THE SUPREME COURT

Supreme Court Appeal No.: 167/18

Clarke C.J.
O'Donnell J.
McKechnie J.
Charleton J.
Irvine J.

IN THE MATTER OF SS. 50, 50A, AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN/

KLAUS BALZ AND HANNA HEUBACH

APPELLANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CORK COUNTY COUNCIL, CLEANRATH WINDFARMS LTD.

NOTICE PARTIES

Judgment of O'Donnell J. delivered the 12th day of December, 2019

1. The appellants, Klaus Balz and Hanna Heubach, have lived since 1992 at Bear na Gaoithe, County Cork, where they carry on a family horticulture nursery, flowers and gardening business. The second notice party, Cleanrath Windfarms Limited ("Cleanrath"), seeks permission to erect eleven turbines at Bear na Gaoithe. The appellants' house is 637 metres from the nearest proposed turbine.

2. Initially, Cork County Council granted permission for the development, but that permission was quashed by the High Court on judicial review for reasons which do not appear relevant to these proceedings. Subsequently, Cork County Council granted a further permission for six turbines only. This was appealed by Cleanrath, and cross-appealed by a number of objectors, including the appellants. An Bord Pleanála ("the Board") granted permission by a majority of 3:1 for eleven turbines at the site. The decision of the Board does not identify the Board members involved, the dissenting member, or the reasons for the dissent. It should not be assumed, however, that any division of opinion within the Board was in any way related to the very net issues which arise for determination on this appeal.

3. The appellants commenced judicial review proceedings which were heard in the High Court by Haughton J. A very large number of points were raised, and in a careful judgment, Haughton J. dismissed the challenge on each ground, and refused a certificate of leave to appeal to the Court of Appeal. This court granted leave to appeal on one issue only relating to the question of the application of guidelines under s. 28 of the Planning and Development Act 2000 (as amended) ("the 2000 Act"). As a result, this appeal has been focussed on a single issue which now emerges in sharp, and perhaps unrealistic,

relief having regard to the large number of other issues that were debated before the Board, and subsequently the legal issues addressed in the High Court.

4. Under s. 28 of the 2000 Act, the Department, which is now the Department of Environment, Community and Local Government, may issue guidelines for use by planning authorities and the respondent Board. The statutory obligation imposed on the planning authorities and the Board is to "have regard" to such guidelines. In this respect, standard s. 28 guidelines may be contrasted with policy guidelines issued under s. 29 of the Act, which planning authorities must implement. The clear distinction is blurred somewhat because of a subsequent amendment to s. 28 which provided that where guidelines were issued on matters of policy, they also must be followed. However, it is accepted for present purposes that what were in issue here were guidelines under s. 28 simpliciter, and that the obligation on the respondent Board was merely to "have regard" to them.

The Wind Energy Development Guidelines 2006 ("W.E.D.G.")

5. The Wind Energy Development Guidelines ("W.E.D.G." or "the guidelines") were issued under s. 28 in 2006. The guidelines constitute a comprehensive and impressive document dealing clearly and lucidly with the very many issues related to wind power developments. Only a portion of those guidelines deal with the question of noise which is central to the issue in this case. Para. 5.6 of the guidelines sets out guidance on that issue. Although not expressly acknowledged in the text itself, it is accepted by all parties that the technical section of this aspect of the guidelines was drawn in turn from a U.K. document entitled "The Assessment and Rating of Noise from Windfarms" issued by the Energy Technology Support Unit ("ETSU") of the Department of Trade and Industry U.K. a decade earlier, in 1996.

6. The W.E.D.G. observe at p. 29 that "[a]n appropriate balance must be achieved between power generation and noise impact". Indeed, that balance can be said to lie at the heart of this case. It is necessary to set out one portion of those guidelines in greater detail:-

> "In general, a lower fixed limit of 45 dB(A) or a maximum increase of 5dB(A) above background noise at nearby noise sensitive locations is considered appropriate to provide protection to wind energy development neighbours. However, in very quiet areas, the use of a margin of 5dB(A) above background noise at nearby noise sensitive properties is not necessary to offer a reasonable degree of protection and may unduly restrict wind energy developments which should be recognised as having wider national and global benefits. Instead, in low noise environments where background noise is less than 30 dB(A), it is recommended that the daytime level of the LA90, 10min of the wind energy development noise be limited to an absolute level within the range of 35-40 dB(A).
>
> Separate noise limits should apply for day time and for night time. During the night the protection of external amenity becomes less important and the emphasis should be on preventing sleep disturbance. A fixed limit of 43dB(A) will protect sleep inside properties during the night.

> In general, noise is unlikely to be a significant problem where the distance from the nearest turbine to any noise sensitive property is more than 500 metres."

A footnote also helpfully explains that the unit of measure of here is an "A" weighted decibel, which is a measure of the overall noise level of sound across the audible frequency range (20Hz-20 kHz) with A frequency weighting to compensate for the varying sensitivity of the human ear to sound at different frequencies. The decibel scale is logarithmic. A 10 dB(A) increase in sound level represents a doubling of loudness. A change of 3 dB(A) is the minimum perceptible under normal circumstances.

7. It is not in dispute that the key components of the guidelines in this respect, namely the use of an "A" weighted decibel for measurements, the recommendation of both fixed limits and an increasable background noise limit, the daytime fixed limit of 45 dB(A) and nighttime limit of 43 dB(A), and the observation that there should be no significant problem when the distance from the nearest turbine to any noise sensitive property is more than 500 metres, are all derived from the 1996 ETSU document.

8. The notice party submitted a very detailed Environmental Impact Survey ("E.I.S."). The noise and vibration portion was contained in chapter 9 and runs to 57 pages. At para. 9.2.2, the E.I.S. addresses the W.E.D.G., which it acknowledges is based in this respect on the ETSU document, and observes that, while the W.E.D.G. acknowledge that an appropriate balance must be achieved, the guidelines "give no specific advice in relation to what constitutes an '*appropriate balance*'", and "[i]n the absence of this guidance will be taken from alternative and appropriate publications". The E.I.S. identifies the 45 dB(A) daytime absolute limit and 43 dB(A) nighttime limit contained in W.E.D.G., and observes, however, that a previous planning permission from An Bord Pleanála for the site (which was still active at the time of preparation of the E.I.S.) imposed a flat limit of 43 dB(A).

9. The E.I.S. also made reference under the heading "Future Potential Guidance Changes" to proposed changes to the assessment of noise impacts as outlined in a Department document entitled *Proposed Revisions to Wind Energy Development Guidelines 2006 – Targeted Review in relation to Noise, Proximity and Shadow Flicker* (December 11, 2013). The E.I.S. recorded that a consultation process in relation to the document is currently being undertaken by the Department, and new formal guidelines had not been issued at the time of submission of the E.I.S. The consultation document, however, proposed amendments, the most significant of which was that a flat noise limit of 40 dB should be applied both day and night "in order to restrict noise from wind turbines at noise sensitive properties". The proposed approach, however, also suggested no noise limit at the properties of landowners with a financial interest in the proposed project. The E.I.S. also made reference to the assessment in the ETSU document and then proposed that:-

> "Due to the fact that there is a planning permission associated with the site for a development of a wind energy development, that if constructed, will operate the specific knowledge condition it is proposed to adopt a lower daytime threshold of 43 dB…in this instance."

10. The E.I.S. carried out detailed modelling of the noise at various standardised wind speeds at a number of locations, including the appellants' premises. At para. 9.4.2.6, the E.I.S. explained that the lower daytime threshold of 43 dB had been chosen because of the existing planning permission, and also "as it is in line with the intent of the relevant Irish guidance and is comparable to noise planning conditions applied to similar sites in the area previously granted planning permission by the local authority and An Bord Pleanála". At para. 9.4.2.7, the E.I.S. also modelled the noise levels against a 40 dB absolute criterion that had been put forward as part of the 2013 consultation document. The E.I.S. noted that they had been the subject of significant debate, and that the comments presented should be considered with the "knowledge that the intent of the document may change when finally published". That modelling noted "[s]light exceedances of the potential absolute noise criterion at some ten locations" including the appellants' property. The court was informed at the hearing of the appeal, by counsel for Cleanrath, that the technology adopted would permit the developer to comply with any limit, but these figures can be taken as indicating that the level of noise was a real and important one, as far as the appellants were concerned.

11. The appellants were represented in relation to the planning matter by Mr. Joe Noonan, a solicitor with experience in environmental matters. By letter of the 29th of June, 2016, he submitted the appellants' appeal to An Bord Pleanála, which set out a number of the objections raised by the appellants. In this regard, a booklet of enclosures was submitted with the letter supporting the grounds of appeal, and containing 35 enclosures. Of these, 19 appeared to be directed towards the question of noise.

12. The letter ran to 21 pages, with two further pages listing all the enclosures. The letter noted that the Board had previously granted permission for eleven turbines at the site, but that that permission had been quashed in the High Court by a judgment of Barton J. on the 25th of February, 2016, on the application of the appellants herein. The present application had been made prior to the determination of the High Court, and it was argued that accordingly it had been prepared without sight of the judgment, and without being in a position to have regard to the reasoning of the judgment. It was noted that the original application in 2012 had been refused by Cork County Council and that, in the material respects, the 2014 development plan contained the same objectives as those in the 2009 development plan which had been relied on in the refusal by Cork County Council.

13. The letter was a comprehensive challenge to the approach of the Board in respect of wind turbines. It was suggested that the 2006 guidelines rested on assumptions derived from the prevailing state of knowledge at the time they were drafted, but that the time had moved on and knowledge had evolved and the Department had publicly stated that the 2006 guidelines were not now fit for purpose in fundamental respects. The letter made reference to the public consultation notice published in 2013 by the Department in that regard and the proposed revisions issued by the Department, but not yet formally confirmed. It was argued that the initiation of the consultation process and the proposed revisions were a clear admission that the Department accepted that the 2006 guidelines

were not supported by robust or up-to-date evidence that enabled policy to be implemented in a manner which safeguards residential amenity. Radically different guidelines had been published by the Department, of which the Board was aware. It was argued that the fact that the 2006 guidelines were not robust or up-to-date was also evidenced by several expert studies which challenged what was described as the "old ETSU standard". Specific reliance is placed on an article by an acoustic consultant, Dick Bowdler. The letter asked the Board to read this article carefully, and to address it specifically in its written record.

14. The letter also referred to a decision by the senior Cork County Council planner on a windfarm at Carrigareirk of the 22nd of February, 2016, which concluded that:-

> "the existing 2006 Wind Farm guidelines are not fit-for-purpose given the changes in wind turbine development over the past ten years: The 500m rule-of-thumb and fit-all set-back guideline is clearly not appropriate for turbines that stand at 140m and the height with a rotor cut covering 10,300 square metres; nor do I concur with the view that it should be normal planning practice to accept that property holders should accept up to 30 minutes a day of shadow flicker".

It was submitted the Board had no robust up-to-date evidence which would enable it to safeguard residential amenity from excessive noise or shadow flicker, and that the Board could not grant permission for this application in reliance on the 2006 guidelines so far as the issues of noise, shadow flicker, and separation distance are concerned. The letter challenged as fundamentally flawed the noise condition typically imposed by the Board, which only limited noise measured using the dB(A) weighted filter. Again, reliance was based on the paper written by Mr. Bowdler. It was also suggested that international planning and regulatory practice had already evolved and that in Germany, where some of the most advanced wind turbine manufacturers were located, Bavaria had adopted a minimum separation distance of 10 times tip-height for large industrial wind turbines and, more recently, Poland had adopted a two-kilometre separation distance. The Bavarian policy would mean a separation of 1,500 metres from people's homes. The letter went on to make a series of other points about public health and safety, public consultation, policy, zoning, and the Cork Development Plan.

15. It should be said that the document upon which most reliance was placed in the letter was the article by Mr. Bowdler of July, 2005, which predated the adoption of the guidelines. However, the appellants also referred to documents from 2012 and 2014.

16. The Inspector's Report is dated the 18th of November, 2016, and runs to 96 pages. It is a comprehensive and impressive document and the precise concentration on the issue of turbine noise and the W.E.D.G. guidelines that have been the necessary focus of this case does not give a fair reflection of the breadth of the document. There was limited reference to the appellants and the question of noise. The letter of the 23rd of June, 2016, from the solicitors on behalf of the appellants was noted as one of the four third party appeals made to the Board. The issues were summarised generally in bullet points, and the bullet

points which appear referable to the issues raised by the appellants in respect of the guidelines were as follows:-

- "The Board is biased in favour of wind farm developments just because of National Policy in favour of renewable energy. However, there are also National Policies in favour of promoting sustainable rural enterprise and preserving viable lifestyles supportive of the rural economy.
- The 2006 Wind Farm Guidelines are out of date, and were from a time when wind turbines were smaller. The noise condition recommendation is outdated (derived from an old ETSU-R-97 standard). The Board should have regard to the Targeted Review of the Wind Energy Guidelines 2013."

17. The Inspector's Report noted that the four appeals were accompanied by documentation and, again, for present purposes, the relevant documentation noted appears to be the following:-

- "Proposed Revisions to Wind Energy Guidelines …
- Series of Public Health & Safety studies in relation to noise and particular wind turbine models – including photographic examples of accidents in wind farms in Ireland.
- Irish Academy of Engineering submission (July 2014) on the review of National Energy Policy as set out in the "Green Paper on Energy Policy in Ireland"."

18. The developer's response to the appeals was noted. Again, the relevant bullet points appear to be the following:-

- "The EIS was prepared in line with all relevant guidance. The Council was satisfied that the EIS complied with Article 94 and Schedule 6 of the 2001 Planning Regulations.
- The development has the potential, if required, to comply with the stricter noise guidelines set down in the 2013 Targeted Review of the Wind Energy Guidelines 2006."

19. Para. 10.8.2 of the Inspector's Report dealt with the W.E.D.G. It set out in detail the portion of the guidelines already quoted above and then continued:-

> "The 2006 Guidelines are based on the UK Department of Trade & Industry, Energy Technology Support Unit (ETSU) publication "The Assessment and Rating of Noise from Wind Farms" (1996). Claims by objectors that this ETSU publication is out-dated and not fit for purpose is not a relevant planning consideration. The 2006 Guidelines are as they are, and remain in force. Proposed changes to these guidelines, outlined in the Department of Environment, Community & Local Government "Proposed Revisions to Wind Energy Development Guidelines 2006 – Targeted Review in relation to Noise, Proximity and Shadow Flicker" (December 2013), have not yet been adopted. The applicant notes that the 2013 revision proposes a noise limit of 40dB LA90, 10 min which should be applied to noise

sensitive properties – as measured outside such properties. The limit would apply day and night, and would not apply at properties of those with a financial interest in the wind farm." (emphasis added).

While it will be necessary to return to this in more detail, it may be noted at this point that this case has, to a large extent, consisted of rival arguments as to what was meant by the passage underlined.

20. It was noted that Cleanrath had adopted and proposed a standard for the development of 43 dB for both daytime and nighttime environments, but a 45 dB limit for both daytime and nighttime in relation to the houses of landowners who were participants in the proposed development. At para. 12 of the Report, the Inspector recommended that permission be granted for the eleven turbines for reasons and considerations set out, and subject to proposed conditions. The reasons and considerations had regard at para. (b) to "the provisions of the "Wind Energy Development Guidelines – guidelines for planning authorities" issued by the Department of the Environment Heritage and Local Government in 2006". No reference was made to the 2013 proposed revisions. Proposed Condition No. 6 provided that the wind turbine noise should not exceed the greater of (a) 5 dB(A) above background noise levels, or (b) 43 dB(A) L90 10 min when measured externally at dwellings or other sensitive receptors. It will be noted, therefore, that the Condition adopted the flat 43 dB(A) limit proposed by the developers, and extended that to all dwellings, irrespective of their ownership. Otherwise the developer's proposal was adopted and, it appears, the appellants' submission rejected.

21. The submissions and Inspector's Report were considered by the Board at its meeting held on the 25th of April, 2017. It is recorded in the Board's direction that it decided by a 3:1 majority to grant permission generally in accordance with the Inspector's recommendations, and subject to reasons, considerations and conditions set out. Again, it was recorded that the Board had regard to inter alia, the provisions of W.E.D.G. Condition No. 7 of the Board's decision was identical to Condition No. 6 proposed by the Inspector. The formal decision issued on the 19th of May, 2017, and was in similar terms in respect of noise. Under the heading "Matters Considered", it was stated:

> "[i]n making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions".

Again, it was noted that the Board had regard to the 2006 W.E.D.G.

Judicial Review Proceedings

22. Judicial review proceedings were commenced. A statement of grounds raised a wide number of issues. Once again, it is only necessary to consider the issue in relation to noise, and in particular the treatment of the W.E.D.G. guidelines, albeit that the isolation of this issue may give a misleading impression as to the breadth of the matters raised.

23. At para. 18 of the Statement of Grounds, the appellants referred to the fact that material had been put before the Board "describing [and] establishing the profound effects of noise from Wind Farms of the type proposed in this case… and/or raising issues which required investigation, identification, description, assessment, examination, analysis and evaluation, finding or conclusion". In particular, the appellants referred to evidence put before the Board, much of it post-dating the 2006 Guidelines, including the revision of the guidelines in 2013, the report of Cork County Council planner, as well as the 2005 Report by Mr. Bowdler, and noted that the appellants had requested that the Board read the paper research, and address it specifically in its written record. There were also further noise studies and other material, including the Large and Stigwood Report of 2014. The appellants noted that they had requested the Board to address this material, and contended that the Board was not entitled to ignore it. It was, moreover, asserted that the Inspector having failed, at least in the appellants' contention, to address this material and record his decision upon it, the Board did not have any material which would allow it conclude that the windfarm would not have an unacceptable effect on the environment in the form of noise.

24. At para. 23 of the Statement of Grounds, it was alleged that neither the E.I.S., the Inspector's Report, nor the Board's impugned decision performed or recorded any investigation or assessment of noise from the windfarm, and ignored and/or failed to take into consideration the material tendered by the appellant, which, it was alleged, demonstrated the likelihood or credibly raised the issue of profound impact of the said noise on the appellants, their home and family. Para. 24 alleged that the Board, in breach of its obligations, relied on the 2006 Guidelines in concluding that there were no adverse impacts on the residential amenity.

25. There followed a specific plea which, I think, it is useful to record *verbatim*:-

"(a) In advising the Board that the 2006 Guidelines could be applied, the Inspector determined, without any reference to the original research, reports, evidence and literature furnished by the applicants, that the applicants objection that the 2006 Wind Energy Guidelines and the ETSU publication on which they were based were outdated and not fit for purpose "*is not a relevant planning consideration. The 2006 Guidelines are as they are and remain in force*". The Board adopted this conclusion in adopting their Inspectors report.

- This conclusion constituted a fundamental error of law.
- The 2006 Guidelines remain in force and the Board was merely obliged at law to have regard to those guidelines.
- The Board was, in principle, entitled to, but not obliged to apply those guidelines.
- Accordingly, submissions that the guidelines should not be applied and the reasons and evidence on which such submissions were based were
    - Relevant planning considerations
    - Relevant EIA considerations

- Accordingly, neither the Board nor the Inspector was entitled to dismiss as irrelevant or to ignore (as the Inspector explicitly did by deeming them irrelevant) criticisms of those guidelines and evidence supporting such criticisms of those guidelines. The Board was entitled, I understand, to decide against such criticisms, but not to ignore them – as it did, thereby failing to take relevant considerations into account."

26. I appreciate that the Statement of Grounds is diffuse, and that a number of different contentions are raised, sometimes by reference to different legal principles, but it is, I think, tolerably clear from the above paragraph that at least one of the points being made on behalf of the appellants was that it was suggested that the Inspector, and therefore the Board, had not considered the material submitted on behalf of the appellants contending that the 2006 Guidelines were out of date; a conclusion, it must be said, which was derived from the statement in the Inspector's Report that the contention was "not a relevant planning consideration. The 2006 Guidelines are as they are and remain in force". Furthermore, it is noteworthy that the contention set out at para. 24(a) above was repeated almost verbatim at para. 19(i) of the affidavit of Klaus Balz, which perhaps explains the incongruous reference "I understand" in para. 24(a) set out at para. 25 above.

27. It is unfortunate that the contention made and cited above does not appear to have been directly engaged with in the Board's Statement of Opposition. Thus at para. 5, it said: "[n]or is it correct to allege (as alleged at F.18) that the Board failed to have regard to the submissions before it". Paras. 9 and 10 of the Statement of Opposition are particularly relevant:-

> "9. Whereas the Applicants challenge the lawfulness of the Board having regard to the Wind Energy Development Guidelines 2006, the Board was obliged to have regard to same in accordance with *inter alia* s. 28 of the PDA. Therefore, whereas the Applicants are of the view that same are not "fit for purpose" they remain guidelines to which the Board must have regard.
>
> 10. The pleadings in F24 are somewhat difficult to understand, and, indeed, appear to mistakenly contain the text of an averment therein. However, as best that can be understood, it would appear that the Applicants' complaint is, again, that the Board was not entitled to have regard to the Wind Energy Development Guidelines with regard to (it is assumed) issues of noise. In this respect, the Board relies on the above pleas and restates that the Board had determined that the proposed development will be acceptable in terms of noise impact within the threshold set out in condition 7. This was a determination the Board was entitled to reach, and the Board was, indeed entitled to (and required to) have regard to the guidelines."

28. A grounding affidavit was sworn by the secretary of the Board which exhibited a small amount of additional documents setting out a chronology of events, and suggested that the first-named appellant's affidavit was, in effect, legal submissions. The affidavit did deal in some detail with the question of confusion as to maps submitted for the purpose

of the appeal and markings thereon. The affidavit does not contain, however, any statement as to the approach either the Inspector or the Board took to the criticisms of the 2006 Guidelines, and the materials submitted in support of those criticisms. Nor, indeed, does the affidavit state what the Board understood the Inspector to have meant by the two sentences at para. 10.8.2 of his report, as highlighted at para. 18 above, and which it is worth recalling at this point:-

> "claims by the objectors that this ETSU publication is outdated and not fit for purpose is not a relevant planning consideration. The 2006 Guidelines are as they are and remain in force. Proposed revisions to Wind Energy Development Guidelines 2006 – Targeted Review in Relation to Noise Proximity and Shadow Flicker (December 2013) have not yet been adopted."

The High Court Judgment

29. The High Court (Haughton J.) delivered a comprehensive and impressively detailed judgment on the 30th of May, 2018. Once again, however, it may do a disservice to the judgment to select only the portion of it dealing with noise, but that is all that is now relevant to the proceedings. At para. 30 of the judgment, the appellants' court case was described as a contention that "the Board did not examine and analyse or evaluate this literature, or take proper account of it, or record their reasons, and that the appellants' submissions were deemed by the Inspector and the Board not to be relevant". At para. 32 of the judgment, the point is described as follows:-

> "The complaint of the applicants in relation to the manner in which the EIA was conducted relates to the use of the WEDG 2006 which they contend are outdated and no longer fit for purpose. The applicants point out that the WEDG 2006 have been under ministerial review since 2013. While not suggesting that the ministerial review of the WEDG 2006 was a basis for contending that the Board should have disregarded the guidelines altogether, they submitted (a) that the Board was not bound by the WEDG 2006, but merely must have regard to them, and (b) flowing from this, that the Board was obliged to take into account and evaluate any evidence presented which indicated that the guidelines were inappropriate or outdated or not suited to the particular planning application. This evidence should have been balanced with the WEDG 2006 and an assessment, analysis and examination of all evidence should have been conducted before any decision was taken. Instead, the Inspector's report explicitly states in response to the evidence proffered that the suitability of the WEDG 2006 or any evidence indicating that they are outdated or not fit for purpose "is not a relevant planning consideration. The 2006 Guidelines are as they are and remain in force." One important feature of the WEDG 2006 being adopted by the Board, allegedly without any proper consideration of contradictory information, is that the WEDG 2006 set a maximum noise level limit of 43dBA whereas the newer guidelines subject to ministerial review recommend a maximum noise level limit of 40dBA."

30. The reference to W.E.D.G. 2006 containing a maximum noise level of 43 dB(A) should be to a 45 dB(A) limit for daytime and 43 dB(A) for night. However, subject to this

clarification, the paragraph in the judgment fairly sets out what I would have understood to be the appellants' case in this regard if reading the papers for the first time.

31. At para. 42 of the judgment, the Board's replying contention is set out. It submitted, in reliance on a previous decision in *Element Power Ireland Ltd. v. An Bord Pleanála* [2017] IEHC 550, that the court had found that there was no obligation on the Board to apply or make decisions on the basis of the 2013 Guidelines which had not yet taken effect, and that the Board was entitled, and indeed obliged, to take W.E.D.G. 2006 into account. At para. 70 of the judgment, the learned trial judge observed that, fundamentally, the appellants asked the court "to impose on the Board (and by extension planning authorities) an obligation to consider, assess and evaluate the general science around wind farm turbine noise emissions, and to reject the currency of ETSU-R-97 and the W.E.D.G. 2006 and apply some new science to the assessment of noise affect, particularly on humans". The judgment considered that it was not the function of the Board to determine matters of policy where specific statutory guidance had been given. It was difficult to see how, without conducting its own research, the Board could come to a fully reasoned policy decision sufficient to override a statutory guideline. In particular, at para. 72 of the judgment, the judge noted:-

> "The Board's decision does not indicate that it examined, analysed or evaluated the scientific materials upon which Mr. Noonan's submission that the ETSU-R-97/WEDG 2006 were outdated/not fit for purpose. The statements in the Inspector's report at 10.8.2 demonstrate a cursory consideration of that claim, but are such as to persuade the court that that the Board probably did not examine, analyse or evaluate those materials in the context of EIA because they were not considered to be "a relevant planning consideration". Instead it is clear that the Inspector and hence the Board applied the WEDG 2006 in carrying out EIA. While there may be much that is cogent and persuasive in the scientific material presented by Mr. Noonan, it must be concluded for the reasons just given in the preceding paragraphs that the Inspector was entitled in law to state that a claim that ETSU-R-97 was out-dated and not fit for purpose "is not a relevant planning consideration", and that "The 2006 Guidelines are as they are and remain in force." It follows that the Board was not required to evaluate and assess the competing scientific research/papers that would tend to undermine ETSU-R-97 and the ongoing use of WEDG 2006 as a guideline."

32. Haughton J. also delivered a judgment on the appellants' application for leave to appeal to the Court of Appeal. For present purposes, it is noteworthy that at para. 15 thereof he describes the Inspector as concluding that the appellants' submission "was "not a relevant planning consideration" and I found that this was the reason why the Board did not engage in detailed analysis of the scientific papers". In a footnote, the learned judge also noted that, by contrast, the Inspector had considered scientific papers insofar as they concern the phenomenon of "amplitude modulation".

33. This court granted leave to appeal in a determination of the 14th of February, 2019. The court concluded that the application raised some issues of general public importance as to the proper approach to ministerial guidelines by the Board. The Board was:-

> "statutorily bound to have regard to them but, it is agreed, is not obliged to follow them in any individual case. Clearly, a distinction could be drawn between a submission that the guidelines would not be appropriate in a particular case, for specified reasons, and a submission that the technical aspects of the guidelines have been overtaken by scientific understanding, and become outdated to the extent that they should not be applied at all. In the first example, any submission or information presented to the Board would relate directly to the potential environmental effects of the development. In the second, the submissions or information might not necessarily have any relationship with the effects of the particular development and might appropriately be described as not dealing with a relevant planning consideration as far as that development was concerned. The question then is the extent, if any, to which the Board is obliged to consider such submissions and information when received."

34. It became apparent at case management that there were, unfortunately, large differences between the parties as to what was in issue and, at a more fundamental level, even as to what had occurred in the appeal to the Board, and in the Inspector's consideration of the appellants' submission. O'Malley J. accordingly directed an exchange of correspondence setting out the respective positions of the parties in relation to W.E.D.G.

35. The appellants' position was set out in a letter of the 6th of March, 2019. The guidelines, it was said, offered advice and, even on their own terms, were not prescriptive, exclusive, or conclusive. The Board was, as a matter of law, required to have regard to the guidelines, but was not obliged to follow or apply the guidelines in whole or in part in any individual case. It followed that the Board had a discretion in that regard. It also followed that the Board could not decline to consider whether it would exercise that discretion. It was obliged to consider in each case whether, and to what extent, it would follow and apply the guidelines. It was obliged, therefore, to consider the scientific and technical information and material submitted to the Board which bore on that decision. It was, in principle, possible that an applicant could submit to the Board that the guidelines should not be applied in whole or in part in a particular case, either because of material suggesting a general underlying deficiency in the guidelines, or by evidence of specific factors as to the guidelines in the context of the specific proposed development or the particular environment. It was submitted that the appellants had submitted material that was both general and specific in this sense. Finally, it was submitted that the Board's erroneous rejection of the scientific/expert materials and submissions thereon submitted by the appellants as irrelevant, and therefore not requiring consideration, amounted to a refusal to exercise in the discretion whether to follow the guidelines in whole or in part and in error treated the guidelines as prescriptive, conclusive, and exclusive. It was submitted accordingly that this amounted to a failure to perform a complete E.I.A.

36. I should say at this point that this was a short and succinct statement of the appellants' case, which perhaps shows the benefit of directing this exchange. The response of the Board in its turn made it clear that there was a fundamental disagreement between the parties, not so much as to any matter of law, but rather as to fact. The response was contained in a letter dated the 11th of March, 2019. With admirable brevity, it stated that it was agreed between the parties that the Board must have regard to W.E.D.G. under s. 28 of the 2000 Act; that the Board may depart from the guidelines; that it was obliged to carry out an E.I.A., and that it could not ignore submissions made to it that bear on matters within its jurisdiction. The letter then went on to state that the Board had regard to the W.E.D.G., and positively (after an E.I.A. in which the appellants' submissions had been considered) imposed a lower noise level than that recommended by W.E.D.G., 43 dB(A) rather than 45 dB(A).

37. It was then stated that the appellants had submitted scientific information contending that noise levels closer to 30 dB(A) were appropriate, and had also argued that a 40 dB(A) level found in proposed changes to W.E.D.G. was appropriate. It was asserted that the appellant had pleaded at para. E(24) of the statement of grounds that "the Board was not entitled to have regard to the W.E.D.G. at all – i.e. they should have been legally irrelevant, and, in effect, set aside". It was suggested that the Board had simply not acceded to the appellants' request that the W.E.D.G. should be deemed legally irrelevant, but had, however, clearly carried out an E.I.A. (in which the scientific information had been considered insofar as it "bore on the actual noise limit that should be considered appropriate for this development. This was done in fact"). This sets out the difference between the points of view of the Board and the appellants quite succinctly if, from the point of view of the Court which may have considered that an issue of law was concerned, rather disconcertingly, since the dispute seemed now to be one of fact. The Board elaborated on the contention that the Inspector (and by extension the Board) had merely rejected the contention that the W.E.D.G. were legally irrelevant, and had rather "as a matter of fact" considered the submission when considering the noise limit. It was said, bluntly, that while the appellants maintained that the Board had erroneously rejected the submissions as not requiring consideration "[t]his did not happen. The Board did not discount the submissions as not requiring consideration". The next sentence of the letter deserves particular attention:- "[t]he submissions – as to what level of noise was appropriate – were considered and nothing has been proven to the contrary". The letter then repeated that the contention that the W.E.D.G. should be ignored was not capable of consideration, and the Board did not consider the submissions "toward that end". This, it was said, was what the High Court had held, but the High Court did not hold that the Board did not carry out an E.I.A. and consider the substance of points being made about noise impact.

38. The letter concluded that the appellants' case as set out arose from this misconception. The appellants had contended that "as a matter of fact" the Board refused to exercise its discretion not to follow or apply the W.E.D.G. This, it was said, "is not true". Again, it was said that the Board had not treated the W.E.D.G. as prescriptive, exclusive, or conclusive. The last paragraph stated "[t]hus the Board's position on how the Appellant wishes to

argue the case is that it simply rests on a complete misrepresentation of what the Board actually determined".

39. There is, therefore, a very strong and direct dispute between the parties, and one which is disconcerting to encounter at this point in proceedings. The written and oral submissions of the parties reflected and elaborated on the positions set out in the correspondence, but added little to the essential argument. It is apparent that what is in dispute on the evidence is what the Board actually did and intended when it adopted the Inspector's Report, which referred to the appellants' claim that ETSU was outdated and not fit for purpose as "not a relevant planning consideration" and that "the 2006 Guidelines are as they are and remain in force".

40. This is a frustrating case, therefore, from the court's point of view, since it is plain that it does not appear to raise any issue of law of general importance, but rather is a dispute – evidently heated – as to how the facts should be characterised or, perhaps at an even more basic level, a dispute as to what occurred when the Inspector received the submissions made on the appellants' behalf. The court's frustration is perhaps minor, however, compared with the frustration which must be felt by the developer, who has now been seeking permission for a relatively modest wind farm development for over seven years, or, for that matter, for the appellants, who have had to come to court on two occasions now, and incur the cost and stress involved, and run the risk of a substantial award of costs against them. It must also be frustrating for the Inspector and, by extension, the Board. While obviously careful, comprehensive, and painstaking work was carried out in the assessment of this matter, legal proceedings now focus on a few sentences of the report, coupled with what might be deduced from the absence of a more elaborate statement of the facts. Any such frustration may be enhanced by a feeling that the submissions made on behalf of the appellants were somewhat peremptory, and, moreover, that the appellants' case, in this respect at least, has developed and been refined as the case proceeded. Furthermore, it should be said that, even taken at their height, the submissions made on behalf of the appellants appeared to have been gathered together by a solicitor with some knowledge of the area, but were not supported by any expert evidence. It is not clear that they would have carried particular weight if the Inspector was permitted to consider them. Finally, and perhaps most importantly, the case must be frustrating to any interested member of the public who would wish to see how two important values are balanced – the protection of the environment from damaging development on the one hand, and the promotion of useful and efficient development on the other, in this case a development asserted to be consisted with the State's Energy Policy.

41. However, this case must be decided in accordance with the law. It seems that the fundamental issue is one of fact, leading in turn to a relatively simple and familiar issue of public law. It does not appear to me that the case gains anything from being recast in terms of European law and the E.I.A Directive. If the Inspector was obliged to consider the submissions and the materials submitted on the appellants' behalf, and that that position was adopted by the Board, then it might be said that there had been a failure to

conduct a full E.I.A., but the case would succeed on the more basic ground, that the Inspector and Board had failed to have regard to a relevant consideration, in this case submissions made on behalf of the appellants.

42. It seems clear that the submissions made by the Board present a characterisation of the facts (and the appellants' arguments) that had not been apparent until this appeal, and the exchange of correspondence directed by the court. In my view, the interpretation of the Inspector's Report on which the appellants had proceeded is perhaps the more obvious and natural one. First, the Inspector stated that the submission that the ETSU document was outdated and not fit for purpose was not a relevant planning consideration, and that the 2006 Guidelines are as they are and remain in force. This does not suggest that the Inspector considered that the submissions were relevant in some limited respect. Instead, the submissions were treated as irrelevant. It would therefore follow that, if so, the Inspector could not have had regard to them in his decision, at least on the question of the noise limits. Furthermore, the Report itself is consistent with the Inspector taking that approach. The Report does not contain any reference to, or consideration of, the materials in question, or anything which can be fairly said to be derived from him. Last, this is exactly what the High Court judge, who had conducted a careful hearing of the entire matter, thought had occurred, as set out at para. 72 of his judgment.

43. The contrary contention now advanced by the Board is, in my view, implausible. First, the appellants' case is characterised as a contention that W.E.D.G. was legally irrelevant, and the Inspector was obliged to ignore the guidelines. I think that this inverts the case that had been made. The appellants had not submitted that the W.E.D.G. were legally irrelevant. The Inspector, however, had decided that the appellants' submissions were. The appellants had, at all times, accepted that the Inspector was obliged to have regard to the guidelines, but in doing so, it was submitted, he should give little or no weight to them, because it was suggested they were outdated and not fit for purpose. The suggestion made in the Board's letter, and repeated in the written submissions, that it is to be deduced that the Inspector must nevertheless have considered the submissions because he set a (daytime) limit lower than that recommended by that of the W.E.D.G. is not persuasive. It is quite clear that the 43 dB(A) limit was recommended by the Inspector and imposed by the Board, because it was the limit sought by the developer. That, in itself, does not suggest any consideration of the submissions on the appellants' behalf. It is true that the Inspector did not accept the developer's proposal that a 45 dB(A) daytime limit should be retained for properties owned by those involved in the development. But this cannot be treated as evidence that the Inspector or the Board considered the submissions made in respect of noise. Nothing has been pointed to in those submissions which would lead to this particular decision. Furthermore, the Board has acknowledged in the written submissions that it is explained simply that because any such properties might change hands, it would therefore be undesirable to distinguish the noise limit for such property simply on the basis of their present ownership.

44. It is worth pausing, however, to consider why this central issue of fact remains in contention and subject to rival interpretations. Whether or not the Inspector considered

the submissions for the purposes that were put forward, or at all, is a matter of fact to which there is only one correct answer, and indeed only one relevant witness. This issue remains a matter of such heated controversy, however, because neither the Inspector nor the Board has said what they did in this respect, either in the Report of the Inspector or the Board's decision, or by way of direct evidence to the court. Indeed, the absence of direct evidence in this regard gives rise to a further disconcerting possibility. Assuming, for these purposes, that there are two possible interpretations of the known and observable facts and the evidence adduced – first, that the Inspector considered that he could not have regard to the submissions that the W.E.D.G. were not fit for purpose (which it now seems to be conceded would be wrong) and second, that the Inspector correctly interpreted the appellants' submissions as suggesting that he should treat the W.E.D.G. as legally irrelevant and properly discounted that, but nevertheless had regard to the submissions in considering the noise limit itself – then it is not at all clear whether the Inspector and the Board were agreed as to what had occurred in fact. It is possible, at least in theory, that the Inspector wrongly excluded any consideration of the submissions, but that the Board erroneously thought that he had merely interpreted the submissions as suggesting that the W.E.D.G. were legally irrelevant, and properly considered them for the purposes of the noise limit. The opposite is also equally possible, at least in theory. It is furthermore unsatisfactory that the Board's characterisation of what occurred in this respect is only found explicitly in the correspondence written in the context of case management, and the written submissions advanced on this appeal, but is not addressed directly in evidence.

45. It is of the utmost importance that planning authorities and the Board, on appeal (or, as is increasingly the case, the Board in those circumstances in which direct application can be made to it for permission), should carry out their functions as professionally and competently as possible. The system of appeal (or first instance application) to an independent expert body was a great advance when introduced in 1976. The imbalance of resources and potential outcomes between developers on the one hand, and objectors on the other, means that an independent expert body carrying out a detailed scrutiny of an application in the public interest, and at no significant cost to the individual, is an important public function. It is apparent, even from the papers in this case, that the Board and its Inspector have carried out their functions with a high degree of technical expertise. It is, however, unsettling that there should be an absence of direct information on this central issue. This may be no more than an unfortunate misunderstanding at the time of the appeal, and the Board's decision may now have become entrenched in the defence of these proceedings. There are also valid reasons why Board decisions may be drafted in a particularly formal way, and it may be that, in most cases, interested parties are able to consult an Inspector's Report to deduce the reasons behind the Board's decision. However, some aspects of the decision give the impression of being drafted with defence in mind, and to best repel any assault by way of judicial review, rather than to explain to interested parties, and members of the public, the reasons for a particular decision.

46. It is unsettling, for example, that when an issue arises where it is suggested that the Inspector (and therefore the Board) has not given consideration to a particular matter, it should be met by the bare response that such consideration was given (for a limited purpose) and "nothing has been proven to the contrary". Similarly, while the introductory statement in the Board's decision that it has considered everything it was obliged to consider, and nothing it was not permitted to consider, may charitably be dismissed as little more than administrative throat-clearing before proceeding to the substantive decision, it has an unfortunate tone, at once defensive and circular. If language is adopted to provide a carapace for the decision which makes it resistant to legal challenge, it may have the less desirable consequence of also repelling the understanding and comprehension which should be the object of any decision.

47. In this case, I would limit myself to the conclusion that the appellants have adduced sufficient evidence to lead to the inference that the Inspector considered that he could not entertain submissions directed to whether the guidelines were adequate or fit for purpose or not, and accordingly that he discounted the submissions, and treated them as irrelevant, and that that approach was adopted and approved by the Board. The Board has not produced, in this case, any evidence which rebuts that inference.

48. It follows from this conclusion, in my view, that the Board's approach was in error. It might reasonably be asked what the purpose of any s. 28 guideline is. It seems obvious that such guidelines are produced to avoid the possibility of inconsistent decisions between different planning authorities in different areas. Such guidelines also deal with technical issues and avoid considerable duplication of effort in respect of that issue, which could, moreover, be the subject of differing views, and therefore the possibility that individual planning authorities or the Board might be persuaded by one expert rather than another. If no guidelines were issued on a particular technical question, then the planning authority and the Board, on appeal, would be obliged to conduct some sort of assessment of what could be quite detailed and complex scientific matters. When guidelines are produced, then a planning authority and/or the Board must have regard to them, and can legitimately take them as the starting point, and in most cases the finishing point, of any consideration of the technical issue covered in the guidelines.

49. However, it is inevitable that, particularly where guidelines deal with matters of technology or science, the knowledge in that field may develop, or that the experience of application of the existing guidelines to particular circumstances produced greater knowledge and insight. What is to occur then?

50. In my view, it is absolutely clear that it is open to a party, whether seeking or resisting permission, to put before a planning authority and/or the Board information, material and submissions suggesting that the decision-maker should depart from the guidelines to a greater or lesser extent. This is not only what the appellants did through their solicitor's letter of the 29th of June, 2016, but is also manifestly what the developer did in referring, prudently in my view, to the 2013 Review, and also in the manner in which reference was made to the 2006 W.E.D.G. and the ETSU documents.

51. A decision-maker must engage with such a submission, and if there is evidence that there is a consensus that the guidelines are no longer widely accepted within the relevant expert community, then that should lead to a reduced reliance on the guidelines as, in themselves, sufficient to ground a decision on any particular aspect of an application. Eventually, new guidelines will be promulgated. In those circumstances, while it might still be open to a party to maintain that such guidelines are erroneous, a decision-maker would be justified in being slow to depart from new guidelines, unless there was very convincing evidence that they were in error.

52. Here, the relevant guidelines were more than a decade old, and the relevant portion was based on the ETSU document which was more than 20 years old. The guidelines were given in an area where knowledge was advancing considerably. The very fact that the process of review had been commenced by the Department, and that proposals had been made suggesting that a significant departure from the guidance in place in the 2006 W.E.D.G. were, in themselves, significant matters suggesting that less reliance could be placed on the W.E.D.G. The fact that a senior local planner in an area with extensive wind turbine development, had considered that the guidelines were not fit for purpose is another feature which could not be discounted. These matters suggested, at a minimum, that what was advanced on behalf of the appellants was not merely one rather eccentric side of an academic controversy, but rather something which was required to be considered.

53. One thing that is beyond dispute, even in the context of the fractious engagement between the parties in this case, is that *something* was considered irrelevant by the Inspector, and therefore necessarily excluded from consideration by him (and, by extension, the Board). It seems tolerably clear to me that he considered that the contention made by the appellants, that the 1996 ETSU was outdated and not fit for purpose, was an irrelevant planning consideration. It must follow that he did not address that issue or any of the material advanced in support of the appellants' contention. In stating that the 2006 W.E.D.G. "are as they are and remain in force" and that the 2013 Review "has not yet been adopted", it seems clear that he considered that the 2006 W.E.D.G. and the 1996 ETSU were the only guidance to which regard could be had and excluded from consideration any argument whether the guidelines were outdated, or that regard could be had to the 2013 proposals. If this was the approach the Inspector took – and I think it was – then it was wrong in law, and meant unavoidably that he had excluded from his decision-making relevant considerations. It follows that the Board's decision, being based on the Inspector's report must be similarly flawed.

54. The High Court judge in his admirable, comprehensive, and careful survey of a complex issue in this case did not come to this conclusion. The reasoning of the learned judge is contained, in essence, in para. 71 of his judgment. He considered that while, if there was no national or local policy, the Board might be required to decide an issue of policy, that otherwise it was not a function of the Board to determine matters of policy where specific statutory guidance had been given and was extant. The Board, while an expert body, was not designed or intended to assess and evaluate policy matters.

55. I sympathise with much of what is said in this passage, but in my view it leads to the wrong conclusion. These were not policy guidelines. If they were, they would be mandatory and the Board would have been obliged to follow them rather than merely have regard to them. If so, the Board must at least consider submissions to the effect that little weight should be placed on the guidelines. In doing so it is not determining a matter of policy. It is deciding an appeal before it by reference to all relevant considerations, including the guidelines. It is common sense that the Board, or any planning authority, would be slow to depart from official promulgated guidelines, and even in cases where there is a substantial argument the guidelines were outdated and required to be replaced, the Board might be justified in considering, at least in principle, that it would be a matter for the body issuing the guidance to determine both whether the guidelines should be updated and in what respect. But neither the Board nor any other planning authority could exclude as irrelevant the argument that the guidelines were outdated, particularly when that had substantial independent support from official sources.

56. To return to a theme of this judgment, this distinction is clear, but undoubtedly frustrating. It must be doubtful that if, having considered all the materials and submissions made on behalf of the appellants, a decision-maker would have been likely to accept them, and certainly the more extreme version put forward. There was something of a scattergun approach about the submissions and the voluminous material landed on the Inspector as appendices to the letter of the 29th of June, 2016. No report from any expert, still less an expert of standing in the field, was produced either by reference to the specific application made or the more general scientific contentions. As the judge observed, there was no reason to assume that the material submitted was representative of a scientific consensus, or that it would not be possible to have a similarly selective exercise which might produce an equal amount of opposing views. In the circumstances, it would not have been unreasonable to continue to give weight to the existing guidelines, and to be slow to depart radically from them.

57. However, this was not what was done here. Instead, the submission was rejected *in limine* on the basis of a determination that the matters contained therein were irrelevant. It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live. I consider, therefore, that it is necessary to quash the decision of the Board granting permission in this case. In the circumstances, I would hear counsel as to what ancillary orders should be made, and in particular whether it is possible or desirable to remit the matter to the Board, and if so, at what stage of the decision-making process.