

**THE HIGH COURT**

**[Record No. 2022 211 JR]**

**[2024] IEHC 318**

**BETWEEN**

**DARK SKY ROSCOMMON**

**APPLICANT**

**AND**

**AN BORD PLEANÁLA**

**RESPONDENT**

**BOARD OF MANAGEMENT TARMON SCHOOL**

**NOTICE PARTY**

**JUDGMENT of Ms. Justice Bolger delivered on the 27<sup>th</sup> day of May 2024**

**1.** The applicant is an NGO established to protect the night-time environment of Roscommon by raising awareness of the impact of light pollution and promoting the use of lighting designs that mitigate such impact. It seeks *certiorari* quashing a decision of the respondent (hereinafter referred to as "the Board") of 18 January 2022 to grant planning permission for a 21 light floodlighting development (hereinafter referred to as "the development") at Tarmon National School in County Roscommon. The development has proceeded with the applicant's knowledge in spite of these proceedings. The applicant chose not to challenge that and instead to await the outcome of this application and so I do not rely on that in my decision. It will be a matter for the relevant parties to deal with matters in the light of my decision.

**The applicant's challenge**

**2.** The applicant contends that there was a failure by the Board firstly, to properly assess the impact of the development on the receiving environment and secondly, to consider or engage with

their submissions to the Board on the impact the development may have on the Greenland White Fronted Goose (hereinafter referred to as "the goose/geese") which is a qualifying interest for a nearby Special Protection Area (SPA) at the Bellanagare Bog some three kilometres away from the development. They rely on an ecological submission that was before the Board which they say confirmed that the development was likely to have a significant impact on the SPA and they say that raised a reasonable scientific doubt about the development's impact on the geese, which they say is sufficient as they do not need to prove evidence of actual impact.

**3.** The Board's Inspector said that there would be no significant impact on the geese because firstly, the geese had abandoned the site and secondly, even if the geese recolonised the site, because of the size and scale of the proposed development and the fact that migratory birds (which would presumably include the geese) will avoid areas of artificial illumination. The applicant says this conclusion failed to comply with the conservation objectives of the Bellanagare Bog SPA and with s. 177U of the Planning and Development Act 2000 and Article 6(3) of the Habitats Directive in not addressing the restoration of the qualifying interest conservation objective of the Bellanagare Bog SPA.

**4.** The following National Parks and Wildlife Service have identified the conservation objective of the Bellanagare Bog SPA as: *"To maintain or restore the favourable conservation condition of the bird species listed as Special Conservation Interests for this SPA"*.

Article 6(3) of the Habitats Directive 92/43/EEC requires, *inter alia*:

*"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."*

Section 177U of the Planning and Development Act 2000 provides:

*"Screening for appropriate assessment.*

*177U.—(1) A screening for appropriate [assessment of a draft Land use plan or application for consent for proposed development] shall be carried out by the competent authority to assess, in view of best scientific knowledge, if that Land use plan or proposed development, individually or in combination with another plan or project is likely to have a significant effect on the European site.*

*(2) A competent authority shall carry out a screening for appropriate assessment under subsection (1) before—*

- (a) a Land use plan is made including, where appropriate, before a decision on appeal in relation to a draft strategic development zone is made, or
- (b) consent for a proposed development is given.

...

(4) The competent authority shall determine that an appropriate assessment of a draft Land use plan or a proposed development, as the case may be, is required if it cannot be excluded, on the basis of objective information, that the draft Land use plan or proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site.

(5) The competent authority shall determine that an appropriate assessment of a draft Land use plan or a proposed development, as the case may be, is not required if it can be excluded, on the basis of objective information, that the draft Land use plan or proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site.

...

(9) In deciding upon [a declaration or a referral under section 5] of this Act a planning authority or the Board, as the case may be, shall where appropriate, conduct a screening for appropriate assessment in accordance with the provisions of this section.]

[(10) In deciding upon an application under section 176A or a determination review or an application referral under section 176C, a planning authority or the Board, as the case may be, shall, where appropriate, conduct a screening for appropriate assessment in accordance with the provisions of this section.]

**5.** The applicant relies on the low threshold for Article 6(3) as found by Advocate General Sharpston in *Sweetman* C-258/11 i.e. that “likely” equates to “possibility of” and “significant effect” is an effect somewhere above “no appreciable effect” and that “[t]he threshold at the first stage of Article 6(3) is thus a very low one. It operates merely as a trigger...”. That test was incorporated into Irish law by Finlay Geoghegan J. in *Kelly v. An Bord Pleanála* [2014] IEHC 400. The applicant also relies on the caselaw of the CJEU that the Habitats Directive applies to a location that has been abandoned by the protected species; Case C-477/19 *Magistrat der Stadt Wien* (‘the Hamster case’), Case C-383/09 *Commission v. French Republic*, Case-281/16, Case C-535/07 *Commission v. Austria* and Case C-404/09 *Commission v. Spain*.

### **The response of the Board and notice party**

6. The Board says that all issues, including those raised in the ecological report on which the applicant relies, were properly considered by the inspector and there was no evidence or reasonable scientific doubt that the proposed development would have a significant effect on the geese. Both the Board and the notice party placed heavy emphasis on the content of the notice party's expert report ("the McLoughlin report") which found that the development presented no significant effect on the geese. They say the Board was entitled to prefer one expert to another as long as reasons are given (as per Humphreys J. in *Alice O'Donnell & Ors v. An Bord Pleanála* [2023] IEHC 381). They disputed that the conservation objectives of the SPA for the purposes of the Habitats Directive included repopulation of abandoned areas of distribution and said the purpose of Article 6(3) is only to ensure that the integrity of the site is not compromised; *People Over Wind v. An Bord Pleanála* [2015] IECA 272.

### **The expert reports**

7. The Ní Bhroin report, on which the applicant relied in asserting a reasonable scientific doubt that the proposed development would have a significant effect on the geese, was submitted by a different objector. That does not lessen the issues now raised by the applicant. There were two expert reports before the Board which had to be considered by the inspector. I examine below what each report said.

### **The McLoughlin report**

8. Dr. McLoughlin does not consider that the development will have any significant effects on the Bellanagare Bog SPA and that any effect on the geese will be avoided because they are no longer at the site and are now likely to avoid the area:

*"The impacts of light emissions upon the QI of Bellanagare Bog SPA have also been considered. The sole QI species of this SPA is the Greenland White-fronted Goose (*Anser albifrons flavirostris*). In the past when this SPA was initially designated, this bog was used by wintering Greenland White-fronted Goose from the internationally important population that is centred on Lough Gara. However, the geese now feed mainly on intensively managed grassland and have not been recorded at the site in recent years (NPWS, Bellanagare Bog SPA, Site Synopsis 2012 and Natura 2000 Standard Data Form, 2018). Therefore, it can be concluded that significant effects upon this bird species will be avoided. Unlike wires, pylons and turbines the lights pose no direct mortality threat to any bird species, and any birds that fly on winter nights are simply likely to avoid the area.*

...

*There will be no direct disturbance to any species listed in Annex I of the Birds Directive or Annex II of the Habitats Directive. There will be no significant effects upon any protected species arising from the installation of the lights or operation of the lights. The lights will have no significant effects upon the Greenland White-fronted goose, which no longer uses the habitats of Bellanagare Bog SPA."*

Appendix 1 to the report discusses 'Ecological Considerations':

*"The proposed development will have no significant effects upon any Natura 2000 site. However, as part of the response to the appeal against the granting of permission to this development by Roscommon County Council, a number of other ecological issues were raised. These points are considered below:*

- 1. The need for an Ecological Impact Assessment – It is not considered necessary... There will be no loss or fragmentation of any habitat of biodiversity arising from the proposed installation of lights. Whilst light can result in fragmentation of habitats, it is not considered significant in this instance. The lights will be used on dark evenings outside of the late spring and summer months and they will have a shut off time at 10pm. There will be no loss or removal of any trees or hedgerows. In addition, there are no watercourses on site, therefore pollution to watercourses will not arise."*

Later the report says:

*"4. Mammals that remain active through winter and that can be affected by lighting include otters, badgers and pine martins. There are no suitable otter habitats on site, and otters will forage at night time along river corridors... The closest watercourse to the application site is approximately 500m away, therefore effects upon otters arising from the lights are not likely to occur. Badgers and pine martins may occur in habitats that are closer to the proposed site but having regard to the habitats on the site and around the site and the fact that lights will shut off at 10pm, significant effects upon these mammals are not likely to arise.*

*5. Impacts upon flight paths of birds – the lights will be used at night, when the majority of birds are inactive. Some geese do fly at night however but the light emitted will not have any significant effect upon them and they may simply avoid the spillage and glare. The lights will shut off at 10pm so usage of same will not be significant. The Greenland white-fronted goose has abandoned the Bellanagare Bog SPA."*

9. Dr. McLoughlin's report says there will be no light after 10pm but this is not correct as the planning permission that was granted allowed the notice party to maintain two of the 21 lights on after 10pm in the carpark area which are operated by daylight sensors.

**The Ní Bhroin report**

10. Dr. Ní Bhroin sets out at 3.0 of her report:

*"...the Planner has not considered that where floodlighting is concerned the sky is a connection between the proposed development and the nearby Natura 2000 sites. The Planner has not sought additional information with respect to the light emissions into the dark sky. It should be considered that light quality during winter months October to January is considerably poorer than (sic) summer months March through to August. The Planner has not sought expert advice with respect to the proposed development on Natura 2000 sites and the impact on the ecology that these sites support."*

She continues at 4.0:

*"The abundance of Turloughs and the callows of the River Suck provides an ideal network of habitats for winter migratory birds and waterbirds. There has been no assessment of the cumulative impact of Natural Heritage Areas, proposed Natural Heritage Areas, Turloughs and the callows of the River Suck on the migration of the Annex I bird species Greenland White Fronted Goose, other winter migratory birds and waterbirds by the proposed development."*

At 5.0 she says:

*"It is important that the direct, indirect and especially the cumulative impacts associated with the floodlighting should be assessed. Impacts during and post construction should also be determined. Where there is deemed to be significant impact upon habitats or species, mitigation measures should be provided to reduce the impact of the proposed development upon protected species and upon the receiving environment."*

She concludes at 6.0:

*"The proposed development consisting of floodlighting of a rural area with 6m and 10m light stands entailing 17 light stands in total will lead to the illumination of an existing dark sky. A Screening for Appropriate Assessment needs to assess the impact of the proposed development on SPA sites within the Ricker Suck catchment. It is especially important that birds flying between habitats in adverse weather conditions are not distracted by bright lights. The Annex I winter migratory species Greenland White Fronted Goose is a qualifying*

*interest of many of the SPA sites within the River Suck catchment and the bird is afforded protection under the Birds Directive.*

*Illuminating an existing dark sky could have a significant impact on the receiving environment and the wildlife the environment supports. An Ecological Impact Assessment should have been requested to assess the impact of the proposed development on bat species locally, on birds flying between waterbodies and the impact on nocturnal species associated with rural environments. Nocturnal species need dark zones to trigger wake up time and for foraging. The impact of the proposed floodlighting on the local environment and species has not been assessed."*

**10.** Dr. Ní Bhroin is more general in her observations than Dr. McLoughlin, but she does confirm the importance of birds flying in winter (which must include the geese) not being distracted by bright lights. She says that birds fly between locations to forage during the winter months and the floodlights will lead to the illumination of an existing dark sky which "*could have a significant impact on the receiving environment and the wildlife the environment supports*" (at 6.0). She expresses her concern about the impact on nocturnal wildlife and while she does not describe the geese as nocturnal, Dr. McLoughlin confirms in her report that they fly at night.

### **The inspector's report**

**11.** The inspector found that migratory patterns were not affected:

*"...it is clear from the site synopsis form prepared by the NPWS that the Greenland White Fronted Goose have abandoned the site in question in favour of grassland sites elsewhere. Having regard to the fact that the qualifying interest no longer uses the Nature 2000 site in question it is self-evident and unquestionable that the proposed development will in no way affect migratory patterns associated with the bird."* (para. 11.3)

**12.** The absence of the geese on the site is a point heavily relied upon by the inspector who definitively concludes at 11.5 of his report that:

*"...the proposed development in combination with other plans and projects would not be likely to have a significant effect on European Site (004105) or any other European Site, in view of the site's conservation objectives, and an appropriate assessment and the submission of an NIS is therefore not required."*

**13.** The inspector endorses Dr. McLoughlin's finding that the geese would avoid areas of illumination if the area was being recolonised. The inspector did refer to recolonisation but only to say that:

*"Having regard to the size and scale of the subject site and the amount of illumination proposed it would be reasonable to conclude that even where bird migratory patterns could potentially be affected (for example if the species in question recolonise the SPA), the site and scale of the development would not be such that it would significantly affect migratory patterns associated with the birds in question."* (para. 11.3)

He says nothing about how the conservation objectives for the Bellanagare Bog SPA of restoring the favourable condition of the geese might be accommodated, including by the possibility of encouraging such recolonisation. I found it difficult to locate any consideration of that aspect of the site's conservation objectives in the inspector's report.

### **Discussion**

**14.** It is common case that the geese are not currently in situ on the Bellanagare Bog SPA but, if anything, that should highlight rather than obviate the need to consider the impact that this development could have on the conservation objective of restoring the qualifying interest. The fact that the geese, if they return, are likely to avoid the site because of the artificial illumination from the development – a finding the inspector seems to make regardless of the size and scale of the proposed development – cannot be consistent with achieving the conservation objective of restoring the geese. It is difficult to understand the inspector's conclusion that the geese avoiding the area equates to no significant impact on the geese, particularly given the apparent absence of any identifiable consideration of Dr. Ní Bhroin's observation that *"birds move from location to location to forage"*.

**15.** Proper consideration of the two ecological reports available to the inspector could not have led to a reasonable conclusion that the development *"will not adversely impact on the qualifying interests associated with the nearest SAC or SPA"*, as found by the inspector. That conclusion is contradicted by the inspector's own endorsement of Dr. McLoughlin's finding that the geese, if they returned, would be *"likely to avoid the area"* and *"simply avoid the spillage and glare"*. The inspector's finding that the geese will *"simply avoid areas of artificial illumination"* does not sit comfortably with the requirement in Article 6(3) that:

*"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."*

**16.** Counsel for the Board says that the inspector found that if the geese came back, they would fly away, and the inspector had therefore considered the issue and had concluded that the development would not be a significant effect on the geese. There is no consideration of what might influence a possible recolonisation or restoration of the geese or how this development, which apparently will lead to the area being avoided by the geese, will impact on the prospect of recolonisation or restoration of the geese in the Bellanagare Bog. In those circumstances a consideration of the size and scale of the development, separation distance between the development and the site and the lack of hydrological connection between them without any consideration of the impact of a possible recolonisation, cannot justify the inspector's conclusions that the development "*will not in any way adversely impact on the qualifying interests associated with these Natura 2000 sites.*"

**17.** The inspector was not entitled to simply prefer the views of the notice party's expert, Dr. McLoughlin. This is not a binary exercise of preference or balance between two options, rather it is an exercise of excluding all and any reasonable scientific doubt as Humphreys J. in *Reid v. An Bord Pleanála* [2021] IEHC 362 held at para. 43:

*"...we are not dealing with a question of 'balance'. There is a clear EU law requirement that there be no adverse effect on the integrity of a European site and that all reasonable scientific doubt on this point must be excluded."*

He went on at para. 45 to explain what Article 6(3) requires:

*"The test is not whether the applicant has demonstrated that no reasonable decision-maker could have concluded that there was no scientific doubt. The test is whether the applicant has demonstrated that a 'reasonable expert' (a reasonable person with the relevant sufficient expertise and aware of, and in a position to fully understand and properly evaluate, all the material before the decision-maker) could have a reasonable scientific doubt as to whether there could be an effect on a European site. One could, as the board in the present case seemed to be suggesting, turn this into a merely semantic issue by redefining the application*

*of O'Keefe to produce a meaning in which it could make sense in the exclude-all-doubt context, but that would be a fairly tortured exercise. Far better in terms of understandability, transparency, clarity, accessibility of the law and all-round credibility of the intellectual process at stake to accept that 'some material before the decision maker' just isn't enough when the mission statement of the exercise is not 'form a planning judgement' but 'exclude all reasonable scientific doubt'."*

This approach is supported by the views of Barniville J. (as he was then) in *Kelly v. An Bord Pleanála* [2019] IEHC 84 where he set out the principles applicable to a stage one screening, including at para. 68(7):

*"The 'possibility' of there being a 'significant effect' on the European site will give rise to a requirement to carry out an appropriate assessment for the purposes of Article 6(3). There is no need to 'establish' such an effect and it is merely necessary to determine that there 'may be' such an effect (para. 47 of opinion of Advocate General Sharpston in Sweetman)."*

He explained at para. 68(10):

*"Plans or projects or applications for developments which have 'no appreciable effect' on the protected site are excluded from the requirement to proceed to appropriate assessment. If all applications for permission for proposed developments capable of having 'any effect whatsoever' (sic) on the protected site were to be caught by Article 6(3) (or s.177U) 'activities on or near the site would risk being impossible by reason of legislative overkill' (Opinion of Advocate General Sharpston in Sweetman, para. 48)."*

**18.** Considering the impact of a development on the restoration of a species is entirely different to a positive obligation on a developer to contribute to the restoration objective, the latter of which was rejected by the Court of Appeal in *People Over Wind*. The applicant in the case before me has not sought to impose such an obligation on the Board or the notice party. They have simply asked that the Board should consider the impact of the development on the geese, which is far closer to what was endorsed by Hogan J. at para. 12 of *People Over Wind*:

*"There is no doubt but that a development which compromised the objective of restoration might well affect the integrity of the SAC site within the meaning of Article 6(3) of the Directive. A development which, for example, made the objective of restoration appreciably more difficult might well be thought to be likely to have significant effects in respect of the site. In some circumstances such a development could well compromise the integrity of the*

site. This very point was acknowledged by the Court of Justice in Case C-127/02 Waddenzee [2004] E.C.R. I-7448 when it stated (at para. 48) that:

*'where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site.'*

He went on to say at para. 22:

*"It is sufficient, therefore, that the applicant for permission demonstrates that the proposed development will pose no threat of the integrity of the SAC. It is not unfair that an applicant demonstrate that the proposed development will not impact adversely on a qualifying species protected by an SAC: it would be quite another matter if the applicant was to be required to contribute positively to the restoration of the protected species."*

**19.** The threshold for a stage one assessment is low but it still must be reached. Dr. Ní Bhroin is a reasonable expert (as is Dr. McLoughlin) and she has raised a reasonable scientific doubt that the proposed development could impact the qualifying interest in the nearby SPA. Whilst that conclusion is not shared by Dr. McLoughlin, she does confirm the possibility of an impact in finding that birds that fly on winter nights are likely to avoid this area of artificial illumination. This is, as counsel for the applicant pointed out, a problem rather than a benefit for the site and its qualifying interest, because birds who fly from location to location in order to forage are being diverted from their flight path. Therefore, the development may have the capacity to adversely affect one of the SPA conservation objectives of restoring the favourable conservation condition of the geese and that is something that requires consideration.

**20.** This SPA has not been delisted, a process which requires specific steps to be taken as per Article 9 of the Directive and Regulations 14 to 18 of S.I. No. 477 of 2011. Nevertheless, the inspector seems to view the absence of the geese as a reason not to be concerned about the potential impact of the proposed development on the qualifying interests of this SPA, including in the event of a recolonisation of the species, and as a reason to grant planning permission without requiring further assessment. This is not correct and does not properly comply with the requirements of Article 6(3).

**21.** The CJEU have made it clear that the departure of a species does not dilute the need for protecting that species (Case C-477/19 *Magistrat der Stadt Wien* ('the Hamster case'), Case C-535/07 *Commission v. Austria*, Case C-383/09 *Commission v. French Republic*). The CJEU in the *Hamster* case left it to the national courts to determine how to assess the probability of a species

returning to an abandoned resting place, but the court has made it clear that this must be done on the basis of best scientific data; Case C-674/17 *Luonnonsuojeluyhdistys Tapiola* ('the Finnish Wolves case').

**22.** Dr. Ní Bhroin did more than just raise issues, she raised reasonable scientific doubt. Her concerns were not properly considered by the Board. In *Balz v. ABP* [2019] IESC 90 the Supreme Court held that central to the public confidence in the planning process is the need for the concerns raised by members of the public to be addressed by the competent authority:

*"It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they were not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may have profoundly disagree, and with whose consequences they may have to live".*

The fact that the inspector summarised the points made by Dr. Ní Bhroin does not mean they were properly considered. The absence of a narrative analysis (which is not necessary as confirmed in *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2022] IEHC 7) is not what causes this Court concern. It is the failure to properly consider the reasonable scientific doubt that a reasonable expert's evidence based concerns have raised and the lack of scientific evidence before the Board to facilitate consideration of the positive restoration obligation of the conservation objectives of the Bellanagare Bog SPA.

### **Ecological corridors**

**23.** The applicant says an ecological corridor was not properly considered by the inspector. That has not been fully pleaded and the applicant did not have leave to seek judicial review on that ground and it does not, therefore, form part of this decision.

### **Conclusions**

**24.** For the reasons set out above, I am satisfied that the Board failed to properly apply the relevant provisions of Article 6(3) in not carrying out any or any proper or sufficient screening for appropriate assessment, in spite of the expression of reasonable scientific doubt of the possible impact of the development on the neighbouring Bellanagare Bog SPA, on the restoration of favourable conservative status there for the geese. The Board failed to consider and address whether the development may influence any potential future return of the geese to the Bellanagare

Bog SPA. I will hear counsel on what orders might be appropriate in the light of the completion of the development.

**Indicative view on costs**

**25.** As the applicant has succeeded in this application, my indicative view on costs is, in accordance with s. 169 of the Legal Services Regulatory Act 2015, that the applicant is entitled to their costs. I will put the matter in for mention before me on 19 June at 10:30am for the purpose of hearing such further submissions which the parties may wish to make both in relation to costs and the scope and application of the final orders to be made. Any written submissions should be filed with the court at least 48 hours before the matter is back before me.

**Counsel for the applicant:** Oisín Collins SC, Margaret Heavey BL

**Counsel for the respondent:** David Browne SC, Ellen O'Callaghan BL

**Counsel for the notice party:** Alan Keating SC