

## Nature Conservation in Europe: Approaches and Lessons

### Annex IE.2. The Public and NGOs' Access to Justice in Nature Conservation Matters in Ireland by Taking Cases to Court

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Ireland's standard rule on legal costs in litigation is the 'loser pays'.<sup>1</sup> Under this system, an individual or NGO taking a legal action and losing could easily face a bill of >€100 000,<sup>2</sup> which is evidently prohibitively expensive. In light of obligations under the Aarhus Convention and EU law, Ireland made new legislation in 2010/2011 that sought to address this by introducing a system of 'costs shifting', under which an individual or NGO could take certain cases knowing that they would not be exposed to the other side's legal costs if they lost, and that the court could award the winning applicant (but not respondent) their costs (or part of them) if they won (Browne *et al.*, 2021). The result is that, where these special costs rules apply, individuals and NGOs can potentially find lawyers willing to act for them on a conditional fee ('no win, no fee') basis, with the lawyers expecting to be paid from the costs recovered from the losing respondent if the case is successful.

The 2010/11 legislation has provided much improved access to justice but has been hampered by the uncertain scope of the special rules, albeit the law was amended in 2018 to provide explicitly that the rules apply to cases under Habitats Directive Article 6(3) and (4),<sup>3</sup> and the Supreme Court ruled in 2022 that, in effect, all planning permission challenges now fall under the special rules.<sup>4</sup> However, the government has recently proposed far-reaching changes to these special costs rules as well as to the rules on standing in planning judicial review cases, which would if enacted have the effect of restricting access to justice. This has been done by way of the draft Planning and Development Bill 2022.

On the question of costs, the Bill proposes that in all proceedings relating to non-compliance with EU or national law relating to the environment, the court must make no order as to costs, unless the court considers that the proceedings are frivolous or vexatious or constitute an abuse of process. This means that NGO and individual applicants litigating environmental law will go into court knowing that they do not risk bearing the other side's costs if they lose. However, it also means that the court will no longer have the discretion to award a winning applicant its costs (or part of them) if the applicant wins, meaning that public interest litigants will not be able to find lawyers willing to act for them on a 'no win, no fee' basis, because there will be no prospect of the legal team being paid in this way. In place of this, the Bill states that an 'administrative scheme to deal with costs in Judicial Review proceedings under this Part is to be established' (s.250). No further details have been provided. Assuming that what is envisaged is some sort of legal aid scheme, the following point made in the report of the Sullivan Review (2008) in the UK context seems apposite: 'It is [...] important that legal aid is not seen as, and does not become, "the only game in town" for environmental litigation and ensuring compliance with Aarhus. Proper and effective access to justice is likely to require a range of funding options.'

Regarding standing, the Bill proposes a range of changes that will, if enacted, adversely affect access to justice in nature cases.<sup>5</sup> It is important to emphasise that these questions of costs and

<sup>1</sup> Order 99 of SI 15/1986, as amended.

<sup>2</sup> For example, see the Klohn case, described by Simons (2012) as a 'common or garden planning judicial review', in which Mr. Klohn fell liable to pay almost €120 000 on losing his case (€32 000 to his own legal team and €86 000 for the respondent's costs): see the Opinion in Case C-167/17 *Klohn*. Following the CJEU's judgment in that case, the Supreme Court reduced Mr. Klohn's liability for the respondent's costs from €86 000 to €1 250: *Klohn v An Bord Pleanála* [2021] IESC 51.

<sup>3</sup> See s.50B of the Planning and Development Act 2000 (as amended) and Part 2 of the Environment (Miscellaneous Provisions) Act 2011 (as amended).

<sup>4</sup> *Heather Hill v. An Bord Pleanála* [2022] IESC 43.

<sup>5</sup> See s.249(10) of the Bill: [www.gov.ie/pdf/?file=https://assets.gov.ie/245627/be71aebe-a594-4b3c-bffb-89ddf8e1ed95.pdf#page=null](https://www.gov.ie/pdf/?file=https://assets.gov.ie/245627/be71aebe-a594-4b3c-bffb-89ddf8e1ed95.pdf#page=null)

standing remain proposals at the time of writing (March 2023), and the Bill is currently undergoing pre-legislative scrutiny before an Oireachtas (parliamentary) committee. As part of its submission to that committee, the Law Society of Ireland (2023) emphasised that it ‘would be concerned that any changes are carefully scrutinised for compatibility with the [Aarhus] Convention and EU Law in order to avoid new delays in judicial review proceedings as settled questions of law are reopened’.

### **References**

- Browne, D., Quinn, C. & Slattery, B. (2021) *Simons on Planning Law*. 3<sup>rd</sup> edition. Dublin: Round Hall.
- Law Society of Ireland (2023) Draft Planning and Development Bill 2022, Joint Committee on Housing, Local Government and Heritage, Opening Statement - 2 March 2023, [www.lawsociety.ie/globalassets/documents/submissions/2023-opening-statement-draft-pd-bill.pdf](http://www.lawsociety.ie/globalassets/documents/submissions/2023-opening-statement-draft-pd-bill.pdf)
- Simons, G. (2012) *Unresolved issues under the Planning and Development (Amendment) Act 2010*. Paper given at Round Hall conference in Dublin on 10 November 2012. Dublin: Round Hall.
- Sullivan Review (2008) *Ensuring access to environmental justice in England and Wales*. Report of the Working Group on Access to Environmental Justice.

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