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Access to Justice under the Århus Convention and Irish Judicial Review

Sweetman v An Bord Pleanála, Ireland and the Attorney General [2007] IEHC 153; [2007] 2 ILRM 328

Keywords: Århus Convention – Environmental Impact Assessment – judicial review – public participation – access to justice – amendment of pleadings – sufficient interest – substantial interest – prohibitive costs

Introduction

The case of *Sweetman v An Bord Pleanála*,¹ decided in the High Court of Ireland in April 2007, raises a number of interesting issues regarding the scope of Directive 2003/35/EC on public participation in respect of the drawing up of certain plans and programmes relating to the environment (the Public Participation Directive), which is intended to give effect to the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, and particularly whether Irish law requires amendment as a consequence. Clarke J. clarified that Irish judicial review procedure could be modified, if necessary, to accommodate the requirements of European law, in such a way as to obviate the need for implementing legislation in certain circumstances.

Facts of the Case

The plaintiff, Mr. Sweetman, had made a submission with regard to an application by Clare County Council to An Bord Pleanála for approval under section 51 of the Roads Act 1993 (as amended) for a road scheme to link the N18 Gort Road to the Ennis Information Park. Because the proposed road was to run immediately south of Lough Girroga, which is part of the Ballyallia Lake candidate Special Area of Conservation (cSAC), the application included an environmental impact statement (EIS). Mr. Sweetman raised concerns regarding the need for long term monitoring and enforcement to ensure that there would be no adverse impact on the adjacent cSAC.

An Bord Pleanála appointed an inspector who considered this and other matters. He concluded that the impacts or potential impacts of the development were adequately addressed in the EIS and recommended that there would be ongoing monitoring of groundwater, with the results to be made available publicly on a monthly basis. An Bord Pleanála subsequently approved the road scheme. Mr. Sweetman wished to challenge this approval on the basis that the monitoring of groundwater was ‘demonstrably inadequate without some additional measure to provide for further mitigation in the event that the monitoring shows some unforeseen consequence.’² He sought leave to apply for judicial review of the decision of An Bord Pleanála. The application was heard by Clarke J.

Relevant Law

The case turned on what impact, if any, Directive 2003/35/EC (the Directive) had, or should have, on Irish law, particularly judicial review procedure and substance. The significant article is Article 10a of Directive 85/337/EEC on the assessment of the effects

of certain public and private projects on the environment (the EIA Directive), inserted by Article 7 of the Public Participation Directive, and which provides:

Member states shall ensure that, in accordance with the relevant national legal system, members of the public concerned;

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a member state requires this as a pre-condition,

have access to a review procedure before a court of law or other independent and impartial body established by law, to challenge the substantive or procedure legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged. What constitutes a sufficient interest and impairment of a right shall be determined by the member states, consistently with the objective of giving the public concerned wide access to justice. To this end, the interests of any non governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purposes of subpara. (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purposes of subpara. (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement or exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this Article, member states shall ensure that practical information is made available to the public, on access to administrative and judicial review procedures.

Ireland had not adopted any specific measures in order to implement Article 10a, and claimed, in these proceedings, that there was no need to do so. Mr. Justice Clarke therefore needed to consider this issue in detail. His analysis proceeded through two stages: First, did the Directive have direct effect? Second, does Irish judicial review meet the requirements of the Directive? This required a consideration of the difference, if any, between the words ‘sufficient interest’ in the Directive and ‘substantial interest’ in section 50 of the Planning and Development Act 2000 (PDA 2000); the adequacy of judicial review; and whether the costs of judicial review in Ireland were a ‘prohibitive cost’ under the Directive.

Late Amendment of Pleadings

However, before dealing with those, he had to first consider the procedural issue of whether these issues were, in fact, correctly pleaded and if not, could the pleadings be amended to include them? Clarke J. read the original Statement of Grounds as ‘setting out a challenge based on a contended for failure to provide judicial review at a non

prohibitive cost [not] a wider challenge based on a contention that the form of review itself is inadequate’,³ whereas the applicant now wanted to put forward the latter argument of inadequacy.

Relying on *Ní Eilí v EPA*⁴ and *Muresan v Minister for Justice, Equality and Law Reform*,⁵ he held that ‘an amendment [to the pleadings] can only be allowed if there is “good and sufficient reason” for allowing it to be brought outside the [eight week] time limit.’ To avoid an injustice to the applicant, because the issue arose late in the proceedings, Clarke J. went on to consider whether there were substantial grounds to grant leave on the grounds not pleaded, essentially giving him the benefit of the doubt.⁶

He also considered briefly whether the entire application was out of time, as Clare County Council argued. The issue was whether time began to run when An Bord Pleanála wrote to Mr. Sweetman with a copy of the determination of the Board, or when the decision was formally published. As there was no statutory obligation on An Bord Pleanála to write to the applicant, Clarke J. was satisfied that the eight week period began when the notice of the decision was published.⁷

‘Sufficient’ or ‘Substantial’ Interest?

Article 10a requires that those ‘having a sufficient interest ... [in] decisions, acts or omissions subject to the public participation provisions of’ the Directive have access to a means of challenge. It also leaves it up to the discretion of Member States to determine what constitutes a sufficient interest, ‘with the objective of giving the public concerned wide access to justice.’

Mr. Sweetman argued that the Irish test of ‘substantial interest’ was more stringent than ‘sufficient interest’, particularly as the test was ‘sufficient interest’ before the enactment of the PDA 2000. However, Clarke J. held that the meaning of the phrase in the Directive was not necessarily the same as the meaning in Irish law and that ‘it is clear from the text of Article 10a itself that “sufficient interest” is merely taken to mean the interest which the member state itself determines subject only to the requirement that it give wide access to justice.’⁸ Therefore, an Irish court could read the phrase ‘substantial interest’ (in the PDA 2000) in a wide fashion so as to give effect to the objective of the Directive.

The Adequacy of Irish Judicial Review

Mr. Sweetman claimed that Irish judicial review did not adequately meet the requirements of the Directive on the basis of two arguments: ‘that the requirement for leave amounts to a barrier to the entitlement to the judicial review mandated by the directive’ and ‘that the limitations placed upon the scope of the inquiry entered into on a judicial review fails, also, to meet those requirements.’⁹

Clarke J. saw no substance in the first argument. There are no procedural limits to the issues which can be raised in a leave application and the court gives the benefit of the doubt in factual questions to the applicant. A leave application under s. 50 of the PDA 2000 can be a detailed inquiry, taking a number of days. On this basis, he considered it to be a ‘review procedure before a court of law’ as the phrase is used in the Directive.¹⁰

The second argument relied upon the limited scope of Irish judicial review. However, Clarke J. felt that as the famous ‘irrationality’ test from *O’Keeffe v An Bord Pleanála*¹¹ was only applied in circumstances where the decision maker had properly considered all of the matters to be taken into account, and that the Irish courts could, and do,¹² apply a higher level of scrutiny (analogous to the ‘anxious scrutiny’ doctrine applied in the courts of the United Kingdom) where necessary, any additional requirements imposed by Article 10a could be accommodated within the existing judicial review regime.¹³

As to what those requirements are, Clarke J. considered that ‘the Directive does not require that there be a judicial review of the substance of the decision itself but rather the “substantive legality” of the decision’, which is not ‘a complete appeal on the merits’. Irish judicial review law ‘may well meet ... that requirement.’¹⁴ In support of this, he cited the judgment of Fennelly J. in *SIAC v Mayo County Council*,¹⁵ which held that the Public Procurement Directives were intended to incorporate into public procurement law the European concept of ‘manifest error’ and that the application of this concept would be similar to Irish judicial review. Clarke J. stated that ‘[i]t is difficult to envisage that the imposed requirement on member states to provide a judicial review of substantive legality in respect of environmental decisions was intended to impose a higher level of scrutiny on the courts of Member States than the EU Court itself would apply to decisions of EU institutions.’¹⁶ Irish judicial review was therefore sufficiently adaptable to meet the requirements of the Directive, and ‘the appropriate approach to be taken in respect of a challenge to a particular decision is to consider whether there are substantial grounds for suggesting that, in relation to that decision, a higher level of scrutiny is required on the facts of the case and, in turn, to determine whether, on applying such a higher level of scrutiny, there would be substantial grounds for the challenge itself.’¹⁷

“Prohibitive Costs” in Judicial Review?

The issue of whether Irish judicial review is ‘not prohibitively expensive’, as required by the directive has been previously considered in Kelly J. in *Friends of the Curragh Environment v An Bord Pleanála*,¹⁸ in which the learned judge concluded that the lack of clarity as to whether this referred to court filing fees or lawyers’ fees meant that the Directive could not have direct effect. Clarke J. considered Article 9 of the Århus Convention, to which the Directive is intended to give effect. He focused on Article 3 paragraph 8 (cited in the judgment as Article 9 paragraph 3), which, he claimed, makes it clear that the Convention are not intended to cover court costs and which provides:

Each party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalised, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.

On this basis, he was ‘satisfied that the “absence of excessive cost” requirement in the Directive is not intended (nor are there substantial grounds for arguing to the contrary) to cover the exposure of a party to reasonable costs in judicial proceedings.’¹⁹ He also thought that the discretion of the court not to award costs against an unsuccessful applicant, or even to award costs in their favour,²⁰ meant that there were no ‘substantial grounds for the contention that the level of exposure which a party might have to costs in the Irish judicial review context is “unreasonable”’.²¹ He did not think that the two stage

process involved in judicial review would render costs unreasonable.

Transposition of the Directive

From the foregoing, Clarke J. was satisfied that there was no failure to transpose the Public Participation Directive. Irish judicial review law and procedure is sufficiently flexible to accommodate its requirements. (Note that the Commission intends to refer Ireland to the ECJ for alleged failure to adopt the Directive.²²)

Conclusion of the Court

Clarke J. then applied the law as he saw it to the facts of Mr. Sweetman's complaint.

With regard to the 'substantial interest', he applied the tests he had previously developed in *Harding*.²³ The first question was whether the applicant has asserted the issues raised at an appropriate earlier stage of the process. This had occurred. The second question was his connection with the development. Although this was not direct, the especially sensitive nature of the cSAC meant that this should be interpreted broadly and the connection was therefore sufficient to meet the substantial interest test.²⁴

However, with regard to the question of 'substantial grounds', the EIS contained 'more than ample material' to justify the conclusion in the inspector's report.²⁵ Mr. Sweetman did not challenge this conclusion in any specific way. Even if the court were to apply a more stringent test of 'manifest error', it was difficult to see how the decision contained such an error. On that basis, Clarke J. refused leave on all grounds.

Commentary

The Århus Convention has been welcomed by NGOs as 'a necessary and important stimulus to the furtherance of environmental protection and participatory democracy'.²⁶ However, Rose-Ackerman and Halpaap claim that the three pillars of the Convention are unlikely to be welcome in western European democracies, because they threaten established practices, the authority of professional bureaucracies and the interests of certain private individuals and organisations.²⁷ Therefore, the weak obligations of the Convention are only likely to have real impact at the domestic level if they are given teeth by European legislation.²⁸ The Irish experience to date would seem to bear that out.

Lee and Abbot claim that UK judicial review procedure adequately meets the requirements of Article 9(2) in most cases, and that the impact of the Convention on the enforcement of UK environmental law will be very small.²⁹ This seems to be the view of the UK government³⁰ and also that of the Irish government. While it may be true, Clarke J.'s judgment shows that there are real questions to be asked about what difference the Convention and the Public Participation Directive is likely to make to Irish law. In the context of Article 9, for example, what is a 'sufficient interest'? Does judicial review allow an applicant to challenge both 'the substantive or procedure legality of decisions'? Is judicial review 'fair, equitable, timely and not prohibitively expensive'? We will probably have to wait for an ECJ ruling for the final answers.

However, the *Sweetman* decision provides some assistance, although in a way that raises further issues. With regard to the meaning of 'sufficient interest', Clarke J. was of the

view that the phrase ‘substantial interest’ (in the PDA 2000) could be read in a broad way, so as to give effect to the Directive and ensure that the public would have access to justice in environmental matters. While this is a laudable goal, it creates the odd situation that the explicit raising of the standard by the legislature (from the pre-PDA 2000 ‘sufficient interest’ to the current ‘substantial interest’) is essentially rolled back, but only in cases that involve the EIA Directive. EIA law is already complex and difficult to understand, particularly for the lay person;³¹ that a word in a statute changes meaning depending on the context in this way is not very satisfactory.

In addition, it is not clear that judicial review is a proper means for a ‘substantive’, as distinct from procedural, challenge to a decision. Nor is it clear what level of scrutiny is required in order to satisfy the requirement that members of the public can ‘challenge the substantive and procedural legality’. It may be as low as the *Wednesbury* unreasonableness standard,³² which is quite close to the irrationality standard of *O’Keeffe*.

Clarke J. felt that the requirement to obtain leave was not a barrier to the review procedure required under Article 7 of the Public Participation Directive; indeed, he felt that it was part of that procedure. Given the relatively open nature of a leave application, this view is most likely correct.

However, his conclusion that judicial review meets the requirement for a ‘substantive challenge’ is more questionable. Judicial review focuses on procedure, not substance.³³ While the Irish courts have not, in practice, followed the practice of UK courts of lowering the threshold of review (to a ‘sub-*Wednesbury*’ standard), it is likely that they would do so in cases involving fundamental rights.³⁴ Whether the courts will consistently hold that access to justice in environmental matters is such a right is not at all clear. This lack of clarity runs counter to the Convention recital that ‘the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them’.

The issue of the costs of judicial review proceedings is not given the detailed consideration it deserves. While the Convention does permit national courts to award ‘reasonable costs’, Article 9 (and Article 7 of the Public Participation Directive) does make it clear that any access to justice procedures must not be ‘prohibitively expensive’. Clarke J. has interpreted this as meaning ‘excessive cost’, but the total costs of legal proceedings may be prohibitive without being excessive. Leaving aside the question of whether the costs of Irish judicial review proceedings are ‘reasonable’ to begin with, for an individual or a poorly-resourced NGO, the risk that a court will award reasonable costs against it will often mean that challenges to environmental decisions will not be taken.³⁵ Simons argues, for this reason, that if Article 10a is ambiguous, it should be interpreted to include lawyers’ fees as well as court fees.³⁶

The Convention envisages ‘access to a review procedure before a court of law or other independent and impartial body established by law [which is] be fair, equitable, timely and not prohibitively expensive’. This requirement is perhaps better met by a specialised environmental appeals tribunal or by legal aid for public interest environmental litigants than by judicial review with the risk of a costs order against an unsuccessful plaintiff. Unfortunately, these arguments do not seem to have been made in this case. More

importantly, the Oireachtas has not yet introduced legislation to provide more certain answers to the questions raised above.³⁷ This lack of clarity may mean that Ireland is not providing an effective means of vindicating Community rights under the Directive.

Conclusion

The *Sweetman* case presents some of the practical questions raised by the Århus Convention and gives us answers to them, for the moment. Some aspects of the learned High Court judge's decision can be criticized. However, the judgment deals with the issues raised in detail and presents a considered view of the impact of the Public Participation Directive on Irish law. It is unfortunate that the legislature has not enacted legislation to take account of all aspects of the Directive or of the Århus Convention. For more definitive answers to these issues, we must await a decision of the European Court of Justice. Until then, Clarke J.'s extensive discussion provides much food for thought.

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¹ [2007] 2 ILRM 328.

² *Ibid.* at 334.

³ *Ibid.* at 340.

⁴ [1997] 2 ILRM 458.

⁵ [2004] 2 ILRM 364.

⁶ Above n.1 at 341.

⁷ *Ibid.* at 343.

⁸ *Ibid.* at 344.

⁹ *Ibid.* at 345.

¹⁰ *Ibid.* at 345-346.

¹¹ [1993] 1 IR 39; [1992] ILRM 237.

¹² For example, *Gashi v Minister for Justice, Equality and Law Reform*, unreported, High Court, 3 December 2004.

¹³ Above n.1 at 347.

¹⁴ *Ibid.* at 348.

¹⁵ [2002] 3 IR 148.

¹⁶ Above n.1 at 348.

¹⁷ *Ibid.*

¹⁸ [2006] IEHC 243.

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- ¹⁹ Above n.1 at 350-351.
- ²⁰ See *Harrington v An Bord Pleanála* [2006] IEHC 223.
- ²¹ Above n.1 at 351.
- ²² T. Flynn, 'Recent European Environmental Developments' (2007) 14(2) *Irish Planning and Environmental Law Journal* 78, 80.
- ²³ [2006] IEHC 295.
- ²⁴ Above n.1 at 352-353.
- ²⁵ *Ibid.* at 353.
- ²⁶ NGO Conference "Environment for Europe", 'NGO Resolution on the Public Participation Convention' (22 June 1998), available at http://www.participate.org/index.php?option=com_docman&task=doc_view&gid=24.
- ²⁷ S. Rose-Ackerman and A.A. Halpaap, 'The Aarhus Convention and the Politics of Process: The Political Economy of Procedural Environmental Rights', (2002) 20 *Research in Law and Economics*, 27.
- ²⁸ M. Lee and Carolyn Abbot, 'The Usual Suspects? Public Participation Under the Aarhus Convention' (2003) 66 *MLR* 80, at 82.
- ²⁹ *Ibid.* at 102-105.
- ³⁰ R. Macrory with M. Woods, *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal*, available at <http://www.ucl.ac.uk/laws/environment/tribunals/>, at 25, cited in D. Reid, 'The Aarhus Convention and access to justice' (2004) 16 *ELM* 77, at 79.
- ³¹ Fennelly J. has commented that "[i]t is regrettable that rules of law intended to regulate processes in which individual members of the public are supposed to be able to take part cannot be written in more accessible form." [2003] 2 *ILRM* 297 at 314, cited in Y. Scannell, *Environmental and Land Use Law* (Thomson Round Hall: Dublin 2006) 433.
- ³² Lee and Abbot, above n.28 at 103.
- ³³ G. Simons, *Planning and Development Law* (Thomson Round Hall: Dublin 2007) 835.
- ³⁴ H. Delaney, 'Significant Themes in Judicial Review of Administrative Action' (1998) 20 *Dublin University Law Journal* 73; H. Delany, 'Judicial Review in Cases of Asylum Seekers' (2002) 24 *Dublin University Law Journal* 1.
- ³⁵ J. Razzaque and P. Stookes, 'Community Participation: UK Planning Reforms and International Obligations' (2002) *JPL* 786, at 794.
- ³⁶ Above n.33 at 833.
- ³⁷ Note that the Planning and Development (Strategic Infrastructure) Act 2006 amends the PDA 2000 to exempt NGOs from the "substantial interest" requirement. See further *ibid.* at 828.

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