Request to The President of Ireland

to convene the Council of State to consider referring the Planning and Development (Amendment) Act 2010 to the Supreme Court to determine the constitutionality of the amendments to Section 50 of the Planning and Development Act 2000

Report and Final Stages, Seanad

Counsel's Opinion

FIE Press Release

July 2010

President Mary McAleese
Áras an Uachtaráin,
Phoenix Park,
Dublin 8
6 July, 2010

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Request to convene the Council of State to consider referring the Planning and Development (Amendment) Act 2010 to the Supreme Court

Mam;

We write to request you to convene the Council of State to consider referring the Planning and Development (Amendment) Act 2010 to the Supreme Court to determine the constitutionality of the amendments to Section 50 of the Planning and Development Act 2000.

These amendments purport to implement Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in matters relating to the environment and amending our rights to public participation and access to justice.

In fact, Section 33 (2) of the Planning and Development (Amendment) Act 2010 states:

> (2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts and subject to subsections (3) and (4), in proceedings to which this section applies, each party (including any notice party) shall bear its own costs.

The effect of this is to deny even successful litigants the right to recoup the enormous costs of pursuing litigation in the High Court and Supreme Court. Irish NGOs in particular are poorly resourced and would be acting recklessly if they sought the assistance of the courts in obtaining constitutional and European law rights under this amendment. Ordinary members of the public will find it impossible to obtain legal representation necessary for the access to justice that European law requires.

The exceptions provided require the litigant establish that the matter is of "Public Importance" AND that there are "Special Circumstances" AND that it is "in the Interests of Justice" to make such an award of Costs – a clear barrier to our access to justice.

We would therefore be most grateful if you would convene the Council of State to determine if the matter should be referred to the Supreme Court to ensure that it is accordance with our constitution and our rights as European citizens before you sign into law this legislation.

Yours, etc,

Tony Lowes
Caroline Lewis
Directors of Friends of the Irish Environment

Planning and Development (Amendment) Bill 2009
[Seanad Bill amended by the Dáil]: Report and Final Stages, Seanad

Wed 14th July 2010

Senator Ivana Bacik:
Generally we see much of this Bill as being progressive in import, but there has been a difficulty - in terms of the lack of scrutiny that has been enabled - for both Houses. Given that 90 amendments were never reached in the Dáil and given the number of amendments made by the Dáil with which we are presented now, it is essentially a new Bill that has come before the Seanad today. Given it is a Bill that started in the Seanad and on which we had an opportunity to debate amendments previously, it is unfortunate we are confronted with such a volume of new amendments at this stage.
Some of the amendments deserve more scrutiny, particularly amendments which could have the effect of limiting access to the courts for individual litigants, particularly environmentalists. These are a serious concern. With respect, I refer, in particular, to amendment No. 57 to section 33 of the Bill because the new section 50B it inserts will have a seriously chilling effect on litigation in the environmental field.
Senator David Norris: It will also be relevant to group 11.
Senator Ivana Bacik: I take the point being made by Senator Norris that this is also relevant to group 11 and will wait to speak further on it when we reach that group. Having made the point, it is unfortunate we are faced with pressure to complete this. I know we are short of time and that this is the last sitting day. I do not want to lay the issue at the Minister of State's door, but it is most unfortunate that a Bill of this import, with the sort of impact it will have on local democracy, is being rushed through in this way and that we are faced with amendments which were never scrutinised in the Dáil and with which we are confronted for the first time.
……………………
Senator David Norris: I am interested particularly in the alterations to section 33 and the introduction of a new section 50B. This relates to cost recovery and, as I mentioned at the beginning of this debate, the whole matter of the way in which we implement European regulations and directives that require planning decisions to be fair, equitable, timely and not prohibitively expensive. The problem is the section operates on the assumption that adequate compliance is granted with Article 10A, in the sense that applicants can be protected from legal costs ordered against them and that Article 10A does not require that applicants are assisted with their own legal costs. There is a real question about this and whether the section in fact amounts to compliance by Ireland at all. People can be accruing costs for their own side and this only-----
Acting Chairman (Senator Jim Walsh): Will the Senator clarify to which section he is referring?
Senator David Norris: Section 33.
Senator Paudie Coffey: Amendments Nos. 91 and 92, I presume.
Senator David Norris: I understood this was dealing with cost recovery, according to the helpful note. If it is dealing with cost recovery then it certainly should deal with this matter. My brief states that the cumulative effect of the provisions may well be to reduce the capacity of the public to challenge important planning decisions because of the question of costs recovery. If this is incorrect, I am happy to stand corrected but it states very clearly, cost recovery, consultation and directive requirements.
Acting Chairman (Senator Jim Walsh): To which particular amendment is the Senator speaking?
Senator David Norris: I am dealing with group 11 amendments. My briefing notes state that this is the subject matter of these amendments. If I am wrong, then I apologise but this is what the advice states. In any case, the principle certainly stands. For example, if a litigant, an applicant for review, is successful, it is only in the most exceptional circumstances that he or she can recover the costs incurred in making a legal challenge. Otherwise the applicant's full costs spent on lawyers and other necessary environmental experts can never be recovered. This replaces the ordinary rule whereby a successful applicant is only entitled to recover the cost of proceedings. The position of the ordinary citizen is actually disadvantaged as a result of this amendment. I am sorry if I have got it wrong but if I have, it is under official advice. I am talking specifically about the new section 50B introduced in section 33, if the Minister of State is interested in seeing it. What about people who may well conduct their proceedings successfully, briefly and efficiently but in most cases at a heavy cost to themselves, unless they choose to do so without a lawyer? That is the effect of this new amendment. I am very concerned

about that because there may be something unintentional here and the interests of ordinary citizens may be militated against unintentionally by the operation of the new section.
In light of this, there should be a specific transitional provision. The Act could apply to proceedings instituted after the commencement or to proceedings issued in respect of acts or omissions which occurred after commencement. The latter would seem to be preferable as using the former would create an incentive to institute proceedings in a rush to have them started pre-commencement. In other words, it could be used as an incentive and this would have a very bad impact, although an unintentional one, on the legislation.

Senator Ivana Bacik: I echo what Senator Norris has said on the issue of cost recovery and on section 33. I agree it gives cause for concern. It is about how the Bill is implementing the provisions of the directive. There is a concern and it has been raised with me by environmentalists and others that the Bill may be in breach of the provisions of the Aarhus Convention guaranteeing access to justice because of the change it makes. Although it protects applicants from legal costs orders against them, as required by the directive, the section really does not do this. The effect of the section will be to exacerbate and worsen the power imbalance that exists between individual environmentalists who litigate and the developers against whom they are generally litigating. Following the bringing into force of this section, which was not, I understand, debated in the Dáil, the environmentalists will be left with no option but to represent themselves in court. There will be significant costs, especially to a solicitor, in taking on a case like this, such as overheads and so on. Many solicitors, as we know, may do that currently on a no foal, no fee basis. There is a concern about access to justice and about its effect upon that. Senator Norris has put it very well. The provisions in some of the amendments in this group 11 refer to reasonable costs. We all agree that costs have to be reasonable and there has been recent reporting about the scandalously high level of legal costs in particular cases. I query as to who determines this. I see it as a theme running through the Bill. The board will determine the matter, according to amendments Nos. 90 and 91. That is why we need to scrutinise provisions to ensure they will not have a chilling effect on environmental litigation or worsen the power and money imbalance between the majority of individual litigants in such cases and the people against whom and the organisations and companies against which they litigate. We must be careful to ensure we are adequately complying with the directive and not worsening the power imbalance and obstructing litigants in taking action in planning cases.

Deputy Ciarán Cuffe: The Acting Chairman has shown significant, if not exceptional, latitude in allowing speakers to raise significant issues in commenting on a new subsection, inserted in all three sections, which requires An Bord Pleanála to state the reasons for its decisions and it is attaching related conditions. The subsection also empowers it to recover its costs. In the interests of permitting discourse and debate on the significant issues to which the Senators referred, I will refer to section 50B. The question was asked why the new cost rule was required. Its genesis is in Article 10A of the EIA directive which was inserted by the so-called public participation directive, 2003/35/EC. Member states are required to provide for a review procedure that is not prohibitively expensive. Specifically, the new rule is required to ensure Ireland complies with the judgment of the European Court of Justice. Ireland was the subject of EU infringement proceedings relating to the public participation directive which culminated in the judgment of the European Court of Justice last summer, which upheld the system of judicial review as a suitable review mechanism for the purposes of the directive. The court ruled that the judicial review procedure did not meet the requirement that it not be prohibitively expensive. The amendment seeks to remove the cost barrier by ensuring applicants will only be responsible at most for their own legal costs when they initiate judicial review proceedings. The court retains discretion to make a different cost order in specified circumstances. The amendment aims to avoid providing an undue incentive to initiate judicial review proceedings but also removes the very real risk that if the current cost rules were to be litigated before the European Court of Justice, they would be found to be in breach of the terms of the public participation directive.
How will this impact on individuals and NGOs in seeking to challenge decisions? In practice, anyone seeking a judicial review of a decision covered by the new rule will have clarity in advance on the legal costs to be incurred. Regardless of whether they are successful, such individuals will only be responsible for their own costs. Some have asked if this will have a negative impact on *pro bono* representation. The legal profession has a proud history of providing its services without charge, *pro bono publico*. A majority of judicial review applications challenging planning decisions fail and in most cases the lawyers involved will not receive payment. Notwithstanding this, there is no evidence that applicants will not be able to secure legal representation because practitioners are willing to give of their time and provide their services *pro bono publico*. In practice, the deterrent to engaging in judicial review proceedings is not a supposed difficulty in securing legal representation but rather the risk of exposure to liability for the costs of the other side.

Senator Ivana Bacik: I thank the Minister of State for taking the time to respond on the arguments made by Senator Norris and me. The provision may have a chilling effect, even though this is not the intention of the Minister of State. Subsection (4) which changes the entitlement of the court to award costs in favour of a party significantly raises the bar in terms of when costs can be awarded. I do not practise in this area, but many who do, particularly barristers, do *pro bono* work. It is asking a lot of a solicitor who may have significant overheads in running a case such as this to bear these costs or to insist that litigants bear their own costs because there will be no prospect of winning unless one gets over this very high bar. Subsection (4) may have the unforeseen chilling effect of preventing or obstructing litigation other than by those who have sufficient money to bear their costs. I accept the points made by the Minister of State that in most cases it will prevent costs being awarded against people. That is an advance, but subsection (4) sets the bar too high.
Acting Chairman (Senator Jim Walsh): The Minister of State is not required to reply.
Deputy Ciarán Cuffe: It is a challenge to respond to the judgment of the European Court of Justice, but a balance must be struck. We do not want to see the courts being clogged by judicial review proceedings. How can we strike the right balance? This brings us back to the definition of *pro bono publico*, which means one is acting for the public interest. We must wait and see how this works in practice. I hope it will represent a suitable transposition of the directive which the Green Party wants to be implemented in a consistent, robust and democratic fashion.

Re: Proposed amendments to the Planning Act

The State has been obliged, pursuant to Article 10A of the Environmental Impact Assessment Directive, as inserted by the Public Participation Directive 2003/35/EC to give effect to a review procedure whereby the public concerned may bring reviews of the decisions of relevant authorities on environmental impact assessments.

Last year, Ireland was found to be in breach of its obligations under these Directives by the Court of Justice in the case of *Commission – v – Ireland* (Case C427/07).

In this case, the Court of Justice held that Ireland had failed to meet its obligations under Article 10A in that Ireland had not put in place a mechanism to ensure that applicants for judicial review and, in particular, unsuccessful applicants for judicial review were not exposed to prohibitive costs under the normal cost provisions under Order 99 of the Rules of the Superior Courts.

Since the judgment of the Court of Justice, Ireland has been under pressure to legislate in a manner that will protect applicants in judicial reviews in respect environmental impact assessment decision from prohibitive cost orders. It would now appear that the State is intending to implement Article 10A by means of Section 50B of the Planning and Development Bill 2010.

This section provides that challenges to decisions made by competent authorities pursuant to the EIA Directive will no longer be covered by the provisions of Order 99 and that instead no orders for costs shall be made.

Section 50B(2) of the proposed Bill states a follows:

"50B(2). Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts and subject to subsections (3) and (4) in proceedings to which this section applies each party (including any notice party) shall bear its own costs."

This is subject to a new provision at Section 50B(3) which states as follows:

"The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so –

- *a. Because the Court considers that a claim or counterclaim by the party is frivolous or vexations;*
- *b. Because the manner in which the party has conducted the proceedings; or,*
- *c. Where the party is in contempt of Court."*

Accordingly, it would appear that there remains a discretion for the Court to award costs against a party to proceedings in certain circumstances.

It would appear, therefore, that there is a potential sanction through costs and that certain parties may have an order for costs made against them if they conduct the proceedings in a particular manner or if the Court considers that a claim or counterclaim is frivolous or vexatious.

In addition to the foregoing, Section 50B(4) states as follows:

"50B(4) Subsection (2) does not affect the Court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where the special circumstances of the case it is in the interests of justice to so do".

There is, therefore, a possibility of a successful applicant having a costs order made in its favour but only in circumstances of exceptional public importance and where, in the special circumstances of the case it is in the interests of justice to do so. These requirements are conjunctive.

The effect of this Planning Bill is quite obvious. While applicants for judicial review in respect of EIA Directives will no longer be exposed to significant costs orders in the event that they are unsuccessful, Applicants will now have to fund their own legal

bill themselves, regardless of the merits of their case and the probabilities of success or indeed, the fact of actual success.

While there is an exception at 50B(4) to this rule whereby in certain circumstances an applicant may obtain an order for costs in its favour, the requirements to be met in advance of such an order being made are set so high that it could only apply in an extreme minority of cases.

The words used in section 50B(4) of *"exceptional public importance"* already have been interpreted at length by the Courts in the context of certificates for leave to appeal and it is well established that this is an extremely high and difficult bar to reach and has only ever been reached in a very small number of cases.

The second requirement of '*special circumstances of the case*' will require some interpretation but given that this requirement runs conjunctively, it will only cover cases where there is both an issue of exceptional public importance and where, in special circumstances arising from the facts of a particular case or in the nature of a particular applicant that merit an award of costs being made.

I simply could not see any lawyers – solicitors or barristers – engaging in litigation on a contingency basis having regard to this exceptionally high threshold.

Therefore, this new section will have a significant impact on the rights of future applicants in EIA judicial reviews. These provisions will also have significant impacts on the legal profession and, in particular, on the legal profession's ability to act on a contingency or *pro bono* basis for applicants in cases of this nature.

The question arises as to whether or not the proposed section is in accordance with the requirements of the Directive and, perhaps more importantly, in accordance with the requirements of the Constitution.

Taking the requirements of the Directive first, on its face, the proposed Bill does seem to deal with the issue of there not being any limit or cap on the exposure of unsuccessful applicants to legal costs in judicial reviews of Irish EIA decisions. That

is to say, unsuccessful applicants now no longer face necessarily face the situation of having to pay the legal costs of multiple respondents and notice parties in the event that they are unsuccessful in a challenge to an environmental impact assessment decision.

This lack of a ceiling was particularly criticised by the Commission in the challenge before the Court of Justice.

However, the purpose of the Public Participation Directive is twofold. Firstly, it is designed to protect the rights of the public concerned to participate in environmental impact assessment decisions for the purposes of protecting their own and their community's rights.

Secondly, it is the purpose of the Directive to improve environmental impact assessment decisions by enabling full public participation in respect of same and, if necessary, by ensuring a review mechanism through the Courts to make certain that decisions made in environmental impact assessment are legally valid. It occurs that the current proposal by Ireland through Section 50B will not achieve either of these results.

The public concerned will be forced, regardless of the strengths or otherwise of their case, to fund the litigation in its entirety themselves. This is likely to present a very significant deterrent to many seeking to bring a review of an EIA decision as they will not have access to members of the legal profession who might be prepared to take a good stateable case on a contingency or near contingency basis in the hope of being able to recover the costs of so doing from a respondent in the event that they are successful.

EIA decisions only arise in the context of substantial developments that exceed the thresholds for the requirements for an environmental impact statement and assessment set out in the EIA Directive and in the domestic regulations made thereunder. Any challenges to developments of this nature almost invariably end up in the Commercial Court and therefore require significant commitments from solicitors and counsel for them to be brought through the Court. These commitments come at a cost that is very

considerable and is likely to form a very significant bar to members of the public concerned seeking to bring such challenges.

Moreover, those most likely to be affected by this will be those non-governmental organisations involved in environmental protection and who have limited resources at their disposal. Such NGOs are afforded special protection and mention in Article 10A and have an automatic right of standing to bring reviews of environmental impact assessment decisions.

These applicants will simply be unable to sustain challenges through the Courts in the event that this legislation is passed. I can confirm that I have spoken to members of An Taisce in this relation (and other NGOs) and they have confirmed that they fear that this proposal will end any possible involvement they may have in this type of litigation.

An Taisce have indicated to me that they simply would not have the funding to sustain any challenges through the Courts if they had to pay their legal teams on an own client basis.

Many other applicants, such as Friends of the Irish Environment and any number of private individuals who are concerned with environmental protection and who have litigated on their own behalf, will not be in a position to do so into the future if this Bill becomes law.

In light of the foregoing, therefore, it is difficult to see how the interests of the public concerned for the purposes of the Directive and the ends to be achieved by the Directive will be met by the current proposal in Section 50B of the Planning and Development Bill 2010.

This new proposal also appears to run somewhat at odds with the more recent developments in the Strategic Infrastructure Act 2006 and the Planning and Development Act 2000 wherein, for example, costs of participation in oral hearings before An Bord Pleanála, may be recovered by parties to the appeal from the proposer

of the development. It is quite striking that no similar proposal exists in relation to a challenge or a review of such a decision. This is somewhat incongruous.

In addition to the foregoing, it is also well accepted that the possibility of having to pay significant legal costs in the event that a decision maker is unsuccessful in defending its decision provides a significant incentive to decision makers to ensure that their decisions are made in accordance with law. Fear of being successfully judicially reviewed and fear of the attendant costs incurred in such challenges has improved environmental decision making. Removing such a sanction for poor decision making is, in my view, not consistent with the purpose of the Directive.

In addition to the foregoing, the directive requires that any review process shall be *'fair, equitable, timely and not prohibitively expensive'*. It is difficult to see how a successful applicant having to bear its own costs could be considered fair or equitable.

Moreover, in removing the possibility of recovery of costs in the majority of cases the new section will inevitably reduce the ability of public concerned to engage proper legal representation. This in turn will inevitably result in an inequality of arms in these cases.

In light of the foregoing, I doubt very much if the proposed bill meets the *'results to be achieved'* of the Directive.

However, it appears to me that the biggest issue facing the proposed bill is that of its Constitutionality.

The new Section 50B will create a situation where those who come to Court to exercise their Constitutional right of access to the Courts, often for the purposes of protecting their private property rights, will not be in a position to recover the costs and expenses that they were forced to incur in order to so do.

This is particularly difficult as, increasingly, environmental decision making on the foot of EIA is setting the standard for what a reasonable person is and is not expected to endure without a cause of action in nuisance or otherwise.

For example, in the decision of Ms Justice Laffoy recently in *Smyth – v – The Rail Procurement Agency & Ors.*, the court applied a yardstick in respect of acceptable noise thresholds at the level that is generally set in environmental impact assessments. Accordingly, environmental impact assessment decisions are setting the standard that will be applicable in private litigation and will therefore be affecting the private property rights of individuals.

Similarly, any person wishing to protect their own personal property from the immediate threat of a proposed development that they consider will adversely affect their private property rights will now do so without any hope of recovering the costs of so doing regardless of whether they are successful in this attempt or not.

This places, in my view, an unduly onerous burden on those exercising their Constitutional rights successfully as they will have no hope of recovering the costs of so doing under Section 50B as it is unlikely that those asserting a private interest will ever reach the exceptional public importance threshold required by Section 50B(4) of the Bill.

This will create a situation whereby those applicants who successfully challenge decisions of planning authorities that adversely affect their private property rights and that were subject to an environmental impact assessment are now to be treated differently to those who successfully challenged decisions that are not subject to environmental impact assessment.

While it is true that the Directive gives those who wish to challenge EIA decisions a higher level of protection than those who wish to challenge non-EIA decisions, nevertheless, this of itself would not violate any principles of equality as the Directive merely gives additional rights to those who are challenging environmental impact assessment decisions.

However, Section 50B takes away the rights of successful applicants to recover their costs and it is this subtraction of rights that, in my view, may be contrary to the Constitution.

This new proposal means that those who are of limited means, but who wish to protect their own private property rights may be precluded from doing so as they will be unable to obtain legal representation who will be prepared to act for them on a contingency basis as they would not ever be able to hope to recover any recompense in respect of same. At a basic level, the outlays alone in a case might be beyond what such a person might be able to afford.

It is also possible that this current proposal may fall foul of the European Convention on Human Rights in circumstances where the right to participate and obtain a fair hearing in planning decisions, including those involving an environmental impact assessment, has been considered necessary to vindicate property rights as it engages Article 6 of the Convention (*Ortenberg – v – Austria* refers).

Similarly, those wishing to challenge such decisions where their own property rights are adversely affected ought to be entitled to do so in a court, safe in the knowledge that if they are successful in such vindication, that they would be able to recover the costs of so doing from the decision maker of the decision impugned.

Further to the above, it occurs that the distinction between successful applicants in EIA cases and successful applicants in ordinary judicial reviews of planning decisions, not involving an environmental impact assessment may violate Article 40.1 of the Constitution. As you are aware, Article 40.1 states as follows:

> *"1. All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."*

It is well established that inequality of the law can arise in a number of circumstances but it clearly arises in circumstances where like applicants are treated differently and unlike applicants are treated the same.

It appears that in the context of the proposed amendment to Section 50, it is arguable that like persons (those who are successful in judicial review proceedings in respect of

the vindication of their own private interests) will be treated differently depending on whether or not the decision involved an environmental impact assessment.

This would appear to violate the principle of equality before the law. This issue has arisen in a number of cases and perhaps the clearest statement in relation to Article 40.1 is that given by Mr. Justice Walsh who said in *De Burca – v – Attorney General* [1976] IR that the article:

"Imports the Aristotelian concept that justice demands that we treat equals equally and unequals unequally."

Interestingly, the issue of equality before the law has been discussed in a number of cases involving legal costs.

In *O'Shaughnessy – v – The Attorney General*, the validity of the Criminal Justice (Legal Aid) Act 1962 was challenged on the basis that it was unconstitutional in providing assistance in respect of costs to those involved in criminal proceedings, but did not do likewise for civil litigants. This, it was argued, breached Article 40.1 of the Constitution.

However, O'Keeffe P. held:

"It is for the legislature to determine how the personal rights of the citizen are to be vindicated. The Act is not to be held invalid on the ground either that the Courts consider that the priority should be different, or that, in providing assistance to those charged with criminal offences, the State has elected not to provide any assistance to those persons whose civil rights have been affected. I do not consider that legislation of this kind fails to accept or acknowledge the equality of all citizens before the law".

This judgment was given in the context of the granting of assistance and legal aid as something above and beyond the norm, and the Court held that it was open to the State to only choose to provide assistance to those facing criminal sanction. This is markedly different to a circumstance in which those involved in civil litigation can expect to achieve materially different outcomes from similar cases in circumstances

where there is not any additional benefit afforded to those in one category, but yet it is taken away from those in another.

No doubt the State will seek to argue that the removal of a hazard in the form of a costs order being made against unsuccessful applicants balances the subtraction of the entitlement to recover costs on the part of successful applicants. However, the classes of person in each, it appears to me, are different.

The classes of person who are adversely affected are those who are successful in litigation arising from a challenge to a decision on a planning decision. These persons do not derive any benefit from the removal of the hazard for a different class of person, namely those who have been unsuccessful in their litigation.

It is the subtraction of the right of those who are successful to recover their costs of their labours in being successful that I think is problematic, and I cannot see how this could be balanced against the protection afforded to a materially different class of person, namely those who have been unsuccessful in their case.

In another case, that of *Dillane – v – The Attorney General*, a challenge was brought to Rule 67 of the District Court Rules 1948, whereby the general power afforded to a District Judge to award costs against any party to proceedings was denied in the context of the Attorney General or a member of the Garda Siochána acting in discharge of his duties as a police officer.

In the case, the Applicant had been successful in defending a criminal prosecution and had been unable to recover his costs in respect of same. It was contended that the Rule contravened the requirement in Article 40.1 that all citizens as human beings be held equal before the law. In his judgment, Mr. Justice Henchy held as follows:

"Treating Rule 67 as part of the enactments of the State, I consider its discrimination in favour of a member of the Garda Siochána to be justifiable under this Constitutional provision on the ground of social function. This case arises in the context of the prosecution in the District Court by a Garda, in his own name, of the Plaintiff for summary offences. The prosecutor in such a case must be either the

Director of Public Prosecutions (on who the functions of the Attorney General in criminal matters have devolved pursuant to Section 3 of the Prosecution of Offences Act, 1974) or a common informer…

The effect of the rule, therefore, in its application to a case such as this, is that the District Justice may grant costs or witness expenses to an accused if the person who prosecuted his claim is not a member of the Garda Siochána, but he is debarred from making such an award if the prosecutor is a Garda acting in discharge of his duties as a police officer. It is the latter requirement for immunity from costs or witness expenses that, in my opinion, provides a valid Constitutional justification, on the ground of social function, for the discrimination complained of between one kind of common informer and another. When the State, whether directly by statute or immediately through the exercise of a delegated power of subordinate legislation, makes a discrimination in favour of, or against, a person or a category of persons, on the express or implied ground of a difference of social function, the Courts will not condemn such discrimination as being in breach of Article 40.1 if it is not arbitrary, or capricious, or otherwise not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of. It seems to me to have been well within the law making discretion allowed by Article 40.1 for the District Court Rules Committee to draw a distinction between, on the one hand, a common informer who is a Garda acting in discharge of his duties as police officer and, on the other, a common informer who is either a mere member of the public or a Garda not acting in discharge of his duties as a police officer. Whether the Court supports or approves of that distinction is irrelevant, what matters is whether it could reasonably have been arrived at as a matter of policy by those to whom the elected representatives of the people delegated the power of laying down the principles upon which costs are to be awarded".

The Court went on to state that:

"Having regard to the overriding public policy desire that members of the Gardaí are able to prosecute offences without fear of retribution through costs and witness expenses, that this discrimination was justifiable."

It occurs that, in the proposed Section 50B, a similar discrimination exists.

There will, in effect, be two types of applicant; the first being an applicant in an environmental impact assessment case and the second being an applicant in a non-environmental impact assessment case. The first of these applicants will have no entitlement to recover his costs if successful and the latter applicant will. There is no particular difference of capacity, physical or moral, and nor is there any operation of social function that requires this particular discrimination.

Again, it can be expected that the State will argue that this is necessary for it to give effect to its obligations and duties under the Directives. However, it is hard to see how that could be so in circumstances where the ends to be achieved under the Directive do not require necessarily (or at all) that successful applicants in judicial reviews of planning decisions should be penalised in this fashion.

Leaving to one side the Constitutional issue of equality before the law, there remains also the Constitutional issue of access to the Courts. Again, it would appear that there is a difficulty in this regard.

As has been stated previously, Section 50 requires those who wish to vindicate their rights by means of a challenge to a decision of a planning authority to do so by way of a judicial review. These persons, in the context of an EIA case, can only now do so if they bear their own legal costs and they have no hope of recovery of these legal costs even if they are successful.

The issue of the Constitutionality of costs orders has been considered in a number of cases.

In *Re Michael Orr (Kilternan) Limited* [1986] IR 273, O'Hanlon J held, in relation to stamp duty provisions, that they imposed extraordinarily heavy burdens on persons engaged in litigation before the High and Supreme Courts who wish to avail of *"the administration of justice"*.

Given that, as has already been stated, cases involving EIAs involve the filing of very substantial paperwork, the compilation of extensive exhibits including environmental impact statements of great length and that all of these are often required to be repeatedly produced for numerous notice parties and Respondents and that, on regular occasions such matters are adopted into the Commercial List, the logistical costs associated with a judicial review of this nature will be substantial.

This feature will be further complicated by the fact that the new section 50A(2) requires the application to be made *ex-parte* rather than on notice and within the normal eight week period. In other words, an applicant for leave will be required to put together a full set of papers, probably including the full planning or appeal file, and move its application within eight weeks.

This application for leave will have to meet the normal thresholds set out in section 50A(3) of substantial interest and substantial grounds. These thresholds are high, and highly nuanced.

A refusal of leave will also have to be certified in order for an appeal to be brought to the Supreme Court. This could leave an applicant for review in a situation where in an inchoate proceeding where no party has joined issue (or is even aware of a case being brought) the applicant's case will in effect, be at an end. This is an unwelcome development.

Returning to costs, it is not uncommon for judicial reviews in environmental impact assessment cases to run, in outlay alone, to several thousand Euros. Needless to say, instruction and brief fees, refresher fees, drafting fees etc. are also extremely expensive in litigation of this nature and will be beyond the reach of many applicants. Removing the prospect of recovering any of these expenses, even if one is successful, raises a significant obstacle to access to the Courts.

The bearing of costs has been explored by Mr. Justice Finlay in the case of *Heneghan – v – Allied Irish Banks Limited* High Court, 19th October 1984. In this case, the Defendants had been ordered to pay all the Plaintiff's costs, but the Taxing Master disallowed certain expenses, including travelling to Dublin.

Finlay P. considered the principles applicable in respect of the award of costs and held as follows:

"Due to the fact that the jurisdiction of the Court to award costs and the consequences of an Order providing for costs are part of the ancillary machinery associated with the access of citizens to the Courts, and as such should be construed in the light of the Constitutional origin of the right of access and the obligation of the Courts to make such a Constitutional right real and effective."

In the light of these principles, Mr. Justice Finlay held that it was patently illogical and unjust to refuse to allow the travelling expenses of a lay litigant and Mr. Justice Finlay awarded those costs.

Given the above, it is difficult to see how a blanket removal of an entitlement to recover costs, except in the exceptional cases where there is a point of law of exceptional public importance, and other special circumstances, could do anything other than create a clear impediment to those seeking justice having access to the Courts.

It is sustainable for the Bar and for the Law Society to offer their services on a contingency or a *pro bono* basis as the cases in which applicants who are offered services on this basis and are successful and obtain an award of costs balance out the unsuccessful cases, which are taken, in effect, at a loss.

This practice will just simply become unsustainable if members of the legal profession have no hope of recovering costs in respect of cases of this nature as cases of this nature cannot be run at a net loss indefinitely.

Accordingly, it is difficult to see how this new provision, in any real way, gives effect to the end to be achieved of Council Directive 2003/35/EC or how it could be said to be consonant with the principles of Constitutional justice.

OISIN COLLINS, Barrister at law

FRIENDS OF THE IRISH ENVIRONMENT

PRESS RELEASE
15 JULY 2010

New Planning Bill appealed to President

The environmental NGO Friends of the Irish Environment have written to Mary MacAlesse requesting her to convene the Council of State to consider referring the new Planning and Development (Amendment) Act 2010 to the Supreme Court to test its constitutionality.

In the letter, they allege that the new legislation will prevent them from accessing the Courts, a right under both European Directives and the Irish Constitution.

A precedent for this was established in 1999, when the on the advice of the Council of State, President MacAlesse referred Part V of the Planning and Development Bill 1999 to the Supreme Court.

The new Planning and Development (Amendment) Act 2010 was passed by Senate yesterday and will now go to the President for her signature.

FIE claims that amendments to Section 50 of the Planning Bill 2010, which 'purports to implement the European legislation encouraging access to justice, does the opposite'.

'While the legislation eliminates the 'loser pays' principle, citizens can only recoup their costs if they meet the most onerous requirements - even if they win. The case must be of "Public Importance" AND there must be "Special Circumstances" AND it must be in "in the Interests of Justice".

'This will act as an absolute BAR to anybody actually having an award of Costs made in their favour, leaving even successful challengers to pay the enormous cost of the Irish legal system.' FIE estimates that even a simple case one to two day case in the High Court without any appeal is currently costing in the region of €120,000 - €140,000.

'The effect of this change in the law will mean that oordinary members of the public will find it impossible to obtain legal representation if their costs will not be met even when they win against the State.'

Solicitors and barristers can not be expected to provide this level of support for free.

A spokesman for the organisation said that 'While much of the new legislation is forward thinking, the inclusion of this amendment to the Act will have devastating consequences for justice in Ireland. We hope the President will convene the Council of State and refer the matter to the Supreme Court to determine if change is constitutional.'

EDITORS NOTES

The President may, upon consultation with the Council of State, refer a bill to the Supreme Court to test its constitutionality. The Supreme Court then tests its constitutionality in toto and the President may not sign the bill into law if it is

found to be unconstitutional. This is the most widely used reserve power and was used by six of the eight presidents.

The Council of State met on 30 June 2000 to advise the President, Mary McAleese on whether to refer each of two separate bills to the Supreme Court to test their constitutionality. These were Planning and Development Bill, 1999 and the Illegal Immigrants (Trafficking) Bill, 1999. Arising from the meeting the president decided to refer Part V of the Planning and Development Bill, and Sections 5 and 10 of the Illegal Immigrants Bill to the Supreme Court. Both bills were ultimately found to be constitutional.