Community Law & Mediation

Submission on the General Scheme of the Housing & Planning & Development Bill 2019

Executive Summary

Community Law and Mediation (CLM) welcomes the opportunity to make a submission on the Housing and Planning and Development Bill 2019.

The proposals contained within the Bill will, if enacted, pose a serious threat to environmental democracy and citizens' access to justice rights; and significantly restrict Irish environmental NGOs and lay litigants from challenging planning decisions in the courts.

It is CLM's view that the Bill, if enacted in its current form, will contravene Ireland's obligations under the Aarhus Convention (and its implementing EU Directives), the Constitution and the repeated jurisprudence of the Court of Justice of the European Union.

CLM makes the following recommendations:

1. Abandon the Housing and Planning and Development Bill 2019;
2. Provide legal aid for plaintiffs seeking to challenge environmental decisions to ensure effective access to justice in line with the Aarhus Convention, Article 47 of the Charter of Fundamental Rights of the European Union and Articles 6 and 13 of the European Convention on Human Rights;
3. Support engagement and participation within communities around environmental matters to ensure:

- Fulfilment of Aarhus Convention obligations:
- Consensus building on the need for environmental action; and
- 'Just transition' and recognition of the intersection between environmental action and responses to issues faced by the community e.g. workers' rights, energy poverty, health, housing, transport.

A. Introduction

Environmental democracy and oversight is protected by EU law and the Aarhus Convention and has never been as important as we grapple with ever increasing environmental challenges. Proposals contained in the *Housing and Planning and Development Bill 2019* ('the Bill') to '*safeguard the timely delivery of projects and value for public money'* look to seriously threaten environmental democracy and citizens' access to justice rights. If enacted, the Bill will significantly restrict Irish environmental NGOs and lay litigants from challenging planning decisions in the courts.

Community law & Mediation (CLM[i]) is of the view that the Bill, if enacted in its current form, will contravene Ireland's obligations under the Aarhus Convention (and its implementing EU Directives), the Constitution and the repeated jurisprudence of the Court of Justice of the European Union.

In the last ten years, Ireland has made significant changes to its standing and cost rules as a result of its adoption of the Aarhus Convention. In relation to costs, the Environmental (Miscellaneous Provisions) Act 2011 and legislative amendments to Section 50 of the Planning and Development Act 2000 in 2010 departed from the general "*costs follow the event*" rule for certain environmental cases. Instead, each side was to bear its own costs and in recognition of the unequal burden presented by "*own costs*", applicants could be awarded certain of their costs if they were successful in some of the reliefs. The provisions also provided for discretion for judges to make an award in *"a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so"*. The protection however could be forfeited if: "*the claim or counter-claim is frivolous or vexatious"*, or "*because of the manner in which the party has conducted the proceedings",* or *"where a party is in contempt of court".*

In addition, previous standing rules were relaxed to dispense with the requirement to show that an individual was peculiarly affected by a particular development. Finally, the restrictions on the type of NGO which could have standing were largely removed by the decision of the Supreme Court in *Sandycove and Mount Merrion Residents Association v An Bord Pleanala,* 2012 IESC 51.

The Aarhus Convention has not changed, yet the Bill would return Ireland's standing and costs rules largely to the position which existed prior to the adoption of that document.

B. Ireland's obligations under the Aarhus Convention

Article 9(2) of the Aarhus Convention provides that members of the public, with a sufficient interest, have access to a review procedure before a court of law to challenge the substantive and procedural legality of any decision, act or omission subject to the public participation provisions of article 6. What constitutes a sufficient interest is determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of the Aarhus Convention. Under Article 9 (5) of the Convention, appropriate assistance mechanisms must be considered to remove or reduce financial and other barriers to access to justice.

It is impossible to square the Bill with the Aarhus Convention. This Convention has been implemented in EU law through a number of Directives and Regulations, such as the Environmental Impact Assessment (EIA) Directive (Directive 85/337/EEC), codified by Directive 2011/92/EU, and Article 10 (a) of Directive 2003/35/EC on Public Participation. As such, EU Member States are obliged to transpose such provisions into their national jurisdiction and give effect to the Convention rights. This requirement has been further underpinned by recent rulings of the Court of Justice of the EU (CJEU)[ii].

The policy behind the implementing directives is '*wide access to justice",* indeed the *"broadest possible*" access to justice as per Case C-137/14, *Commission v Germany*. The necessary balance between the expeditious completion of development and the right of access to judicial review has been re-cast at European level. For example in Case C-72/12, *Gemeinde Altrip*, the Court clarified that Member States could no longer continue to baldly restrict access rights:

> *"Although it is true that that extension may have the effect, in practice, of delaying the completion of the projects involved, a disadvantage of that kind is inherent in the review of the legality of decisions, acts or omissions falling within the scope of Directive 85/337, a review in which the legislature of the European Union has, in accordance with the objectives of the Århus Convention, sought to involve members of the public concerned having a sufficient interest in bringing proceedings or maintaining the impairment of a right, with a view to contributing to preserving, protecting and improving the quality of the environment and protecting human health."*

The CJEU has consistently noted the link between access to justice in environmental matters and '*the desire of the European Union legislature to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public plays an active role'*.

C. Proposals contained in the Housing and Planning and Development Bill 2019

(i) Head 4(1)-"On Notice"

The Bill proposes that leave for judicial review be taken "on notice" to the other side, rather than "ex-parte" (with only one side present). This might not seem significant but it adds a minimum of an extra four days to the eight-week timeframe for bringing the leave application. Taken together with the new practice direction issued last year for Strategic Infrastructure cases, which requires early filing of documents, this puts significant pressure on the legal teams for plaintiffs seeking to challenge these types of decisions.[iii]

It is highly probable that a respondent on notice will contest the application for leave. This is likely to result in an increase in cost and delay where, in effect, the case will be fought on its merits at both stages of the judicial review process. Where the Bill also intends to raise the threshold for receiving leave by requiring the applicant to show a "*reasonable prospect of success*", courts will be obliged to engage with the merits of the substantive claim at the leave stage. It replicates, almost exactly, the disastrous introduction of this requirement into asylum and immigration litigation which was scrapped after 10 years of introducing more delays, uncertainty and expense into the system (See the move from Section 5, Illegal Immigrants (Trafficking) Act 2000 to Section 34, Employment Permits (Amendment) Act 2014).

These attempts to place barriers in the way of access to justice, when so many barriers already exist would represent a retrograde step in terms of fulfilment of the obligations of the Aarhus Convention.

(ii) Head 4(2)-'Reasonable Prospect of Success'

Head 4 (2) of the Bill proposes that a person or body must be able to prove that the proposed judicial review has a reasonable prospect of success before being permitted to bring the judicial review action. The present requirement that an Applicant must prove to a Court is that there are "*substantial grounds*" for challenging the planning decision. This is already more stringent than for general judicial review leave applications which merely require an applicant to show "*arguable grounds*".

The intent of raising the threshold for the bringing of a review appears to be to reduce the number of reviews being brought. This goes against the clear legal requirements of the Aarhus Convention, which calls for the elimination of obstacles to access to justice. This is particularly unsatisfactory at a time when, more than ever, individuals and organisations need to be in a position to advance and protect their (and the community's) environmental rights and is

instinctively inconsistent with the decision of the High Court in *Merriman v Fingal County Council* 2017 IEHC 295 which identified a constitutional right to an environment consistent with human dignity.

(iii) Heads 4(3) & 4(4)-Standing Rights[iv]

The Bill also proposes to change the current position regarding standing rights requirements for applicants from "*sufficient interest*" to "*substantial interest*" and a requirement that they must be "*directly affected by a proposed development*" and "*in a way which is peculiar or personal".* This is in addition to a new requirement that the applicant must have had prior participation in the planning process.

The introduction of the more onerous test as set out in the Bill is not consistent with the Aarhus Convention and its requirement to foster broad access to justice. While the Aarhus Convention and its implementing EU legislation allows Member States a certain degree of discretion in establishing the criteria for standing, the discretion exercised should be consistent with the objectives of the Convention regarding ensuring access to justice and not be used as an excuse for introducing or maintaining strict criteria.

The "*sufficient interest*" test was introduced into s.50A(3)(b)(I) by section 20 of the Environment (Miscellaneous Provisions) Act 2011, replacing the previous standard of "*substantial interest*". The Preamble to that piece of legislation explains specifically that the change was made in order to implement in Irish law certain articles of the Aarhus Convention. This suggests a recognition by the Legislature that there needed to be change from the "*substantial interest*" test on the basis that it was, non-compliant with the requirements of the Convention. The current proposals undo this change, and undo and reverse the efforts of Ireland to comply with the Aarhus Convention despite the fact that the Convention itself is unchanged.

(iv) Head 4(5) & 5-NGOs must be in existence for a minimum of 3 years and have a minimum of 100 affiliated members.

The Bill proposes an extension of the minimum time that an NGO must be in existence before it can challenge a planning decision from 12 months to 3 years. Given that applicants in this area are frequently local community groups formed specifically in response to a proposed development, the effect of the Bill is to pre-suppose an unreasonable and unrealistic degree of foresight among interested parties. Communities may not have sufficient (or any) information about a proposed development to form an association 3 years in advance of any

leave application. The possibility that the Bill would limit the ability of citizens to form an organisation in order to challenge a development raises profound issues concerning the Constitutional rights of freedom of association (protected by Article 40.6) and of access to the courts (protected by Article 40.3).

A requirement for environmental NGOs to have been active in that country for a certain number of years might not be consistent with the Aarhus Convention, because it may violate the non-discrimination clause of article 3, paragraph 9 of the Aarhus Implementation Guide. In Case C-263/08 (Sweden), the CJEU found that the obligation on NGOs to be active in Sweden for more than three years to be in violation of the EU legislation intended to implement the Aarhus Convention.

The 2019 Bill also proposes a new requirement that NGOs must have a minimum of 100 affiliated members in order to bring an application for Judicial Review which again will limit the ability of many environmental groups, who are smaller in size, from taking a legal challenge.

Parties to the Aarhus Convention, as per the discretion offered to them under the Convention, may set requirements for NGOs under national law. However, the Aarhus Convention Implementation guide states that NGOs have an '*integral role in the implementation of the Convention [and so] Parties should ensure that these requirements are not overly burdensome or politically motivated, and that each Party's legal framework encourages the formation of NGOs and their constructive participation in public affairs.*'[v]

(v) Head 6-Cap on Protective Costs

In Ireland, there is no currently no legal aid available for plaintiffs seeking to challenge environmental decisions. While individuals and groups can appeal local authority planning decisions to An Bord Pleanála, decisions made by the national planning authority can only be challenged through Judicial Review proceedings in the High Court.

Current rules regarding costs are contained in 50B(2)-(4) of the Planning and Development Act of 2000, and provide "*each party to the proceedings, including the notice party, shall bear its own costs*", but with provision in s.50B(2A) for the successful party to recoup their costs. This strikes an appropriate balance by removing the risk of being exposed to the costs of the other side in the event that the plaintiff is unsuccessful, while preserving "no-foal, no-fee" litigation by retaining the possibility of recouping of costs if successful.

The protective costs cap proposed in the Bill – on plaintiffs of €5,000 - €10,000 and on defendants of €40,000 – is clearly designed to remove the kind of "no-foal, no-fee" litigation that is currently the main mechanism facilitating access to justice in a high-costs jurisdiction. This risks making it prohibitively expensive for the public and environmental NGOs to take legal cases, dis-incentivising litigation. If applicants are discouraged from challenging environmental or planning decisions for fear of a costs order being made against them, this is likely to frustrate public access to justice.

The Explanatory Note for Head 6 clarifies that the purpose of the proposed changes is to introduce a "*reasonable and proportionate balance*" between the cost liability of applicants and respondents. This objective is obviously at odds with the Aarhus Convention, which seeks to provide the public with access to justice in environmental matters and acknowledges that citizens "*may need assistance in order to exercise their rights*".

Head 6 (5) and (6) provides that the Court retains residual discretion to vary or remove cost caps. It is important to note that judicial discretion is no replacement for legal certainty. A person embarking on environmental litigation will be put off if there is no certainty as to what costs might be imposed on them at the end. The Aarhus Convention requires that States ensure that the system of access to justice is not "*prohibitively expensive*". The CJEU, in *Edwards v Environmental Agency* Case C-260/11, set out detailed guidance on the concept of "*prohibitively expensive*". These factors are subject to the overarching aim "*to ensure wide access to justice and to contribute to the improvement of environmental protection*". For instance, the possibility that a successful applicant might not recover their costs, or might even be required to pay the unsuccessful party's costs, on a discretionary basis was found by the CJEU not to satisfy the requirement that access to justice is not "*prohibitively expensive*" (Case C-427/07 *Commission v Ireland*).

Significantly, rules surrounding costs in legal proceedings must be clear, precise and predictable in their effect, particularly when they may have a negative effect on individuals (Case C-167/17 *Volkmar Klohn v An Bord Pleanála*, at [50]). The possibility that these caps could be varied or removed on the basis set out in the Bill potentially exposes applicants to full and unquantifiable costs risks, which may have a chilling effect and is completely incompatible with the decision in *Klohn.*

It is unlikely that this proposal would be considered compatible with the Not Prohibitively Expensive Rule under the Aarhus Convention and related EU Directives. It curbs the 'wide access to justice' that both demand.[vi]

D. Conclusions and Recommendations

The proposals set out in the General Scheme of the Housing and Planning and Development Bill 2019 are alarming and represent a retrograde step in terms of fulfilment of our obligations under EU law. The Bill, in its current form, will have a chilling effect on environmental litigation and will seriously damage environmental oversight and democracy in relation to bad and unlawful planning decisions.

Access to effective judicial control to ensure that the law is applied correctly is more important than ever before. This is especially the case with enforcement of the Environmental Impact Assessment directive (which includes an obligation to assess the impact of a proposed development on climate) and the Habitats directive.

CLM makes the following recommendations:

1. Abandon the Housing and Planning and Development Bill 2019;
2. Provide legal aid for plaintiffs seeking to challenge environmental decisions to ensure effective access to justice in line with the Aarhus Convention, Article 47 of the Charter of Fundamental Rights of the European Union and Articles 6 and 13 of the European Convention on Human Rights;
3. Support engagement and participation within communities around environmental matters to ensure:
    - Fulfilment of Aarhus Convention obligations:
    - Consensus building on the need for environmental action; and
    - 'Just transition' and recognition of the intersection between environmental action and responses to issues faced by the community e.g. workers' rights, energy poverty, health, housing, transport.

ENDS

[i] **Community Law & Mediation-further information**
Community Law & Mediation (CLM) was established in 1975 as the first independent, community-based law centre in Ireland. Today, CLM supports more than 3,000 people annually through its services, which include free legal advice and representation; information and education; mediation and conflict coaching; and law reform. It operates two Community Law Centres, CLM Northside (Dublin) and CLM Limerick, and partners with other organisations to provide outreach legal advice clinics around Ireland.

[ii] **CJEU rulings on obligations under the Aarhus Convention – further points**

The CJEU, in its ruling in Lesoochranárske Zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky (Case C-240/09) ("LZ"), insisted that national courts must interpret national law *'in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention'*. In Križan and Others v Slovenská inšpekcia životného prostredia (Case C-416/10), the CJEU confirmed that directives which aim to bring EU law into line with Aarhus requirements must be interpreted in light of, and having regard to, the provisions of the Convention. The 'interpretive obligation'- whereby the national courts interpret national procedural law to be consistent with the objectives in the Aarhus Convention - suggest then that, as per Article 9 (2), national law gives '*the public concerned wide access to justice'*.

[iii] **Practice Direction for Strategic Infrastructure cases**

http://courts.ie/Courts.ie/Library3.nsf/pagecurrent/797211DDCD63BD008025822800555D4D?opendocument

[iv] **Substantial Interest – further points**

Articles 2(5) and 9(2) of the Aarhus Convention and the related EU legislation giving effect to it recognise the important role of NGOs by giving them a form of legal standing de lege on the assumption that they meet the relevant requirements laid down in national law. For these NGOs, pre-conditions to legal standing based on a sufficient interest or impairment of a right are deemed to be fulfilled. The CJEU has stated that, although it is for the Member States to make rules defining such requirements, they may not be framed in a way that makes it impossible for NGOs to exercise a right to go to court in order to protect the general interest. As held in the case of Djurgården (Case C-263/08)(paragraph 45), the national rules '*must […] ensure wide access to justice.*

Previous case law has demonstrated that 'substantial interest' establishes a very high standard. The Planning & Development (Amendment) Act 2006, saw an attempt at introducing such a phrase but it was removed, as it was incompatible with EU law, and replaced with 'sufficient interest'. Other cases also demonstrate that this would seem to be incompatible with Aarhus Convention requirements on access to justice and previous CJEU case law requiring broad standing rights for NGOs. In ACCC/C/2005/11, the Aarhus Convention Compliance Committee concluded that the requirement by Belgian courts that NGO applicants had to show a direct, personal and legitimate interest as well as a "*required quality*", was overly restrictive and thus did not meet the requirements of the Convention.

The CJEU Court in Case C-263/08 found that standing should be provided to the public regardless of the role — e.g., expressing their views, making comments, etc. — the public might have played during the prior administrative procedure. The Swedish law on access to justice for NGOs was subsequently changed as a result of the court decision.

The judgment in *LZ I* (also known as 'Slovak Brown Bears')(Case C-249/09), concerned a decision by a public authority to authorise the hunting of brown bears in derogation from the provisions on species protection laid down in the Habitats Directive, 92/43/EEC. This is especially important in the context of the Bill and the general field of nature protection, where it is sometimes difficult to argue that decisions, acts or omissions of public authorities can affect specific rights of individuals, such as those relating to human health.

[v] **Obligation on NGOs to have certain number of members – further points**

In Case C-263/08 (Sweden), the CJEU found that the obligation on NGOs to have at least 2000 members, was in violation of EU legislation implementing the Aarhus Convention; "*the number of members required cannot be fixed by national law at such a level that runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its scope*".

[vi] **The *Not Prohibitively Expensive* Rule – further points**

In July 2009, in the case of Commission v Ireland (Case C-427/07), the CJEU ruled, inter alia, that Ireland had failed to transpose the obligation to ensure that costs in cases involving the EIA directive and the IPPC directive were 'not prohibitively expensive.' In summer 2010, in response to this adverse ruling from Luxembourg, Ireland introduced legislation providing for a special costs regime for judicial review proceedings-section 50B of the Planning & Development Act 2000 Act.