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

Irish Human Rights and Equality Commission

November 2021

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an Duine agus Comhionannas
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Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014* (the '2014 Act'). In accordance with its founding legislation, the Commission is mandated to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality and to examine any legislative proposal and report its views on any implications for human rights or, equality.[1]

The Commission considers that judicial review is an important accountability mechanism that encourages better administrative decision-making and provides an opportunity for decisions of the State, its organs and its public bodies to be challenged. It is essential that access to justice is as broad as possible to allow the individuals, groups and communities who may be affected by decisions to bring judicial review proceedings, where relevant. As the General Scheme is concerned with proposed legislative reforms to judicial review provisions, including reforms of the legal standing rights to bring judicial review proceedings in environmental matters, it engages the right of access to the courts and fair procedures protected under the Constitution, EU law and international human rights law binding on the State.

[1] Section 10(2) (c) of the Irish Human Rights and Equality Commission Act 2014.

Relevant Human Rights and Equality Framework

Right of Access to the Courts and to Fair Procedures

The General Scheme engages the right of access to the Courts and to fair procedures, as guaranteed under the Constitution, the European Convention on Human Rights ('the ECHR') and international law.[2]

The Constitution

The right of access to justice[3] is a fundamental right, which includes the right to access the courts and it is recognised as a fundamental personal right protected under Article 40.3 of the Constitution. In the case of the *Illegal Immigrants (Trafficking) Bill 1999*, the Supreme Court provided that is within the competence of the Oireachtas to regulate by law,[4] procedural matters, including procedural remedies, before the courts - provided constitutional rights and other provisions of the Constitution relating to the courts are not infringed.[5]

It is a matter for the legislature to choose the appropriate procedures, such as rules regulating standing. It is of note that the legislature is not obliged to choose the widest possible rules on standing that might be thought consistent with the policy objective concerned. However, in exercising its discretion the legislature must not undermine or compromise a substantive right guaranteed by the Constitution, such as the right of access to the courts. Where procedural rules are so restrictive as to render access to the courts impossible or excessively difficult, they may be considered unreasonable, and therefore unconstitutional.[6]

European Convention on Human Rights

Article 8 of the ECHR, which protects the right to private and family life, applies to certain litigation in respect of environmental matters. Article 8 applies to severe

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[2] Article 40.3 of the Constitution; Articles 6, 8 and 13 of the European Convention on Human Rights (the 'ECHR'); Article 47 of the Charter of Fundamental Rights of the European Union.

[3] Core elements of access to justice include effective access to information, advice, legal aid, access to the courts and access to effective remedies.

[4] By primary legislation or, in the due exercise of its powers, by way of secondary legislation, such as statutory instruments.

[5] Article 36 of the Constitution provides, *inter alia*, that "Subject to the foregoing provisions of this Constitution relating to the Courts, the following matters shall be regulated in accordance with law, that is to say:....iii "the constitution and organisation of the said Courts, ... and all matters of procedure." *Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360, the Supreme Court, at p 387-88.

[6] *Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360, the Supreme Court stated at p 393.

environmental pollution, which may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.[7] In *Taşkın and Others v. Turkey*, the European Court of Human Rights (the 'ECtHR') stated:

> "The same is true where the dangerous effects of an activity to which the individuals concerned are likely to be exposed have been determined as part of an environmental impact assessment procedure in such a way as to establish a sufficiently close link with private and family life for the purposes of Article 8 of the Convention. If this were not the case, the positive obligation on the State to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 would be set at naught."[8]

Whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair, so as to afford due weight to the interests of the individual as safeguarded by Article 8.[9] In *Taşkın and Others,* the Court found that an aspect of the Article 8 procedural guarantees is that the individuals concerned must "be able to appeal to the courts" against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process.[10]

In order to comply with Article 6(1) of the ECHR, despite the wide margin of appreciation afforded to Member States, the limitations on the right of access to the courts must pursue a legitimate aim and must also be proportionate in light of that legitimate aim.[11] In *Zubac v Croatia*,[12] the ECtHR stated that:

> "the right to access a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier

[7] See *López Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C, pp. 54-55, at para 51, and *Taşkın and Others v. Turkey*, no. 46117/99, ECHR 2004-X, at para 113.
[8] *Taşkın and Others v. Turkey*, no. 46117/99, ECHR 2004-X, at para 113.
[9] *Taşkin and Others v. Turkey*, no. 46117/99, ECHR 2004-X, at para 118 and *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, p. 55, at para 87.
[10] *Taşkın and Others v. Turkey*, no. 46117/99, ECHR 2004-X, at para 119.
[11] *Weissman v Romania*, no. 63945/00 ECHR (24 May 2006).
[12] *Zubac v Croatia*, no. 40160/12, ECHR, GC (5 April 2018).

preventing the litigant from having his or her case determined on the merits by the competent court."[13]

For Article 6(1)[14] to be applicable to environmental litigation, in its 'civil' limb, there must be a dispute over a 'right' that can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question: mere tenuous connections or remote consequences are not sufficient to bring Article 6(1) into play.[15] It is important to note that if environmental litigation impacts on an applicant's economic or civil rights, as opposed to being purely a public law dispute – Article 6 ECHR will apply.

Article 13 of the ECHR provides for the right to an effective remedy before a national authority, where there has been a breach of rights under the ECHR. In a case involving environmental matters, the ECtHR has found a breach of Article 13 in the light of Article 8. It found that the scope of review by the domestic courts of the excessive noise caused by night flights did not allow at the time consideration of whether the claimed increase in night flights represented a justifiable limitation on the Article 8 right to respect for the private and family life of those living near the airport.[16]

[13] *Zubac v Croatia*, no. 40160/12, ECHR, GC (5 April 2018) at para 98.

[14] Art. 6(1) provides that *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..".*

[15] For example, see *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, Series A no. 43, pp. 21-22, § 47; *Fayed v. the United Kingdom*, 21 September 1994, Series A no. 294-B, pp. 45-46, § 56; *Masson and Van Zon v. the Netherlands*, 28 September 1995, Series A no. 327-A, p. 17, § 44; *Balmer-Schafroth v. Switzerland*, 26 August 1997, Reports 1997-IV, p. 1357, § 32; and *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 43, ECHR 2000-IV; see also *Syndicat des médecins exerçant en établissement hospitalier privé d'Alsace and Others v. France* (dec.), no. 44051/98, 31 August 2000). See also Guide on Article 6 of the ECHR, Right to a Fair Trial (Civil Limb) at p 7-14.

[16] Hatton & Others v the United Kingdom, 36022/97 [2003] ECHR 338 (8 July 2003)

The Council of Europe

In May 2021, the Council of Europe Commissioner for human rights intervened as a third party and submitted written observations[17] in the case of *Cláudia Duarte Agostinho and others v. Portugal.*[18]

The Commissioner stated that:

> . . . [I]nternational environmental law sets out important enabling rights and guarantees that allow concerned individuals to receive information about environmental issues and risks, participate in decision-making processes, and have access to effective justice."[19]

The Commissioner was of the view that:

> "'member states' respect for such procedural enabling rights and guarantees is another aspect for consideration in assessing their level of compliance with human rights obligations in matters concerning the environment."[20]

The Commissioner has previously noted the view that in many parts of Europe, such rights are not being respected and that the lack of information for communities affected by environmentally damaging projects continues to be a major problem in many Council of Europe member states.[21] The importance to environmental human rights defenders of implementing and reinforcing the *Aarhus Convention*, which places

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[17] Council of Europe Commissioner for Human Rights, Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights Application No. 39371/20 Cláudia DUARTE AGOSTINHO and others v. Portugal and 32 other States (5 May 2021) at para 29.

[18] *Cláudia Duarte Agostinho and others v. Portugal and 32 other States* (application no. 39371/20).

[19] Many of these rights are set out in the 1998 Aarhus Convention ("Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters", ECE/CEP/43), in the 2018 Framework Principles on Human Rights and the Environment (A/HRC/37/59, 24 January 2018) and have been confirmed in case law of the European Court of Human Rights. See *Taşkın and Others v. Turkey*, no. 46117/99, ECHR 2004-X, at para 99 and *Di Sarno v. Italy*, no. 30765/08, judgment of 10 January 2012, at para 107.

[20] Council of Europe Commissioner for Human Rights, Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights Application No. 39371/20 Cláudia DUARTE AGOSTINHO and others v. Portugal and 32 other States (5 May 2021) at para 30.

[21] Council of Europe Commissioner for Human Rights, Environmental Rights Activism and Advocacy in Europe: Issues, Threats, Opportunities, Report of Round-table with environmental human rights defenders and activists organised by the Office of the Council of Europe Commissioner for Human Rights (18 December 2020) at para 26.

obligations on states regarding the public's right to environmental information, to participate in environmental decision-making and to access justice was also noted.[22] The Parliamentary Assembly of the Council of Europe, in its *Recommendation 1614 (2003)* on the environment and human rights, also recommended that Council of Europe member states safeguard the individual procedural rights to access to information, public participation in decision making and access to justice in environmental matters set out in the *Aarhus Convention*.[23]

Aarhus Convention

Article 9(3) and (4) of the Aarhus Convention[24] provide insofar as is relevant:

> 3. . . . each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.
>
> 4. In addition . . . , the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. . .

Environmental Impact Assessment (the 'EIA') Directive

The EIA Directive[25] is a very significant instrument in the implementation of EU environmental policy. It is designed to ensure that projects likely to have significant effects on the environment are subject to a comprehensive assessment of

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[22] Council of Europe Commissioner for Human Rights, Environmental Rights Activism and Advocacy in Europe: Issues, Threats, Opportunities, Report of Round-table with environmental human rights defenders and activists organised by the Office of the Council of Europe Commissioner for Human Rights (18 December 2020) at para 26.

[23] Council of Europe Parliamentary Assembly, Recommendation 1614(2003) Environment and Human Rights, at para 9.3.

[24] Aarhus Convention 1998 ("Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters", ECE/CEP/43). See also the Environmental Impact Assessment Directive (85/337/EEC) which gives effect in EU law to the Convention.

[25] EIA Directive, Council Directive 85/337/EEC of 27 June 1985 The EIA Directive, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment as amended by Council Directive 97/11/EC of 3 March 1997, Directive 2003/35/EC of 26 May 2003 and Directive 2009/31/EC of 23 April 2009, now codified in Directive 2011/92/EU of 13 December 2011.

environmental effects prior to development consent being given. Article 10 is set out below as it is most relevant in respect of the Commission's submission.

Article 10(a), as inserted by Article 3(7) of Directive 2003/35:[26]

> "Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
>
> (a) having a sufficient interest, or alternatively,
>
> (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,
>
> have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.
>
> Member States shall determine at what stage the decisions, acts or omissions may be challenged."

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this article, member states shall ensure that practical information is made available to the public on access to administrative and judicial review procedures."

[26] Now Article 11 of the EIA Directive 2011/92 (December 2011).

The EU Charter of Fundamental Rights

The *EU Charter of Fundamental Rights* (the 'Charter') does not contain any express right related to environmental matters. Article 37, which deals with environmental protection, sets out a principle or principles rather than any right. In any event, it is addressed to the EU rather than the Member States—so it could not place any obligation on Ireland. Under Article 52(3) of the Charter, the meaning and scope of Charter rights that correspond to ECHR rights shall be the same as those laid down by the ECHR. Therefore, the implied environmental dimension of ECHR rights such as Article 8 is also present in the equivalent Charter rights. Article 47 of the Charter also provides for the right to an effective remedy for breach of EU rights.

United Nations

The UN Special Rapporteur on human rights and the environment has stressed that pursuant to international human rights law, states have procedural obligations to:

> "enable affordable and timely access to justice and effective remedies for all, [and] to hold states and businesses accountable for fulfilling their climate change obligations."[27]

On the UN Special Rapporteur's visit to Fiji[28] in December 2019, he stated:

> "At the same time that the full enjoyment of human rights depends on a healthy environment, the exercise of human rights helps to ensure the protection of the environment. The free and full exercise of rights relating to information, participation and access to justice enables people to ensure that environmental policy is fair and effective."

[27] Report of the UN Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (Doc A/74/161, 15 July 2019) at para 64.

[28] Visit to Fiji: Report of the UN Special Rapporteur on the issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (Doc A/HRC/43/53/Add.1, 27 December 2019) at para 32.

Observations on the General Scheme

Legal Standing Rules

The General Scheme purports to amend the standing rights of applicants seeking to bring judicial review proceedings in respect of planning decisions. Under Head 4(3), an applicant must now show 'substantial interest' in the matter, which is the subject of the leave application, be directly affected in a personal or peculiar way, and have had prior participation in the planning application or appeal. This is in contrast to the existing 'sufficient interest' test under the *Planning and Development Act 2000* (the 'Act of 2000'). It is noted that this proposal is in line with the recommendation of the Review of the Administration of Civil Justice Review Group in 2020.[29]

However, the Commission would like to draw the Committee's attention to the case of *Grace v. an Bord Pleanála,*[30] where the Supreme Court commented on EU environmental law requirements in respect of legal standing. It noted that while it is open to the Irish legislature to provide for any standing rules considered appropriate, those rules must meet the 'broad access to justice' requirement. McKechnie J, in *Digital Rights Ireland Ltd. v. Minister for Communications*[31] also noted the liberal approach that the courts may take in respect of the issue of legal standing and EU requirements and that the rules on standing should not be interpreted in a way that makes it 'virtually impossible', or 'excessively difficult' or 'unduly difficult' to bring a challenge.[32]

Head 4(3) would change the standing test from sufficient interest back to 'substantial interest' which was the requirement originally included in the Act of 2000 and subsequently changed in 2011 to comply with the Aarhus Convention.[33] The application of the original 'substantial interest' requirement by the courts became a very difficult standard for applicants to meet when they did not have nearby property or

[29] Department of Justice and Equality, Review of the Administration of Civil Justice (October 2020). The remit of the Review of the Administration of Civil Justice Group was to examine the administration of Civil Justice in Ireland which included the aim of improving access to justice and the examination of judicial review proceedings.
[30] *Grace v. an Bord Pleanála* [2017] IESC 10, at para 6.2.
[31] *Digital Rights Ireland Ltd. v. Minister for Communications* [2010] IEHC 221, [2010] 3 I.R. 251, at para 46.
[32] See also *Van Schijndel v. Stichting Pensioenfonds* (Cases C-430/93 and C-431/93) [1995] E.C.R. I-4705, at para 17; and *Amministrazione delle Finanze dello Stato v. SpA San Giorgio* (Case C-199/82) [1983] E.C.R. I-3595, at para 14.
[33] Section 20, Environment (Miscellaneous Provisions) Act 2011.

financial interest in the outcome of the planning decision in question.[34] The more restrictive application of the 'substantial interest' test could therefore leave the State in breach of the constitutional right of access to the courts and in breach of the Aarhus Convention.[35]

The Commission recommends that 'sufficient interest' should be the standing test in the proposed legislation.

Automatic Standing Rights of NGOs

Head 4(5) of the General Scheme proposes to limit the 'automatic standing rights' of NGOs. It proposes to extend the minimum time an NGO must be in existence from twelve months to three years. This will have the effect of excluding any newly established environmental NGOs with environmental concerns from bringing challenges. This will severely restrict local community groups that were formed specifically in response to a proposed development, which is often the case. Further requirements include that NGOs must have a minimum of 100 affiliated members, be pursuing the objective of protection of the environment for non-profit concerns, have legal personality, and the area of environmental protection that its aims and objectives relate to must be relevant to the subject matter of the leave application. The Aarhus Convention allows parties to set down in law the criteria for NGOs to have standing to avail of judicial procedures.[36] However, those requirements cannot be overly burdensome. The Commission is of the view that the proposed changes are unreasonably burdensome. In the case of *Djurgården-Lilla Värtans Miljöskyddsförening,*[37] the European Court of Justice stated:

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[34] See *Harding v Cork County Council and An Bord Pleanála and Xces Projects Ltd* [2008] IESC 27; [2008] 2 ILRM.

[35] It was widely believed that the terminology was previously changed in the legislation specifically to comply with the Aarhus Convention.

[36] Article 9 of the Aarhus Convention. See also Article 11 of Regulation (EC) No 1367/2006 (the Aarhus Regulation) – it sets out the criteria that NGOs must meet to be entitled to request internal review at Community level of acts adopted or of omissions under environmental law by a Community institution or body. Article 11(1) provides: A non-governmental organisation shall be entitled to make a request for internal review in accordance with Article 10, provided that: (a) it is an independent non-profit-making legal person in accordance with a Member State's national law or practice; (b) it has the primary stated objective of promoting environmental protection in the context of environmental law; (c) it has existed for more than two years and is actively pursuing the objective referred to under (b); (d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.

[37] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening* EU: C: 2009:631, [2009] ECR I-9967.

> "While it is true that Article 10a of Directive 85/337, by its reference to Article 1(2) thereof, leaves to national legislatures the task of determining the conditions which may be required in order for a non-governmental organisation which promotes environmental protection to have a right of appeal under the conditions set out above, the national rules thus established must, first, ensure 'wide access to justice' and, second, render effective the provisions of Directive 85/337 on judicial remedies. Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts."[38]

Also, in the above case, the Advocate General criticised the requirement that environmental organisations had to have a minimum number of members before having access to the courts as this would could too easily close the door to many groups which would have a legitimate interest in access to justice.[39]

The assertion in the explanatory note that the changes to standing criteria for NGOs:

> "are fairly standard minimum requirements in most other jurisdictions"

is devoid of any supporting evidence. The Commission considers that the proposed changes lean towards the more restrictive end of the scale of standing requirements.[40] In contrast, Portugal has a complete and progressive legal framework that grants legal standing to both individuals and NGOs through administrative and judicial procedures. The *actio popularis*, which allows anyone to challenge administrative decisions and omissions on environmental matters, prevails in Portugal.[41]

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[38] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening* EU: C: 2009:631, [2009] ECR I-9967, at para 45.

[39] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening* EU: C: 2009:631, [2009] ECR I-9967, at para 78.

[40] UNECE / Task Force on Access to Justice: Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union (11 November 2012), at p13-14.

[41] UNECE / Task Force on Access to Justice: Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union (11 November 2012), at p11. This is guaranteed at constitutional level. The *Actio Popularis* and Participating Procedures Law (Popular Action law) grants the right to participate in administrative procedures and to initiate legal proceedings (Art. 4°, Law 83/95), including to: any citizen in full enjoyment of his or her civil and political rights having or not a direct interest in the claim;

The Commission is of the view that the requirements in Head 4(5) for NGOS to have standing would may cumulatively breach the constitutional right of access to the courts and the Aarhus Convention. The amended requirements would significantly narrow the basis on which environmental groups could gain access to the courts to bring what could be important litigation. For many organisations, these proposals would constitute an absolute barrier to their ability to take challenges.

The Commission recommends that the Committee reconsiders the proposed changes to the criteria for NGOs to have legal standing to ensure they do not restrict access to justice under domestic and EU law.

Proposal to revert to 'motion on notice' approach

The General Scheme also proposes that judicial review applications be made by 'motion on notice' as opposed to *ex parte* (Head 4). This would allow the Notice Party to contest the application at leave stage and submit counter arguments. If a leave application were successful, this would mean, effectively, that the matter would be heard twice, thus increasing legal costs and taking up more court time, something that the General Scheme purports to avoid as stated in the Explanatory Notes. There is concern that this will impede the public's access to the courts and ability to challenge environmental decisions.

The Commission is of the view that the requirement in the General Scheme to put respondents on notice of judicial-review proceedings could be contrary to the condition in Article 9(4) of the Aarhus Convention and Article 10(a) of the EIA Directive that there be timely access to a remedy.[42] If significant delays were to occur with environmental challenges because of a requirement to bring them on notice, there can be little doubt but that Article 9(4) of the Aarhus Convention would be breached.

The proposal to put respondents on notice may also impact negatively on the constitutional right of access to the courts. Requiring applicants to seek leave to apply

associations and foundations that fulfil specific legal requirements. The legal requirements for environmental NGOs are simply: being a legal person; mentioning expressly in their regulations the protection of the environment as a goal or competence; and having no other professional activity competing with companies or independent workers.

[42] A few years ago, when most immigration-and-asylum-judicial-review challenges had to be brought on notice, the waiting time for a hearing date after filing the proceedings was over four years.

for judicial review on notice rather than by means of an *ex parte* application is likely to lead to significant delays and increased legal costs. The Supreme Court pointed out delays caused by statutory requirements to seek leave on notice in *Okunade v. Minister for Justice* [2012] 3 I.R. 152.[43] The Commission is concerned that this proposal would make the exercise of the constitutional right of access to the courts more difficult in practice in circumstances where the courts already have a discretion to direct applicants to put respondents on notice of leave applications, in appropriate cases. [44]

The Commission recommends that the proposed changes in Head 4 to revert to a 'motion on notice' approach is reconsidered to ensure there is no negative impact on the constitutional right of access to the courts.

Judicial review challenges restricted to decisions made by An Bord Pleanála

Head 3(i) proposes to amend section 50 of the Act of 2000 to provide that judicial review challenges may only be initiated after the making of a planning determination in relation to a proposed development by An Bord Pleanála. The Commission considers that an absolute prohibition on challenging a first-instance planning decision may be contrary to the constitutional right to fair procedures. This proposal would require applicants to await an outcome of an appeal to An Bord Pleanála before making an application for judicial review, causing further delays in the process. The reasoning behind this proposal is unclear. A fair appeal to An Bord Pleanála does not cure an earlier unfair and unlawful process that preceded the making of the decision being appealed.[45]

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[43] [2012] 3 I.R. 152. In his judgment, Mr Justice Clarke (as he was then) stated at para. 6.2: "*It is my view that the system of applications for leave on notice (which was designed to weed out unmeritorious applications at an early stage) has had significant unintended consequences. The High Court list is full of cases awaiting a hearing of the leave application precisely because many of the leave applications are opposed thus requiring time for the filing of materials and submissions and, because of the necessarily longer hearing time required for opposed applications, a significant waiting list exists until a sufficient slot for such hearing can be provided. It seems to me that the concept of leave on notice, while well intended, has turned out to be counter-productive.*"

[44] It is noted that in Northern Ireland, applications for leave to apply for judicial review are required to be made *ex parte*, however, the Court may consider and determine such applications in chambers (i.e. "on the papers") but may also direct the applicant to appear before it and no application for leave may be refused without first giving the applicant an opportunity of being heard - Order 53 Rule 3(3) and (10) of the Rules of the Court of Judicature (NI) 1980.

[45] *Stefan v Minister for Justice* [2001] IESC 92, [2001] 4 IR 203. Other cases that have considered when a first instance decision may be challenged by way of judicial review instead of, or along with, pursuing a statutory right of appeal include *O.M.R v Minister for Justice & Ors* [2016] IEHC 532; *M.A.B. v Refugee Applications Commissioner & Ors* [2014] IEHC 103; *O'Donnell v Tipperary (South Riding) County Council* [2005] 2 IR 483.

A less restrictive measure could be put in place, for example, by providing that in the absence of exceptional circumstances an applicant will normally be expected to appeal the decision to An Bord Pleanála.

The Commission recommends that a less restrictive measure be put in place in Head 3 and that the absolute prohibition on challenging a first-instance planning decision by An Bord Pleanála be reconsidered in light of the constitutional right to fair procedures.

Special Legal Cost Rules

Head 6 seeks to impose new legal cost capping arrangements and to maintain proceedings at a cost that is not prohibitively expensive.[46] There would be a cost cap of €5,000 for individuals, €10,000 for groups, as well as €40,000 for defendants (Head 6). The current costs regime under Section 50(b) of the Act of 2000 allows for each side to bear their own costs and for successful litigants to be awarded certain costs if they are successful. The rationale provided in the explanatory notes of the General Scheme for modifying the 'not prohibitively expensive' rule is to deter spurious challenges by introducing a degree of risk of cost to the applicant,[47] but the Commission is concerned that if enacted the new costs regime could act to deter judicial review challenges. The test in Article 9(4) of the Aarhus Convention is whether the procedures are 'prohibitively expensive', i.e., whether applicants are prevented from availing of them because of their cost. The proposed cost-capping provisions in the General Scheme would seem to intend that successful environmental applicants, even if they win their case, should generally not recover their full legal costs. In the view of the Commission, this appears to be inherently unreasonable and inconsistent with the requirements of Article 9(4) of the Aarhus Convention and Article 10(a) of the EIA Directive that procedures must be fair and equitable and not prohibitively expensive.[48]

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[46] As required by section 50(b) of the Planning and Development Act 2000 (as most recently amended in 2018) and/or under Part 2 of the Environment (Miscellaneous Provisions) Act 2011; article 11 of the EIA Directive (previously Article 10, referred to earlier in the submission); and article 9(3) of the Aarhus Convention.

[47] This is permissible under the EIA Directive, Article 11, as long as the cost to the applicant is not unreasonably high. See Case C- 470/16 *North East Pylon Pressure Campaign Ltd* [2018], at para 61.

[48] Communication from the EU Commission, *EU Commission Notice on Access to Justice in Environmental Matters* (Brussels, 28 April 2017, C (2017 2616) at para 191.

The Commission recommends that the proposals sought under Head 6 are reconsidered to ensure compliance with the Aarhus Convention.



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