

THE HIGH COURT
JUDICIAL REVIEW

[2023 No. 407 JR]

IN THE MATTER OF SECTIONS 21B AND 3 OF THE FORESHORE ACT 1933, AS AMENDED
AND IN THE MATTER OF SECTION 50B OF THE PLANNING AND DEVELOPMENT ACT 2000,
AS AMENDED

BETWEEN

IVAN TOOLE
AND
GOLDEN VENTURE FISHING LIMITED

APPLICANTS

AND
THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE

RESPONDENT

AND
RWE RENEWABLES IRELAND LIMITED AND THE MINISTER FOR AGRICULTURE, FOOD
AND THE MARINE

NOTICE PARTIES

(No. 5)

JUDGMENT of Humphreys J. delivered on Friday the 27th day of October, 2023

1. These proceedings involve issues of EU law related to the obligation to carry out an appropriate assessment under Article 6(3) of Council Directive 92/43/EEC of 21 May, 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206 22.7.1992, p. 11).

2. The issues arise in the context of a challenge to the validity of a five-year foreshore licence granted by the respondent to the first named notice party to undertake geotechnical and geophysical site investigations and ecological, wind, wave and current monitoring to provide further data to refine wind farm design, cable routing, landfall design and associated installation methodologies for the proposed Dublin Array offshore wind farm off the coast of counties Dublin and Wicklow, which was executed by licence agreement on 13th January, 2023.

3. In these proceedings I have decided to seek a preliminary ruling from the CJEU in relation to the EU law issue involved, and the formal order for reference will follow shortly.

4. On the basis of requests from the parties, I am also requesting that the CJEU apply the expedited procedure under Article 105 of the Rules of Procedure of the CJEU. The purpose of the present judgment is to set out reasons for that request, to assist the President of the CJEU.

Request for expedited procedure

5. I request that the preliminary reference in this matter be determined pursuant to the Expedited Preliminary Ruling Procedure under Article 105 of the Rules of Procedure of the CJEU. The matter has a degree of urgency both from the perspective of national, European and international policy objectives and from the perspective of protection of the environment.

6. Article 105(1) of the Consolidated version of the Rules of Procedure of the Court of Justice of 29th September, 2012 provides that:

"At the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure derogating from the provisions of these Rule."

7. As set out in the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01) under the heading of "Condition for the application of the expedited procedure and the urgent procedure":

"34. Article 105 of the Rules of Procedure provides that a reference for a preliminary ruling may thus be determined pursuant to *an expedited procedure*, derogating from the provisions of those rules, where the nature of the case requires that it be dealt with within a short time. Since that procedure imposes significant constraints on all those involved in it, and, in particular, on all the Member States called upon to lodge observations, whether written or oral, within much shorter time limits than would ordinarily apply, its application must be sought only when particular circumstances create an emergency that warrants the Court ruling quickly on the questions referred. That may be the case, *inter alia*, if there is a serious and immediate danger to public health or to the environment which a prompt decision by the Court might help to avert, or if particular circumstances require uncertainties concerning fundamental issues of national constitutional law and of EU law to be resolved within a very short time. According to settled case-law, the large number of persons or legal situations potentially affected by the decision that the referring court or tribunal has to deliver after

bringing the matter before the Court for a preliminary ruling, the fact that there may be important economic issues at stake or that the referring court or tribunal is obliged to rule expeditiously do not, however, in themselves constitute exceptional circumstances that would justify the use of the expedited procedure.”

8. In this judgment I will set out the rationale for the request under the headings of public policy objectives and environmental protection.

Urgent considerations of public policy

9. While the CJEU will be familiar with the policy context, it is worth emphasising that the latest IPCC report states, among other things:

“B.6 All global modelled pathways that limit warming to 1.5°C (>50%) with no or limited overshoot, and those that limit warming to 2°C (>67%), involve rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade. Global net zero CO₂ emissions are reached for these pathway categories, in the early 2050s and around the early 2070s, respectively. (*high confidence*) ...

C.1 Climate change is a threat to human well-being and planetary health (*very high confidence*). There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*). Climate resilient development integrates adaptation and mitigation to advance sustainable development for all, and is enabled by increased international cooperation including improved access to adequate financial resources, particularly for vulnerable regions, sectors and groups, and inclusive governance and coordinated policies (*high confidence*). The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*). ...

C.2 Deep, rapid, and sustained mitigation and accelerated implementation of adaptation actions in this decade would reduce projected losses and damages for humans and ecosystems (*very high confidence*), and deliver many co-benefits, especially for air quality and health (*high confidence*). Delayed mitigation and adaptation action would lock in high-emissions infrastructure, raise risks of stranded assets and cost-escalation, reduce feasibility, and increase losses and damages (*high confidence*). Near-term actions involve high up-front investments and potentially disruptive changes that can be lessened by a range of enabling policies (*high confidence*) ...”

(see https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf)

10. The net zero commitment is reflected in Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June, 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No. 401/2009 and (EU) 2018/1999 (the “European Climate Law”) (OJ L 243, 9.7.2021, pp. 1–17, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R1119>). This provides a binding objective of climate neutrality in the Union by 2050 in pursuit of the long-term temperature goal set out in Article 2(1)(a) of the Paris Agreement (done at Paris on 12th December, 2015), and provides a framework for achieving progress in pursuit of the global adaptation goal established in Article 7 of the Paris Agreement.

11. Article 4 of the European Climate Law provides for intermediate union climate target. Article 4(1) provides that:

“In order to reach the climate-neutrality objective set out in Article 2(1), the binding Union 2030 climate target shall be a domestic reduction of net greenhouse gas emissions (emissions after deduction of removals) by at least 55 % compared to 1990 levels by 2030.”

12. Recommendation (EU) 2022/822 of 18 May, 2022 on speeding up permit-granting procedures for renewable energy projects and facilitating Power Purchase Agreements (OJ L 146, 25.5.2022, pp. 132–138, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022H0822>) states that (Recital 1):

“Renewable energy is at the heart of the clean energy transition necessary to achieve the objectives of the European Green Deal, make energy affordable and decrease the Union’s dependence on fossil fuels and energy imports”.

13. Recital 3 states that:

“The energy sector is responsible for over 75 % of the total greenhouse gas emissions in the Union. Speeding up the production of energy from the development and deployment of renewable energy installations is therefore vital for the Union to reach its 2030 renewable energy target and for contributing to reaching the 2030 Union target of at least 55 % GHG emission reductions in accordance with Regulation (EU) 2021/1119 of the European Parliament and of the Council”.

14. Recital 1 of Council Regulation (EU) 2022/2577 of 22 December, 2022 laying down a framework to accelerate the deployment of renewable energy (OJ L 335, 29.12.2022, p. 36–44, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2577>) provides that “[a] fast deployment of renewable energy sources can help to mitigate the effects of the current energy

crisis”, by forming a defence against Russia’s war of aggression against Ukraine and the unprecedented reduction of natural gas supplies. To this end, Recital 3 provides that:

“... the Union needs to take further immediate and temporary action to accelerate the deployment of renewable energy sources, in particular by means of targeted measures which are capable of accelerating the pace of deployment of renewables in the Union in the short term.”

Climate goals are also reflected in domestic legislation: Climate Action and Low Carbon Development Act 2015 (as amended), in particular section 3 which provides as follows (<https://revisedacts.lawreform.ie/eli/2015/act/46/revised/en/html#SEC3>):

“National climate objective

3. (1) The State shall, so as to reduce the extent of further global warming, pursue and achieve, by no later than the end of the year 2050, the transition to a climate resilient, biodiversity rich, environmentally sustainable and climate neutral economy (in this Act referred to as the "national climate objective").

(2) For the purpose of enabling the State to pursue and achieve the national climate objective, the Minister shall make and submit to the Government for approval—

(a) carbon budgets in accordance with sections 6B and 6D,

(b) a sectoral emissions ceiling in accordance with section 6C,

(c) a climate action plan in accordance with section 4,

(d) a national long term climate action strategy in accordance with section 4, and

(e) a national adaptation framework in accordance with section 5.

(3) The Minister and the Government shall carry out their respective functions under sections 4, 5, 6, 6A, 6B, 6C and 6D in a manner—

(a) that is consistent with the ultimate objective specified in Article 2 of the United Nations Framework Convention on Climate Change done at New York on 9 May 1992, and:

(i) any mitigation or adaptation commitments entered into by the European Union in response or otherwise in relation to that objective;

(ii) the steps specified in Articles 2 and 4(1) of the Agreement done at Paris on 12 December 2015 to achieve that objective, and

(b) which takes account of the most recent national greenhouse gas emissions inventory and projection of future greenhouse gas emissions, prepared by the Agency.

(4) The Minister shall consult with the Advisory Council for the purpose of the performance, by him or her, of his or her functions under sections 4, 5 and 6.

(5) The Government may consult with the Advisory Council for the purpose of the performance by them of their functions under sections 4 to 6D.”

15. The need for “in most cases, immediate” action on climate change mitigation, as put by the IPCC, has the potential to conflict with the normal pace of processes of scrutiny and examination of projects by national and European competent authorities and courts. This conflict can be rendered less problematic by urgent priority being given to such scrutiny. Otherwise a delay in determining the legality of development consents such as this one and in determining the correct legal framework for such consents has a potential to disrupt current plans to implement national and European climate goals.

16. In the present case, the results of the investigations allowed by the impugned licence are designed to increase knowledge of conditions at the location of a potential future offshore wind farm, including at the potential future location of turbine and offshore substation foundations, inter-array cabling, and export cabling.

17. When combined with the geophysical, ecological and metocean data gathered under a 2021 foreshore licence, and such further geophysical, ecological and metocean survey data as may be gathered under the licence are intended to facilitate a more detailed windfarm (including turbine foundation and offshore substation foundation) design and assist in selecting potential export and inter-array cable designs.

18. This project is one of six so-called “Phase One” projects. The most advanced offshore wind projects in Ireland currently are the Phase One projects, which were awarded Maritime Area Consents (“MAC”) by the Minister for the Environment, Climate and Communications. Phase One projects were assessed to ensure speedy progression of only the most viable wind projects, with a view to meeting Ireland’s renewable energy targets.

19. The first named notice party secured its MAC for the Dublin Array project on 23rd December, 2022. The MAC permits the first named notice party to commence the process of applying to An Bord Pleanála for development permission for the “Permitted Usage” under the MAC, namely the “construction and operation of an Offshore Wind Farm and associated infrastructure (including decommissioning and other works required on foot of any Development Permission for such Offshore Wind Farm)” (p. 2).

20. However, this MAC is time-limited, such that the development permission application must be made to An Bord Pleanála within 18 months of the date of the grant, i.e. by 22nd June, 2024. Clause 5.1 of the MAC provides that the 18-month time-limit for making a development permission application to An Bord Pleanála may be extended by the Minister. This is subject to the Minister being satisfied that there are reasonable grounds for the extension and that any such extension would not constitute a material amendment to the MAC.

21. The first named notice party is required to secure a "Route to Market" for the Permitted Maritime Usage by or before 31st December, 2025. The first named notice party has already provisionally secured a Route to Market by successfully bidding into the first Offshore Renewable Electricity Support Scheme (ORESS 1) auction process. Provisional results for ORESS 1 were published by EirGrid on 11th May, 2023, indicating that the Dublin Array project has been successful in securing an offer quantity of 824MW. Pursuant to the Offshore Connection Policy - Offshore Phase 1 Projects Grid Connection & Charging Decision dated 7th October, 2022, the 31st December, 2025 'longstop' date will only be extended by CRU in limited circumstances, to be determined on a case-by-case basis.

22. In this regard, current State policy is that the Dublin Array project is important to Ireland meeting its climate change commitments. Ireland has committed to achieving 80% renewable electricity by 2030, which is a binding target under the Climate Action Plan 2023 (<https://www.gov.ie/en/publication/7bd8c-climate-action-plan-2023/>) and includes attaining 5GW offshore wind capacity. According to the State, the Dublin Array is proposed to account for over 16% of Ireland's total 5GW-by-2030 target. Wind energy capacity represents 40% of the required emissions reduction for the electricity sector and State policy is that the delivery of offshore wind energy at a rapid pace is fundamental to the delivery of these reductions.

23. Accordingly, resolution of these proceedings as early as possible is important in Ireland's national interest and that of the EU, and by reference to global climate objectives, particularly where, as of the date of this judgment, there is a stay on the implementation of the foreshore licence by order of the referring court.

Environmental protection

24. From the point of view of the applicants' interests in the protection of the environment, the matter has an urgency, particularly in the event that the stay were to be discharged. The applicants contend that there is a strong case for using the expedited procedure, having regard to the serious and immediate risk to the environment and Natura 2000 Sites, which would be posed by allowing the project to proceed without an appropriate assessment, which takes into account the in-combination effects of pending projects.

25. The CJEU's factsheet on the Urgent Preliminary Ruling Procedure and Expedited Procedure refers (pp. 25-26) to an unpublished Order of 11 October 2017, *Commission v. Poland*, C-441/17, EU:C:2017:794 (Grand Chamber) in which the Republic of Poland had failed to fulfil some of its obligations pursuant to the habitats directive. The factsheet provides that the President of the Court decided of his own motion to apply the expedited procedure as "he found that the dispute between the Commission and the Republic of Poland brought to light imminent and potentially serious risks to the environment".

26. The applicants rely on the aim of the habitats directive as set out in the recitals as follows: "Whereas, the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; whereas the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities;"

27. They also rely on Article 2(1) of the directive: "The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies."

28. The applicants' position is that in circumstances where there is a possibility (or risk) that the appropriate assessment was unlawful, the possibility cannot be excluded beyond a reasonable scientific doubt that there may be a risk that the project will have adverse effect on the integrity of a Natura 2000 site. As such, there is a serious and immediate danger to the environment which would be particularly acute in the event that the stay was vacated by a domestic court. On that analysis, an expedited decision by the CJEU would help to avert such a risk.

Order

29. For the foregoing reasons, the CJEU is requested to apply the expedited procedure under Article 105 of the Rules of Procedure of the CJEU in relation to the request for a preliminary ruling which is in the process of being made in these proceedings.