



THE SUPREME COURT

Appeal No: S:AP:IE:2017:000013

Record No: 2014/488JR

Clarke C. J.
O'Donnell J.
Dunne J.
O'Malley J.
Finlay Geoghegan J.

Between/

Kathleen Connelly

Applicant/Respondent

and

An Bord Pleanála

Respondent/Appellant

And

Clare County Council

McMahon Finn Wind Acquisitions Ltd

Notice Parties

Judgment of the Chief Justice delivered the 17th July 2018

1. Introduction

1.1 In very simple terms the application which lies at the heart of these proceedings involved a proposed wind farm development consisting of six turbines in respect of which the second named notice party ("the Developer") was the applicant. The application for permission was turned down by the relevant planning authority, being the first named notice party ("Clare County Council"), on the 12th July 2011. While it will be necessary in due course to say a little more about the process which followed on from an appeal against that refusal to the respondent/appellant ("the Board"), ultimately, on the 9th May 2014, the Board determined to grant permission with the formal decision of the Board being dated the 29th May 2014.

1.2 The applicant/respondent ("Ms. Connelly") brought these judicial review proceedings challenging that decision of the Board. For reasons which it will again be necessary to address in more detail, the High Court (Barrett J.) (*Connelly v. An Bord Pleanála* [2016] IEHC 322) decided to quash the decision of the Board granting permission. It is in respect of that decision of Barrett J. that the Board has appealed to this Court.

1.3 I propose to turn initially to the grant of leave, but it is appropriate at this stage to record that the central issue with which the High Court was concerned, and also the central issue with which this Court is concerned on this appeal, relates to the question of whether, at least in very general terms, adequate reasons were given by the Board in its decision.

1.4 There have been significant developments in recent years in the law relating to the reasons required to be given by any decision maker who has the legal power to make determinations which affect legal rights and obligations. It will be necessary to address that evolving jurisprudence in due course. The particular focus of the issues

which arise on this appeal concerns the application of those principles to decisions made by the Board when exercising its statutory role in relation to planning permission. However, questions of European law also arise in the context of this appeal, for the project in respect of which the challenged permission was given involved obligations under Union law both to conduct an environmental impact assessment (“EIA”) and, having regard to the possibility of there being an effect on a sensitive site, an appropriate assessment (“AA”). It follows that it is also necessary to consider the extent, if any, to which there may be additional obligations placed on the Board when making decisions involving either or both an EIA or an AA.

2. The Grant of Leave

2.1 The Board applied to this Court for leave to bring a leapfrog appeal direct to this Court.

2.2 For the reasons set out in a determination (*Connelly v. An Bord Pleanála & ors* [2017] IESCDET 57) this Court granted leave.

2.3 The issues which this Court identified as meeting the constitutional threshold and in respect of which leave to appeal was, therefore, granted were all of the grounds proposed by the Board in its application for leave. These grounds were set out in the following terms:-

1. The High Court erred in law in finding legal fault with the reasons for the Board’s Decision by failing to consider the Decision as a whole and focusing only on the conclusions cited at [12] and [25] to the detriment of the clear and express reasoning set forth elsewhere in the Decision. The law requires that the whole of the Board Decision be examined (see e.g. *Rathineska v An Bord Pleanála* [2015] IEHC 18) which includes the entire of its reasoning and the reasons for the imposition of specific conditions. Further, the adequacy of the

Board's reasons fall to be considered in light of the documents and evidence before the Board and from the standpoint of an intelligent person who has participated in the relevant proceedings and is appraised of the broad issues involved (see e.g. *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39 and *O'Neill v. An Bord Pleanála* [2009] IEHC 202). In the premises the High Court applied an inappropriate standard of review to the Board's Decision.

2. The High Court erred in law by concluding that the Board had failed to comply with s.177V(1) of the PDA insofar as the High Court held that a failure to provide proper reasons for a conclusion on AA equates to non-compliance with s.177V(1) and erred in law in concluding that the Board had failed to provide proper reasons for its Decision insofar as AA was concerned. S.177V(1) does not impose any express reasoning obligation on a decision maker apart from the obligation to make a determination under Article 6(3) of the Habitats Directive.
3. The High Court erred in holding that the Board could not refer to and rely on other material in its decision unless the particular observations or conclusions relied upon are identified with specific particularity on the face of the Board's Decision.
4. The High Court erred in law by holding that the Board could not adopt contents of the Inspector's report in circumstances where it did not accept the Inspector's recommendations and where the report was not "unfailingly positive" as regards the proposed development.. The Board Decision clearly indicates that the Inspector's report was adopted save in respect of issues

where the Board disagreed with the Inspector and express reasons were provided by the Board for its conclusions on these issues.

5. The High Court erred in law and in fact in holding that the Board could not rely on the Inspector's report because the proposed development had been redesigned subsequent to the preparation of that report. In so holding the High Court paid no regard to the fact that the redesign had been invited by the Board to meet specific concerns highlighted by the Inspector in her report or that the development remained broadly similar save certain items were omitted (thereby lessening any impact the development might have) that the location of other items of infrastructure were changed to meet the said concerns.
6. The High Court erred in law by holding that the Board had not carried out an EIA and had not complied with s.172(1J) of the PDA and/or not provided proper reasons with regard to its carrying out of EIA.
7. The High Court erred in law in his interpretation of s.172(1J) insofar as it held that same required more in terms of the Board's statement of the "*evaluation of the direct and indirect effects of the proposed development*" than what had occurred and requires a standard of Board reasoning in terms of detail that is not required by law.
8. The learned High Court Judge erred in law by holding that for the Board to be able to refer to evidence which was before it in defence of its Decision that evidence had to be specifically cross referred or linked in a manner greater than actually done and evident in the Board Decision.

9. The learned High Court Judge erred in law by failing to have regard to the established principle that the adequacy of reasons should be assessed from the perspective of an intelligent person who has participated in the relevant proceedings and is appraised of the broad issues involved and applied an inappropriate standard in its stead.

10. The learned High Court Judge erred in law in holding that the Applicant was given no proper understanding of how the Decision was reached by the Decision itself and, again, in so holding analysed only the conclusions of the Board which in no way profess to amount to complete explanations of the Board Decision which has to be read as a whole.

2.4 It is therefore to those issues that this appeal is directed. In order to more fully identify the precise issues which arise it is appropriate to start with a brief account of the facts.

3. The Facts

3.1 As noted above, on the 12th July 2011, a planning application by the Developer for a wind farm development consisting of 6 turbines and associated works was refused by Clare County Council. This refusal was appealed to the Board on the 8th August 2011.

3.2 The Board appointed an inspector (the "Inspector") to prepare a report, which report is dated the 30th November 2011. On the 25th January 2013, a Board meeting was held at which this appeal was considered. The Board had various concerns and requested the Developer to provide specific information and revisions, including a so-called Natura Impact Statement ("NIS"). On the 13th February 2013, a statutory notice

under s. 132 of the Planning and Development Act 2000 ("the 2000 Act") was issued to the same effect.

3.3 On the 9th August 2013, the Developer provided a detailed response to the s. 132 notice, including the requested NIS. The Board was satisfied that the new information provided was sufficient to address the concerns it had raised previously.

3.4 At a meeting on the 9th May 2014, the Board decided to grant permission. The Board decision ("the Decision") is dated 29th May 2014. For the purposes of understanding the Decision it is also important to have regard to certain provisions of European Union law which require, in certain circumstances, that there be an EIA and, in some cases, an AA. It will therefore be necessary to consider certain aspects of the legal parameters surrounding the Union law obligations in that regard in due course.

3.5 However, for present purposes, it is sufficient to note that, in the Decision, the Board stated that it was satisfied that the information before it was adequate to undertake an EIA and an AA in respect of the proposed development.

3.6 The Board then continued on in its Decision to set out the areas in which it disagreed with the conclusions of the Inspector in this context. The reasoning of the Board as set out in its Decision will be explored in detail below.

3.7 The Decision also sets out various conditions to be attached to the grant of permission relating to, for example, the mitigation measures set out in the environmental impact statement and the NIS, measures to be taken in the interests of protection of the Hen Harrier, and measures to be taken in the interests of residential and visual amenity.

3.8 Against the background of those facts it is next necessary to consider the judgment of the High Court.

4. The Judgment of the High Court

4.1 As noted above, the Decision was challenged by Ms. Connelly. The grounds on which Ms. Connelly objected to the decision are described in the judgment of the High Court as follows:-

“[Ms. Connelly] raises four key objections to the decision of An Bord Pleanála. These are that An Bord Pleanála failed:(1) to carry out and/or record any screening assessment for appropriate assessment, contrary to national and European law, (2) to carry out and/or record any proper appropriate assessment under national and European law, (3) to carry out and/or record any proper environmental impact assessment under national/European law, and (4) to consider or have regard to its obligations under s.37(2) of the Planning and Development Act 2000. Each of [Ms. Connelly’s] objections is considered below.”

4.2 Regarding the argument that there was a failure to carry out and/or record a screening assessment for an AA, the High Court rejected the Board’s argument that the s. 132 statutory notice, requesting a NIS so that it could carry out a full AA, was sufficient in this regard. The trial judge concluded at para. 10 of the judgment that the Board has failed to meet the requirements of s. 177U(6)(a) of the 2000 Act :-

“In this regard, [Ms. Connelly] points to the fact that the s.132 notice indicates that a Natura Impact Statement is required so that an appropriate assessment can be undertaken but gives no indication as to the reason/s that An Bord

Pleanála has for undertaking that appropriate assessment. Try as it might (and it has tried), An Bord Pleanála cannot escape the fact that (i) a statement which indicates that An Bord Pleanála requires a Natura Impact Statement so that an appropriate assessment may be done, (ii) offers no reason as to why An Bord Pleanála has determined that the appropriate assessment falls to be done.”

4.3 Regarding the objection that there was a failure to carry out and/or record any proper AA under EU and national law, the High Court agreed that the Decision failed to satisfy the relevant requirements. In this regard the trial judge referred to the analysis of the High Court (Finlay Geoghegan J.) in *Kelly v. An Bord Pleanála* [2014] IEHC 400, and also to the decisions of the Court of Justice of the European Union (“CJEU”) in *Mellor* [2009] ECR I-3799 and the High Court (Clarke J.) in *Christian v. Dublin City Council* [2012] IEHC 163. After examining these decisions, the trial judge stated that:-

“... what is required of An Bord Pleanála are complete, precise and definitive findings and conclusions of a degree of specificity sufficient that a party minded to seek judicial review of such determination can turn readily to the particular observations, reasoning or conclusions in, say, a particular report or text to which reference is made, rather than simply being told that somewhere in an ocean of documentation is some stream of logic that An Bord Pleanála favours. And if it is all of a particular report or text that is being relied upon by An Bord Pleanála, so be it, but let it be identified properly, so that, the findings and conclusions reached in its determination are sufficiently complete, precise and definitive as to enable (i) an interested party

meaningfully to assess the lawfulness of that determination and (ii) a court to undertake a ready and comprehensive judicial review of same.”

4.4 The trial judge was not satisfied that the Decision met this standard and concluded that Ms. Connelly could not readily satisfy herself as to whether or not to bring a challenge.

4.5 It should be noted that, in this context, the High Court judgment does not refer to the analysis in *Kelly* regarding the specific requirements, which must be satisfied under EU law as implemented in Irish law, in carrying out an AA in order to give the Board jurisdiction to grant a permission, but rather focuses on the general duty to provide reasons. These issues will be addressed in greater detail later in this judgment.

4.6 The trial judge went on to consider the argument that the Board had failed to carry out and/or record any proper EIA as required by both national and European law. Having set out the relevant legislative provisions and having quoted from the Decision, the trial judge stated:-

“The difficulty that the court considers to present for An Bord Pleanála in this regard is that in relying upon quite generic reasoning and a rather contrary report that relates to a different development, it is difficult to see that An Bord Pleanála has complied (in fact this Court concludes that it has not complied) with the requirement in s.172(1J) to give a proper “evaluation of the direct and indirect effects of the proposed development”. Moreover and separately, when it comes to providing, again pursuant to s.172(1J) “the main reasons and considerations on which the decision is based”, the court considers that the summary form of the text of An Bord Pleanála’s decision in this regard imparts next to no information to an affected party – here [Ms. Connelly]. She

is not given a proper understanding of why the decision has been reached— and if she wants to seek a judicial review of the decision within the tight time constraints applicable, the generic form of the reasoning employed by An Bord Pleanála has the effect that she cannot properly assess matters without a detailed consideration of the underlying documentation and/or costly expert assistance.”

4.7 Finally in this context, the trial judge stated that, with regard to acceptability of referring to material outside of a decision to provide the reasoning for that decision, it is possible in some situations that a decision and a related inspector’s report may “lawfully fall to be read in tandem”. However, the trial judge concluded that it is not acceptable for a public decision-making body to issue a decision which refers to “an ocean of material consulted or relied upon” in support of its decision “and to leave an affected party thereafter to fish in that ocean for what she might catch there of relevance...”.

4.8 The final objection which was considered by the High Court related to an alleged failure on the part of the Board to consider or have regard to s. 37(2) of the 2000 Act. This objection was rejected by the High Court and is not of relevance to this appeal.

4.9 The trial judge also stated that the High Court judgments in *Balz v. An Bord Pleanála* [2016] IEHC 134 and *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 226, which were delivered after the High Court had reserved its judgment in this case, did not give cause to depart from its conclusions.

4.10 Therefore, the High Court concluded that the Board had breached its obligations regarding the recording of the screening assessment of the AA, the AA

itself and the EIA in the Decision. The trial judge considered that the cumulative effect of these breaches was such that the order of *certiorari* sought should be granted.

5. Some General Observations

5.1 It is perhaps trite to say that it is very difficult to be specific about the manner in which the obligation to give reasons must apply in different types of situations. This is so not least because the kind of decisions to which the obligation to give reasons applies can vary enormously. Furthermore, the process leading to a decision can differ greatly from one case to the next. Some decisions follow on from a largely adversarial process not entirely unlike that which might occur where a court is required to consider a similar question. Others involve a decision of a regulator who has engaged only with a regulated entity. Some decisions, such as most in the environmental field, can involve the interests of a wide range of persons and the participation of many in the process itself.

5.2 Furthermore, the legal requirements which go into different types of decisions may, themselves, vary very significantly from case to case. In certain circumstances a decision maker may be required to determine whether very precise criteria are met. The issue will, therefore, be as to whether those criteria are present, and the reasons which will require to be given will necessarily have to address why it is said that the criteria were, or were not, met. That, in turn, may very well itself require an understanding of the process which led to the decision and the precise issues which were focused on in that process. On what basis was it suggested that the criteria were not met and how did the person concerned suggest that those questions could be answered in its favour? The issues which arise clearly inform the reasoning behind any decision.

5.3 However, other decisions involve much broader considerations involving general concepts, and often, to a greater or lesser extent, a degree of judgment or margin of appreciation on the part of the decision maker. Indeed, it may be said that, in the field of environmental law, issues at various points along that spectrum can arise. There may be specific issues as to whether, for example, a particular project conforms to a development plan or guidelines which the decision maker is required to take into account. On the other hand, a decision may also involve a broader question of whether, for example, a proposed development would involve an excessive impairment of visual amenity in a sensitive area. Many other examples could be given. However, the point is that the type of reasons which may be necessary will depend, amongst other things, on the type of decision which is being made and the legal requirements which must be met in order for a sustainable decision of that type to be reached.

5.4 In my view it is of the utmost importance, however, to make clear that the requirement to give reasons is not intended to, and cannot be met by, a form of box ticking. One of the matters which administrative law requires of any decision maker is that all relevant factors are taken into account and all irrelevant factors are excluded from the consideration. It is useful, therefore, for the decision to clearly identify the factors taken into account so that an assessment can be made, if necessary, by a court in which the decision is challenged, as to whether those requirements were met. But it will rarely be sufficient simply to indicate the factors taken into account and assert that, as a result of those factors, the decision goes one way or the other. That does not enlighten any interested party as to why the decision went the way it did. It may be appropriate, and perhaps even necessary, that the decision make clear that the appropriate factors were taken into account, but it will rarely be the case that a

statement to that effect will be sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons.

5.5 Arising out of those general observations there seem to me to be three specific areas of law which it is necessary to address before going on to apply the principles identified to the circumstances of this case. They are:-

- (a) The criteria by reference to which a court should assess whether the reasons given are adequate in any particular case;
- (b) The identification of the documents or materials which can properly be considered for the purposes of identifying the reasoning of the decision maker as part of the process of determining whether adequate reasons have been given; and
- (c) The potentially separate question of whether European Union law requires, either for the purposes of an EIA or, perhaps more clearly, for the purposes of an AA, that reasons require to be given in any particular form or, importantly, whether certain express scientific findings require to be made prior to a sustainable decision occurring.

That latter point is of particular relevance in the context of the argument that there is an obligation on a relevant permission giver in the environmental field who is required to conduct an AA to reach certain sustainable conclusions before a valid permission can be given. There is a sense in which the argument under that heading is not, strictly speaking, an argument as to the obligation to give reasons but rather represents an argument as to the type of detailed findings which require to be made before a sustainable decision can be arrived at. It is proposed to deal with each of those three matters in turn.

6. The Purpose behind Reasons

6.1 As noted above, what the Court is concerned with here is the criteria by reference to which a court should assess whether the reasons given are adequate in any particular case. It seems to me that it is possible to identify some key principles from the recent case law in this area.

6.2 *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59 concerned a refusal by the relevant Minister to grant a certificate of naturalisation to the appellant, a Syrian refugee residing in the State. The Minister's decision did not give any reason for the refusal beyond simply stating that the Minister had exercised his absolute discretion under the relevant legislation.

6.3 Delivering the decision of this Court, Fennelly J. engaged in a review of the sometimes conflicting jurisprudence in this area. He cited the decision of Barron J. in the High Court in *State (Daly) v. Minister for Agriculture* [1987] I.R. 165, which concerned a civil servant on probation whose appointment was terminated pursuant to s. 7 of the Civil Service Regulation Act 1965. Regarding the failure of the Minister to give reasons for reaching this decision, Barron J. stated:-

“Such powers may only be exercised in conformity with the Constitution. The view of the Minister must be seen to be *bona fide* held, to be factually sustainable and not unreasonable. If no reasons have been given for the exercise of the power, then this court cannot review the exercise of the power in the light of these criteria.

The court must ensure that the material upon which the Minister acted is capable of supporting his decision. Since the Minister has failed to disclose the

material upon which he acted or the reasons for his action there is no matter from which the court can determine whether or not such material was capable of supporting his decision. Since the Minister continues to refuse to supply this material, it must be presumed that there was no such material."

6.4 Fennelly J. also referred to the decision of the High Court (Blayney J.) in *International Fishing Vessels Ltd. v. Minister for the Marine* [1989] I.R. 149 which concerned the refusal by the respondent Minister to grant a licence. Blayney J. held that in this context reasons must be provided:-

"It is common case that the Minister's decision is reviewable by the court. Accordingly, the applicant has the right to have it reviewed. But in refusing to give his reasons for his decision the Minister places a serious obstacle in the way of the exercise of that right. He deprives the applicant of the material it needs in order to be able to form a view as to whether grounds exist on which the Minister's decision might be quashed. As a result, the applicant is at a great disadvantage, firstly, in reaching a decision as to whether to challenge the Minister's decision or not, and secondly, if he does decide to challenge it, in actually doing so, since the absence of reasons would make it very much more difficult to succeed."

6.5 Fennelly J. stated as follows at paras. 64 and 65 of his judgment in *Mallak*:-

"In the present case, the applicant points to the effective invitation to the appellant to "reapply for the grant of a certificate of naturalisation at any time." That statement might reasonably be read as implying that whatever reason the Minister had for refusing the certificate of naturalisation was not of such importance or of such a permanent character as to deprive him of hope

that a future application would be successful. While, therefore, the invitation is, to some extent, in ease of the appellant, it is impossible for the appellant to address the Minister's concerns and thus to make an effective application when he is in complete ignorance of the Minister's concerns.

More fundamentally, and for the same reason, it is not possible for the appellant, without knowing the Minister's reason for refusal, to ascertain whether he has a ground for applying for judicial review and, by extension, not possible for the courts effectively to exercise their power of judicial review."

(Emphasis added)

6.6 Importantly, Fennelly J. stated at para. 66:-

"In the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision.

However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."

6.7 In a useful and elucidating analysis of the judgment in *Mallak*, O'Donnell J., writing in an academic context, has described this preceding paragraph as the "core" of Fennelly J.'s decision in *Mallak*. (see, O'Donnell, "*Mallak* and the Rule of

Reasons” in *Of Courts and Constitutions: Liber Amoricum in Honour of Nial Fennelly*, (2014) at 228)

6.8 Following the above quoted statement at para. 66 of *Mallak*, Fennelly J. stated that there are:-

“Several converging legal sources [which] strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them.” (Emphasis added)

6.9 Therefore, Fennelly J.’s decision in *Mallak* points to at least two purposes served by the provision of reasons by a decision maker being, first, to enable a person affected by the decision to understand why a particular decision was reached, but secondly, to enable a person to ascertain whether or not they have grounds on which to appeal the decision where possible or seek to have it judicially reviewed.

6.10 It is possible to cite further recent decisions of this Court in this context to similar effect.

6.11 In *Meadows v. Minister for Justice* [2010] 2 I.R. 701, Murray C.J. stated:-

“An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.

Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.”

6.12 In my judgment in *Rawson v. Minister for Defence* [2012] IESC 26, I stated at paragraph 6.8:-

“As pointed out by Murray C.J. in *Meadows* a right of judicial review is pointless unless the party has access to sufficient information to enable that party to assess whether the decision sought to be questioned is lawful and unless the courts, in the event of a challenge, have sufficient information to determine that lawfulness. How that general principle may impact on the facts of an individual case can be dependant on a whole range of factors, not least the type of decision under question, but also, in the context of the issues with which this Court is concerned on this appeal, the particular basis of challenge.”

6.13 Similarly, in *EMI Records (Ireland) Limited & ors v. The Data Protection Commissioner* [2013] IESC 34, I concluded at paragraph 6.5:-

“It follows that a party is entitled to sufficient information to enable it to assess whether the decision is lawful and, if there be a right of appeal, to enable it to assess the chances of success and to adequately present its case on the appeal. The reasons given must be sufficient to meet those ends.”

6.14 In *Oates v. Browne* [2016] IESC 7, Hardiman J. stated at paragraph 47:-

“It is a practical necessity that reasons be stated with sufficient clarity that if the losing party exercises his or her right to have the decision reviewed by the

Superior Courts, those Courts have the material before them on which to conduct such a review. Secondly, and perhaps more fundamentally, it is an aspect of the requirement that justice must not only be done but be seen to be done that the reasons stated must 'satisfy the persons having recourse to the tribunal, that it has directed its mind adequately to the issue before it'."

6.15 Therefore, it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review.

6.16 However, in identifying this general approach, it must be emphasised that its application will vary greatly from case to case as a result of the various criteria identified earlier which might distinguish one decision, or decision making process, from another.

6.17 In this regard, it is important to note that, in the context of challenges to environmental decisions which are subject to European law, as in the present appeal, failure to participate in the permission process does not necessarily exclude a person from having standing to challenge a decision (see *Grace and anor v. An Bord Pleanála* [2017] IESC 10). This may potentially impact on the requirement that a

person is entitled to have sufficient information to consider whether they can or should seek to have a decision judicially reviewed. Where a person has participated in a process it might potentially be open to a decision maker to point to information which would be obvious to someone who had so participated for the purposes of explaining a decision and this information might help to satisfy the requirement to give reasons. However, where the person who seeks to challenge the decision was not involved in the process, it may not be open to the decision maker to take this approach, as the same information might not necessarily be obvious or available to the 'outsider', and therefore the requirement to give reasons would not necessarily be met.

6.18 This latter point feeds in to the question of the identification of the documents or materials which can properly be considered for the purposes of identifying the reasons of the decision maker as part of the process of determining whether adequate reasons have been given. I now turn to that issue.

7. Where can the Reasons be Found?

7.1 This issue is essentially concerned with identifying the materials which may be considered appropriate or acceptable in determining the reasons for a decision.

7.2 Of relevance here is the decision of the High Court in *Christian*. That case concerned, in part, a claim that Dublin City Council had failed to provide adequate reasons regarding aspects of a development plan, which reasons were said to be required under the relevant legislation.

7.3 With regard to identifying the location of reasons for a decision, I made the following comments at para. 9.2 of my judgment in *Christian*:-

“The second leg of the requirement to give reasons is that the reasons be capable of being determined with some degree of precision. It seems to me in that context that any document recording the reasons must be such that it is possible to say that the document concerned actually represents the reasons for the decision in question in a way which ought not be capable of real debate. It does not seem to me that it necessarily follows from the above analysis that the reasons have to be included in the development plan itself. It is, for example, possible that there may be documents referred to in the development plan which can provide the rationale for aspects of the measures incorporated into the development plan. In addition, documents prepared in the context of the adoption process may, depending on the content, also be capable of being relied on as an authoritative statement of the rationale. However, the requirement of reasonable certainty as to the reasons seems to me to necessitate that any documentation said to represent the reasons must be either expressly referred to in the development plan or be, by necessary implication, from the terms of the development plan, clearly adopted by those voting in favour of the development plan as part of the reasoning concerned.”

7.4 In this context it is also worth returning to the decision of Fennelly J. in *Mallak*. As noted above, at para. 66 of his judgment, Fennelly J. stated:-

“The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where

the reasons for the decision are obvious and that effective judicial review is not precluded.”

7.5 Therefore, it is possible that the reasons for a decision may be derived in a variety of ways, either from a range of documents or from the context of the decision, or in some other fashion. However, as is clear from the above analysis, this is always subject to the requirement that the reasons must actually be ascertainable and capable of being determined. In this regard, I refer to my judgment in *EMI*, where I stated at paragraph 6.8:-

“While the comments made in *Christian* related to the specific circumstances of that case and derived from the context of a development plan, it seems to me that there is a more general principle at play. Legal certainty requires, as was pointed out in *Christian*, that it must be possible to accurately determine what the reasons were. There should not be doubt as to where the reasons can be found. Clearly, an express reference in the decision itself to some other source outside of the decision document meets that test. Where, however, it is suggested that the reasons can be found in materials outside both of the decision itself together with materials expressly referred to in the decision, then care needs to be taken to ensure that any person affected by the decision in question can readily determine what the reasons are notwithstanding the fact that those reasons do not appear in the decision itself or in materials expressly referred to in the decision.”

7.6 Again, it is worth emphasising the point made earlier. The range of persons who are able to challenge a particular decision will vary from case to case, as will the extent of their involvement in the process. Thus, as a consequence of the above

analysis, the requirement that reasons given for a decision must be adequate necessitates that, where the reasons are not included in the text of the decision itself, they must be capable of being readily determined by any person affected by the decision. Clearly, the ability of a person who was not involved in the process, but who is nonetheless entitled to challenge the decision, to identify the reasons for a decision, where those reasons are to be derived from a diffuse range of sources, will differ greatly from the ability of a person who was involved in the process to do so.

8. The European Union Dimension

8.1 As stated above, this issue concerns the question of whether European Union law requires, either for the purposes of an EIA or, perhaps more clearly, for the purposes of an AA, that reasons require to be given in any particular form or, importantly, whether certain express scientific findings require to be made prior to a sustainable decision occurring. In this context, the decision of Finlay Geoghegan J. in *Kelly* is of particular relevance and importance.

8.2 However, it is first necessary to set out the relevant legislative framework regarding the carrying out of an EIA and an AA.

8.3 Part X of the 2000 Act makes provision regarding the carrying out of EIAs, and the information which the Board must supply after reaching a decision in that context. Section 171A(1) provides:-

“In this Part—

‘environmental impact assessment’ means an assessment which includes an examination, analysis and evaluation carried out by ... the Board ... in accordance with this Part and Regulations made thereunder, that shall identify,

describe and assess in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11 of the Environmental Impact Assessment Directive, the direct and indirect effects of a proposed development on the following:

- (a) human beings, flora and fauna;
- (b) soil, water, air, climate and the landscape;
- (c) material assets and the cultural heritage and
- (d) the interaction between the factors mentioned in paragraphs (a), (b) and (c)."

8.4 Section 172(1H) provides:-

"In carrying out an environmental impact assessment under this section the planning authority or the Board, as the case may be, may have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers."

8.5 Section 172(1J) provides:-

"When the ... the Board ... has decided whether to grant or to refuse consent for the proposed development, it shall inform the applicant for consent and the public of the decision and shall make the following information available to the applicant for consent and the public:

- (a) the content of the decision and any conditions attached thereto;

- (b) an evaluation of the direct and indirect effects of the proposed development on the matters set out in section 171A;
- (c) having examined any submission or observation validly made,
 - (i) the main reasons and considerations on which the decision is based, and
 - (ii) the main reasons and considerations for the attachment of any conditions, including reasons and considerations arising from or related to submissions or observations made by a member of the public;
- (d) where relevant, a description of the main measures to avoid, reduce and, if possible, offset the major adverse effects;
- (e) any report referred to in subsection (1H);
- (f) information for the public on the procedures available to review the substantive and procedural legality of the decision, and
- (g) the views, if any, furnished by other Member States of the European Union pursuant to section 174.”.

8.6 Part XAB of the 2000 Act provides for the making of an AA.

8.7 Section 177U of the 2000 Act makes provision regarding screening for an appropriate assessment. Section 177U(1) provides:-

“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.”

8.8 Of particular relevance for the purposes of this appeal is s. 177U(6), which provides for the notification of a decision by the competent authority that an appropriate assessment is required:-

“(a) Where, in relation to a proposed development, a competent authority makes a determination that an appropriate assessment is required, the competent authority shall give notice of the determination, including reasons for the determination of the competent authority, to the following—

(i) the applicant,

(ii) if appropriate, any person who made submissions or observations in relation to the application to the competent authority, or

(iii) if appropriate, any party to an appeal or referral.

(b) Where a competent authority has determined that an appropriate assessment is required in respect of a proposed development it may direct in the notice issued under paragraph (a) that a Natura impact statement is required.

(c) Paragraph (a) shall not apply in a case where the application for consent for the proposed development was accompanied by a Natura impact statement.”

8.9 Section 177V of the 2000 Act provides for the carrying out of an AA. Section 177V(1) provides:-

“(1) An appropriate assessment carried out under this Part shall include a determination by the competent authority under Article 6.3 of the Habitats Directive as to whether or not a draft Land use plan or proposed development would adversely affect the integrity of a European site and an appropriate assessment shall be carried out by the competent authority, in each case where it has made a determination under section 177U(4) that an appropriate assessment is required, before—

(a) the draft 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 is given for the proposed development.”

8.10 Article 6 of Council Directive 92/43/EEC (as amended) (“the Habitats Directive”) provides in relevant part:-

“2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to

appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.”

8.11 The judgment of Finlay Geoghegan J. in *Kelly* provides an important analysis of these legislative provisions, and the requirements of EU law in this area as interpreted by the CJEU. *Kelly* concerned a challenge to decisions of the Board granting planning permission for wind turbine developments in County Roscommon. It was contended that the Board had failed to adhere to the requirements of Irish and EU law in carrying out an EIA and an AA. It was also contended that the Board had failed to record its conclusions or give any proper statement of its reasons, contrary both to EU and to national law.

8.12 Finlay Geoghegan J. set out the relevant legislative framework for both EIAs and AAs, and, having considered the requirements in each instance, stated:-

"33. As appears, the respective effects on the decision making process of the Board of the environmental impact assessment and the appropriate assessment (where both have to be carried out by the Board prior to taking its planning decision) are quite different. In carrying out an environmental impact assessment, the Board is required to conduct an examination, analysis and evaluation of and identify the direct and indirect effects of the proposed developments on the matters specified in section 171A(1). However, the outcome of that examination, analysis, evaluation and identification informs rather than determines the planning decision which should or may be made. The Board has jurisdiction in its discretion to grant consent regardless of the outcome of the EIA though of course it impacts on how it should exercise its discretion.

34. In contrast, the Board, in carrying out an appropriate assessment under Article 6(3) and s.177V, is obliged, as part of same, to make a determination as to whether or not the proposed development would adversely affect the integrity of the relevant European site or sites in view of its conservation objectives. The determination which the Board makes on that issue in the appropriate assessment determines its jurisdiction to take the planning decision. Unless the appropriate assessment determination is that the proposed development will not adversely affect the integrity of any relevant European site, the Board may not take a decision giving consent for the proposed development unless it does so pursuant to Article 6(4) of the Habitats Directive."

8.13 Finlay Geoghegan J. went on to consider the nature of an AA, taking into account the decisions of the CJEU in *Waddenzee* (Case C-127/02) [2004] ECR I-7405, *Commission v. Spain* (Case C-404/09) [2011] E.C.R. I-11853 and *Sweetman* (Case C-258/11). Finlay Geoghegan J. concluded in this regard:-

“Section 177V(1) must be construed so as to give effect to Article 6(3) of the Habitats Directive, and hence, an appropriate assessment carried out under the section must meet the requirements of Article 6(3) as set out in the CJEU case law. If an appropriate assessment is to comply with the criteria set out by the CJEU in the cases referred to, then it must, in my judgment, include an examination, analysis, evaluation, findings, conclusions and a final determination.”

8.14 Finlay Geoghegan J. went on to summarise what is required in order to carry out an AA in compliance with EU law. It is worth quoting this summary in full:-

“It must be recalled that the appropriate assessment, or a stage two assessment, will only arise where, in the stage one screening process, it has been determined (or it has been implicitly accepted) that the proposed development meets the threshold of being considered likely to have significant effects on a European site. Where that is the position, then, in accordance with the preceding case law, the appropriate assessment to be lawfully conducted in summary:

- (i) Must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in

the light of its conservation objectives. This clearly requires both examination and analysis.

(ii) Must contain complete, precise and definitive findings and conclusions and may not have lacunae or gaps. The requirement for precise and definitive findings and conclusions appears to require analysis, evaluation and decisions. Further, the reference to findings and conclusions in a scientific context requires both findings following analysis and conclusions following an evaluation each in the light of the best scientific knowledge in the field.

(iii) May only include a determination that the proposed development will not adversely affect the integrity of any relevant European site where upon the basis of complete, precise and definitive findings and conclusions made the Board decides that no reasonable scientific doubt remains as to the absence of the identified potential effects.”

8.15 Thus, it seems to me as a result of the foregoing analysis that the overall conclusion which must be reached before the Board has jurisdiction to grant a planning consent after an AA is that all scientific doubt about the potential adverse effects on the sensitive area have been removed. However, there seems, as a matter of EU law, to be a separate obligation to make specific scientific findings which allow that conclusion to be reached. This is apparent from the above passages from *Kelly* and the European case law therein cited.

8.16 The analysis in *Kelly* shows that there are four distinct requirements which must be satisfied for a valid AA decision which is a necessary pre-condition to a

planning consent where an AA is required. First, the AA must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. Second, there must be complete, precise and definitive findings and conclusions regarding the previously identified potential effects on any relevant European site. Third, on the basis of those findings and conclusions, the Board must be able to determine that no scientific doubt remains as to the absence of the identified potential effects. Fourth and finally, where the preceding requirements are satisfied, the Board may determine that the proposed development will not adversely affect the integrity of any relevant European site.

9. Application to this Case – Where Can the Reasons be Found

9.1 It is important to note that enquiry was made at the hearing before this Court as to the availability to members of the general public, at the relevant time, of all the materials which the Court was now being asked to consider. In light of the analysis conducted earlier, it would be difficult to justify placing reliance, in the identification of reasons, on any document which was not publicly available, given the entitlement of some members of the public who had not participated in the process to challenge a relevant decision. It is true that it was indicated that not all of the materials concerned were available online but it was made clear that an interested party did have free access to any of the materials under consideration by this Court.

9.2 The test is, in my view, that identified in *Christian*. Any materials can be relied on as being a source for relevant reasons subject to the important *caveat* that it must be reasonably clear to any interested party that the materials sought to be relied on actually provide the reasons which led to the decision concerned. In that regard, it

seems to me that the trial judge has put the matter much too far. The trial judge was clearly correct to state that a party cannot be expected to trawl through a vast amount of documentation to attempt to discern the reasons for a decision. However, it is not necessary that all of the reasons must be found in the decision itself or in other documents expressly referred to in the decision. The reasons may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning. If the search required were to be excessive then the reasons could not be said to be reasonably clear.

9.3 But it must also be noted that, in at least certain types of applications for planning consent, the issues involved may themselves be complex. The reasons put forward either in favour or against a proposed project may involve detailed scientific argument or complex calculation. If such issues arise then it will inevitably be the case that the reasons themselves may be complex and scientific. Where a party wishes to engage with the planning process in a case which raises complex issues of that type (whether at the stage of the application for permission or in the context of mounting a court challenge to a permission granted) then it is inevitable that the party concerned will also have to engage with such matters if any part of their opposition or challenge derives from such complex or scientific questions. It could form no part of a legitimate complaint, based on an argument as to reasons or the lack thereof, to suggest that the reasoning was unduly complicated or scientific if the issues which arose in the context of the grant or refusal of permission required engagement with such issues.

9.4 In the context of a process such as that which occurred in this case, the reasonable observer would undoubtedly look to the Inspector's report but also have regard to the reservations expressed in that report, to the further information, including the NIS, which the Developer was required to submit because of those reservations and to the rationale found in the decision itself for the Board expressing itself as being satisfied that those reservations had been met.

9.5 In that context, it does not seem to me that the report of the Inspector becomes irrelevant even though it pre-dated the s. 132 notice and the filing of an NIS. It was precisely because of concerns which the Board entertained in the light of the Inspector's report that further information and an NIS was required. The Inspector's report forms the backdrop to the further information sought and the further process which occurred before the Board after that information was provided. While it is correct, as the trial judge noted, that things had moved on from the time of the Inspector's Report, that in itself does not seem to me to be a basis for regarding the Inspector's Report as irrelevant to the process of reasoning for that Report dealt with the project as it then stood and any changes to the project or additional information supplied in respect of it, were clearly made or submitted in the context of those aspects of the Inspector's Report which were adverse.

9.6 In that context it does seem to me to be worth saying that it would be preferable in all cases if the Board made expressly clear whether it accepts all of the findings of an Inspector or, if not so doing, where and in what respect it differs. It may be possible, in certain circumstances, to reach a significantly clear inference as to what the Board thought in that regard but it would be better if the matter were put beyond inference and were expressly stated.

9.7 . Where the Board differs from its Inspector then there is clearly an obligation for the Board to set out the reasons for coming to that conclusion in sufficient detail to enable a person to know why the Board differed from the Inspector and also to assess whether there was any basis for suggesting that the Board's decision is thereby not sustainable. But where, as here, a further process intervenes between an Inspector's report and the final decision of the Board then it is obvious that that further process was designed to ascertain whether the concerns set out in the Inspector's report and accepted by the Board could be met by further information. In essence, the general reasons issue in this case comes down to one of assessing whether the Board has given adequate reasons for being satisfied that the initial concerns expressed in the Inspector's report, and which would appear to have found favour with the Board at least on a *prima facie* basis, had been adequately dealt with by the additional information, including the NIS supplied.

9.8 It seems to me, therefore, that the reasons for the Board's development consent decision in this case can, at a minimum, be found in the Inspector's report and the documents either expressly or by necessary implication referred to in it, the s. 132 notice and the further information and NIS subsequently supplied, as well as the final decision of the Board to grant permission including the conditions attached to that decision and the reasons given for the inclusion of the conditions concerned.

9.9 Any interested party will have had access to all of that documentation. If the reasons for the Board's decision can be reasonably ascertained from that documentation, then, at least so far as national law is concerned, the requirement to give reasons will be met because any interested party (including a person who has standing but who was not involved in the planning process before the Board) will be

able to assess whether adequate reasons have been given or whether there might be grounds for challenging the decision of the Board. Insofar as the High Court judgment suggests that the reasons for the Board's decision cannot be sufficiently identified, I would reverse the judgment.

9.10 Having identified the potential source of reasons in the context of this case I now turn to the question of whether, as a matter of national law, the reasons given were adequate.

10. Were the Reasons given Adequate?

10.1 As noted earlier, the general duty to give reasons does not involve a box ticking exercise. It will rarely be sufficient to set out, in almost standard form, a generic description of the legal test or principles by reference to which the decision is to be made, to state that that test has been applied, and simply to go on to say that a particular decision has been made. While it has often been said that a decision maker is not required to give a discursive determination along the lines of what might be expected in a superior court judgment, it is equally true that the reasoning cannot be so anodyne that it is impossible to determine why the decision went one way or the other.

10.2 Indeed, it is worth saying that there may have been times in the past when decision makers felt that their decisions were more likely to be open to successful legal challenge if they gave detailed reasons because, it might have been considered, the giving of detailed reasons allowed parties to assert that the reasons were legally inappropriate. However, the modern position makes clear that it is more likely that a decision will be open to successful challenge because reasons are not given rather than because they are. Decision makers are normally afforded a significant margin of

appreciation within the parameters of the legal framework within which a particular decision has to be taken. Courts will not second guess sustainable conclusions of fact. As noted earlier, many decisions involve the exercise of a broad judgment and here again the courts will not second guess the decision maker on whom the law has conferred the power to make the decision in question. Giving an explanation as to why the decision maker has concluded one way or the other does not affect that position. What may, however, lead to a successful challenge is if a court concludes that it is not possible either for interested parties or, indeed, the court itself, to know why the decision fell the way it did.

10.3 There is a middle ground between the sort of broad discursive consideration which might be found in the judgment of a court, on the one hand, and an entirely perfunctory statement that, having regard to a series of factors taken into account, the decision goes one way or the other. There is at least an obligation on the part of decision makers to move into that middle ground, although precisely how far will depend on the nature of the questions which the decision maker had to answer before coming to a conclusion.

10.4 It is important to return to the precise sequence of events which occurred in this case. The original report of the Inspector was dated the 30th November 2011. Thereafter the Board required the Developer to provide an NIS and issued a statutory notice under s. 132 of the 2000 Act to like effect. Thereafter, the Developer provided a response to that notice including the requested NIS. The Board was satisfied that the new information provided was sufficient to address the concerns it had raised previously and ultimately decided to grant permission on the 9th May 2014.

10.5 The reasons given by the Board need to be seen in the context of that sequence of events. In other words, the reasons need to be seen in the context of an Inspector's report which dealt with many issues in a way which were not unfavourable to the Developer but raised specific concerns in a number of areas. The Inspector's report was followed by a process where the Developer was required to give further information on foot of a statutory requirement, and where the Board subsequently expressed itself as having been satisfied to grant permission in the light of that additional information.

10.6 Against that backdrop it is appropriate to set out the reasons given by the Board in its Decision in full:-

"In coming to its decision, the Board had regard to the following:

- (a) national policy relating to the development of sustainable energy sources,
- (b) the provisions of the Wind Energy Development Guidelines – Guidelines for Planning Authorities, issued by the Department of the Environment, Heritage and Local Government (2006),
- (c) the provisions of the Mid West Regional Planning Guidelines 2010 – 2022,
- (d) the policies of the planning authority as set out in the Clare County Development Plan 2011 – 2017, as varied, including the provisions of the Clare Wind Energy Strategy set out in Volume 5 of that Plan,
- (e) the location of the subject site within an area designated in the said County Development Plan as "Acceptable in Principle" for wind energy,

(f) the provisions of the Draft Clare County Renewable Energy Strategy 2014-2020,

(g) the location of the subject site outside of any European Site, and the distance to such sites,

(h) the pattern of development in the vicinity, and the planning history of the area, including the existing and permitted wind farms in the vicinity,

(i) the range of mitigation measures set out in the documentation received,

(j) the submissions made in connection with the planning application and the appeal,

(k) the report of the Inspector, and

(l) the further information submitted to An Bord Pleanála on the 9th day of August, 2013, in response to the Board's request, and to the submissions received following circulation of that response.

The Board was satisfied that the information before it was adequate to undertake an Appropriate Assessment and an Environmental Impact Assessment in respect of the proposed development.

Having regard to the nature, scale and design of the proposed development, the Natura impact statement, the environmental impact statement submitted with the application, the documentation and submissions on file generally, and the significant further information submitted to An Bord Pleanála on the 9th day of August, 2013, and notwithstanding the Inspector's assessment of impacts on European Sites, which is noted, the Board completed an

Appropriate Assessment in relation to the potential impacts of the proposed development on the Carrowmore Point to Spanish Point and Islands Special Area of Conservation (Site Code number 001021) and on the Mid-Clare Coast Special Protection Area (Site Code number 004182). Subject to the implementation of the identified mitigation measures, the Board concluded that the proposed development, by itself, or in combination with other plans or projects, would not adversely affect the integrity of these European sites, in view of the conservation objectives for the sites.

Having regard to the nature, scale and design of the proposed development, the environmental impact statement and supporting documentation submitted at the application and appeal stages, the submissions and documents on file generally, the Inspector's assessment of environmental impacts and, in particular, to the significant further information submitted to An Bord Pleanála on the 9th day of August, 2013, the Board completed an environmental impact assessment. The Board noted and generally adopted the Inspector's assessment of environmental impacts, with the exception of the matters set out below, and concluded that the proposed development would not have unacceptable effects on the environment.

It is considered that, subject to compliance with the conditions set out below, the proposed development would accord with the National and County policies set out above, would not seriously injure the amenities of the area or of property in the vicinity, would not result in detrimental visual or landscape impacts, would not give rise to pollution, would not be injurious to the cultural heritage of the area, would be acceptable in terms of traffic safety and

convenience, and would not be prejudicial to public health. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area.

1. In deciding not to accept the Inspector's recommendation to refuse permission for reasons relating to residential amenity, the Board had regard to the distance to residential properties generally, which it considered to be acceptable, to the provisions of the Wind Energy Development Guidelines – Guidelines for Planning Authorities, issued by the Department of the Environment, Heritage and Local Government (2006), and to the further information submitted to the Board by the applicant on the 9th day of August 2013, including cumulative noise and shadow flicker modelling, and was satisfied that the potential impact on residential properties arising from noise and shadow flicker, including the potential cumulative impact arising in combination with effects from the permitted wind farm to the north, would not seriously injure residential amenity.

2. In deciding not to accept the Inspector's recommendation to refuse permission for reasons relating to visual impact, including impact on a scenic route to the north, the Board had regard to the landscape characteristics of the area, to the scale of the revised four-turbine development, and to the planning history of the area, and in particular to planning appeal reference number PL03.237524 (planning authority register reference number 10/9) in respect of Slieve Callan Wind Farm, whereby permission was granted for 29 wind turbines at a site bisected by the scenic route in question, to the north of and in close proximity to the proposed development. The Board considered that the

proposed development of four turbines would read as an extension of the permitted 29-turbine wind farm, and would not have an unacceptable visual impact. Furthermore, the Board noted that the proposed development is located in an area designated as "Acceptable in Principle" for wind power, as set out in the Clare County Development Plan 2011-2017. In the context of national policy to develop alternative sources of renewable energy, the Board considered the planning authority policy to be appropriate, and noted that it had been subject of strategic environmental assessment. In this context, the Board considered that the proposed development would be acceptable at this location in terms of visual amenity.

3. In deciding not to accept the Inspector's recommendation to refuse permission because of the potential for impact on species and habitats in the vicinity, and on Hen Harrier in particular, the Board had regard to the distances to European Sites generally, to the location of the subject site outside of and at a significant distance from any area designated for the protection of Hen Harrier, to the extensive survey work undertaken in respect of Hen Harrier and other species, to the existing habitats on site, which are varied in terms of their suitability for Hen Harrier foraging, and in particular, to the provisions of the Hen Harrier Conservation and Habitat Enhancement Plan, submitted to An Bord Pleanála by the applicant on the 9th day of August 2013, which provides for the creation of a favourable habitat mosaic for Hen Harrier. The Board also took note of the correspondence from the National Parks and Wildlife Service to the applicant, dated 6th August 2013 (a copy of which was submitted to An Bord Pleanála by the applicant on the 9th day of August 2013), which indicated that the site and this part of Clare are not

designated or proposed for designation as a Special Protection Area for Hen Harrier. The Board was satisfied that any finer details required for the implementation of the Hen Harrier Conservation and Habitat Enhancement Plan could be satisfactorily resolved by means of condition.

4. The Board noted the Inspector's recommendation to refuse permission arising from concern in relation to the potential for water pollution, and decided to request the applicant to revise the proposed wind farm layout as a result, and to submit further information in relation to water quality protection measures. In deciding not to accept the Inspector's recommendation to refuse permission, the Board had regard to the significant further information submitted by the applicant on the 9th day of August 2013, including the revision of the wind farm layout to provide for adequate separation distances to watercourses, and to the extensive additional information and mitigation measures proposed in respect of water quality. The Board was, therefore, satisfied that the proposed development would not be likely to give rise to water pollution or to adverse impacts on the aquatic environment, and that the Inspector's concerns had been addressed.

5. Having come to the conclusions set out at items 3 and 4 above, the Board did not accept the Inspector's concerns in relation to the potential for adverse effects on the integrity of the Carrowmore Point to Spanish Point and Islands Special Area of Conservation and the Mid Clare Coast Special Protection Area. The Board had regard to the nature and scale of the potential impacts arising and, in particular, to the direct and hydrological distances to these European Sites, and to the significant further information submitted by the

applicant on the 9th day of August 2013, including a Natura Impact Statement, the revised wind farm layout, increased distances to watercourses, the reduced number of turbines, the omission of one borrow pit, the revised provisions for the two remaining borrow pits, the extensive mitigation measures proposed, and to the preliminary drainage design, peat stability assessment and the preliminary construction stage environmental management plan that were provided. The Board is, therefore, satisfied that the proposed development, by itself, or in combination with other plans or projects, would not adversely affect the integrity of these European sites, in view of the conservation objectives for the sites.

6. The Board noted the Inspector's concerns in relation to ground instability, and decided not to accept the recommendation made in this respect. The Board noted the ground conditions at this site, including the generally low peat depths, and the characteristics of the peat on this site generally, including high shear strength values, and the characteristics of the subsoils and underlying rock, and concurred in general with the conclusions set out in the geotechnical assessment submitted by the applicant, including the peat stability risk assessment. The Board is satisfied that the investigations undertaken were appropriate and proportionate to the conditions found on this site, and that risk of slippage is low. The concerns of the Inspector in relation to the level of peat probing that was undertaken is noted; however, the Board also had regard to the additional survey work subsequently undertaken in June 2013. The Inspector had also expressed concern in relation to excavations at Turbine 6 and Borrow Pit 2, and in relation to the proximity of the initial wind farm layout to the stream to the south, and was satisfied that the revised proposal

submitted to An Bord Pleanála on the 9th day of August 2014, including a revised wind farm layout, addresses these concerns. The Board is satisfied that geotechnical risks at this site are low, and that a material risk of slippage at this site is not likely to arise from the proposed development, either by itself, or in combination with development in the vicinity.

10.7 At this stage of this judgment I do not propose to deal with the separate requirements identified earlier in respect of the grant of permission following on from an AA or whether a case involving an EIA requires different or an additional reasoning.

10.8 I have already identified the materials by reference to which the reasons can be ascertained. Obviously, the starting point has to be to consider the reasons given in the Decision including the reasons given for the application of various conditions. However, as noted earlier, it is obvious from the Decision that it came at the end of a process involving the Inspector's report and the further information thereafter supplied. It follows that it would be obvious to any reasonable observer that the reasons given by the Board in the Decision must be seen in the context of the Inspector's report, including the matters on which the Inspector did not express concern, together with the problematic issues identified by the Inspector and the manner in which those issues were addressed in the additional information supplied including the NIS.

10.9 It might well be that had the Decision stopped before the numbered paragraphs (1) to (6) as cited earlier, a legitimate criticism could be made that the determination of the Board was insufficiently reasoned. Up to that point there was a simple recitation of the various matters taken into account and a recording of the ultimate

conclusion of the Board. That part of the document would undoubtedly enable a court to review whether all appropriate matters were taken into account and would also enable a court to consider whether the Board had asked itself the right questions. However, not least because of the negative recommendation in the Inspector's report, it would be difficult to see on what basis the relevant conclusions were reached.

10.10 However the six numbered paragraphs go on to address the issues which caused concern to the Inspector. They set out reasons why the Board was ultimately satisfied that a permission could be granted notwithstanding the various aspects of the Inspector's report which were negative. For example, in relation to the point made at Item (1) the Board considered residential amenity. Having identified the Inspector's negative assessment in that regard the Board specifically referred to additional information submitted which included "cumulative noise and shadow flicker modelling". It is clear, therefore, that the Board took the view that the additional information, and in particular the modelling, was sufficient to satisfy it that the effect of both noise and flicker would not seriously injure residential amenity.

10.11 It is important to emphasise that this Court is not in these proceedings concerned with whether such a finding was open to the Board on all of the materials before it, still less with second guessing the judgment of the Board in that regard. The Court is only concerned with whether adequate reasons were given. In my view, that analysis of point (1) demonstrates that the Board did give reasons for disagreeing with the Inspector's report under that heading.

10.12 Similar observations can be made in respect of each of the other points (2) to (6). In each case the Board identifies the negative assessment by the Inspector and sets out its reasons, including where appropriate additional information which was

received after the Inspector's report was compiled, for ultimately reaching a different conclusion.

10.13 As noted earlier the Board was also entitled to take into account any aspect of the Inspector's report which was not negative. The cumulative effect of the Inspector's report and the Board's Decision which specifically addresses those areas where the Inspector's view was negative, provides, in my view, adequate reasons for the Board's ultimate conclusion.

10.14 The law on reasons does not require that one agrees with the reasons given. In a challenge based on allegedly inadequate reasoning, the law only entitles an interested party to know what the reasons were. Someone reading the Decision is informed as to why the Board ultimately came to be satisfied in respect of each of the aspects of the Inspector's report which were negative. It is no part of the function of this Court in this case to review whether there was a sustainable basis for any of the views expressed by the Board in that regard let alone to second guess the judgment of the Board as to whether it reached the correct conclusions. However, any interested party knows why the Board came to a different view from the Inspector and has attention drawn, where appropriate, to any specific materials which played an important part in persuading the Board to come to that view.

10.15 In my view, an interested party would, as a result of reading the Decision in conjunction with the Inspector's report, together with documents (such as, for example, the Noise and Shadow Flicker Monitoring Report referred to earlier) which are either expressly referred to or by necessary inference must be taken to form part of the reasoning, have sufficient information both to inform themselves as to why the Board ultimately came to the conclusions which it did and also to consider whether

there was any basis for challenging the conclusions which the Board reached. In my view, the trial judge imposed too exacting a standard in respect of reasons. Just as, at one extreme, the modern law on reasons does not permit a decision maker to engage in a simple box ticking exercise so also, at the other extreme, the law does not require a level of reasoning which goes beyond that required to afford an interested party reasonable information as to why the Decision was made and whether it can be challenged. In those circumstances I would hold that the reasoning of the Board in this case was adequate. Insofar as the High Court judgment held otherwise I would reverse the judgment.

10.16 Having considered that the reasons given were adequate to meet the requirements of national law it is next necessary to consider the European Union law dimension to this case starting with the question of whether different requirements as to reasons apply in a case in respect of which an EIA is required before turning to the separate question of the requirements which arise in the case of an application to which an AA applies.

11. The Position under an EIA

11.1 In my view the same rules apply, at the level of principle, to the reasons which must be given in a case involving an EIA as compared with a case where an application for permission is dealt with purely under national law.

11.2 The principle of subsidiarity requires that national procedural autonomy be respected, subject to the overriding requirements of European Union law that relevant national procedures comply with the principles of equivalence and effectiveness. Clearly, a requirement that the rules concerning reasons should, in principle, be the same whether an EIA is involved or whether the matter is to be determined purely as a

matter of national law meets the obligation of equivalence, for exactly the same rules are being applied.

11.3 Furthermore, it does not seem to me that requiring compliance with the national rules concerning reasons, analysed in some detail earlier in this judgment, could fall short of the obligation to provide an effective remedy. If a person knows the reasons why a particular decision was taken to the standard identified earlier in this judgment, then they will be able to assess whether there might be an arguable case that the EIA was not properly carried out to the standards required by Union law. The overriding principle is that a person needs to know why the decision was made and be able to assess whether it can be challenged. Where the decision was made after an EIA then it follows that, as part of the application of the general principle to the circumstances of such a case, the person must know enough about the decision to be able to assess whether it can be challenged on, amongst other grounds, the basis of an alleged failure to carry out a proper EIA.

11.4 It follows that, while the general principle remains the same, there is an additional requirement in a case to which the EIA regime applies to the effect that the decision must be sufficiently clear to enable any interested party to consider whether they may have grounds to challenge the decision on the basis that it might be contended that an adequate EIA had not been conducted.

11.5 In that context, it is important to note that the EIA regime does not require any particular result to the relevant process but rather is concerned with the process itself. It requires a particular assessment to be carried out and, by necessary inference, that a sustainable permission only be granted where that assessment is favourable to the grant of the permission concerned. It follows that, amongst the reasons which need to

be given, there must be included the basis on which the assessment required under the EIA regime leads to the conclusion that a permission can be granted. That in turn requires that the decision, or other relevant and connected materials available to any interested party, must demonstrate that an EIA was carried out and that the decision maker properly had regard to the results of the EIA in coming to its conclusion.

11.6 Against that background it is necessary to look at the Decision. It is clear that the Inspector's report sets out the analysis of the matters which the Inspector considered necessary in the context of an EIA. But it is also clear that an additional assessment was carried out both by the Board in considering the Inspector's report, again by the Board in requiring additional information including an NIS and finally by the assessment of the Board of the overall situation in the light, amongst other things, of that additional information.

11.7 In those circumstances it does not seem to me that it can be said that there is inadequate information to allow a party to assess whether a proper EIA has been carried out. Any interested party can identify the issues which were addressed in the Inspector's report, in the additional information and in the Board's final assessment. If there is a case to be made that material issues were not assessed then an interested party has access to adequate information to enable them to mount such a case. In my view it follows that the information and reasons given are adequate to permit any interested party to mount a challenge based on a contention that a proper EIA was not carried out. Such a party knows the matters that were assessed and, for the reasons already analysed, knows why the result of that assessment was as set out in the Decision. So far as information and reasons are concerned that is sufficient to meet

the legal requirement. Insofar as the High Court judgment found otherwise I would reverse the judgment.

11.8 Having concluded that the reasons in this case were adequate to demonstrate that an EIA had been carried out and that a sustainable decision had been made to grant permission having regard to that assessment, it is necessary to turn to the somewhat different considerations which apply in the context of an AA.

12. Appropriate Assessment - Reasons

12.1 Two separate questions arise under this heading. First, there is the finding of the trial judge that no reasons can be found anywhere in the materials to suggest why the Board decided that a full AA was required. There can be no doubt but that the trial judge was correct in that conclusion. However, I am also satisfied that the trial judge was correct to hold that such a failure could not, in and of itself in the circumstances of this case, render a permission invalid when an AA was actually carried out and where it is clear from the AA, if that should prove to be the case, that all potential adverse effects on the protected area, having regard to its conservation objectives, had been identified and the necessary analysis conducted which would permit permission to be granted.

12.2 For those reasons, I agree that the trial judge was correct not to regard the failure to give adequate reasons for requiring a full AA as being sufficient in itself to render a permission granted invalid provided that the AA itself was compliant with the requirements analysed earlier most particularly in the judgment of Finlay Geoghegan J. in *Kelly*. That seems to me to be the real issue which arises under this heading.

13. Appropriate Assessment - Validity

13.1 It must be recalled, in that context, that a key requirement of a sustainable AA must involve the identification of all aspects of the development project which might affect the protected site in the light of its conservation objectives and, in particular, the identification of precise and definitive findings and conclusions which can lead to a determination that no reasonable scientific doubt remains as to the absence of the identified potential detrimental effects.

13.2 A conclusion to that latter effect is a necessary element of a sustainable process, but it is not, in and of itself, sufficient. There must, before a valid AA can be said to have been conducted,, be a precise identification of the potential risks and, importantly, precise scientific findings to allay any fear of those risks coming to pass.

13.3 As noted earlier this is not, strictly speaking, a reasons issue. The issue concerns the validity of an AA decision which gives jurisdiction to the Board to grant permission. It may involve reasons, and when it does those reasons must be given in accordance with the established jurisprudence. But there must also be complete, precise and definitive findings and conclusions which sustain the ultimate conclusion. It is against that backdrop that it is necessary to assess the Decision to determine whether it can be said to contain the sort of scientific findings which the CJEU jurisprudence requires.

13.4 In that context it is important to note that there are, in reality, two different stages to the process which must take place in an appropriate sequence. First there must be an AA and an appropriate decision must be made as a result of the AA in order that the Board have jurisdiction to grant a consent. Thereafter, assuming the

Board has jurisdiction, the Board may go on to consider whether it should, in all the circumstances, actually grant permission and, if so, on what conditions.

13.5 There is no reason why the analysis and conclusion of the Board in respect of both of those matters cannot be contained in the one document. That is, of course, what happened here. The Decision sets out the analysis and conclusion both in respect of the AA and also in respect of the general planning process including the EIA. Once a single document dealing with both matters contains all appropriate information (including reasons) then the fact that all matters are dealt with in a single document even though relating to what are, technically, two different decisions, creates no difficulty. I would, however, recommend that the Board take care in ensuring that there is reasonable clarity as to which parts of such a document relate to an AA and which parts relate to more general planning considerations. This is not a formal requirement and a decision of a planning authority (including the Board) will not be invalid provided that the reasonable observer would be able to understand with reasonable clarity what the Board was deciding and why. However, it might well make the task of all concerned a lot easier if the Board were to clearly distinguish, in any document recording its decision, those aspects of the document which are concerned with an AA from those which are concerned with more general planning considerations.

13.6 In any event there is no doubt but that the Decision reaches the appropriate conclusion in respect of the AA. But as already noted that is not sufficient. There must be found either in the decision itself or in other materials which clearly must be taken by express reference or by necessary inference to identify the reasons for the

ultimate determination, the sort of complete, precise and definitive findings which justify that conclusion.

13.7 The Decision states that the Board concluded that the proposed development, by itself, or in combination with other plans or projects, would not adversely affect the integrity of the relevant protected sites in view of the conservation objectives of those sites. That is undoubtedly the correct legal test which the Board had to consider. However, as already stated, that is not sufficient. In accordance with the jurisprudence of the CJEU complete, precise and definitive scientific findings must be set out in the relevant materials which are sufficient to justify that conclusion.

13.8 In that regard the reasons why the Board ultimately came to a different conclusion from that of the Inspector are set out, to a very large extent, at Items (2), (3) and (5) of the Decision. While those paragraphs identify the considerations which the Board took into account and provide, for the purposes of national law, adequate reasons, it does not seem to me that they meet the more exacting standard required in the context of an AA of identifying the precise findings which allow for a sustainable conclusion to be reached to the effect that all scientific doubt has been removed concerning adverse impacts on the protected site having regard to its conservation objectives.

13.9 There is, indeed, very little by way of specific finding to be found in the paragraphs in question. Ultimately, at point (5), the Board states that it took into account the distance of the proposed development from the sites in question, the nature and scale of the potential impacts arising and what it described as the significant further information submitted together with revised layout including

increased distances to water courses. On that basis the Board stated that it was satisfied that the relevant test was met.

13.10 But in so doing the Board does not set out any specific findings. There is, for example, undoubtedly a significant distance between the proposed development and the protected sites. But what findings can be found in the Board's decision which specifies a scientific finding as to the kind of distance which may be material to a consideration of whether all relevant scientific doubt has been removed. Likewise it is doubtless the case that a different design for water courses and the like may reduce the risk of adverse effects downstream but again there are no specific scientific findings which address the extent to which that re-design, whether taken by itself or in conjunction with other matters considered by the Board, removes all scientific doubt.

13.11 On that basis I would hold that the Decision falls short of the more exacting standard of analysis which is required as a matter of European Union law in those cases to which an AA applies. It may, indeed, as counsel for the developer suggested, have been a marginal case as to whether an AA was required in the first place.

Whether that be so or not is not a matter for this Court. But once an AA is embarked on then the jurisprudence makes clear that a decision maker is required not just to provide reasons for reaching the relevant conclusion but to make complete, precise and specific scientific findings which justify that conclusion. It is, in that latter regard, that the Decision falls short of the standard required in respect of an AA.

13.12 I would, therefore, conclude that the Decision falls short of containing the necessary findings which underpin the conclusion required to be reached for a valid AA and thus deprived the Board of jurisdiction to grant a development consent. It may be that the conclusion concerned is indeed justified and that it would have been

possible to make appropriate findings to justify it. However, those findings cannot be found either in the Decision or in any other materials which are either expressly referred to in the Decision or must be taken by necessary implication from the Decision and the process leading to it to be findings underpinning the ultimate conclusion. On that basis I consider that Ms. Connelly's case, insofar as it relates to the adequacy of the AA, is made out.

14. Conclusions

14.1 For the reasons analysed earlier in this judgment I would conclude that the trial judge imposed too exacting a standard on the Board in respect of the obligation under national law to give reasons. I am satisfied that the reasons given were adequate to enable any interested party to know why the Decision, insofar as it relates to the development consent, went the way it did and to consider whether there was any legitimate basis for seeking to mount a challenge. I would, therefore, reverse the judgment of the High Court in that regard.

14.2 I am also satisfied that the Decision and any other materials which are either expressly referred to in it or can be taken by necessary implication to form part of the reasoning, provide adequate information to enable any interested party to assess whether an appropriate EIA has been carried out. I would also reverse the judgment of the High Court in relation to those issues.

14.3 However different considerations apply in respect of an AA. For the reasons which I have sought to analyse I am satisfied that neither the Decision itself nor any other materials which were expressly referred to in the Decision or must be taken by necessary implication to form part of the process leading to the ultimate determination of the Board, can be shown to contain the sort of complete, precise and definitive

findings which would underpin a conclusion that no reasonable scientific doubt remained as to the absence of any identified potential detrimental effects on a protected site having regard to its conservation objectives. Such findings are a necessary pre-condition to the Board having jurisdiction to grant a development consent in a case where it is determined that an AA is required. It follows that I would hold that the permission granted in this case must be quashed because of the failure to make the sort of findings which the jurisprudence of the CJEU requires to be made as part of a valid AA.

14.4 In all those circumstances I would dismiss the appeal but do so on much narrower grounds than those identified by the trial judge confining myself to quashing the Decision on the grounds related to an AA identified earlier in this judgment and in these conclusions. In relation to the other issues raised on this appeal I would reverse the judgment of the High Court.

14.5 I would propose that the Court hear counsel further on the precise order to be made and in particular whether, and if so in what manner, this matter should be referred back to the Board.