Ireland - Review of the Administration of Civil Justice in the State

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Submission by: Fand Cooney (private Citizen) and member of the RTS Action Group.

Area of Work: The RTS Action Group is a community group based in Laois challenging the development of a Strategic Infrastructure Project by State authority EirGrid. This has involved a long-term ongoing battle with the Irish State which is now in its 9th year.

While the focus of this submission is access to justice relating to environmental matters, many aspects are general requirements for Access to Justice.

Background:

The Laois-Kilkenny Reinforcement Project (The Project), involved a planning oral hearing, requiring both an Environmental Impact Assessment and an Appropriate Assessment. Convinced that the planning permission issued for The Project is fundamentally flawed on numerous grounds, our group attempted to assert our rights via the only mechanism open to us - an expensive and highly stressful judicial review.

[redacted]

[redacted]

[redacted]

[redacted]

This background information is provided to demonstrate that the issues set-out in this submission are not theoretical but are based directly on real-life, negative and on-ongoing experiences of the Irish 'justice' system.

I would also highlight that access to justice goes well beyond the court system. Likewise, as per our experience, access to court does not necessarily mean access to justice.

In Conclusion, an effective remedy is required e.g. a review procedure before an independent and impartial body established by law which is clearly understood by and accessible to all citizens in order to challenge the substantive or procedural legality of decisions, acts or omissions on a basis whereby costs are not prohibitive. The citizen and not a company/agency, must be at the heart of this process.

Some Underlying Principles, definitions and references:

All review procedures, judicial or administrative, must provide adequate and effective remedies as explained at page 188 of the Aarhus Implementation Guide[1]. Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

Fundamental requirement for wide access to justice in environmental matters - Aarhus Convention.

Adequate remedy: *"The objective of any administrative or judicial review process is to have erroneous decisions, acts and omissions corrected and, ultimately, to obtain a remedy for transgressions of law. Under paragraph 4, Parties must ensure that the review bodies provide "adequate and effective" remedies, including injunctive relief as appropriate. Adequacy requires the relief to ensure the intended effect of the review procedure."* (Aarhus Implementation Guide p200).

Effective remedy:
EU case law enshrines the principle of effectiveness i.e. rights must not be impossible in practice or excessively difficult-to access. C-71/14 (paragraphs 52, 55 and case law cited therein). The requirement that the remedies should be effective means that they should be capable of real and efficient enforcement.-(Aarhus Guidance). Take the current example of Derrybrien windfarm which despite a ruling from the EU Court of Justice has not yet been implemented. Effective?

Extracts from the Aarhus Convention:

- "Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,"
- "Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,"
- "Considering that, to be able to assert this right and observe this duty, citizens **must have** access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,"

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[1] http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

Issues / Principles that need to be acknowledged and addressed within the "Civil Justice Review"

1. **Recognise the constitutional right to protect to protect the environment**[2]. According to the Friends of the Irish Environment, the Irish Courts have recently recognised the first new constitutional right in several decades. The court ruled that "*A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Art. 40.3.1 of the Constitution. It is not so utopian a right that it can never be enforced.*'[3]

2. EU law recognises that environmental protection can stand alone….."*both Article 191 TFEU (13) and Directive 2003/35 treat environmental protection as an aim in itself…." [4]*

3. Ireland failed to transpose the Aarhus Convention into Irish law, leaving it to the courts to interpret it on a case by case basis (if at all) - this needs to be rectified.

4. The Irish Constitution, Art.6.1 "*All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.*"

5. Given all the above and as follows, **all** members of the public must be in a position to **effectively** defend the environment and exercise their rights.

6. *'…as a right that presents and can be seen always to have presented, and to enjoy protection, under Art. 40.3.1 of the Constitution'*[5] It falls to every agent of the State to protect this right and ensure that it is not restricted, diminished or undermined.

7. As a right that is *'vested personally'* [6], the ability to exercise or defend this right must not be restricted to certain organisations or only where an individual is directly impacted. e.g. the individual most directly impacted may not be in a position to act, an Environmental Non-Governmental Organisation (E-NGO) may choose for numerous reasons not to act.

   Article 20 of the Charter of Fundamental Rights of the European Union states '*Everyone is equal before the law'*. It does not state that 'those with greater resources' or 'who are members of organisations' have greater standing before the law, however, I note with great concern that the Irish State intends on implementing exactly such a restriction[7]. The only way to ensure that

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[2] *The judgement was made 21st November 2017 in relation to a challenge brought by Friends of the Irish Environment against a decision to grant the Dublin Airport Authority a five-year extension to a 2007 planning permission for the construction of a third runway at Dublin Airport. In his judgment, Mr Justice Barrett said:* "*A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Article 40.3.1 of the Constitution. It is not so utopian a right that it can never be enforced.*"
https://environmentalpillar.ie/landmark-high-court-decision-recognises-environmental-rights-in-our-constitution/

[3] Paragraph 264 of Irish High Court Judgment (2017 No. 344 JR) ruled on 21st November 2017

[4] Case C-115/09 (Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg Trianel Kohlekraftwerk Lünen (intervening), paragraph 40

[5] Paragraph 264 of Irish High Court Judgment (2017 No. 344 JR) ruled on 21st November 2017

[6] Paragraph 264 of Irish High Court Judgment (2017 No. 344 JR) ruled on 21st November 2017

[7] Irish Times, 12th Feb 2018, 'Plans to restrict environmental legal challenges approved'

rights can be protected is if any individual citizen is entitled to defend this right. To do otherwise would be to raise some as more equal than others.

8. **Restrictive Review -** ABP planning permission decisions fall under a subset of the judicial review system - called Statutory judicial review. This is even more restrictive than an ordinary judicial review. The State explains: *"Statutory judicial review schemes supplement Order 84 of the Rules of the Superior Courts with their own specific procedural rules. These statutory schemes **narrow** the availability of review through such features as:*
- Time limits for an application for leave are shorter
- Requirements to notify the decision-maker of the leave application
- Higher thresholds applied by the High Court when considering whether to allow leave, for example, substantial grounds rather than arguable case"

   How can the State claim it provides 'wide access to justice' as per Aarhus when the Judicial Review mechanism is the most restrictive mechanism in the State?

9. In order for all citizens to defend these rights, there must be an effective mechanism in place. This is a fundamental human right of the European Union which recognises implicitly that sometimes mechanisms can be put in place that can be ineffective in practice.

   Article 47 of the Charter of Fundamental Rights of the European Union concerns the Right to an effective remedy and to a fair trial stating "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the **right to an effective remedy** before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*"

10. **Independence and impartiality** "*Moreover, to maintain their independence and impartiality, any appeal of a court decision should be made to a superior court instance*" (Aarhus Implementation guide p 188). For a planning Judicial review, in order to appeal the judgment to a higher National Court or European Court, permission must first be granted via a 'certificate to appeal'. The request for this must be heard and granted by the **same** judge who issued the judgment against which appeal is now sought. This is not impartial or independent. I am advised that this is not the case for judicial reviews not regarding planning matters. This needs to be corrected.

11. This review of Civil Law mechanisms must clearly and systematically identify the issues it seeks to address and ensure that the remedy proposed in each case is effective.

12. To ensure any justice mechanism remains effective over time, requires a continuous improvement mechanism e.g. a free/low fee feedback system whereby issues at fault with the system itself can be raised (by citizens), independently reviewed and corrected.

13. Ireland has no preliminary review procedure before an administrative authority as per Article 11 (4) of the EIA Directive 2011/92/EC. An effective review procedure in **all** environmental matters is required.

14. Must acknowledge that there is a fundamental difference between access to court and access to justice: If the outcome of this Civil Justice review is simply to improve access to court then it will have failed. The measure of success must be reliable access to justice for all regardless of income or county of residence. It must be recognised that the requirement for environmental protection, right to good administration and an effective remedy etc. all extend outside of the boundaries of the courts system.

15. **Fair** - *"The Aarhus Convention Complaince Committee stressed that "fairness" in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant, a public body." (Aarhus Implementation Guide p202)*

16. **Equitable & Timely** - *"Equitable procedures are those which avoid the application of the law in an unnecessarily harsh and technical manner." (Aarhus Implementation Guide p201).* (Ratheniska Case judgement gives an example of harsh application of the rules). A review in a court is simply not an equitable process where a citizen is pitched against a State agency or large developer. The average citizen is unfamiliar with the court processes, culture and system. This makes it almost impossible for the average citizen to even attempt to take such a challenge without engaging some form of legal support (usually costly).

    Time - the average citizen is working during the daytime and dealing with family life in the remaining time. In order to take part in a judicial process usually both of these need to be sacrificed (daytime to attend meetings / court hearings, remainder to prepare. Effectively, the process takes over a normal citizen's life). The developer / state entity on the other hand gets paid during their working hours to engage with the process and will generally have a legal team to help manage the process for them. A quicker process is usually in the developers favour as it minimises the delay to their project whereas, it is usually a disadvantage to the citizen who is struggling to understand the process, analyse opposition papers and prepare response documents within the time frames.

    The commercial court is favoured by developers as it greatly shortens the time taken to go through the court process however, it also puts even more pressure on communities to manage complicated legal documents in their spare time between working and taking care of families. e.g. In the Ratheniska case, only approx. 3 weeks were allowed between each exchange of pre-court documents.

    The decision to move to the commercial court cannot be effectively challenged because, if you resist going to the commercial court and then loose your case later - you are likely to be liable for the costs the extra delay caused to the developer's business by going through the slower court process. The public have little or no ability to prevent this move and are put under even greater pressures by it. i.e. even shorter time constraints, arguably the legal costs are greater and flexibility to revise or amend grounds is highly restrictive - breaching any of these conditions is likely to attract some form of cost risk. The time available for fundraising is also shortened. Again, the balance is in favour of developers or those with greater financial resources/legal expertise.

    In the Ratheniska case, EirGrid moved the case to the Commercial court, a branch of the high court which deals primarily with commercial issues. The court used the lack of objection to the move against us on the basis of unfairness to the state authorities. There was no equal consideration of what would be fair to us -(see paragraphs 20, 21 of 2014-340JR judgment).

    The case can be moved to the Commercial court by the more wealthy opponent where the timescales and rules are applied in a particularly strict manner thus further reducing the time-scope for smaller groups to consider or develop their arguments. i.e. less time available for the inexperienced party to get their arguments right. Thus the system for challenging planning decisions is highly adversarial for the public, is highly restrictive and fails to give the public a wide access to review in environmental cases.

17. **Costs -** "*Under the current system, as they say, the only people who can litigate in the High Court are paupers or millionaires,*" Mr Justice Kelly said.[8]

    Certainty in costs is a fundamental requirement for access to justice in environmental matters. This has two aspects:

    Firstly, your own costs are already substantial if you employ a legal team e.g. single stage judicial review (no appeal stage) could cost approx. €40-50k. This alone would be prohibitively expensive for most citizens. Some projects might involve multiple challenges.

[8] 21st Feb 2018; Irish Independent - https://www.independent.ie/irish-news/courts/legal-costs-to-face-cap-under-justice-review-36609852.html

Secondly, the risk of having the costs awarded against you. Section 50B of the 'Planning and Development Act - Costs in Environmental matters' is an ineffective piece of legislation which provides no legal certainty of costs and protection proves difficult to put in place in practice (see Aarhus case ACCC/C/2014/113 against Ireland on this matter). This means that legal challenges that are already prohibitively expensive move into the area where they can threaten peoples homes and livelihoods. This is a fundamental barrier to justice.

In the Ratheniska case-2014-340JR, An Bord Pleanala and EirGrid were issued with a copy of our intended appeal grounds on Tuesday 27th Jan. 2015. They were fully aware that the community intended to seek leave to appeal the judgment. However, this lack of definitive cost protection enabled State agencies to use costs to get us to drop our application to appeal under duress.

Our group was not present in the court on that day as we had not anticipated such an ambush. Our group contact was called by phone while at work and literally given 3 minutes to consider whether we should proceed and risk exposure to estimated costs of €500,000-€750,000 or withdraw our intention to seek leave to appeal. We withdrew the request for permission to appeal for this cost reason alone.

Basically, these state agencies used their access to citizen resources to threaten citizens out of court. This action appears designed to ensure that the public do not even consider trying to exercise their right to challenge any environmental/planning decision-making. The fact that this behaviour can happen and work effectively to disable the public's ability to even access courts and challenge administrative decisions should be a cause of huge concern.

Due to the fact that the protective costs legislation in environmental matters is discretionary in nature it provides little or no legal certainty to Irish Citizens who wish to assert their rights under environmental legislation. I.e. it is a truly ineffective piece of legislation. State agencies exploited this uncertainty to full effect by using the threat of costs against citizens specifically to prevent them from accessing an appeal hearing. In doing so, they blocked access to the only remedy available.

18. **Scope of the Issues that can be challenged:** Ireland has no preliminary review procedure before an administrative authority in accordance with the Aarhus Convention or Article 11 (4) of the consolidated EIA Directive 2014/52/EU. i.e. 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. The Aarhus convention requires ' wide access to justice'.

    Challenge by judicial review does not facilitate these. Public information provided by the state to explain ordinary Judicial Review to citizens is as follows: *"In a judicial review, generally the court is not concerned with the merits of the decision but rather with the lawfulness of the decision-making process, that is, how the decision was made and the fairness of it."* Read in conjunction with *o'Keeffe* it can be seen that the ability to effectively challenge the legality of a decision is far from certain.

19. **Burden of Proof - (**European case law indicates that this falls to the transgressor) and **Permission to argue infringement of any environmental provision.** In the case of Gemeinde Altrip & others v. Land Rheinland-Pfalz (C-72/12) which involved input from Ireland:

    "On those grounds, the Court (Second Chamber) hereby rules: 3.Subparagraph (b) of Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as not precluding national courts from refusing to recognise impairment of a right within the meaning of that article if it is established that it is conceivable, having regard to the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked by the applicant.

    *None the less, **that will be the case only if the court of law or body hearing the action***

does not in any way make the burden of proof fall on the applicant *and makes its ruling, where appropriate, on the basis of the evidence provided by the developer or the competent authorities and, more generally, on the basis of all the documents submitted to it, taking into account, inter alia, the seriousness of the defect invoked and ascertaining, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making, in accordance with the objectives of Directive 85/337."*

Read with next point re. o'Keeffe.

20. **The o'Keeffe principle (irrationality test) as a barrier to justice** - this sets too high a bar for the burden of proof in environmental cases and places this burden on the applicant.

Pre-existing case law in Ireland such as in Lancefort (1998) and the o'Keeffe principle (1993) which pre-dates the Aarhus convention and most of the EU environmental protections gives a fundamental presumption of validity to decisions by entities such as An Bord Pleanala. This places the burden of proof wholly on anyone who challenges ABP. Furthermore, the Irish case-law sets out that if ABP has **any** information in front of it, it precludes the court from interfering. This effectively reduces the court to merely carrying out a superficial check to see if ABP had any relevant information before it.

As stated in Carroll & Ors vs ABP [9], *"The O'Keeffe irrationality test remains central in the Irish law of judicial review so far as planning decisions involving environmental assessments are concerned. .....A court should be slow to intervene in a decision made with special competence in an area of knowledge. The O'Keeffe v An Bord Pleanala decision is relevant to areas of special skill and knowledge, such as planning and development*". Concluding at 42 that "*An applicant faces an uphill task in establishing substantial grounds warranting a departure from the O'Keeffe test.*"

This means that challenges on environmental grounds are subject to an exceptionally high threshold that totally negates any concept of 'wide access to justice'.

21. **Requirement for Legal Certainty** - Provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (EU Case-law).

Irish courts do not appear to consistently rely on the purposive approach when interpreting EU law. Due to the dualist nature of the law in Ireland, there is also heavy reliance on old laws that predate EU laws without always considering whether it undermines the validity of rights from EU law or Aarhus. Legal certainty for the decisions of the administrative bodies such as An Bord Pleanala is built in to the legal system.

However, legal certainty for the rights of citizens seems to be absent thereby negating any concept of 'wide access to justice'. See for example paragraphs 67 and 68 of the Ratheniska case 2014-340JR as follows:

"67. Firstly, the Board's decisions enjoy a presumption of validity until the contrary is shown. As McGuinness J. stated in Lancefort Ltd. v. An Bord Pleanála (unreported, High Court, 12th March, 1998):- "The onus of proof in establishing that An Bord Pleanála did not consider the question of environmental impact assessment...and thereby rebutting the presumption of validity of the Bord's decision, lies squarely on the Applicant." This principle has been followed in many cases and most recently by O'Neill J. in Harrington v. An Bord Pleanála & Ors (unreported, 9th May, 2014).

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[9] [2016] IEHC 90; 2014 475 JR 11/02/2016 Carroll & Ors -v- An Bord Pleanala

68. As to the standard of review applicable to the Board's decision, in O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39 Finlay C.J. stated:-"It is clear from these quotations that the circumstances under which the court can interfere on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare. "

As shown, the courts are extremely reluctant to 'interfere' with environmental decision-making and citizen rights to protect the environment / effective remedy are not reliably considered.

22. Clarity in wording of environmental laws is a requirement for access to justice. The public cannot effectively enforce or challenge something which is written in complex or archaic language understood only by trained legal individuals. For the public to access their rights, the laws must be clear and understandable.

23. Access to justice for lay litigants is a requirement. Through personal experience and through experience relayed through others, the courts administration system is itself a hostile environment. This must cease. Those of modest means must be supported without need to employ expensive legal representation. The courts administrators must support citizens in accessing their rights[10]. A mechanism is needed to allow citizens to make an effective complaint if they are not assisted/supported.

24. **Access to justice for remote communities**. e.g. those that are distant from the courts in Dublin (travelling up for multiple days in court/meetings with legal teams add to costs and are a barrier to justice). Digital access to a justice system should also be carefully considered - not all individuals have access to useful broadband speeds or are familiar with digital technology. Justice for all must be guaranteed-perhaps through regional hubs?

25. **Flawed Strategic infrastructure Mechanism**- Strategic infrastructure goes through a 'fasttrack' planning procedure. Fast-tracking is achieved by eliminating access to any review procedure. This leaves only the narrowest channel of challenge i.e. statutory judicial review for larger projects with potentially greatest environmental impacts. All in all, effectively a mockery of 'wide access to justice' (Aarhus).

- ABP decide what qualifies as Strategic Infrastructure, based on confidential information supplied by and confidential meetings with the developer. Thus the developer has a significant input into deciding the review mechanism available.
- Contrary to natural justice, the public have no input to this decision although it is their rights to justice which will be impacted.

In summary, the current system places corporate rights over citizen rights. I submit that enabling and vindicating the rights of the citizen to access justice effectively must form the central 'mission statement' of this Civil Justice Review Process.

[10] See Article 3(2) of the Aarhus convention