Submission by Alison Hough BL to the Public Consultation on the General Scheme of the Housing and Planning and Development Bill 2019, dated 27th January 2020

SUBMISSION TO THE PUBLIC CONSULTATION ON GENERAL SCHEME OF THE HOUSING AND PLANNING AND DEVELOPMENT BILL 2019

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Executive Summary

The Aarhus Convention (UNECE, 1998) arose out of Principle 10 (UNEP) of the Rio Declaration 1992 (UN, 1992), which embodies a key principle of international environmental law, that environmental decisions are best handled with the participation of those concerned. The three pillars of the Convention are Access to Information about the Environment, Public Participation in Environmental Decision Making and Access to Justice when these rights are denied. Implementation measures have been undertaken by the EU in the areas of Information and Participation rights and this is the main way these obligations make their way into Irish Law (e.g. the EIA Directive (Environmental Impact Assessment) and Access to Environmental Information (AIE) Regulations). The Convention has been declared an integral part of the EU legal order[1].

The proposed legislation represents a roll-back of current Access to Justice Rights in the area of EIA and non-EIA developments which are subject to statutory judicial review under section 50 of the Planning and Development Act 2000 (as amended). This regression is undesirable from the point of view of the Aarhus Convention and the EIA Directive, and is not in accordance with the overall objective of affording wide access to justice, or the international law principle of non-retrogression.

The measures proposed seek variously to expose applicants to an increased level of costs (**Section 5** below), restrict the standing rights of individuals and NGOs (**Section 4** below), and place even more procedural requirements in the already tight eight week window within which applicants must have the leave application heard by a judge (the requirement to seek rectification of the "unintentional" errors or omissions of the decision maker (**Section 3** below), the requirement to hold the leave stage on notice rather than ex-parte, dealt with at **Section 4**), restrictions on the timing of judicial review to An Bord Pleanála decisions, which ignore the practicality of correcting errors in early course by review of first instance decision making, and the range of decisions that do not go to An Bord Pleanála (dealt with at **Section 3** below).

Finally the proposed legislation attempts to reintroduce a number of legislative formulations that had been previously abandoned in recent legislative history due to their non-compliance with either the provisions of the EIA Directive which implement the Aarhus Convention or the Aarhus Convention itself (e.g. the Substantial Interest Test dealt with below at **Section 4**), or which were simply not in the interests of good administration of justice due to making procedures more lengthy (e.g. Leave on-notice, dealt with at **Section 4** below), as well as common law measures long since abandoned like determination on the merits at leave stage (see **Section 4**) through the introduction of a leave stage test of "reasonable prospect of success".

[1] E.g. In Case C-470/16 North East Pylon Pressure Campaign Ltd v An Bord Pleanála of 15 March 2018 http://curia.europa.eu/juris/document/document.jsf;jsessionid=624F1CE5E4566BB043C7848F71C69142?text=&docid=200265&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4442803. At para. 46: "The Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of the Aarhus Convention, which was signed by the Community and subsequently approved by Decision 2005/370, and the provisions of which therefore form an integral part of the EU legal order (judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 30)."

1. Introduction

1.1 The Aarhus Convention (UNECE, 1998) arose out of Principle 10 (UNEP) of the Rio Declaration 1992 (UN, 1992), which embodies a key principle of international environmental law, that environmental decisions are best handled with the participation of those concerned. The Convention was unusual in that it was negotiated with NGO's at the table (Wates, 2004), and NGOs remain important actors at the Meeting of the Parties, with speaking rights. The Convention placed a large degree of importance on including the public in decision making about the environment, framing it as a fundamental international law right. It has come to be regarded as a human right (Ebbesson, 2018). The Aarhus Convention included two other categories of rights to support the right of public participation. These were the right to access information about the environment (so that the public would be well informed enough to participate in environmental decision-making) and the right to a remedy in the courts when rights of public participation and information were not fully protected. "Access to Justice", as it is known, is a very important plank of the tripartite rights that make up the Aarhus Convention rights in broad terms.

1.2 The Convention also provides for environmental impact assessment (EIA) of projects that have a significant effect on the environment, and high-level plans and programs affecting the environment (Strategic Environmental Assessment (SEA). This would include Government Policies and Strategies, or County or Local Development Plans. It provides for public participation as an integral part of the environmental impact assessment process of these types of projects.

1.3 The proposed legislation represents a roll-back of current Access to Justice Rights in the area of EIA and non-EIA developments, for example by introducing additional standing requirements for individuals and NGOs and additional higher hurdles for them to satisfy to be able to review decision, such as the requirement that they show "substantial grounds" plus an additional requirement of "reasonable prospect of success" at the leave stage. This represents an undesirable introduction of determination on merits at leave stage (discussed in **Section 4** below).

1.4 This regression is undesirable from the point of view of the Aarhus Convention, the EIA Directive, and is not in accordance with the overall objective of affording wide access to justice, or the international law principle of non-retrogression. Many of the proposed amendments do the opposite of enhance the administration of justice, as will be seen.

1.5 These proposed amendments seek variously to expose applicants to an increased level of costs (**Section 5 below**), restrict the standing rights of individuals and NGOs (**Section 4 below**) and place even more procedural requirements in the already tight eight week window within which applicants must have the leave application heard by a judge (the requirement to seek rectification of the "unintentional" errors or omissions of the decision maker (set out in **Section 3** below), the requirement to hold the leave stage on notice rather than ex-parte, dealt with at **Section 4** below. Finally there is a restriction on the timing of judicial review to An Bord Pleanála decisions, which ignores the practicality of correcting errors in early course by review of first instance decision

making, and the range of decisions that do not go to An Bord Pleanála (dealt with at **Section 3** below).

1.6 The proposed legislation attempts to reintroduce a number of legislative formulations that had been previously abandoned in recent legislative history due to their non-compliance with either the provisions of the EIA Directive which implement the Aarhus Convention (the Substantial Interest Test dealt with below at **Section 4**), or which were simply not in the interests of good administration of justice due to making procedures more lengthy (Leave on-notice, dealt with at **paragraph 4.14** below).

2. Background - Ratification and Implementation of the Aarhus Convention

2.1 The Aarhus Convention has been ratified (made fully legally binding) by 47 State Parties (UNECE, 2017) worldwide. The European Union (EU) ratified it in 2005 (EU, 2019). The EU was specifically envisaged as a signatory during the drafting of the Convention, and is circumspectly referred to as a Regional Economic Integration Organization or REIO in the Convention (UN, 2019).

2.2 The EU implemented the Convention through a series of Directives and Regulations. Directive 2003/4/EC provided for Access to Information, and 2003/35/EC provided for Public Participation, which brought about amendments to the EIA Directive 85/337/EEC facilitating public participation in Environmental Impact Assessment. Attempts to introduce an Access to Justice Directive were controversial and ultimately failed. The EU also introduced public participation in plans and programs relating to the environment (Directive 2001/42/EC) and in the management of water bodies and river basins (Directive 2000/60/EC "Water Framework Directive"). The Aarhus Regulation 1367/2006 applied the provisions regarding access to justice to the EU institutions, although its implementation is widely regarded as unsatisfactory in many respects (Kramer, 2017). Finally, Regulation (EC) No 1049/2001 provided for access to environmental information from the EU institutions and bodies. The Convention has been declared an integral part of the EU legal order[2].

2.3 Ireland was one of the last countries to ratify the Aarhus Convention in 2012. Ireland has implemented the EU law implementing measures, which carry into Irish law the Aarhus obligations through a complex piecemeal set of amendments to various pieces of legislation, which has been the subject of infringement actions[3] brought by the Commission against Ireland. Implementation is widely regarded as unsatisfactory.

[2] Ibid.

[3] E.g. see https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1581 and https://ec.europa.eu/commission/presscorner/detail/en/IP_02_1950

3. Head 3

TIME OF JUDICIAL REVIEW

3.1 **Head 3, Section (i)** attempts to restrict the right to judicial review to the end stage of the planning decision making process, when An Bord Pleanála decision has issued. This is problematic on a number of levels. Errors in process at initial stage cannot be corrected by judicial review in early course and so are carried through to final stage. A judicial review correcting errors committed by the first instance decision makers can only be corrected after the whole process is complete. If the error has been carried through to final stage, then judicial review at that stage will result in the decision being quashed and remitted back to the first instance decision maker to start the whole process again, which potentially prolongs the entire process of reaching final decision.

RECTIFICATION REQUIREMENT

3.2 **Head 3, Section (ii)** introduces an obligation to seek rectification before seeking a judicial review to correct certain categories of errors in a decision:

- clerical or typographical errors in the order or determination which is sought to be quashed,
- unintentional errors or omissions in the order or determination,
- text, or an omission of text, which has the effect that the determination or order as issued does not on its face accurately express the determination or order as intended,

unless it can be shown that the applicant had previously applied for rectification of the deficiency concerned and had wrongly been refused that relief.

3.3 The first category of error seems unproblematic but unnecessary. I am not aware of any cases of judicial review taken over a typographical error in the order or determination. This begs the question of whether there really is an issue requiring legislative solution. If there is no problem of vexatious judicial reviews over typographical errors, then it seems absurd to legislate against them. It also undermines the proportionality of the measure if the mischief it purports to remedy does not actually exist.

3.4 The second category, unintentional errors or omissions, seems conceptually problematic. This would mean that an error on the face of the record is or is not amenable to judicial review depending on the intention of the decision maker. How exactly a potential litigant is to determine the intention of the decision maker in this situation is not dealt with.

3.5 A similar issue arises in the third category, which deals with text which does not accurately express the determination or order as intended. Once again the litigant must

read the mind of the decision maker and ascertain what their true intention was in writing their determination.

3.6 This becomes even more problematic when dealing with the second half of both category two and three. These refer to unintentional omissions of text from the decision. Here the litigant is expected not only to know the intention of the decision maker in relation to text that was written but also in relation to text which they had not written. The litigant is expected to identify text that is absent and determine that this was left out "unintentionally"[4].

3.7 It is also possible that in the middle of a judicial review the decision maker could claim that the matters complained of result from an error (not visible on the face of the text) of inclusion or omission, for which rectification was not sought prior to the judicial review, rendering the court without jurisdiction in relation to same. This "Schrodinger's Error" can simultaneously be both intentional (and subject to judicial review) and unintentional (and therefore not subject to review) depending on the decision makers undeclared intention, only crystallizing at the point where the matter is opened before the courts. This potentially exposes the litigant to costs (which are increased as a result of this legislation, dealt with further).

3.8 These provisions are rife with conceptual, evidential and practical problems, every single aspect of which will give rise to a potential legal dispute. This is the opposite of the stated intention of the legislation to reduce litigation in this area.

3.9 The letter requirement is implanted into the context of an already extraordinarily tight timeframe. No procedure set down by the Heads of Bill for the process of seeking rectification, for example, the time expected for a response, or the consequences of issuing a leave application (which now must be on notice) prior to receiving a response. No provision made for extending the hard deadline for having the leave application heard on notice within eight weeks in the event that an applicant is waiting on a response to find out if the deficiency they have identified in the decision is intentional or unintentional and therefore amenable to review.

4. Head 4 & 5

LEAVE ON-NOTICE

4.1 **Head 4, section 1** reintroduces the Notice requirement for the leave stage when seeking to judicially review an environmental decision. It is hard to see how this contributes to a more efficient planning law system, as it is likely to increase the length and cost of the leave stage.

4.2 This process has been resurrected from previously repealed versions of the 2000 Planning Act. It was present in previous iterations of the Act, and was removed in 2010

[4] This was an issue identified by Oisín Collins BL at Briefing on the Heads of Bill organized by Planning, Environmental and Local Government Bar Association of Ireland (PELGBA) on the 19th December 2019

amendment to the Planning Act[5]. The stated reason for re-creating the contested leave stage is that it would prevent applications that are "frivolous, lacking in substance" and enable judges to "filter" the grounds on which Judicial Review is sought. This implies judges are currently not filtering applications on merits and grounds, which is clearly incorrect if one considers the number of successful Judicial Reviews. If judges are failing to gate-keep access to Judicial Review adequately due to the hearings not being on notice, then one could expect to see a higher proportion of cases being thrown out at full hearings; this is not borne out by the facts, as the number of cases found against An Bord Pleanála has not varied substantially from the pre-2010[6] level.

4.3 This change makes the process less streamlined and more cumbersome[7]. The previous iteration of this procedure had been criticized previously as inefficient and cumbersome[8] as it increased the length of time to final decision and increased costs.

4.4 The period of just eight weeks to receive a decision, take legal advice on it, determine whether a letter seeking rectification of the kind referred to in Head 3 needs to be sent, and then issue and service the Notice of Motion for a Leave application on the other side, and get it on for hearing, (together with recent practice directions requiring papers be filed prior to the application hearing in Strategic Infrastructure Cases[9]) is extremely tight. This puts the applicant for Judicial Review in this area under the kind of time constraints rarely seen anywhere else in the law for taking a High Court action, raising the issue of whether access to justice is being adequately facilitated by these rules. The creation of a regime that is more restrictive for reviewing environmental decisions that required for Judicial Review in general raises issues of compliance with the requirements of the Aarhus Convention, which is intended to foster broad access to justice requirements in Environmental Matters.

4.5 One of the recurring themes of this submission is that individual measures taken in isolation may not look like breaches of the Aarhus Convention, but they nevertheless constitute breaches of the Convention where they represent a retrogression or a more

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[5] Planning and Development Act 2000 (No.30 of 2000), amended by Planning and Development (Amendment) Act 2010 (No. 30 of 2010).

[6] An Bord Pleanála, Annual Report and Accounts 2015, Figure 26 "Legal Cases and Planning Cases Disposed of (Comparison) 2006-2015", page 75, http://www.pleanala.ie/publications/2016/ar2015.pdf
An Bord Pleanála, Annual Report and Accounts 2018, Figure 9 "Legal Cases and Cases Disposed of Comparison 2014 - 2018", page 30, http://www.pleanala.ie/publications/2019/AR2018.pdf

[7] This was an issue identified by both Rory Mulcahy SC at Briefing on the Heads of Bill organized by Planning, Environmental and Local Government Bar Association of Ireland (PELGBA) on the 19th December 2019 who stated it "adds an extra stage to an already overburdened process", pointing out that it is available as an option under the current system but not used.

[8] E.G. the comments of Kelly J. in Mulholland v An Bord Pleanála (No. 2) [2005] I.E.H.C. 306, and Clarke J. in Arklow Holidays Home Ltd. v An Bord Pleanála [2006] I.E.H.C. 15 ("difficult to avoid the conclusion that, at least in a not insignificant number of cases, the process leads to a longer rather than a shorter challenge period").

[9] HC74 - Judicial Review Applications in respect of Strategic Infrastructure Developments
http://courts.ie/Courts.ie/Library3.nsf/pagecurrent/797211DDCD63BD008025822800555D4D?opendocument

restrictive criteria than that applicable in the lex generalis[10],[11] (dealt with in more detail under Section 6 of this Submission which deals with Head 6 - Costs).

4.6 This measure also increases the cost of such application, as a contested hearing involves the other side's costs as well as the applicants own.

4.7 The narrative that there has been an increase in frivolous and vexatious judicial reviews that proceed to the courts has been repeatedly dismissed by experts[12],[13],[14]. The number of judicial reviews has hovered steadily around 40 per year for the last twelve years[15],[16], other than a dip during the worst years of the recession. If the existing regime, substantially introduced post 2010, was responsible for increasing vexatious cases to the extent that required the law to be rolled back to the pre-2010 position, one would expect that the data would show a significant increase in judicial review cases. Instead the figures have remained steady, with 45 cases in the year 2008 and 42 cases in the year 2018.

NGO STANDING RIGHTS

4.8 **Head 4, section 5** provides new restrictions for the standing rights of NGOs. These include a requirement to have a minimum of 100 members, to have environmental objectives, which objectives must relate to the subject matter of the case under review, and to have been existence for three years prior to the application. This provision will have the effect of eliminating the ability of local communities to form environmental organizations in response to a proposed local development. It is difficult to get figures on the membership of the various NGO's in Ireland but it appears from the research on the topic that only four NGOs in Ireland could meet this membership requirement, therefore the majority of NGO's in Ireland would be excluded from judicial review of environmental decision making.

4.9 The eNGO sector in Ireland is radically underfunded compared to its counterparts in the UK, Northern Ireland, and Sweden, for example, with knock on effects on size and

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[10] ACCC/C/2004/04 (Hungary)

[11] Dr. Áine Ryall, at the Briefing on the Heads of Bill organized by Planning, Environmental and Local Government Bar Association of Ireland (PELGBA) on the 19th December 2019.

[12] O'Sullivan, K. "Bill to tackle 'vexatious' court challenges to planning proposals will backfire – legal experts" Irish Times, 10th January 2020. https://www.irishtimes.com/news/environment/bill-to-tackle-vexatious-court-challenges-to-planning-proposals-will-backfire-legal-experts-1.4135891

[13] Gallagher C. 12th February 2018, "Plans to restrict environmental legal challenges approved" Irish Times https://www.irishtimes.com/news/environment/plans-to-restrict-environmental-legal-challenges-approved-1.3388650

[14] Gallagher, C. 12th February 2018, "Experts say little evidence of bad faith objections to major projects" https://www.irishtimes.com/news/environment/experts-say-little-evidence-of-bad-faith-objections-to-major-projects-1.3388506

[15] An Bord Pleanála, Annual Report and Accounts 2015, Figure 26 "Legal Cases and Planning Cases Disposed of (Comparison) 2006-2015", page 75, http://www.pleanala.ie/publications/2016/ar2015.pdf

[16] An Bord Pleanála, Annual Report and Accounts 2018, Figure 9 "Legal Cases and Cases Disposed of Comparison 2014 - 2018", page 30, http://www.pleanala.ie/publications/2019/AR2018.pdf

membership[17]. This, combined with the small country population in Ireland means that a size restriction considered acceptable in a larger country like Sweden (where 100 member restriction is presently acceptable[18] but with addendums allowing smaller NGOs standing in certain circumstances), with a better funded NGO sector would not be acceptable in the Irish context, constituting, as it would, an exclusion of the majority of eNGOs.

4.10 **Head 5** also extends these restrictions to the bringing of applications for appeals to An Bord Pleanála. This is clearly inconsistent with the clear objective of the Convention of affording broad access to justice, particularly to NGOs

4.11 It also seems contrary to the stated aim of reducing an apparent proliferation of litigation in this area. Instead of a community organizing into a coherent group which would take a single judicial review, instead communities will be forced to act as individuals which surely raises the possibility of multiple individual litigants raising the same issues.

4.12 The issue of numbers restrictions for NGOs was dealt with by the CJEU in Case C-263/08, "Djurgården"[19] and in that case the membership number restriction was found to be incompatible with the concept of broad access to justice. Paragraph 45 of this judgement states that while the EIA Directive leaves to the Member State the task of determining the conditions for NGOs to be eligible to take appeals/reviews, the rules as set down must be consistent with "broad access to justice" and with the requirement that projects covered by the Directive be subject to judicial review. In particular, they stated at paragraph 47 that:

> **"…**the number of members required cannot be fixed by national law at such a level that it 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."

This approach that Member State's flexibility regarding criteria is limited by the requirement to ensure broad access to justice was reiterated by the CJEU in many cases since[20].

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[17] Harvey, B. (2015) "Funding Environmental and Non-Governmental Organisations in Ireland" a study commissioned by the IEN. https://ien.ie/wp/wp-content/uploads/Funding-Environmental-NGOs-in-Ireland.pdf

[18] Europa (2018) Access to justice in environmental matters – Sweden, https://e-justice.europa.eu/content_access_to_justice_in_environmental_matters-300-se-maximizeMS-en.do?member=1

[19] Case C-263/08, "Djurgården" of 15 October 2009 https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:297:0012:0013:EN:PDF

[20] E.g. Case C-115/09, "Trianel" ,of 12 May 2011, para 39, http://curia.europa.eu/juris/document/document.jsf?text=&docid=82053&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5631960

LOCUS STANDI IN GENERAL

"Reasonable Prospect of Success"

4.13 **Head 4, Section 2** requires the applicant to show substantial grounds (as is currently the case) and adds a new additional criteria of "reasonable prospect of success". This seems to be an inappropriate addition to a leave stage application. The court is being asked to make a judgement of the decision on its merits, at short notice leave stage hearing convened in a time-frame of eight weeks. This is inconsistent with the case law of the court in dealing with the analogous categories of short-notice decisions. The existing substantial grounds test was already a more demanding standard than that applicable to conventional judicial review under Order 84 of the Rules of the Superior Courts, which apply the test of a "stateable" or "arguable case" e.g. JC v DPP [2016] IECA 183. The case of interlocutory injunctions is similar, in that the judge must filter cases on short notice contested hearings without opportunity for cross-examination of witnesses and detailed legal argument on the evidence. The test applied in this instance is that of raising a "serious question" to be tried (Campus Oil v Minister for Industry and Commerce (No. 2) 1983 IR 88) which is broadly similar to raising a stateable or arguable case. The courts moved away from a consideration of strength or weakness of the party's case at interlocutory stage in the 1980s as it was considered to run contrary to the interests of good administration of justice. The introduction of a merits decision here can only be seen as a retrograde step that will be vulnerable to later challenge for failing to vindicate the party's right to a fair trial on full consideration of the evidence, as required by Article 38 of the Constitution of Ireland, 1937.

Substantial Interest, Individual Concern and Prior Participation

4.14 **Head 4, section 3** changes the test for an individual's standing rights for judicial review from "sufficient interest" to "substantial interest", together with the addition of two new requirements, that the applicant show they are individually affected by the decision, and that they have prior participation in the planning process (so have made a submission or observation in the earlier stages). Unlike the locus standi changes for NGOs which are carried through to An Bord Pleanála hearings by way of Head 5, these requirements remain relevant only to Judicial Review applications.

4.15 The "substantial interest" test has been seen before, in the 2006 iteration of the Planning and Development Act[21]. It was removed in response to the Harding v Cork County Council case 2008 IESC, as it became apparent that it was an inappropriately difficult hurdle for applicants to overcome. This occurred prior to ratification of the Aarhus Convention in 2012, but in contemplation of same.

4.16 It seems strange that, in pursuit of less litigation, the Department of Housing has reverted back to a standard that gave rise to some remarkably lengthy litigation, and

[21] Planning and Development Act 2000 Act as amended by section 13 of the Planning and Development (Strategic Infrastructure) Act 2006.

one that was ultimately removed because it was deemed to be flawed. It seems clear that should the "substantial interest" test be re-introduced, coupled with the more restrictive additional requirements, the most likely outcome would be successful challenges to decisions made under this legislation.

4.17 The previous case law shows this phrase denotes a very high standard to reach, higher than the current test of "sufficient interest"[22]. The "substantial interest" formula was previously introduced under the Planning & Development (Amendment) Act 2006, but had to be removed as it was incompatible with EU law (EIA Directive 85/337/ EEC Article 10(a)), and it was replaced by the original test, sufficient interest[23].

4.18 Denham J in Lancefort Ltd. v An Bord Pleanála [1999] 2 IR 270 at 29 indicated that the sufficient interest test was interpreted broadly by the Courts.

4.19 Article 11 of the EIA Directive (2011/92/EU as amended by the 2014/52/EU[24]) sets out the test for access to justice in relation to decisions subject to Environmental Impact Assessment, and this creates a test of "sufficient interest" **or alternatively** maintaining an impairment of a right.

4.20 The proposed provisions at issue here replicate the pre-2010 situation that persisted under the old EIA Directive 85/337/EEC of non-compliance with Article 10(a) of the Directive because of the Substantial Interest test.

4.21 The requirement of prior participation is clearly contrary to the decisions of the CJEU in the area of the EIA Directive. For example in Case C-263/08, "Djurgården[25] at paragraph 39 the Court stated:

> "Accordingly, the answer to the second question is that the members of the public concerned, within the meaning of Article 1(2) and 10a of Directive 85/337, must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views."

This makes it clear that the prior participation requirement would breach the EIA Directive.

4.22 It is clear that raising the threshold to "substantial interest" and making the impairment of a right and prior participation requirements additional and not alternative to them represents an inexcusable failure to implement the EIA Directive, rendering the State vulnerable to infringement actions, as well as actions by individuals

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[22] Harding v Cork County Council [2008] IESC 27.

[23] Environment (Miscellaneous Provisions) Act 2011, s.20.

[24] Informal Consolidation of the EIA Directive 2011/92/EU as amended by 2014/52/EC available at https://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf

[25] Case C-263/08, "Djurgården" of 15 October 2009 https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:297:0012:0013:EN:PDF

denied standing rights under the proposed legislation (in addition to constituting a breach of the Aarhus Convention requirements under Articles 6 & (that it set out to replicate).

5. Head 6 - Costs

5.1 Head 6 provides seeks to amend the legal costs rules to increase exposure to costs for Applicants. They are potentially exposed to costs of €5,000 for a single individual and €10,000 in all other cases, in addition to their own side's costs, in the event of an unsuccessful Judicial Review. This amount may seem small in comparison to the overall costs of such actions, but it is a prohibitive amount of money for the general population, 60% of whom earn less than €32,000 per year individually in Ireland.

5.2 The previous position in Ireland was that each side bore their own costs, effectively limiting costs to own costs[26]. This was determined to be potentially prohibitively expensive[27], as even own costs could run into the hundreds of thousands, so this was amended later to allow discretion to award costs in favour of a successful applicant[28]. This was done to render the legislation compliant with Article 9 of the Aarhus Convention, and the rule that costs not be prohibitively expensive.

5.3 The new provisions will expose the applicant to greater risk, as not only do they run the risk of being left with their own costs, but also with up to €10,000 of the other sides costs. For an applicant with no means or limited means running a no-foal no-fee judicial review (where their lawyers agree to only charge fees if they are successful in recovering their costs) this potential risk of €10,000 would represent a barrier to access to justice.

5.4 The Explanatory Note to Head 6 references the need for proportionality in the introduction of measures, and then moves on to discuss proportionality solely in relation to the applicant's ability to pay the additional €10,000 in costs. This is reflected in the "balancing" provisions of Heading 6, section 6 and 7, which provide for the costs provisions to be varied where they would render the proceedings prohibitively expensive. However, this approach ignores the first requirement of a proportionality test generally, (and as pointed out by Dr. Ryall[29], proportionality as discussed in the LZ No. 2 decision C-243/2015), which is that the measure sought to be introduced is

[26] Planning and Development Act 2000 (No.30 of 2000), s.50B, inserted by Planning and Development (Amendment) Act 2010 (No. 30 of 2010), s. 33, S.I. No. 451 of 2010. Revised version up to 23rd October 2019, Law Reform Commission Consolidation http://revisedacts.lawreform.ie/eli/2000/act/30/revised/en/html.

[27] See for example references to the NPE rule by the CJEU in Commission v Ireland C-427/07, 16 July 2009 and Case C-470/16 North East Pylon Pressure Campaign Ltd v An Bord Pleanála EU:C:2018:185

[28] Planning and Development Act 2000 (No.30 of 2000), s.50B as amended by Environment (Miscellaneous Provisions) Act 2011 (No. 20 of 2011), s. 21(a), S.I. No. 433 of 2011. Revised version of the Planning and Development Act 2000, up to 23rd October 2019, (Law Reform Commission Consolidation) available at http://revisedacts.lawreform.ie/eli/2000/act/30/revised/en/html

[29] Briefing on the Heads of Bill organized by Planning, Environmental and Local Government Bar Association of Ireland (PELGBA) on the 19th December 2019.

objectively justified. The justification implicit in the Explanatory Note appears to be the prevention of a proliferation of frivolous and costly judicial review. However there is no evidence that there is an issue with a sudden proliferation, and as pointed out in the in the submission on Head 4&5 above, the level of judicial reviews of An Bord Pleanála decisions has remained relatively stable since 2008[30], at around 40 – 50 per year. The measure cannot satisfy the proportionality requirement if it does not fulfill a legitimate objective.

5.5 Exacerbating this is the issue of uncertainty in relation to costs. The applicant must run on the proceedings on hazard, and hope that (a) they win or (b) they can satisfy the judge that €10,000 (or €5,000) represents a prohibitive expense for them. This uncertainty is a matter described as unacceptable in C470/16 North Eastern Pylon Pressure Group[31].

5.6 As mentioned this represents a regression from the previous position in operation in Ireland. The Principle of Non-Retrogression in international law is well established. Dr. Áine Ryall, at the Briefing on the Heads of Bill organized by Planning, Environmental and Local Government Bar Association of Ireland (PELGBA) on the 19th December 2019, highlighted that this principle was referred to in the Aarhus Convention Compliance Committee decision of ACCC/C/2004/04 (Hungary) [32]. It is clear from this decision the Convention does not permit Parties to dis-improve access to justice standards. In that case the Hungarian Government attempted to introduce procedures which restricted public participation compared to that which had been available before. Taken on their own the measures would not have represented a breach of the Convention, but in lowering the bar from pre-existing standards, the Committee noted that this could breach the Convention, and adverted to the Principle of Non-Retrogression enshrined in the article 5, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights. The Committee also indicate such a lowering of standards was not in keeping with Article 1 of the Convention, with its overarching obligation of ensuring adequate protection of the Convention rights. Article 3, paragraph 6 indicates that a Party cannot rely on the Convention to justify a reduction of access rights, as is stated here in the Explanatory Memorandum under Head 6, which claims the measures increasing costs exposure for applicants are being introduced in order to comply with

[30] An Bord Pleanála, Annual Report and Accounts 2015, Figure 26 "Legal Cases and Planning Cases Disposed of (Comparison) 2006-2015", page 75, http://www.pleanala.ie/publications/2016/ar2015.pdf
An Bord Pleanála, Annual Report and Accounts 2018, Figure 9 "Legal Cases and Cases Disposed of Comparison 2014 - 2018", page 30, http://www.pleanala.ie/publications/2019/AR2018.pdf

[31] Case C-470/16 North East Pylon Pressure Campaign Ltd v An Bord Pleanála EU:C:2018:185. http://curia.europa.eu/juris/document/document.jsf;jsessionid=624F1CE5E4566BB043C7848F71C69142?text=&docid=200265&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4442803.

[32] UNECE, 23rd April 2019, "Compilation of findings of the Aarhus Convention Compliance Committee adopted 18 February 2005 to date", ACCC/C/2004/04 (Hungary) (ECE/MP.PP/C.1/2005/2/Add.4) , pg.41 https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Compilation_of_Findings/Compilation_of_CC_findings_23.04.2019.pdf

Article 9 paragraph 4. However, Article 3 paragraph 6 clearly states "This Convention shall not require any derogation from existing rights of access…"[33].

6. Overview

6.1 In summary these measures seek to restrict:

- When judicial review of a planning decision can be taken
- The grounds on which review can be taken
- The types of NGO organizations that can take review cases and appeals to An Bord Pleanála.

6.2 It also seeks to increase the costs exposure for taking such cases.

6.3 It creates a dangerous lack of clarity around when an error is amenable to review, subjecting it to an unpredictable test which rests on the unascertainable intention of the decision maker. This introduces an unacceptable degree of uncertainty when trying to determine whether to take a judicial review or not.

6.4 It is striking that many of these measures are attempts to reintroduce older measures that were removed to ensure compliance with the Aarhus Convention. (e.g. Head 3, section 1 reintroduction of the leave on-notice requirement, Head 4, section 3 reintroducing the restrictive substantial grounds test).

6.5 All of these measures are regressions from a previous standard of access to justice, and as such are problematic from an international law point of view. It is clear from the decision of the ACCC against Hungary in the case of ACCC/C/2004/04 (Hungary)[34], that the Convention does not permit Parties to dis-improve access to justice standards, and such an approach is incompatible with the Principle of Non-Retrogression enshrined in the article 5, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights. Lowering of standards was not in keeping with Article 1 of the Convention, with its overarching obligation of ensuring adequate protection of the Convention rights.

6.6 Another issue apparent from both the Aarhus Convention Compliance Committee decisions and the CJEU decisions in this area is that Parties/Member States should not have procedures in place for review of environmental decisions that are considerably

[33] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998, Article 3, paragraph 6. https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf

[34] UNECE, 23rd April 2019, "Compilation of findings of the Aarhus Convention Compliance Committee adopted 18 February 2005 to date", ACCC/C/2004/04 (Hungary) (ECE/MP.PP/C.1/2005/2/Add.4) , pg.41 https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Compilation_of_Findings/Compilation_of_CC_findings_23.04.2019.pdf

less favourable than that available in the general legal regime outside the environmental area. For example, the already cited ACCC/C/2004/04 (Hungary) at para 17, and the decision of the CJEU in LZ No. 2, C243/15 where at paragraph 49 the Court stated:

> "On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (Impact, paragraph 46 and the case-law cited)"

6.7 These measures compare poorly to the general legal framework in respect of locus standi for bringing applications (for example, comparable environmental actions under the Planning Acts, the s.160 planning injunction may be brought by any member of the public with no requirement to demonstrate standing requirements due to the public interest nature of environmental and planning protection). The time limits are among the shortest known to the law, with the time limit for general judicial review under Order 84 of the Rules of the Superior Courts for certiorari standing at three months[35], and for all other orders, six months. The requirement to prove reasonable prospect of success runs counter to the entire body of the law of interlocutory injunctions, as well as the test for standard judicial review.

6.8 These measures will promote litigation not reduce it, and in many cases make the judicial review process potentially longer and more cumbersome.

6.9 As can be seen from the discussion of the case law, the measures do not accord with the issued decisions of the Aarhus Convention Compliance Committee on these issues, which the legislature are obliged to have regard to since ratification. Should these measures be introduced they will place Ireland in breach of its international law obligations.

6.10 This suite of measures all representing regressions in current standards of Aarhus Rights is evidence of an ideology that access to justice is problematic. This is the opposite the State's commitment on ratification of the Aarhus Convention, of ensuring wide access to justice. It is the opposite of expert views in the area, and is not borne out by the facts. Indeed, even the Chair of An Bord Pleanála stated before an Oireachtas Committee[36] that access to judicial review contributes to a "strong system". The tenor of his evidence to the committee was that delays arise as a result of under resourcing in An Bord Pleanála as well as a result of under-resourcing and efficiency issues in the Courts system.

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[35] Rules of the Superior Courts (Judicial Review) 2011 (SI No. 691 of 2011)

[36] David Walsh, Chair of An Bord Pleanála, before the Joint Committee on Housing, Planning and Local Government debate -
Wednesday, 6 Feb 2019,
https://www.oireachtas.ie/en/debates/debate/joint_committee_on_housing_planning_and_local_government/2019-02-06/3/

7. Conclusions and Recommendations

7.1 It can be seen from the above that the proposed measures represent an undesirable and impermissible restriction on Access to Justice rights, and as such runs contrary to the spirit and letter of the Aarhus Convention. As such the one guaranteed outcome of this attempt to restrict rights will be further litigation, seeking to resolve this incompatibility. This is the opposite of the intended outcome, which is to reduce litigation in the area.

7.2 A more preferable approach to reduction of litigation in the area of planning law would be to improve the quality of first instance decision making at County Council and An Bord Pleanála level, by providing targeted training for those staff members making such decisions, and generally making more expertise available to the decision makers, and ensuring they are properly resourced to meet their increasing case load.

7.3 Ensuring proper implementation of Aarhus Rights of Access to Information, Participation and Justice would reduce litigation as decisions would be made properly and with the full engagement of the affected public early in the process, which would increase public satisfaction with such decisions as well as insulate them from challenge later.

7.4 Enormous amounts of eNGO and voluntary time and energy have already been devoted to analyzing and deconstructing these legislative provisions. This is undesirable in an already over-burdened and underfunded sector. It would be much more productive from all points of view if the Department were to instead spend time consulting and working with the eNGO sector (including existing mechanisms such as ELIG which were bypassed in the preparation of this legislation) and availing of their considerable experience at the coalface of environmental law to construct better systems for implementing Aarhus rights while accommodating the need to have development and large scale projects in Ireland for economic growth and development.

7.5 Clearly a culture change is required in order for the State to realise the immense capital that is available to it in terms of the dedicated volunteer and professional eNGO sector in Ireland and to adopt the principles of open and transparent government required in a mature democracy.