



C/2024/2290

2.4.2024

Reference for a preliminary ruling from High Court (Ireland) made on 26 January 2024 — NE, MY, HJ, XF, WB, UV, VK, JU, RJ and DZ v An Bord Pleanála, Minister for Housing, Local Government and Heritage, Ireland and The Attorney General

(Case C-58/24, Drumakilla)

(C/2024/2290)

Language of the case: English

Referring court

High Court (Ireland)

Parties to the main proceedings

Applicants: NE, MY, HJ, XF, WB, UV, VK, JU, RJ and DZ

Respondents: An Bord Pleanála, Minister for Housing, Local Government and Heritage,

Ireland and The Attorney General

Notice party: Drumakilla Limited

Questions referred

1. Does Article 11 of Directive 2011/92 ⁽¹⁾ read in the light of the principle of wide access to justice under Article 9(2) of the Aarhus Convention have the effect that, in a case where a project within the meaning of Article 1(2)(a) of Directive 2011/92 the subject of an application for development consent (the 'primary consent') cannot be carried out without the developer having first obtained another permission (the 'secondary consent'), and where the authority competent for granting the primary consent for such a project retains the ability to assess the project's environmental impact more strictly than was done in the secondary consent, such a secondary consent (if granted prior to the primary consent) is to be treated as forming part of the development consent procedure for purposes other than in relation to the scope of matters to be considered or assessed under Directive 2011/92, either generally or where the secondary consent is a decision adopted under Article 16(1) of Directive 92/43 and which authorises a developer to derogate from the applicable species protection measures in order to carry out the project?
2. If the answer to the first question is Yes, does Article 11 of Directive 2011/92 read in the light of the principle of wide access to justice under Article 9(2) of the Aarhus Convention have the effect that national domestic rules as to the date on which time commences to run to challenge the validity of a decision adopted under Article 16(1) of Directive 92/43 ⁽²⁾ (the 'secondary consent') must be interpreted so as to preclude that time from commencing to run prior to the date of adoption of the development consent concerned (the 'primary consent'), either generally or in a case where: (i) the project was subject to the case-by-case examination envisaged by Article 4(2)(a) of Directive 2011/92, and/or (ii) the determination under Article 4(5) for the purposes of the primary consent was made after the secondary consent had been granted and simultaneously with the decision on the primary consent, and/or (iii) the proceedings challenging the validity of the secondary consent do not contain any ground challenging the relevant primary consent by reference to the asserted invalidity of the secondary consent, and/or (iv) the applicant fails to apply for an extension of time to bring the challenge to the secondary consent, which application is required by domestic law for a late challenge in the absence of any EU law rule to the contrary?
3. If the answer to the first question is Yes and if the answer to the second question in general is No, does Directive 2011/92 read in the light of article 47 of the Charter of Fundamental Rights and/or the principle of wide access to justice under Article 9(2) of the Aarhus Convention have the effect that a time limit provided by the domestic law of a member state for the bringing of proceedings to assert a right under that Directive, must be reasonably foreseeable, but

⁽¹⁾ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012, L 26, p. 1).

⁽²⁾ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992, L 206, p. 7).

does not have to be expressly specified in legislation in accordance with Article 11(2) of Directive 2011/92 and/or in practical information made available to the public on access to administrative and judicial review procedures pursuant to Article 11(5) of Directive 2011/92 and/or definitively determined with certainty by domestic caselaw, so that the answer to the second question is unaffected by provision being made in the domestic law of a member state for a foreseeable time limit of a general nature which applies to public law actions generally including for the bringing of proceedings challenging a decision adopted under Article 16(1) of Directive 92/43 and which authorises a developer to derogate from the applicable species protection measures in order to carry out the project, albeit that this is implicit rather than explicit in the domestic law concerned?

4. If the answer to the first question is Yes and either the answer to the second question is Yes or the answer to the third question is No, does Article 16(1) of Directive 92/43 have the effect that a competent authority cannot conclude that there is 'no satisfactory alternative' to a decision which authorises a developer to derogate from the applicable species protection measures in order to carry out a project within the meaning of Article 1(2)(a) of Directive 2011/92 unless the competent authority actually considers alternatives such as alternative location or design, or refusal of the derogation?
 5. If the answer to the first question is Yes and either the answer to the second question is Yes or the answer to the third question is No, does Article 16(1) of Directive 92/43 have the effect that a competent authority cannot conclude that it is 'in the interest of protecting wild fauna and flora and conserving natural habitats' to grant a decision which authorises a developer to derogate from the applicable species protection measures in order to carry out a project within the meaning of Article 1(2)(a) of Directive 2011/92 unless some identified protection is created by the derogation itself rather than by mitigation measures adopted to reduce or compensate for the detriment created by the steps authorised by the derogation decision?
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