good and sufficient reason for an extension is an additional hurdle, not an alternative one (s. 50(8)(b) of the Planning and Development Act 2000). Such a rule is, in general, regarded as both equivalent and effective for the purpose of EU law. So that's it? Apparently not, because the applicants here contend that they have found a new opening based on a new argument – the discretionary nature of the notification requirements and the board's failure to comply with them here. The issue addressed in the present judgment is not to definitively answer that but to address some initial objections and procedural matters, and thereby winnow down the matter to identify the net substantive questions for further and more focused written submissions.

Judgment history

2. In *Thompson v. An Bord Pleanála (No. 1)* [2024] IEHC 101 (Unreported, High Court, 26th February 2024), I held that, leaving aside arguments based on EU law, the proceedings were one day late and the statutory provision for extension of time was not satisfied, and I directed the applicants to put the State on notice of their claim that the legal framework as to time for judicial review was contrary to EU law.

3. I am now dealing with that claim on a modularised basis (that is, we are not dealing with the actual merits of the challenge, which depend on the applicants being in a position to advance the challenge in the first place).

Geographical context

4. The site in question (for which the impugned permission provides for sub-division, the provision of a single story infill dwelling to the rear, amendments to the exiting boundary treatment to the side and rear, the provision of two parking spaces to serve the proposed dwelling, landscaping and a new connection to the existing waste water and water supply and all associated site works) is situated at Howth Road, Sutton, Dublin 13.

Facts

5. The applicants are scientists, the first named applicant being an emeritus professor and the second named applicant being a retired geneticist.

6. On 14th March 2022, the notice party lodged the application with Fingal County Council.

7. On 28th April 2022, the council issued a request for additional information and subsequently issued public notices in respect of additional information on 19th August 2022.

8. The council then decided to grant permission with conditions, on foot of a planning report dated 28th September 2022.

9. On 26th October 2022, the applicants appealed to the board.

10. On 8th March 2023, the board wrote to the applicants indicating that the appeal would not be decided within the target time-frame of 18 weeks.

11. On 22nd May 2023, the respondent's inspector carried out a site inspection.

12. On 24th May 2023, the inspector issued his report. The report contains a screening analysis for the purposes of the environmental impact assessment (**EIA**) and appropriate assessment (**AA**) directives concluding that due to the limited nature and scale of the project and the distance from sensitive sites and lack of connectivity thereto it would be unlikely to have significant effects on the environment or on European sites. Accordingly:

(i) EIA was ruled out at preliminary examination stage and no screening was required; and
(ii) AA was ruled out after screening.

13. On 29th May 2023, the board wrote again to the applicants indicating that the matter would be further delayed.

14. The application was considered at a meeting of the board on 26th June 2023, at which the board decided to grant planning permission for the development. The board direction is dated 26th June 2023.

15. The board order that is the formal decision, is dated 28th June 2023.

16. The board then has a requirement to provide notification of the decision through three specific channels:

(i) making available the file for inspection at its office within three days – that presumably happened but it doesn't constitute notice because that in itself doesn't inform anybody of anything – they would have to know that the decision had been made;
(ii) making the papers available online or elsewhere as the board decides (and the board's consistent policy and practice is to do so on its website – as stated in its published guidance on public access to decision files, noted in *Reid v. An Bord Pleanála (No. 7)* [2024] IEHC 27 at para. 113) within three days (that ran from (i.e. including) Wednesday 28th June 2023 and expired on Friday 30th June 2023) – that didn't happen until seven days after the decision (on Wednesday 5th July 2023); and
(iii) notifying the participants in the process as soon as may be (no time limit specified in law) – notice wasn't sent for five days (posted to the applicants on Monday 3rd July 2023), arriving six days later (received on Tuesday 4th July 2023).

17. Thus the first meaningful notice received by the applicants was on 4th July 2023, which was four days after the web publication should have happened.

18. The applicants requested a hard copy of the inspector's report and received that on 5th July 2023.

19. Following receipt of notice of the board's decision, the applicants didn't act with any noticeable speed for a month, during the period 5th July 2023 to 4th August 2023, and then took the (legally misconceived) step of corresponding with the board on the latter date, to ask if there was any other basis for the decision than that disclosed on the papers they had. Dissatisfied with a mere acknowledgement dated 15th August 2023, they wrote again on 16th August 2023 and only then decided to seek judicial review – at that point there were only eight days left to bring the proceedings.

20. The applicants also say that they were busy during that period including due to an unfortunate illness of a relative. But the applicants' difficulties in no way reached the level that would have precluded them acting within time – their real problem was that they mistakenly believed that time ran from notification (as they effectively admit in their joint affidavit at para. 25).

21. Working from the date of the decision, the eight-week period expired on 22nd August 2023.

Procedural history

22. The application for leave to apply for judicial review was opened on 23rd August 2023 before Roberts J. at a vacation sitting of the High Court.

23. A motion to admit to the List was first returnable on 16th October 2023. On that date I was minded to grant it, but it then transpired that the applicants had failed to notify the notice party of the motion in breach of the Practice Direction then applicable and contrary to the very nature of a notice of motion which requires to be served on the other parties. I then had to reverse my announced intention to admit the matter, and instead to adjourn it.

24. The matter was put back to 6th November 2023, to enable the applicants to rectify that non-compliance.

25. On 6th November 2023, all parties having been properly notified, the motion was granted without objection. Leave was granted with an amended statement of grounds to be delivered within one week and the originating notice of motion was made returnable for two weeks.

26. By letter dated the 8th December 2023, the respondent proposed the following directions:

(i) board opposition papers due – 8th February 2024 (excluding Christmas period);
(ii) notice party papers due – 15th February 2024;
(iii) any replying affidavit by the applicants due – 7th March 2024;
(iv) any further replying affidavit by any other party due – 21st March 2024; and
(v) the matter to be listed for mention – 8th April 2024.

27. On 11th December 2023, the board indicated to the court that they considered the case to be one day out of time, superseding the previous proposed directions.

28. On 18th December 2023, I gave the applicants liberty to bring a motion seeking an extension of time returnable for 19th February 2024. This was without prejudice to the fact that the applicants were permitted to maintain their argument that they were within time. It was agreed that if the motion was dismissed that the leave order would be set aside, and that if the motion was granted, that would be the end of the time objection as far as the opposing parties were concerned.

29. The applicants were directed to issue the motion by 16th January 2024 with any replying affidavit by 29th January 2024 followed by applicants' submissions by 6th February 2024, board submissions by 15th February 2024 and notice party submissions by 16th February 2024 at 13:00.

30. The matter was listed for callover on 19th February 2024, when it transpired that the applicants had failed to initiate the preparation of a statement of case, and belated compliance was directed. As it happens, they had also failed to correctly populate the ShareFile in accordance with Practice Direction HC124, a matter that remained unaddressed. The matter was listed for hearing on 20th February 2023, and heard on that date with judgment being reserved.

31. In the No. 1 judgment on 26th February 2024, I ordered (at para. 65) that:

(i) the applicants be directed to serve notice on the CSSO on behalf of Ireland and the Attorney General, within seven days from the date of this judgment, copied to the other parties, setting out their EU law validity related objections to the time limit procedures in the 2000 Act and their proposals for procedurally managing that objection;

(ii) the matter be listed thereafter for mention on Monday 11th March 2024;

(iii) the applicant be directed to arrange to correctly populate the ShareFile folder by 09:30 on that date in full compliance with Practice Direction HC124 and in full consultation with the other parties; and

(iv) the CSSO be given access to the ShareFile folder forthwith on providing relevant details to the List Registrar.

32. Liberty to file a second amended statement of grounds was given on 11th March 2024, to be filed by 20th March 2024 adding relief against the State. The matter was listed for mention on 8th April 2024, when time for the amended statement was extended by one week with six weeks for State opposition. The matter was adjourned to the List to Fix Dates, with the board having liberty to get involved if it wished to notwithstanding the lack of live relief against it. On 29th April 2024 it was adjourned to the following List to Fix Dates, and on 24th June 2024 a hearing date of 5th November 2024 was fixed in relation to the module against the State.

33. The matter was heard on the latter date when judgment was in effect reserved (in the sense that the court indicated the option of providing a judgment defining the issues before inviting further written submissions on the issues so defined – the course now being taken). The board and notice parties did not participate in this module beyond a watching brief for the latter.

European legislation

34. Articles 41 and 47 of the Charter of Fundamental Rights of the European Union (2000/C 364/01) provide:

"Article 41

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

…

Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

35. Article 6 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (the **EIA directive**) provides:

"1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities or local and regional competences are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent, taking into account, where appropriate, the cases referred to in Article 8a(3). To that end, Member States shall designate the authorities to be consulted, either in general terms or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to those authorities. Detailed arrangements for consultation shall be laid down by the Member States.

2. In order to ensure the effective participation of the public concerned in the decision-making procedures, the public shall be informed electronically and by public notices or by other appropriate means, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

(a) the request for development consent;

(b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;

(c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

(d) the nature of possible decisions or, where there is one, the draft decision;

(e) an indication of the availability of the information gathered pursuant to Article 5;

(f) an indication of the times and places at which, and the means by which, the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

(a) any information gathered pursuant to Article 5;

(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information (7), information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 of this Directive and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. The detailed arrangements for informing the public, for example by bill posting within a certain radius or publication in local newspapers, and for consulting the public concerned, for example by written submissions or by way of a public inquiry, shall be determined by the Member States. Member States shall take the necessary measures to ensure that the relevant information is electronically accessible to the public, through at least a central portal or easily accessible points of access, at the appropriate administrative level.

6. Reasonable time-frames for the different phases shall be provided for, allowing sufficient time for:

(a) informing the authorities referred to in paragraph 1 and the public; and

(b) the authorities referred to in paragraph 1 and the public concerned to prepare and participate effectively in the environmental decision-making, subject to the provisions of this Article.

7. The time-frames for consulting the public concerned on the environmental impact assessment report referred to in Article 5(1) shall not be shorter than 30 days."

36. Article 11 of the EIA directive provides:

"1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
(a) having a sufficient interest, or alternatively;
(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;
have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.
2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.
3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.
4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.
Any such procedure shall be fair, equitable, timely and not prohibitively expensive.
5. In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures."

37. Article 6(1) and (9) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (done at Aarhus on 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (the **Aarhus Convention**) provides:

"1. Each Party: (a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;
(b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and
(c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.
…
9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based."

38. Article 9(3) of the Aarhus Convention provides:

"3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

Domestic legislation

39. Section 50(6) to (8) of the Planning and Development Act provides:

"(6) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(a) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate.
(7) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(b) or (c) applies shall be made within the period of 8 weeks beginning on the date on which notice of the decision or act was first sent (or as may be the requirement under the relevant enactment, functions under which are transferred under Part XIV or which is specified in section 214, was first published).
(8) The High Court may extend the period provided for in subsection (6) or (7) within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that—

(a) there is good and sufficient reason for doing so, and
(b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension."

40. The way the domestic legislation operates (subject to any contrary requirement of EU law) is that:

(i) if the applicant doesn't know of the decision at the outset of the eight weeks, but learns of it during that period in sufficient time to be capable of bringing a challenge before the expiry of the period, then they have the balance of the eight weeks but no more and are not eligible for an extension of time if they fail to do so, because that failure was not outside their control (that is the effect of the mandatory and cumulative nature of s. 50(8)(a) and (b)); and

(ii) if the applicant learns or was only capable of learning with reasonable diligence of the decision either so late in the eight-week period that it is not possible to challenge the decision by the end of that period, or after the expiry of that period, then not only are they eligible for an extension of time but they should be given an extension equivalent to a full period of eight weeks running from the date they knew or ought to have known of the decision: see *Arthropharm (Europe) Ltd v The Health Products Regulatory Authority* [2022] IECA 109, [2022] 5 JIC 1003 (Unreported, Court of Appeal, Murray J., 10th May 2022), *Marshall v. Kildare County Council* [2023] IEHC 73, [2023] 2 JIC 1705 (Unreported, High Court, 17th February 2023).

41. Section 146(5) to (7) of the 2000 Act provides:

"(5) Within 3 days following the making of a decision on any matter falling to be decided by it in performance of a function under or transferred by this Act or under any other enactment, the documents relating to the matter—
(a) shall be made available by the Board for inspection at the offices of the Board by members of the public, and
(b) may be made available by the Board for such inspection—
(i) at any other place, or
(ii) by electronic means,
as the Board considers appropriate.
(6) Copies of the documents referred to in subsection (5) and of extracts from such documents shall be made available for purchase at the offices of the Board, or such other places as the Board may determine, for a fee not exceeding the reasonable cost of making the copy.
(7) The documents referred to in subsection (5) shall—
(a) where an environmental impact assessment was carried out, be made available for inspection on the Board's website in perpetuity beginning on the third day following the making by the Board of the decision on the matter concerned, or
(b) where no environmental impact assessment was carried out, be made available by the means referred to in subsection (5)(b) for a period of at least 5 years beginning on the third day following the making by the Board of the decision on the matter concerned."

42. There is a time limit for publication of the material by making it available at the board's office and on the website (or by other means if the board so decides, which generally it doesn't – see *Reid v. An Bord Pleanála (No. 7)* [2024] IEHC 27, [2024] 1 JIC 2401 (Unreported, High Court, 24 January 2024)). In that case I held as follows:

"'102. Section 146(5) of the Planning and Development Act 2000 provides:
'(5) Within 3 days following the making of a decision on any matter falling to be decided by it in performance of a function under or transferred by this Act or under any other enactment, the documents relating to the matter—
(a) shall be made available by the Board for inspection at the offices of the Board by members of the public, and
(b) may be made available by the Board for such inspection—
(i) at any other place, or
(ii) by electronic means,
as the Board considers appropriate.'
103. Paragraph (b) sounds discretionary ('may') but in fact is ultimately mandatory when one turns to sub-s. (7):
'(7) The documents referred to in subsection (5) shall—
(a) where an environmental impact assessment was carried out, be made available for inspection on the Board's website in perpetuity beginning on the third day following the making by the Board of the decision on the matter concerned, or

(b) where no environmental impact assessment was carried out, be made available by the means referred to in subsection (5)(b) for a period of at least 5 years beginning on the third day following the making by the Board of the decision on the matter concerned.'

104. Thus the board 'shall' make the documents available by the means referred to in sub-s. (5)(b) if no EIA applies. As regards the duration for which the order should be available, since no EIA was conducted, the 5-year publication in s. 146(7)(b) applies rather than the indefinite publication in s. 146(7)(a).

105. While the board tries to characterise the process as discretionary, that is therefore misconceived. The 'may' in sub-s. (5) is qualified by the 'shall' in sub-s. (7). The board could not exercise any discretion in sub-s. (5) in a way that would nullify the 'shall' in sub-s. (7). In practice that means that the board 'may' do (5)(a) or it 'may' do (5)(b) but it 'shall' do either (a) or (b). Thus the 'may' can only mean 'shall' do one or the other of the sub-s. (5) options. That is perfectly harmonious because the board retains a discretion — but not a discretion to do nothing. The board completely exaggerates the difficulty of statutory interpretation here. The harmonious reading is obvious and straightforward."

43. Three days from a decision includes the day of the decision itself unless the context otherwise requires – see s. 18(h) of the Interpretation Act 2005:

"(h) Periods of time. Where a period of time is expressed to begin on or be reckoned from a particular day, that day shall be deemed to be included in the period and, where a period of time is expressed to end on or be reckoned to a particular day, that day shall be deemed to be included in the period;"

44. Section 146(5) of the 2000 Act refers to 3 days "following" the decision. But "following" is encompassed within the concept of a "period … reckoned from a particular day". The context certainly doesn't "require" a more favourable interpretation from the board's point of view.

45. Article 74(1) of the Planning and Development Regulations 2001 provides:

"The Board shall, as soon as may be following the making of a decision on an appeal or referral, notify any party to the appeal or referral and any person who made submissions or observations in relation to the appeal or referral in accordance with section 130 of the Act."

46. This doesn't specify any time limit.

Relief sought

47. The reliefs sought in the second amended statement of grounds are as follows:

"1. An Order of certiorari quashing a decision of An Bord Pleanála (the Respondent) made on 28 June 2023 (ref. ABP314936-22) to grant the Notice Party permission for the sub division of an existing site, the provision of a single story infill dwelling to the rear of the site, amendments to the exiting boundary treatment to the side and rear of the site, the provision of 2 no. parking spaces to serve the proposed dwelling, landscaping and a new connection to the existing waste water and water supply and all associated site works at … Howth Road, Sutton, Dublin 13 ('the impugned decision').

2. Such declarations of the legal rights and/or legal position of the Applicant and/or persons similarly situated and/or of the legal duties and/or legal position of the Respondent and/or Notice Parties as the court considers appropriate.

3. A Declaration that Section 50 and/or s.146 of the Planning and Development Act 2000 (as amended) and/or Section 146 of the Planning and Development Act 2000 (as amended) and/or regulation 74 of the Planning and Development Act 2001 (S.I.No.600/2001)(as amended) is is [*sic*] contrary to European law.

4. In the alternative, a Declaration by way of application for judicial review that the Second and Third Named Respondents failed to adequately transpose the EIA Directive (2011/92/EU).

5. If necessary, an order for the discovery of documentation which is or has been in the power, possession or procurement of other parties hereto and which is relevant to any issue in these proceedings.

6. Further and/or other order or relief.

7. Liberty to apply.

8. Liberty to file further Affidavits.

9. A Declaration that the within proceedings are covered by the protective costs provisions of s.50B of the Planning and Development Act 2000 (as amended), and/or sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 (as amended), and/or otherwise including under the Legal Services Regulation Act 2015 and/or Order 99 RSC.

10. Such further or other order as this Honourable Court shall deem fit.

11. The costs of these proceedings."

48. We are at this stage only dealing in effect with reliefs 3 and 4.

49. It can also be noted that in the reliefs and grounds the 2001 regulations are incorrectly referred to as a 2001 "Act". The State sensibly didn't take a point on this. I will therefore read this as meaning "regulations" for now, but it would be best if the statement was formally amended.

Grounds of challenge

50. The core grounds of challenge are as follows:

"DOMESTIC LAW GROUNDS

1. The decision is invalid and/or ultra vires in that the Board has erred in law, misdirected itself in law, acted and/or took into account irrelevant considerations and/or misunderstood and/or overlooked relevant material and/or acted irrationally, where it failed to assess adequately or at all compliance with the development management criteria required to be met by the 'BRE Guidelines 'Site layout planning for daylight and sunlight: a guide to good practice, 2011' ('the BRE guidelines'), the Building Height Guidelines and the Fingal Development Plan 2023 -2029. ('the new development plan')

2. The impugned decision is invalid where it comprises a material contravention of the development plan without a lawful basis to do so. The decision is predicated on the ~~acceptance of the Inspector and the Board~~ basis that the requirements of the Fingal Development Plan 2023-2029 have been met, such that permission may be granted. The failure of the Board to give reasons as to why ~~in breach of the material contravention of the infill development/, being a maximum~~ the proposed development accords with, inter alia, the development management standards of the new development plan, renders the decision to grant permission for the proposed development, irrational void and of no legal effect.

3. The impugned decision is invalid and/or ultra vires where the Inspector's analysis and the decision of the Board failed to address the Applicant's submissions as to the impact on the residential amenity of their home at … Howth Road, Sutton Cross. In failing to engage with the Applicant's submission concerning inter alia visual obtrusion, overlooking and overshadowing, the Respondent acted irrationally by falling to address the concerns of the applicants herein with regard to his daylight and overshadowing concerns.

EUROPEAN LAW GROUNDS

4. The impugned decision is invalid and/or ultra vires in that it contravenes Art.6(3) of the Habitats Directive (and the Birds Directive) and Part XAB of the Planning and Development Act 2000 (as amended) in circumstances where, in purporting to carry out a Screening for Appropriate Assessment: (i) the Respondent reilied [*sic*] on a material error of fact in reaching its conclusion and (ii) the Respondent failed to provide sufficient expertise and conclusions and explicit and detailed reasons in its Screening for Appropriate Assessment which were capable of dispelling all reasonable scientific doubt as to the effects of the proposed development on the conservation objectives and qualifying interests of Baldoyle Bay SAC (Site code 004016) Baldoyle Bay SPA (site code 004016).

5. The Impugned Decision is invalid and contrary to the requirements of the EIA Directive (as amended), the Planning and Development Act 2000 (as amended), and the Planning and Development Regulations 2001 (as amended) including Article 103, Schedule 7 and Schedule 7A, in circumstances where the Respondent failed to provide sufficient expertise screened out significant effects on the environment by way of a preliminary examination without giving reasons for its conclusion.

6. The impugned decision is invalid and/or ultra vires where the Respondent erred in failing to consider whether the proposed development would cause a limit value (set out in directive 2008/50 EC and/or Dublin Air Quality Management Plan) to be breached.

7. Section 50 of the Planning and Development Act 2000 (as amended) and/or Section 146 of the Planning and Development Act 2000 (as amended) and/or regulation 74 of the Planning and Development Act 2001 (S.I.No.600/2001)(as amended) is invalid in that it contravenes art 41 of the Charter of Fundamental Rights (the Right to good administration), art.47 of the Charter of Fundamental Rights (the Right to an effective remedy and to a fair trial) art. 11 of the EIA directive ((2011/92/EU),) being directly effective against the State and its emanations, by providing that a competent authority is empowered with a completely discretionary period to write to/notify appellants and/or limitation periods begin to run even when a person concerned is not on notice of a decision of a competent authority further particulars of which are set out at Part 2 below.

8. Section 50 of the Planning and Development Act 2000 (as amended) and/or Section 146 of the Planning and Development Act 2000 (as amended) and/or regulation 74 of the Planning and Development Act 2001 (S.I.No.600/2001)(as amended) is invalid in that it it [*sic*] contravenes art.41 of the Charter of Fundamental Rights (the Right to good administration), art.47 of the Charter of Fundamental Rights (the Right to an effective remedy), art. 11 of the EIA directive (2011/92/EU), being directly effective against the State and its emanations. by failing to provide a compensatory mechanism for

appellants/applicants for judicial review where the competent authority is in default of its obligations to notify under domestic procedural law, further particulars of which are set out at Part 2 below."

The relevant grounds

51. For present purposes we are just dealing with core grounds 7 and 8. However it can be noted that the statement of grounds challenges the decision based *inter alia* on:

(i) council directive (EU) 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the habitats directive);
(ii) the EIA directive;
(iii) directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (the birds directive); and
(iv) directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (the air quality directive).

52. Oddly enough there is no core ground that expressly adds anything specifically referable to relief no. 4, so it follows that the claim of inadequate transposition can only be by reference to the matters pleaded in core grounds 7 and 8. Sub-ground 35 has some possible relevance to the non-transposition claim but that is sub-optimally located within core ground 7 which is phrased overall as referable to statutory invalidity.

53. The parties' positions in relation to the relevant grounds, core grounds 7 and 8, as recorded in the statement of case, are summarised as follows:

"The Applicant maintains two grounds of challenge against Ireland and the Attorney General. Firstly, the Applicants argue that Section 50 of the Planning and Development Act 2000 (as amended) and/or Section 146 of the Planning and Development Act 2000 (as amended) and/or regulation 74 of the Planning and Development Act 2001 (S.I.No.600/2001) (as amended) is invalid in that it contravenes art 41 of the Charter of Fundamental Rights (the Right to good administration), art.47 of the Charter of Fundamental Rights (the Right to an effective remedy and to a fair trial) art. 11 of the EIA directive ((2011/92/EU), by providing that a competent authority is empowered with a completely discretionary period to write to/notify appellants and/or limitation periods begin to run even when a person concerned is not on notice of a decision of a competent authority.

Secondly, the Applicants maintain that Section 50 of the Planning and Development Act 2000 (as amended) and/or Section 146 of the Planning and Development Act 2000 (as amended) and/or regulation 74 of the Planning and Development Act 2001 (S.I.No.600/2001)(as amended) is invalid in that it contravenes art.41 of the Charter of Fundamental Rights (the Right to good administration), art.47 of the Charter of Fundamental Rights (the Right to an effective remedy), art. 11 of the EIA directive (2011/92/EU) by failing to provide a compensatory mechanism for appellants/applicants for judicial review where the competent authority is in default of its obligations to notify under domestic procedural law

Ireland and the Attorney General (the 'State Respondents') have pleaded that the reliefs sought against them are moot in circumstances where the Court has already determined that the Applicants could have brought the proceedings within the statutory eight-week time period provided by s.50(6) of the Planning and Development Act 2000 (the '2000 Act') and did not do so. The Applicants lack the necessary locus standi to seek the reliefs claimed against the State Respondents as the Court has already refused their application for an extension of time pursuant to s.50(8) of the 2000 Act based on the evidence before the Court.

The State Respondents deny that sections 50 and/or 146 of the 2000 Act and/or art.74 of the Planning and Development Regulations 2001 (the 'PDA Regulations') are invalid. They also deny that s.146(5) of the 2000 Act and /or art.74 of the PDA Regulations contravene art. 41 of the Charter of Fundamental Rights (the Right to good administration), art.47 of the Charter of Fundamental Rights (the Right to an effective remedy and to a fair trial) or art. 11 of the EIA directive ((2011/92/EU).

The State Respondents' position is that s.50(6) of the 2000 Act has already been held by the Supreme Court to be consistent with EU law (and specially the principles of equivalence and effectiveness) in Krikke v. Barranafaddock Sustainable Electricity Ltd. The compatibility of s.50(6) of the 2000 Act with EU law (specifically the EIA Directive) has also recently been considered by the Court of Appeal in Heaney v An Bord Pleanála [2022] IECA 123 which is also binding on this Court. The Applicants have not identified any basis upon which it would be necessary for that position to be re-considered.

The State Respondents further submit that the discretion vested in the Court by Section 50(8) of the 2000 Act offers sufficient safeguards in Section 50 of the 2000 Act to ensure a party's rights under EU law, including the EIA Directive and the Charter on Fundamental Rights, can be vindicated."

Standing and mootness

54. First of all the State has a point, although perhaps not as much of a point as they think, in relying on the existing finding that the applicants could have moved within the eight-week period. That finding must govern the present module, but it doesn't automatically make this module moot, or deprive the applicants of standing, because the real question now is whether, notwithstanding that finding, EU law requires a longer period for the applicants to be allowed to bring their proceedings.

55. Insofar as concerns the complaint that the applicants lack the necessary *locus standi* to seek the reliefs claimed against the State as the court has already refused the application for an extension of time pursuant to s. 50(8) of the 2000 Act based on the evidence before the court, that misunderstands the effect of the legislation on applicants such as these. The point is that the applicants are not eligible for an extension of time for the simple reason that they don't meet the initial hurdle (chronologically the first within the two mandatory and cumulative conditions for an extension) namely that the failure to act within the original period was outside their control.

56. Thus, as regards the alleged discretion to cure all ills via extension of time, the problem with that argument is that unless EU law compels a conclusion otherwise, such extension can't arise if the precondition for it at s. 50(8)(b) isn't met, namely that the failure to act within the eight weeks was outside the control of the applicants. That self-evidently doesn't preclude an argument that such a limitation is itself contrary to EU law – that's the argument now being made, in effect.

Whether the applicants are precluded by authority from making their points

57. As regards the State's reply that s. 50(6) of the 2000 Act has already been held by the appellate courts to be consistent with EU law (and specially the principles of equivalence and effectiveness) in *Krikke v. Barranafaddock Sustainable Electricity Ltd* [2022] IESC 41, [2023] 1 I.L.R.M. 81, [2022] 11 JIC 0303 (Woulfe J. and Hogan J.) and *Heaney v. An Bord Pleanála* [2022] IECA 123, [2022] 5 JIC 3123 (Unreported, Court of Appeal, Donnelly J., 31st May 2022), one can take it as read that we are going to start from a default position of simply applying such pronouncements. However the specific question that falls for consideration here just didn't arise in *Krikke* or *Heaney*, and one can't proceed on the pretence that it did. A point not argued is, according to the Supreme Court itself, a point not decided: *The State (Quinn) v. Ryan* [1965] I.R. 70, 100 I.L.T.R. 105 at 120, *Laurentiu v. Minister for Justice* [1999] IESC 47, [1999] 4 I.R. 26, [2000] 1 I.L.R.M. 1. There is no question of re-consideration of those cases as incorrectly suggested by the State.

58. Indeed Woulfe J. impliedly acknowledges the possibility that a future case could throw up new issues in *Krikke* at para. 90 by framing the decision in the context of the facts of that case (emphasis added):

> "90. *On the facts of the present case,* it seems to me very difficult for the appellants to argue that the time limits in s. 50 make it in practice impossible or excessively difficult to exercise rights conferred by the EIA Directive, in circumstances where they have never sought to apply for judicial review of the compliance decision and have never tested the operation of the time limit rules."

59. In general terms, as already noted, it has already been held that the limitation period in s. 50 of the 2000 Act complies with the principles of equivalence and effectiveness. However here the applicants make a new argument not made in those cases, namely that time running from the date of the decision rather than notification is problematic in the context of legislation that gives a discretion as to when notice of the decision would be given and particularly so if that notification isn't provided within the statutory timelines. On that basis this point is not governed by existing authority. One can note that EU law has the consequence that even an otherwise binding domestic appellate court's view of European law doesn't preclude a reference by a first-instance court if the latter thinks that the point is not *acte clair*: judgment 16 January 1974, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-166/73, ECLI:EU:C:1974:3; judgment of 9 March 2010, *Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others*, C-378/08, ECLI:EU:C:2010:126 (Grand Chamber); judgment of 22 June 2010, *Aziz Melki* and *Sélim Abdeli,* joined cases C-188/10 and C-189/10, ECLI:EU:C:2010:363 (Grand Chamber); judgment of 15 January 2013, *Jozef Križan and Others v Slovenská inšpekcia životného prostredia*, C-416/10, ECLI:EU:C:2013:8 (Grand Chamber); judgment of 18 July 2013, *Consiglio nazionale dei geologi v Autorità garante della concorrenza e del mercato and Autorità garante della concorrenza e del mercato v Consiglio nazionale dei geologi,* C-136/12, ECLI:EU:C:2013:489 (and see *Enniskerry Alliance v. An Bord Pleanála (No. 3)* [2022] IEHC 338, [2022] 6 JIC 1002 (Unreported, High Court, 10th June 2022)). But that rather delicate basis only arises here if I am wrong about the application of the "point not argued" principle – and for good measure I emphasise that I am not deciding to make a reference at all at this stage.

60. For the sake of clarity, the applicants' argument here is rather more nuanced than the previous attempt to revisit the jurisprudence that was rejected in *Marshall*. There the point made was:

> "45. The applicants' essential argument is that by analogy with *Uniplex*, the EIA directive (Council Directive 2011/92/EU) and habitats directive (Council Directive 92/43/EEC) have the effect that national time-limits should only commence to run from the date on which an applicant knew of an infringement as opposed to of the mere fact of the decision."

61. By "infringement" what I was referring to there was the argument made to the effect that it wasn't enough to start the clock that the applicants were merely aware of an adverse decision. They also had to have access to the decision itself and its background information sufficient to provide ammunition for the claim that there had been an infringement of EU law. Only then would time start to run. That argument was rejected.

62. Here, the applicants don't argue that commencement of time from the decision is the problem in and of itself. It is that in combination with the discretionary nature of the notification requirements and/or the failure to comply with those requirements.

Conforming interpretation and remedies

63. The State's submission on conforming interpretation derives from *Heaney v. An Bord Pleanála*, as put in written submissions:

> "Donnelly J. stated (§38) that there is nothing in the principle of effectiveness that would require Section 50(6) to be interpreted as meaning that time only runs from when the decision was communicated to the person. The principle of effectiveness does not require the interpretation of a statute in a manner that is contra legem and the term 'date of the decision' is clear on its face and cannot be interpreted otherwise. Donnelly J. also stated that the provisions of Section 50(6) are clear, and time runs from the date the decision is made, noting that there is no evidential basis or rationale for holding that this particular interpretation in itself violates the principle of effectiveness"

64. A conforming interpretation is only available if it would not be *contra legem*, the determination of which is a matter of domestic law. The only available course is to follow *Heaney* and say that time running from the date of the decision is not susceptible to any other interpretation (as I said in the *No. 1* judgment at para. 47). Likewise the requirement that time can only be extended if the failure to act was outside an applicant's control is clear and not subject to creative re-writing by way of interpretation. That requirement is simply not met here.

65. Subject to reconsidering the matter by reference to the exact terms of any EU law infringement should it arise, it appears that if the applicants eventually establish some mismatch between EU law and the time requirements of s. 50, the remedy will have to lie in some form other than conforming interpretation. On balance, the best approach is to say that the issue of the remedy doesn't arise now and there is no particular point in anticipating it. It would be a matter for domestic law anyway in the light *inter alia* of what remedies domestic law provides for, if it arises following a decision on the substance.

The outstanding issues

66. The applicants argue that a discretionary time period for notification breaches the principle of legal certainty, submitting:

> "AG Kokott at paragraph 69 in her opinion and the CJEU judgment in [judgment of 28 January 2010,] Case C-406/08 Uniplex (UK) Ltd v. NHS Business Services Authority ECLI:EU:C:2010:45 [considered such discretion] to give rise to uncertainty because a limitation period, the duration of which is placed at the discretion of the competent court or body in this case, is not predictable in its effects."

67. In fairness, that was a different sort of discretion – the discretion to hold an application to be out of time even if commenced within the stated limitation period. I referred to the relevant cases in *Marshall* and perhaps it would help to recapitulate that here.

68. In the judgment of 28 January 2010, *European Commission v Ireland*, C-456/08, ECLI:EU:C:2010:46, the Third Chamber declared as follows:

> "— by reason of the fact that the National Roads Authority did not inform the unsuccessful tenderer of its decision to award the contract for the design, construction, financing and operation of the Dundalk Western Bypass, and
>
> — by maintaining in force Order 84A(4) of the Rules of the Superior Courts, in the version resulting from Statutory Instrument N° 374 of 1998, in so far as it gives rise to uncertainty as to which decision must be challenged through legal proceedings and as to how periods for bringing an action are to be determined,
>
> Ireland has failed – as regards the first head of claim – to fulfil its obligations under Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive

92/50/EEC of 18 June 1992, and Article 8(2) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 and – as regards the second head of claim – to fulfil its obligations under Article 1(1) of Directive 89/665, as amended by Directive 92/50".

69. In the judgment of 28 January 2010, *Uniplex (UK) Ltd v NHS Business Services Authority*, C-406/08, ECLI:EU:C:2010:45, in a judgment delivered on the same day as that in *European Commission v Ireland*, the Third Chamber ruled as follows:

"1. Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992, requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement.

2. Article 1(1) of Directive 89/665, as amended by Directive 92/50, precludes a national provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly.

3. Directive 89/665, as amended by Directive 92/50, requires the national court, by virtue of the discretion conferred on it, to extend the limitation period in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules. If the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, as amended by Directive 92/50, the national court must refrain from applying them, in order to apply Community law fully and to protect the rights conferred thereby on individuals."

70. The applicants' submission appears to have the consequence that reliance on a discretion is particularly problematic if the discretion means that the notification is not reasonably contemporaneous with the making of the decision. The applicant relies on the judgment of 25 January 2024, *Caixabank SA and Others v WE and Others*, C-810/21 to C-813/21, ECLI:EU:C:2024:81, albeit a decision in a consumer rights context:

"48 Thus, as regards the starting point of a limitation period, such a period may be compatible with the principle of effectiveness only if the consumer has had the opportunity to become aware of his or her rights before that period begins to run or expires (judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 46 and the case-law cited)."

71. In the judgment of 7 November 2019, *Alain Flausch and Others v Ypourgos Perivallontos kai Energeias and Others*, C-280/18, EU:C:2019:928, it was held by the Court of Justice as follows:

"55 In particular, the Court does not regard as an excessive difficulty the imposition of periods for bringing proceedings which start to run only from the date on which the person concerned was aware or at least ought to have been aware of the announcement (see, to that effect, judgments of 27 February 2003, *Santex*, C-327/00, EU:C:2003:109, paragraphs 55 and 57; of 6 October 2009, *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 45; and of 8 September 2011, *Rosado Santana*, C-177/10, EU:C:2011:557, paragraph 96).

56 It would, on the other hand, be incompatible with the principle of effectiveness to rely on a period against a person if the conduct of the national authorities in conjunction with the existence of the period had the effect of totally depriving him of the opportunity to enforce his rights before the national courts, that is to say, if the authorities, by their conduct, were responsible for the delay in the application (see, to that effect, judgment of 19 May 2011, *Iaia and Others*, C-452/09, EU:C:2011:323, paragraph 21).

57 Finally, it is apparent from Article 11(3) of the EIA Directive that the Member States must pursue an objective of wide access to justice when they lay down the rules governing review procedures in respect of public participation in decision-making (see, to that effect, judgments of 11 April 2013, *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, paragraphs 31 and 44, and of 17 October 2018, *Klohn*, C-167/17, EU:C:2018:833, paragraph 35)."

72. The conclusion was:

> "1. Article 6 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment must be interpreted as precluding a Member State from carrying out the procedures for public participation in decision-making that relate to a project at the level of the headquarters of the competent regional administrative authority, and not at the level of the municipal unit within which the site of the project falls, where the specific arrangements implemented do not ensure that the rights of the public concerned are actually complied with, a matter which is for the national court to establish.
>
> 2. Articles 9 and 11 of Directive 2011/92 must be interpreted as precluding legislation, such as that at issue in the main proceedings, which results in a period for bringing proceedings that starts to run from the announcement of consent for a project on the internet being relied on against members of the public concerned where they did not previously have an adequate opportunity to find out about the consent procedure in accordance with Article 6(2) of that directive."

73. Thus the court stressed that if the national authorities were in default, the limitation period could not be relied on, but in what circumstances? The court refers to this being the case both where this totally deprives the applicant of her opportunity to challenge, and where the authorities were responsible for delay. So there may be an ambiguity where there was a breach by a national authority but not one to totally deprive an applicant of her rights.

74. As noted in *Marshall*, the judgment of 27 February 2003, *Santex SpA v Unità Socio Sanitaria Locale n. 42 di Pavia, and Sca Mölnlycke SpA, Artsana SpA and Fater SpA*, C-327/00, EU:C:2003:109 (quoted in para. 55 of *Flausch* above) is not precisely as represented in *Flausch,* because at para. 55 of the judgment in *Santex* the court said: "Second, it must be held that such a period, which runs from the date of notification of the act or the date on which it is apparent that the party concerned became fully aware of it, is also in accordance with the principle of effectiveness since it is not in itself likely to render virtually impossible or excessively difficult the exercise of any rights which the party concerned derives from Community law." But the word "fully" before the reference to awareness is not included in para. 55 of *Flausch.*

75. In the judgment of 6 October 2009, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira,* C-40/08, ECLI:EU:C:2009:615, the limitation period was described as follows:

> "45. Moreover, it should be pointed out that Article 41(4) of Law 60/2003 provides that the time-limit starts to run from the date of notification of the arbitration award. Therefore, in the action in the main proceedings, it was not possible for the consumer to have found herself in a situation in which the limitation period had started to run, or had expired, without even being aware of the effects of the unfair arbitration clause upon her.
>
> 46. In such circumstances, such a time-limit is consistent with the principle of effectiveness, since it is not in itself likely to make it virtually impossible or excessively difficult to exercise any rights which the consumer derives from Directive 93/13 (see, to that effect, Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 55)."

76. I noted in *Marshall* that there the emphasis is on the plaintiff being aware of the effect of the impugned provision upon her. This could be contrasted with for example receiving full information about the decision.

77. In the judgment of 8 September 2011, *Francisco Javier Rosado Santana v Consejería de Justicia y Administración Pública de la Junta de Andalucía,* C-177/10, ECLI:EU:C:2011:557*,* the limitation period provided "that action must be brought within two months of the date of publication of the competition notice" (para. 85). The court held at para. 96:

> "In those circumstances, it must be held that a time-limit such as the time-limit at issue in the main proceedings is not, in principle, liable to render practically impossible or excessively difficult the exercise of the rights conferred by the framework agreement."

78. However special rules applied where a decision was later annulled. An applicant could not be shut out from challenging a process under the latter circumstances, and the court ultimately concluded as follows in para. 3 of the curial part of the judgment:

> "The primary law of the European Union, Directive 1999/70 and the framework agreement are to be interpreted as not precluding, in principle, national legislation which provides that, where an action brought by a career civil servant challenging a decision rejecting his candidature for a competition is based on the fact that the promotion procedure was contrary to clause 4 of the framework agreement, that action must be brought within two months of the publication of the competition notice. Nevertheless, such a time-limit could not be relied upon against a career civil servant, who has been a candidate in that competition, who has been admitted to the tests and whose name was placed on the definitive list of successful candidates for that competition, if that were liable to render practically impossible or excessively difficult the exercise of the rights conferred by the framework agreement. In those circumstances, time for the purposes of the two-month time-limit could run only from

notification of the decision annulling the civil servant's admission to that competition and his appointment as a career civil servant in the higher group."

79. In *Marshall* the argument (rejected) was that the court was obliged to treat the eight-week period as running from the date on which a planning judicial review applicant gets additional information (such as about the content of a decision, or obtains a copy of it, or of the background files) as opposed to when she knew or ought to have been aware of the fact of such a decision, even if some detail follows later. Here the applicants' proposition is somewhat less ambitious. They did attempt propose a wording for a question for the CJEU but before even getting to whether anything should be referred we would need to re-word the outstanding issues involved into more granular sub-points.

80. As a final note before defining the outstanding issues, it is not altogether clear on the basis of submissions made to date as to the extent to which the applicants can rely on art. 11 of the EIA directive where EIA never even got to the screening stage. But even if they face restrictions in that regard, the board was in any event implementing EU law by conducting the preliminary examination and the AA screening. So either way some element of EU law applies. Whether the extent of that element limits what the applicants are entitled to is something that can be considered in addressing the more substantive issues.

81. To assist the progression of the matter it is appropriate to identify the sub-questions involved:

Do arts. 41 and/or 47 of the EU Charter of Fundamental Rights and/or arts. 6 and/or 11 of directive 2011/92/EU read in the light of the general EU law principle of legal certainty and/or arts. 6 and/or 9 the Aarhus Convention as approved on behalf of the European Community by Council decision 2005/370/EC have the effect, in the context of a challenge (based on the EIA, habitats, birds and/or air quality directives) to a development consent for a project where EIA was rejected at preliminary examination stage under national law corresponding to article 4(3) of the EIA directive (insofar as it provides that Member States may set thresholds or criteria to determine when projects need not undergo either the determination under arts. 4(4) and (5), or an environmental impact assessment) and AA was screened out:

(i) of requiring either the specification in the domestic law of a member state of a reasonably contemporaneous, or any, time limit for each channel of notification of a decision if domestic law provides that the time for challenge runs from the date of the decision rather than its notification, or alternatively of requiring provision in the domestic law of a member state for time to run from notification in respect of any decision where the time for any channel of notification is discretionary?

(ii) of requiring the domestic law of a member state to make provision for a power, in the event that the national authorities fail to notify a participant in the process of a decision within the period specified in domestic law in respect of any channel of notification so specified, to extend the limitation period for the bringing of the challenge for such limited period as is required to compensate for the time lost between the date on which the applicant ought to have been notified and the date on which she was notified and/or otherwise became aware of the decision?

(iii) of precluding a member state from excluding by its domestic law the possibility of extension of time to bring the challenge in circumstances where the applicant fails to show that they could not have brought the proceedings prior to the expiry of the limitation period even in the event that the national authorities fail to notify a participant in the process of a decision within the period specified in domestic law in respect of any channel of notification so specified?

82. Without deciding at this stage whether any issues should be referred to the CJEU, the best way for the court to progress matters, and to keep its options open for now until all data are in, is to request the parties to deliver a written summary of their position on each sub-question in the following format within one week (for the applicants) and two further weeks (for the State):

(i) a brief summary of the party's answer (*c.* 200 words);

(ii) the party's position on whether the question is *acte clair* and reasons for that position; and

(iii) a longer elaboration of the answer if the party so wishes.

83. On receipt of these submissions I can make a final decision as to whether to refer the questions or any of them or decide them myself, subject to considering the views of the parties.

Summary

84. In outline summary, without taking from the more specific terms of this judgment:

(i) the factual findings made previously and the refusal of an extension of time are relevant to the arguments that can be made by the applicants but in themselves don't deprive the applicants of standing or render the proceedings moot;

(ii) appellate authority contrary to the applicants' proposition is not conclusive since the applicants have raised a new argument not previously considered – a point not argued being a point not decided;

(iii) if I am wrong about the application of that principle, and if the hypothetical reference context were to arise, contrary domestic authority even if otherwise binding does not preclude referral of a question of EU law if the referring court considers that it is not *acte clair*;

(iv) conforming interpretation appears unavailable in the theoretical event of an incompatibility between s. 50 of the 2000 Act and EU law being established, because the meaning of s. 50 is clear and interpretively re-programming it would be *contra legem*;

(v) it is not necessary to consider the question of remedies further until that question arises, if it arises; and

(vi) further submissions will be invited on the precise outstanding issues identified.

Order

85. For the foregoing reasons, it is ordered that:

(i) the parties be directed to provide written submissions in relation to the questions identified in the format set out in this judgment;

(ii) subject to any contrary view on the part of the opposing parties, the applicants have liberty to apply for an amendment to correct the typographical errors in relation to the reference to the 2001 regulations and should for that purpose deliver a draft amended statement to the opposing parties prior to the next listing date;

(iii) the matter be listed for further mention on 2nd December 2024; and

(iv) costs be reserved with liberty to apply.