



FLAC Preliminary Submission on the General Scheme Of the Housing and Planning and Development Bill 2019

FLAC January 2020

About FLAC

FLAC (Free Legal Advice Centres) is one of Ireland's oldest civil society organisations. It is a voluntary, independent, legal and human rights organisation which for the last fifty years has been promoting access to justice. Access to justice includes access to legal aid, access to the Courts and access to effective remedies. Our vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights. FLAC works in a number of ways. It: -

- operates a telephone information and referral line where approximately 12,000 people per annum receive basic legal information
- runs a nationwide network of legal advice clinics in 71 locations around the country where volunteer lawyers provide basic free legal advice to approximately 12,000 people per annum.
- is an independent law centre that takes cases in the public interest. These are cases that seeks to establish a new point of law, while also securing a benefit for the individual or community involved. It can be a very effective way of using the law to effect change for marginalised and disadvantaged groups.
- during 2017 FLAC was an associate partner of and facilitated the JUSTROM programme, which promoted access to justice for Roma and Traveller women. FLAC currently operates a Roma legal clinic.
- Operates the Public Interest Law Alliance (PILA), that runs a pro bono referral scheme, that facilitates social justice organisations receiving legal assistance from private practitioners acting pro bono. In 2018, 115 social justice organisations were directly assisted through the pro bono referral scheme.
- Engages in research and advocates for policy and law reform in areas of law that most affect marginalised and disadvantaged, including legal aid, access to the courts, and access to effective remedies, personal debt and social welfare.

The submissions most relevant to the subject matter of this submission include;

- FLAC Submission to the Justice and Equality Joint Oireachtas Committee on Legal Aid and Costs: November 2019
- FLAC Submission on High Court Practice Direction 81: July 2019
- FLAC Submission to the Joint Oireachtas Committee on Justice and Equality on Reform of the Family Law System, March 2019
- FLAC Submissions to the Review of Administration of Civil Justice February and June 2018
- FLAC Submission: Multi-Party Actions Bill 2017: February 2018
- FLAC Submission to the Courts Service Statement of Strategy 2018-2020, October 2017

You can download/read FLAC's policy papers at
<http://www.flac.ie/publications/policy.html>

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Recommendations

- 1. The proposal raises fundamental issues in terms of equality of arms in access to justice in environmental matters and, in this way, offends constitutional principle both as a matter of Irish and EU law. In practice, it would have a chilling effect on litigants and lawyers involved in environmental litigation in the public interest. The restrictive nature of the proposals contained in the General Scheme would if enacted, have such a negative impact on the right of access to justice in environmental matters that the Bill should not be proceeded with.**
- 2. The obligation on statutory bodies as required by section 42 of the Irish Human Rights and Equality Commission Act 2014 to have regard to the need to promote equality of opportunity and protect the human rights of litigants and potential litigants, should inform the contents of this Bill.**
- 3. Any form of legislation in relation to procedures governing claims in environmental law and/or other public interest law matters should include an amendment to section 28(9) of the Civil Legal Aid Act, to allow for legal aid in class/multi-party actions.**

This submission is informed by our experience in working on access to justice issues and human rights in Ireland. It is also informed by the Communication from the European Commission on Access to Justice in Environmental Matters.¹

Reservation

FLAC welcomes the opportunity to make a preliminary submission and comment on the General Scheme Of the Housing and Planning and Development Bill 2019, (hereinafter referred to as the General Scheme). We particularly welcome that any changes to the rules governing access to Judicial Review would be carried out by primary legislation rather than changes to the Rules of the Superior Courts. The General Scheme of the Bill includes proposed legislative reforms to the judicial review provisions in the Planning and Development Acts 2000 to 2019, including reforms of the standing rights to bring judicial review proceedings in planning cases and also the special legal costs rules relating to such judicial review challenges.

However FLAC is concerned at the short time frame allowed for the consultation, the extent of the changes proposed, the reasons for such changes, in so far as they can be identified from the General Scheme and the lack of any evidence adduced to support the need for such sweeping changes in relation to access to Judicial Review to challenge planning decisions.

We agree with the comments of Dr Áine Ryall in her feature on the General Scheme published in the PILA Bulletin on the 22nd of January FLAC "*The proposals set out in the General Scheme of the Bill are alarming.*"² The proposal raises fundamental issues in terms of equality of arms in access to justice in environmental matters and, in this way, offends constitutional principle both as a matter of Irish and EU law. In practice, it would have a chilling effect on litigants and lawyers involved in environmental litigation in the public interest.

The restrictive nature of these proposals raises serious concerns over the negative impact that they will have on the right of access to justice in environmental matters. FLAC therefore reserves the right to comment further on any Bill in the event that evidence is adduced and if and when the Bill is published.

¹ Commission Notice on Access to Justice in Environmental Matters, Brussels, 28.4.2017

² <https://www.pila.ie/resources/bulletin/2020/01/22/guest-piece-by-ine-ryall-future-of-environmental-judicial-review-under-threat>

Recommendation 1

The proposal raises fundamental issues in terms of equality of arms in access to justice in environmental matters and, in this way, offends constitutional principle both as a matter of Irish and EU law. In practice, it would have a chilling effect on litigants and lawyers involved in environmental litigation in the public interest. The restrictive nature of the proposals contained in the General Scheme would if enacted, have such a negative impact on the right of access to justice in environmental matters that the Bill should not be proceeded with.

Access to Justice

Access to justice enables individuals to protect themselves against infringements of their rights, to remedy civil wrongs and to hold executive power accountable. Access to justice is both a process and a goal, and is crucial for individuals and groups seeking to benefit from other procedural and substantive rights. It is inherent in the rule of law.

Access to justice is a fundamental feature of our constitutional system of justice, with access to the courts recognised as a fundamental personal right guaranteed under Article 40.3 of the Constitution. The right of access to justice is also enshrined in Articles 6 and 13 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights, which guarantee the rights to a fair trial, to an effective remedy and to legal aid to those who lack sufficient resources so far as this is necessary to ensure effective access to justice.

While it has no single precise definition, core elements of access to justice include effective access to information, advice, legal aid, access to the courts and access to effective remedies.

FLAC welcomed the commitment of the Chief Justice to make access to justice a central focus of his tenure and his call for the reform of the civil justice system. We also agree with the comments of the Chief Justice that there is little point in having a good court system if a great many people find it difficult or even impossible to access that system for practical reasons.³

Limitations or preconditions applied to the right of access to the courts can undermine the very core of the right to access to justice. Limitations on the right must pursue a legitimate aim and must also be proportionate in light of the legitimate aim which they seek to satisfy. The European Court of Human Rights has stated the principle as follows:

“The right of access to 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

³ Statement of the Chief Justice for the New Legal Year 2017
<http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/B137A31686073CA5802581A800536B5E?op=endocument>

preventing the litigant from having his or her case determined on the merits by the competent court.”⁴

The Court has further stated:

“Notwithstanding the margin of appreciation enjoyed by the State in this area, the Court emphasises that a restriction on access to a court is only compatible with Article 6 § 1 if it pursues a legitimate aim and if there is a reasonable degree of proportionality between the means used and the aim pursued.

In particular, bearing in mind the principle that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.”⁵

That the right of access to the courts is a constitutional right was established in *Macauley v Minister for Posts and Telegraphs* where Kenny J stated:

“That there is a right to have recourse to the High Court to defend and vindicate a legal right and that it is one of the personal rights of the citizen included in the general guarantee of Article 40.3 seems to be a necessary inference from Article 34.3.1... If the High Court has the full original jurisdiction to determine all matters and questions (and this includes the validity of any law having regard to the provisions of the Constitution), it must follow that the citizens have a right to have recourse to that Court to question the validity of any law having regard to the provisions of the Constitution or for the purpose of asserting or defending a right given by the Constitution, for if it did not exist, the guarantees and rights in the Constitution would be worthless.”⁶

Access to the courts and duty to protect human rights

Article 40.1 of the Constitution guarantees the right of equality before the law. Section 42 of the Irish Human Rights and Equality Commission Act 2014 requires public bodies, including the Courts Service, to have regard to, in the performance of their functions, the need to eliminate discrimination, promote equality of opportunity and treatment for litigants, and to protect the human rights of litigants and potential litigants. FLAC has made a number of submissions⁷ on the accessibility of the courts, with recommendations on improving access to the courts for lay litigants and people with disabilities. These submission highlighted the obligations imposed on statutory bodies such as the Court Services by Section 42 of the Irish Human Rights and Equality Commission Act 2014, to have regard to, in the performance of their functions, the need to eliminate discrimination, promote equality of opportunity and treatment for litigants, and to protect the human rights of litigants and potential litigants.⁸

⁴ *Zubac v Croatia*, Application No 40160/12.

⁵ *Weissman v Romania*, Judgment 24 May 2006.

⁶ *Macauley v Minister for Posts and Telegraphs* [1966] IR 345 at p 358. In *Re Article 26 and Section 5 and Section 10 of the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, it was recognised that this right also extended to a non- citizen of the State.

⁷ FLAC Submission on the Courts Service Statement of Strategy 2018- 2020 October 2017, and two Submissions to the Review of the Administration of Civil Justice.

⁸ FLAC has been given a grant by IHREC to engage in research on the implications of the public sector duty for three bodies with functions that concern access to justice, the Courts Services, the Legal Aid Board and the Workplace Relations Commission

FLAC recommended that the public sector duty be a core consideration in the review of the administration of justice. Its requirements on the Court Services to promote equality of opportunity and treatment for litigants and to protect the human rights of litigants and potential litigants should also inform the contents of the Bill.

Recommendation 2

The obligation on statutory bodies as required by section 42 of the Irish Human Rights and Equality Commission Act 2014 to have regard to the need to promote equality of opportunity and protect the human rights of litigants and potential litigants, should inform the contents of this Bill.

Judicial Review

Judicial review is one matter that is under consideration by the Review of Administration of Justice. Judicial review provides a vitally important avenue by which decisions of the State, its organs and its public bodies can be challenged. Judicial review is an accountability mechanism that encourages better administrative decision making, and provides a remedy where this is not always achieved. For this reason, it is important that it is as accessible as possible to the ordinary persons, groups and communities who may be seriously affected by the decisions of such bodies.

FLAC's second submission to the Review of the Administration of Justice noted that there is already a multi-tier system for judicial review in place with distinct rules applicable in certain areas such as asylum/immigration and planning. It stated that *"Rules of Court should facilitate, rather than inhibit access to justice for individuals. They should be clear, accessible, foreseeable in their application. Any changes to the rules on the substantive requirements for judicial review are properly matters for primary legislation, rather than rules of court and should not provide the State and the organs of the State with an unfair advantage."*

Access to Justice and the environment

The environment is our life-support system and a common heritage. Preserving, protecting and improving the environment is a shared European value, with EU environmental law establishing a common framework of obligations for public authorities and rights for the public.

Communication from the Commission

The EU Commission has issued an Interpretative Communication on access to justice in environmental matters, bringing together all the substantial existing CJEU case law [up to 28.4.2017] and drawing certain inferences from it in order to provide clarity and a reference source for a number of bodies including national administrations who are responsible for ensuring the correct application of EU environmental law, national courts, the public, notably individuals and environmental NGOs who exercise a public-interest advocacy role and economic operators who have an interest in the predictable application of the law.

The Notice notes that it fits with the broader Commission work on access to justice, notably the EU Justice Scoreboard and on the application of the Charter of Fundamental Rights and the EU Framework to strengthen the rule of law.

The following are relevant extracts from the Commission Notice:

“ ...

2. *The recently adopted Commission Communication 'Better results through better application'⁹ stresses that, where obligations or rights under EU law are affected at national level, there has to be access to national courts in line with the principle of effective judicial protection set out in the EU Treaties and with the requirements enshrined in Article 47 of the Charter of Fundamental Rights of the European Union.*

3. *EU law recognizes that, in the domain of the environment, access to justice needs to reflect the public interests that are involved.*

4. *The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters¹⁰ ('the Aarhus Convention') establishes that, in certain cases, natural and legal persons (such as non-governmental organisations, 'NGOs') can bring a case to a court or to other impartial bodies in order to allow for the review of acts or omissions of public or private bodies¹¹. This has been ratified by all Member States and by the EU¹².*

5. *Apart from meeting an international commitment, ensuring that individuals and NGOs have access to justice under this Convention is also an important means of improving Member State's implementation of EU environmental laws without the need for Commission intervention.*

6. *The Aarhus Regulation, 1367/2006, applies the Aarhus Convention to EU institutions and bodies. For Member States, certain pieces of EU secondary legislation contain express access to justice provisions mirroring those of the Convention¹³. “*

The General Scheme

The proposals contained in the General Scheme are presented as reforming the judicial review provisions in the Planning and Development Acts 2000 to 2019. However it is clear from the Explanatory notes included in the General Scheme that the primary if not sole purpose of the Bill is to reduce and restrict challenges to planning decisions.

⁹ C(2016)8600.

¹⁰ <http://www.unec.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

¹¹ See, in particular, Article 9(2) AND (3) OF THE Aarhus Convention

¹² Decision 2005/370/EC

¹³ For example, the Environmental Impact Assessment Directive, 2011/92/EU

1. Specific Points in Time for Initiating Judicial Review Challenges and Alleged Deficiencies

Head 3 seeks to change existing law to determine the time, venue, and type of decision deficiency which may be subject to legal challenge. In so doing it seeks to determine the stage at which a challenge may be brought, as required by Article 11(2) of EIA Directive and recognised by the CJEU at para 32 of Case C- 470/16 *North East Pylon Pressure Campaign Ltd* [2018].¹⁴

It provides that:

“Section 50 of the Act of 2000 be amended to provide that judicial review challenges –

(i) shall only be initiated after the making of a planning determination in relation to a proposed development by An Bord Pleanála, and

(ii) may not be sought in respect of an alleged deficiency falling within any of the following categories –

(a) clerical or typographical errors in the order or determination which is sought to be quashed,

(b) unintentional errors or omissions in the order or determination,

(c) 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.”

The first part of Head 3 seeks to limit judicial review to planning decisions taken by An Bord Pleanála. This would have two effects.

First, would-be challengers of local authority planning decisions would initially be required to appeal the local authority decision to An Bord Pleanála and await the outcome of this appeal before making an application for judicial review. Based on existing law, to guarantee a right to appeal to An Bord Pleanála, in most cases, such applicants would be required to make submissions or observations during the first stage of the planning process.¹⁵

It is unclear whether this is meant to insulate from judicial review any decision of a local authority that is not capable of appeal to An Bord Pleanála (e.g., to extend the duration of a planning permission under section 42, to make a decision on an application that is consistent with a Strategic Development Zone planning scheme where section 170(3) prohibits appeal, to agree points of detail under section 34(5),

¹⁴ [2018] ECLI:EU:C:2018:185 (15 March 2018).

¹⁵ S 37(1)(a) PDA 2000.

to make a declaration under section 5). There is no basis put forward for protecting these classes of decision from legal challenge.

Second, Head 3(i) would exclude the possibility of an application for judicial review being taken before a final planning decision was made by An Bord Pleanála.¹⁶ The effect of this would be to impede/prevent judicial reviews such as that taken in *Spencer Place Development Company Ltd. v Dublin City Council*,¹⁷ in which, in anticipation of a negative planning decision, the developer sought to judicially review a Dublin City Council planner's interpretation of statutory guidelines on building height guidelines. It might also preclude any attempt to prevent the completion of the planning process in appropriate circumstances, e.g., by attempting to prevent an oral hearing (*Martin v. An Bord Pleanála* or *North East Pylon (1) v. An Bord Pleanála*).

Head 3(ii)(a) seeks to prevent the initiation of planning challenges which are grounded on errors which are so trivial and inconsequential¹⁸ that the law should not take them into account (e.g. clerical or typographical errors). This would provide a statutory basis for the court to refuse to entertain challenges made on the basis of a "de minimis breach". There is considerable scope for argument about what is trivial or de minimis: *Southwood v. An Bord Pleanála*¹⁹ and *Krikke v. Barranafaddock Sustainable Electricity*²⁰.

The prospect for legal challenge on that question is no less great.

Head 3 (ii)(b) and (c) take the concept considerably further.

These seem to make unclear decisions lawful. Head 3 (ii)(b) seeks to exclude any challenge to "unintentional errors or omissions in the order or determination". Head 3 (ii)(c) seeks to restrict challenges based on "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 the decision challenger previously sought to have the error remedied, and was unfairly refused relief. The court already has discretion to excuse this kind of matter. There are recent examples where the court has not been satisfied to do that: *Red Rock Developments Limited v. An Bord Pleanála*²¹.

Decisions should be clear and capable of being challenged as necessary; in light of existing discretion which permits such issues to be addressed in appropriate cases, it is not clear that this measure is necessary.²²

Moreover, if the purpose of Head 3(ii)(c) is to ensure that would-be challengers of local authority decisions must first appeal these decisions to An Bord Pleanála before

¹⁶ The drawbacks of the planning appeal were recognised by the Law Reform Commission in its 2004 report "...if the appeal does not enjoy the scope to look to the jurisdiction or the point of law under which the initial decision was made, judicial review will often be a more suitable remedy..." Law Reform Commission, *Report on Judicial Review Procedure* (LRC 71 – 2004) 1.58.

¹⁷ [2019] IEHC 384.

¹⁸ *Dunne v an Bord Pleanála* Unreported, High Court, McGovern J, 14 December 2006

¹⁹ [2019]IEHC 504

²⁰ [2019]IEHC 825

²¹ [2019] IEHC 792

²² *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 ILRM 453 and *Balz v. An Bord Pleanála* [2019] IESC

seeking judicial review, this purpose is achieved elsewhere in the General Scheme. Another possible explanation for Head 3(ii) (c) is as an attempt to prevent the initiation of a planning challenge, where text was omitted in documents which led to the final decision. In *Ratheniska v an Bord Pleanála* (“**Ratheniska**”) Haughton J expressly rejected the argument that the statutory notices published by EirGrid which preceded a grant of planning permission were invalid as they did not disclose an alleged increase in the operational voltage of an electrical line. He rejected the argument that this omission, in turn, invalidated the grant of planning permission.

2. Bringing of Judicial Review Proceedings including Standing Rights

Head 4 is divided into 5 parts which seek to redefine the procedural requirements for the judicial review process and to limit the right to bring judicial review proceedings to a narrower category of parties.

(a) Head 4(1) Stage 1 Leave to Apply for Judicial Review

Head 4(1) revises the initial stage of the judicial review procedure. It provides that:

“(1) Section 50A(2) of the Act of 2000 be amended as follows:

(2) An application for section 50 leave shall be made by motion, on notice (grounded in the manner specified in the Order in respect of an ex parte motion for leave)

(a) If the application relates to a decision made or other act done by a planning authority or local authority in the performance or purported performance of a function under this Act, to the authority concerned and, in the case of a decision made or other act done by a planning authority on an application for permission, to the applicant of the permission where he or she is not the applicant for leave,

(b) If the application relates to a decision made or other act done by the Board on an appeal or referral, to the Board and each party or other each party, as the case may be, to the appeal or referral,

(c) If the application relates to a decision made or other act done by the Board on an application for permission or approval, to the Board and to the applicant for permission or approval where he or she is not the applicant for leave,

(d) If the application relates to a decision made or other act done by the Board or a local authority in the performance or purported performance of a function referred to in section 50(2)(b) or (l), to the Board or the local authority concerned, and

(e) to any other person specified for that purpose by order of the High Court.”

Head 4(1) determines how judicial proceedings may be initiated. Judicial review of planning decisions include two stages: a leave stage (which is designed to filter out weak cases) and a substantive hearing stage for cases that pass the leave stage. Since 2010, s 50A(2) of the Planning and Development Act 2000, as amended (“**PDA 2000**”) has allowed applicants to conduct the first stage of the judicial review, the leave stage, on an *ex parte* basis. This is also the standard for non-planning related judicial reviews. *Ex parte* means that there is no requirement for applicants to notify all other parties at the outset. Although a judicial discretion exists to permit the judge to require the leave stage to be heard on an *inter partes* basis (i.e. including the other parties in the leave stage) this is not regularly used.

Head 4(1) seeks to change this by requiring an application for leave to apply for judicial review in planning matters to be made by way of a motion on notice. In other words, other parties would be notified of the application for judicial review and could participate at the leave stage of the proceedings, if they chose to do so.

When this was the rule for planning challenges, the common practice was to compress the leave and substantive stages into a single court hearing e.g. *Cosgrave v. An Bord Pleanála*, *Cicol v. An Bord Pleanála*. There is no good reason to suspect that practice will not repeat itself, particularly with urgent or significant cases.

As mentioned, conventional judicial review is generally conducted on an *ex parte* basis, with a judicial discretion to require other parties be notified of the leave application. As planning often affects the environment and triggers the legal requirement for Member States to grant the public concerned “*wide access to justice*”; mandating the more burdensome *inter partes* process at the first stage of the planning judicial review process is difficult to justify. *Inter partes* proceedings have the potential to lead to “*double hearings*”. In 2004, the Law Reform Commission recognised the argument that “... [an] *inter partes application is often akin to a full dress rehearsal of the substantive hearing, sometimes lasting for several days*”.²³ When considered in conjunction with the other changes proposed by the General Scheme, an argument can be made that this breaches the EIA Directive’s requirement to ensure that the process is “*fair, equitable, [and] timely*”.²⁴ It could further be seen to breach the EU principles of and effectiveness, by creating a more onerous procedure for the judicial review of planning decisions relating to EU environmental law.²⁵

Moreover, in light of the differentiated manner in which one particular class of litigants would be singled out and subjected to much higher thresholds in accessing the courts, the proposals also offend against the constitutional guarantee of equality before the law.

²³ Law Reform Commission, Report on the Judicial Review Procedure (LRC 71 - 2004), 25.

²⁴ Article 11(4).

²⁵ See further Case C-167/17 *Klohn* [2018] ECLI:EU:C:2018:833 (17 October 2018).

- (b) Head 4(2), (3) and (4): the Criteria to be Granted Leave to Bring Judicial Review Proceedings before the High Court

Heads 4 (2), (3) and (4) are best considered together. They provide that:

“(2) The “substantial grounds” test that must be satisfied under section 50A(3)(a) of the Act of 2000 in order for the Court to grant leave to apply for judicial review be amended to require that, in addition to being satisfied that there are substantial grounds for challenging the decision or act concerned and contending that it is invalid or ought to be quashed, the Court must also be satisfied that the application has a reasonable prospect of success.

(3) The “sufficient interest” test that must be satisfied under section 50A(3)(b)(i) of the Act in order for the Court to grant leave to apply for judicial review be amended to refer to the term “substantial interest”, and to require that an applicant shall -

(a) be directly affected by a proposed development in a way which is peculiar or personal, and

(b) have made submissions or observations in relation to the planning application to the proposed development to the planning authority or An Bord Pleanála, or relating to an appeal made to An Bord Pleanála.

(4) Such prior participation requirement in subsection (3)(b) may be waived where –

(i) there were good and sufficient reasons for not making objections, submissions or observations, as the case may be, or

(ii) there has been a procedural breach in the decision-making process.”

These Heads seek to further strengthen the existing criteria applicants must meet to be granted leave to have judicial review proceedings heard. Under existing rules, applicants must meet the criteria set by Order 84 of the Rules of the Superior Courts (“**RSC**”) along with further requirements provided by the PDA 2000. The existing test can be broken down into the following 3 questions.

- (c) Does the applicant fulfil the requirements of Order 84 RSC? This includes making the application within an 8 week time limit; demonstrating that the applicant has included facts in his/her application which if proven demonstrate a stateable case; and that there is an arguable case in law on the facts.
- (d) Can the applicant show that they have “substantial grounds” for challenging the decision? In order for a ground to be substantial, it must be reasonable, arguable and weighty. It should not be trivial or tenuous. A ground which does not stand any chance of being sustained (one

which was previously decided in another case) cannot be said to be substantial.²⁶

- (e) Does the applicant have “sufficient interest” in the decision to challenge it? Sufficient interest has been interpreted broadly by the courts in environmental cases. It is not limited to property rights. It is also not essential for a challenger to have taken part in the planning process which led to the grant of permission. To show “sufficient interest”, ordinarily the person concerned will need to be in a position to demonstrate that the decision or measure which they wish to challenge either has or is imminently in danger of adversely affecting their interests so as to cause or potentially cause injury or prejudice.²⁷

Should Heads 4(2), (3) and (4) become law, the revised test would be:

- (a) Does the applicant fulfil the requirements of Order 84 RSC (*demonstrating a stateable case and a case in law*) and do they have a reasonable prospect of success? The phrase “a reasonable prospect of success” has been held to require that the case has “*a certain measure of substance to it. It is not required that there be a probability of success, but ...at least a good chance of success.*”²⁸
- (b) Can the applicant show that they have “substantial grounds” for challenging the decision?
- (c) Does the applicant have “substantial interest” in the decision to challenge it? In other words, are they affected by the development in a way that is peculiar or personal to them, and did they previously take part in the planning process? Applicants can be excused from the requirement to take part in the planning process in two circumstances, where they had “good and sufficient” reasons for not doing so or there was a procedural breach in the decision-making process.

Head 4(2)’s requirement for an applicant to show that they have a “reasonable prospect of success” is a standard taken from the protective costs regime. It is applied within that regime to determine whether applicants should be given certainty as to costs at the start of litigation. While this standard is an

²⁶ *McNamara v an Bord Pleanála* [1995] 2 ILRM 125.

²⁷ As stated by Clarke J & O'Malley J in the Supreme Court in *Grace and anor v An Bord Pleanála & ors* [2017] IESC 10: “A reasonably liberal approach is taken to the sort of interest which must be potentially affected in order to confer standing in environmental cases. Persons can have an interest by virtue of proximity to the proposed development. The degree of proximity required may well depend on the scale and nature of the development in question. For example, a large scale development having the potential to impact on the amenity of persons within a wide catchment area might well be said to have the potential to have an adverse impact on the legitimate interests of persons living, or perhaps working or otherwise having regular contact with, a significant geographical area. A minor domestic development might well only have an impact on a much more restricted area. In addition, regard can be had to the nature and general importance of the site or amenities sought to be protected. Developments which have the potential to have a material and significant effect on the environment generally or raise questions of particular national or international importance ... may confer standing on a much wider range of persons.”

²⁸ *McCoy & anor v Shillelagh Quarries Limited & ors* [2014] IEHC 511.

accepted and justifiable part of the protective costs regime, its attempted inclusion in the main judicial review framework is problematic. It will most likely face challenge as evidencing an impermissible bias against the applicant,²⁹ (particularly when considered in conjunction with the other requirements placed on an applicant seeking judicial review) in breach of the wider right to fair procedure as recognised by the courts³⁰ and required by law.³¹

Head (4)(4) if enacted would resurrect the previous “*substantial interest*” requirement originally included in the PDA 2000 by s50(4) of the PDA 2000 and subsequently removed in 2011. Because of the manner in which the “substantial interest” requirement was applied by the courts, it became a very difficult standard for applicants to meet when they did not have nearby property or a financial interest in the outcome of the planning decision in question. The case *Harding v Cork County Council and An Bord Pleanála and Xces Projects Ltd now known as Kinsale Harbour Developments Ltd* [2008] IESC 27; [2008] 2 ILRM (“**Harding**”) demonstrates why.

Mr. Harding, the plaintiff and appellant, was a retired sailor and merchant seaman who had lived in the town of Kinsale, on the coast of County Cork, for his entire life. He grew up in the area of Ballymacus, and lived some three kilometres from it. Members of his family subsequently lived there. The notice party, Xces or Kinsale Harbour Developments (KHD), applied for planning permission to construct a substantial hotel, golf and leisure resort at Ballymacus Head and Preghane Point, at the entrance to Kinsale Harbour. Mr. Harding was opposed to the development and participated in the planning process, objecting to the application. Planning permission was granted and Mr. Harding applied to the High Court for leave to apply for judicial review. This was refused by Clarke J in a decision, which was upheld by the Supreme Court, finding that the applicant did not have the necessary “substantial interest” under section 50 of the PDA 2000. Kearns J (which whom Murray CJ and Finnegan J agreed) stated that “*in order to enjoy a substantial interest within the meaning of s. 50 of the Act of 2000, it is necessary for an applicant to establish the following criteria: - (a) That he has an interest in the development the subject of the proceedings which is “peculiar and personal” to him. (b) That the nature and level of his interest is significant or weighty. (c) That his interest is affected by or connected with the proposed development.*”

By attempting a return to the *Harding* test, Head (4)(4) seeks to limit the effect of the more recent Supreme Court decision in *Grace and Sweetman*³² which was recognised as having increased the number of those with the potential to apply to have planning decisions judicially reviewed. It is important to recall that *Grace and Sweetman* was resolved on domestic law grounds only, without any need to apply the European law concept of “wide access” to justice. In that context, the tightening contemplated by this Head has yet to be tested against

²⁹ *O’Ceallaigh v An Bord Altranais* [2011] IESC 50.

³⁰ *Mallak v Minister for Justice Equality and Law Reform* [2012] IESC 59.

³¹ Bunreact na hÉireann article 40.1; EU Charter of Fundamental Rights article 47.

³² *Grace and anor v An Bord Pleanála & ors* [2017] IESC 10.

the suite of cases relied upon in the *Grace and Sweetman* case, which the Court did not consider it necessary to apply.

In light of the constitutional status of the right of access to the courts both as a matter of Irish and EU law, any significant restriction on access to the courts must be justified by an important public interest objective and must go no further than necessary in order to achieve that objective. These proposals would constitute an unjustified and disproportionate restriction on the right of access to the courts in environmental matters. Moreover, in light of the differentiated manner in which one particular class of litigants would be singled out and subjected to much higher thresholds in accessing the courts, against the constitutional guarantee of equality before the law.

3. NGO Automatic Standing Rights

Heads 4(5) and 5 seek to tighten the criteria to be fulfilled by NGOs seeking either to judicially review an environment-related planning decision (i.e. one which triggered the requirements of the EIA Directive) or to appeal an environment-related planning decision to An Bord Pleanála. They are:

“(5) The NGO “automatic standing rights” criteria, as provided for in section 50A(3)(b)(ii) of the Act, be amended as follows –

(a) the minimum time requirement applicable to NGOs in relation to their establishment and pursuit of environmental protection objectives be increased from 12 months to 3 years preceding the date of application for section 50 leave;

(b) insert new requirements that in order for an NGO to have automatic standing rights in this regard, it shall

(i) have a minimum of [100] affiliated members;

(ii) have pursued its environmental protection objectives otherwise than for profit;

(iii) have a legal personality involving the possession of a constitution and/or rules of association; and

(iv) the area of environmental protection that their aims and objectives relate to shall be relevant to the subject matter of the leave application in question.

Head 5: Consequential amendments to section 37 of the Act

Provide that:

Consequential to the amendments to section 50A(3)(b)(ii) of the Act in Head 4, make appropriate amendments to section 37 (4)(d) to (f) of the Act relating to the entitlement of NGOs to make appeals to An Bord Pleanála:

(a) extend the minimum time period that NGOs must have pursued their environmental protection aims or objectives from the current 12 months to 3 years;

(b) introduce new requirements that NGOs shall also –

(i) have a minimum number of [100] affiliated members,

(ii) pursue their environmental protection objectives otherwise than for profit, and

(iii) have a legal personality involving the possession of a constitution and/or rules or articles of association.”

Under existing law, NGOs are granted an automatic right where: (i) the aims or objectives of the body relate to the promotion of environmental protection, and (ii) the body has pursued those aims or objectives during a period of twelve months preceding the making of the appeal.

Heads 4(5) and 5 seek to limit access. They require NGOs to have (i) pursued their aims and objectives for 3 years; (ii) to have a minimum of 100 affiliated members; (iii) to pursue their objectives on a not-for-profit basis; and (iv) to have a legal personality.

The new rules if enacted are likely to rule out a substantial number of NGOs and in particular locally based organisations and community groups that may be formed on an ad hoc basis in response to a particular environmental issue.

Further the provision may be so restrictive as to risk falling foul of EU law. Article 1(2) of the EIA Directive, read in conjunction with Article 11(3) thereof, requires that non-governmental organisations which promote environmental protection, “meeting any requirements under national law” are to be regarded either as having “sufficient interest” or as having a right which is capable of being impaired by projects falling within the scope of that directive. While it is up to national legislatures to determine these national requirements, any national rules are required to achieve two objectives. First, they must ensure “wide access to justice”. Second, they must render the provisions of the EIA Directive on judicial remedies effective. Accordingly, national rules must not be liable to nullify EU provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs (e.g. NGOs) are to be entitled to bring actions before the competent courts.

A requirement for NGOs to have a specified membership is problematic. A similar requirement, albeit requiring a much higher membership level of 2,000, has already been labelled as too restrictive by the Court of Justice of the European Union.³³ In that case, while the Court focused on the numerical requirement for membership, the Advocate General criticised the nature of the requirement itself. She stated that requiring “*environmental organisation to have a minimum number of members before it can have access to the courts could close the door to many groups which would have a legitimate interest in access to justice. In the present case, the provision*

³³ See: Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening* [2009] ECR I-09967, where a 2000 member requirement was found to be too restrictive.

penalises local environmental organisations harshly, denying them access to the courts even when the project under assessment has exclusively local impact.”³⁴

Moreover, in defining classes of NGOs which would and would not have access to the courts in this field, the proposal would also interfere, without any real or apparent justification, with the guarantees of equality and freedom of association enshrined in Article 40 of the Constitution.

4. Costs

Head 6 seeks to modify the entitlement of an applicant to maintain proceedings at a cost that is not prohibitively expensive. This entitlement arises where an applicant challenges a decision which is made pursuant to a statutory provision which gives effect to any one of the following four EU environmental law Directives: (i) the public participation provisions of the EIA Directive; (ii) the Strategic Environmental Assessment Directive; (iii) the Industrial Emissions Directive; or (iv) article 6 (3) or (4) of the Habitats Directive. This is often referred to as the “not prohibitively expensive rule”.³⁵ The not prohibitively expensive rule finds expression through section 50B of the PDA 2000 and/or under Part 2 of the Environment (Miscellaneous Provisions) Act 2011. Section 50B of the PDA 2000 creates a default position whereby a member of the public seeking to review a public decision will not be obliged to pay their opponents’ costs if they lose. If they win, they may be awarded some or all of their costs. The Court can also award costs in favour of the applicant in a matter of exceptional public importance and where, in the special circumstances of the case, it is in the interests of justice to do so.

The not prohibitively expensive rule stems from article 11 of the EIA Directive. Article 11 of the EIA Directive requires Member States to ensure that, in accordance with their national legal systems, members of the public “concerned” either (a) with a “sufficient interest”, or alternatively; (b) “maintaining the impairment of a right”; 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. In transposing this requirement into national law, Ireland opted to require a public party seeking to challenge an environmental decision to demonstrate “sufficient interest”. The alternative option to require the applicant to demonstrate the impairment of a right was not taken.³⁶

Pursuant to article 11 of the EIA Directive, once Member States give the public concerned “wide access to justice” ensuring that that the procedures are fair,

³⁴ Opinion of AG Sharpston, para 78.

³⁵ As required by section 50B 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; and article 9(3) of the Aarhus Convention.

³⁶ While commentators have sometimes suggested that Ireland should change its approach and instead, require a party seeking to bring judicial review proceedings to show the impairment of a right, this is not considered advisable for the following reason. It could enable a considerably larger number of judicial review challenges, post *Merriman & ors v Fingal County Council & ors* [2017] IEHC 695, in which Barrett J recognised a constitutional right to the environment (albeit in obiter discussion).

equitable, timely and “*not prohibitively expensive*”³⁷ Member States are allowed to determine:

- (i) at what stage the decisions, acts or omissions may be challenged; and
- (ii) what constitutes a sufficient interest, or the impairment of a right.

In turn, this EU requirement finds its genesis in article 9(2) of the Aarhus Convention.

Head 6 of the General Scheme seeks to modify elements of the Irish “*not prohibitively expensive*” rule to adjust the balance and, it is said, to deter spurious challenges. Head 6 seeks to achieve this by introducing the risk of some cost exposure for applicants through a measure which was recognised as permissible under the EIA Directive by the CJEU in Case C- 470/16 *North East Pylon Pressure Campaign Ltd* [2018].³⁸

Head 6 provides:

“The special legal costs rules in section 50B(2)-(4) of the Act of 2000 (“each party to the proceedings, including the notice party, shall bear its own costs”) relating to judicial reviews of decisions, actions, omissions or failures to take action pursuant to laws giving effect to the Environmental Impact Assessment (EIA) Directive, the Strategic Environmental Assessment (SEA) Directive, the Integrated Pollution Control (IPC) Directive and the Habitats Directive be amended and replaced by new legal cost capping arrangements as follows:

(1) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (S.I. No 15 of 1986) and subject to the following subsections, in proceedings to which this section applies, an applicant or defendant in a challenge may not be ordered to pay costs exceeding the amounts in subsections (2) to (4), or as varied in accordance with subsections (5) to (9).

(2) For an applicant, the amount is –

(a) [€5,000] where the applicant is claiming only as an individual and not as, or on behalf of, a business or other legal person;

(b) [€10,000] in all other cases.

(3) For the defendant, the amount is [€40,000].

(4) In proceedings with multiple claimants or multiple defendants, the amounts payable in subsections (2) or (3), subject to any direction of the Court under subsections (5) to (9), apply in relation to each such applicant or defendant

³⁷ Note: the CJEU has stated the prohibitive nature of costs must be assessed as a whole, taking into account all the costs borne by the party concerned (see, to that effect, judgment of 11 April 2013, *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, paragraphs 27 and 28).

³⁸ At para 61 the CJEU stated: “*It is therefore open to the national court to take account of factors such as, in particular, whether the challenge has a reasonable chance of success, or whether it is frivolous or vexatious, provided that the amount of the costs imposed on the applicant is not unreasonably high.*”

individually and may not be exceeded, irrespective of the number of receiving parties.

(5) The Court may vary the amounts under subsections (2) to (4) or may remove altogether the limits on the maximum costs liability of any party to the proceedings.

(6) The Court may vary such an amount or remove such a limit only if satisfied that –

(a) to do so would not make the costs of the proceedings prohibitively expensive for the applicant, and

(b) in the case of a variation which would reduce an applicant's maximum costs liability or increase that of a defendant, without the variation the costs of the proceedings would be prohibitively expensive for the applicant.

(7) Proceedings are to be considered to be prohibitively expensive for the purpose of these provisions if their likely cost (including any Court fees which are payable by the applicant) either –

(a) exceed the financial resources of the applicant; or

(b) are objectively unreasonable having regard to –

(i) the situation of the parties;

(ii) whether the claimant has a reasonable prospect of success;

(iii) the importance of what is at stake for the applicant;

(iv) the importance of what is at stake for the environment;

(v) the complexity of the relevant law and procedure; and

(vi) whether the claim is frivolous.

(8) When the Court considers the financial resources of the applicant for the purposes of these provisions, it must have regard to any financial support which any person has provided or is likely to provide to the applicant.

(9) A hearing (or any part of it) in relation to costs under these provisions shall be in private if it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality.

(10) The Minister may by order/ regulations vary the amounts specified in subsections (2) and (3) having regard to changes in the consumer price index between the financial year in which any such variations are being made and the financial year in which this Act is passed.”

In essence, Head 6 provides that where the “*not prohibitively expensive rule*” applies (e.g. where an applicant challenges a decision made pursuant to a statutory provision which gives effect to: (i) the public participation provisions of the EIA Directive; (ii) the Strategic Environmental Assessment Directive; (iii) the Industrial Emissions Directive; or (iv) article 6 (3) or (4) of the Habitats Directive), the costs payable by either the applicant or the defendant can be capped by the Court, as follows:

- For an applicant, who is an individual, the proposed cap is €5,000. Where there is more than one applicant, the proposed cap is €5,000 per individual. Where the applicant is not an individual the proposed cap is €10,000.
- For the defendant, the proposed cap is €40,000. Where there is more than one defendant, the proposed cap is €40,000 per entity.

The introduction of these proposed caps would represent a new default position. Head 6(6) permits the Court to vary or remove the caps, where doing so would ensure the proceedings were not prohibitively expensive for the applicant. Head 6(7) provides a list of criteria which can be used to assess whether proceedings are prohibitively expensive. These criteria (which follow the guidance provided by the CJEU in Case C-260/11 *Edwards*³⁹ para 36 – 48) include the following:

(a) *exceed the financial resources of the applicant; or*

(b) *are objectively unreasonable having regard to –*

(i) the situation of the parties;

(ii) whether the claimant has a reasonable prospect of success;

(iii) the importance of what is at stake for the applicant;

(iv) the importance of what is at stake for the environment;

(v) the complexity of the relevant law and procedure; and

(vi) whether the claim is frivolous.

Head 6(8) permits the Court to factor in the provision of any financial support in its assessment of the applicant’s resources. Head 6(9) allows a hearing relating to costs to be held privately where matters of confidentiality are being discussed. Head 6(10) allows the Minister to vary the caps to reflect changes in the consumer price index.

The position is similar to that in the UK, where cost capping, rather than shifting, applies. The Explanatory notes in the General Scheme confirm that the intention here is to tighten up the current costs rules and to increase the financial risk of bringing judicial review proceedings. While framed as forming part of the State’s implementation to the not prohibitively expensive rule imposed under EU and international law, there is no doubt that if enacted the proposed new costs regime will deter environmental litigation. The proposal raises fundamental issues in terms of equality of arms in access to justice in environmental matters and, in this way, offends constitutional principle both as a matter of Irish and EU law. In practice, it would have

³⁹ [2013] EU:C:2013:221 (11 April 2013).

a chilling effect on litigants and lawyers involved in environmental litigation in the public interest.

5. Legal aid and class/multi party actions

One of the biggest obstacles to public interest law is the express restriction on civil legal aid being granted in public interest and multi-party actions, as set out in Section 28(9) of the 1995 Act:

“Legal aid shall not be granted by the Board in respect of...

(viii) a matter the proceedings as respects which, in the opinion of the Board, are brought or to be brought by the applicant as a member of and by arrangement with a group of persons for the purpose of establishing a precedent in the determination of a point of law, or any other question, in which the members of the group have an interest;

(ix) any other matter as respects which the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned.”

Representative or multi-party actions are an effective way for marginalised persons to vindicate their rights in court. In its consultation paper on multi-party litigation, the Law Reform Commission recommended that the 1995 Act be interpreted as allowing legal aid for representative actions.⁴⁰ Despite such reform being desirable in terms of access to justice, increased efficiency and greater consistency in the law, this recommendation has not been followed.⁴¹

Recommendation 3

Any form of legislation in relation to procedures governing claims in environmental law and /or other public interest law matters should include an amendment to section 28(9) of the Civil Legal Aid Act, to allow for legal aid in class/multi-party actions.

⁴⁰ Law Reform Commission, Consultation Paper on Multi-Party Litigation (Class Actions) (LRC CP 25–2003) <https://www.lawreform.ie/_fileupload/consultation%20papers/cp25.htm>.

⁴¹ Public Interest Law Alliance (PILA), 'FAQ on Class Actions' <<https://www.pila.ie/resources/faq-on-class-actions/>> accessed June 2019.