

**THE HIGH COURT  
JUDICIAL REVIEW**

**BETWEEN**

**MARTIN STAPLETON**

**APPLICANT**

**AND**

**AN BORD PLEANÁLA, THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND  
HERITAGE, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**

**SAVONA LIMITED AND DUBLIN CITY COUNCIL**

**NOTICE PARTIES**

**(No. 3)**

**JUDGMENT of Humphreys J. delivered on Tuesday the 26th day of July, 2022**

**Subject matter of the dispute**

1. This matter arises from a challenge to the validity of a decision by An Bord Pleanála (the board) on 23<sup>rd</sup> December, 2021 (file reference 311333) authorising a strategic housing development in Redcourt, Seafield Road, Clontarf, Dublin 3, consisting of 131 build-to-rent apartment units.
2. The applicant is an owner and resident of property neighbouring the proposed development.

**Facts**

3. The Dublin City Development Plan 2016-2022 setting out *inter alia* building heights for Dublin City was adopted in 2016 and was assessed under directive 2001/42.
4. Ministerial guidelines, the Urban Development and Building Heights Guidelines, were adopted in 2018 under section 28(1C) of the Planning and Development Act 2000. These guidelines were also assessed under directive 2001/42/EC. They contain mandatory Specific Planning Policy Requirements (SPPRs) particularly SPPR3 that allows the board to override building heights provisions of the Development Plan.
5. Savona Ltd., the first named notice party, applied to the board for planning permission for the development concerned on 8<sup>th</sup> September, 2021.
6. The application included documentation for the purposes of appropriate assessment (AA) and a Natura Impact Statement (NIS) for the purposes of the habitats directive 92/43/EEC.
7. It also included an Environmental Impact Assessment (EIA) screening statement dated August 2021 for the purposes of the EIA directive 2011/92/EU as amended.
8. A total of 377 submissions were received on the application.

9. The board's inspector prepared a report recommending grant of permission with conditions.
10. At a meeting on 21<sup>st</sup> December, 2021 the board made a direction to grant permission generally in accordance with the inspector's report.
11. As noted above, the formal decision granting permission with conditions was made on 23<sup>rd</sup> December, 2021. The board noted that the grant of permission would materially contravene section 16.7.2 of the Dublin City Development Plan 2016-2022 in relation to building heights. The board considered that this could be justified by reference to, among other things, ministerial guidelines entitled the Urban Development and Building Heights Guidelines adopted in 2018.
12. The statement of grounds was filed on 25<sup>th</sup> February, 2022 and amended statements were filed on 16<sup>th</sup> and 23<sup>rd</sup> March, 2022.
13. The challenge consists of both a legal and administrative law objection to the decision itself, and a challenge to the ministerial guidelines and the legislation under which they were made (section 28(1C) of the Planning and Development Act 2000).
14. Preliminary issues arose as to the applicant's liability for costs in the event of not being successful. On 20<sup>th</sup> May, 2022 the applicant filed a motion seeking protective costs orders, including declarations that he would not be liable for costs in that event. The issue of a protective costs order against the board was postponed. However, at the request of the State, the question of whether the applicant enjoyed costs protection in the statutory challenge was heard.
15. In *Stapleton v. An Bord Pleanála (No. 1)* [2022] IEHC 372, [2022] 6 JIC 2201 (Unreported, High Court, 22<sup>nd</sup> June, 2022), I refused to order declarations under s. 50B of the Planning and Development Act 2000, s. 3 of the Environment (Miscellaneous Provisions) Act 2011 and the Aarhus Convention (in respect of the challenge to the statute) and decided in principle to refer a question identified in the judgment to the CJEU in respect of the challenge to ministerial guidelines.
16. In *Stapleton v. An Bord Pleanála (No. 2)* [2022] IEHC 455 (Unreported, High Court, 26<sup>th</sup> July, 2022) I addressed certain procedural matters.
17. I now make the formal order for reference.

### **The relevant grounds of challenge**

18. The core grounds of challenge which relate to the case against the State (with which the present matter is concerned) are as follows:

#### **Validity of Guidelines**

7. ... the impugned decision is invalid because it is based on invalid Guidelines which exceed the powers conferred on the Minister by S28(1C) of the 2000 Act.

8. In the alternative, the impugned decision is invalid because it is based on SPPR3 of the Height Guidelines, which are adopted pursuant to Section 28(1C) of the 2000 Act, and that Section is contrary to Article 15.2.1 of the Constitution.

### **Grounds Relating to Costs**

9. The grounds advanced in the present proceedings are grounds alleging contraventions of national law relating to the environment for the purposes of A9(3) of the Aarhus Convention, and attract the operation of S3(1) and (2) of the Environment (Miscellaneous Provisions) Act 2011, or, in the alternative, of S50B(2) and (2A) of the 2000 Act as amended.

### **Relevant provisions of EU law**

19. A full list of the relevant EU, international and domestic legal material is set out in the appendix to the No. 2 judgment together with web links. I will however endeavour to identify some of the most notable material.

20. The most pertinent provisions of EU law are as follows:

- (i). Directive 92/43/EEC of 21<sup>st</sup> May, 1992 on the conservation of natural habitats and of wild fauna and flora.
- (ii). Directive 2001/42/EC of the European Parliament and of the Council of 27<sup>th</sup> June, 2001 on the assessment of the effects of certain plans and programmes on the environment.
- (iii). Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters.
- (iv). Directive 2011/92/EU of the European Parliament and of the Council of 13<sup>th</sup> December, 2011 on the assessment of the effects of certain public and private projects on the environment, as amended.

### **Relevant International Materials**

21. Also relevant as a result of the foregoing is the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus (Denmark) on 25<sup>th</sup> June, 1998 ('the Aarhus Convention') in particular art. 9.

### **Relevant domestic law**

22. The most pertinent provisions of domestic law are as follows:

- (i). Section 50B of the Planning and Development Act 2000, sub-section (2) of which provides a general rule that parties in judicial reviews of decisions under enactments giving effect to EU law public participation rules, or article 6(3) and (4) of the habitats directive 92/43, shall bear their own costs. The section provides for limited

exceptions as well as for provision in sub-section (2A) for the applicant to obtain costs to the extent that she is successful.

- (ii). Section 3 of the Environment (Miscellaneous Provisions) Act 2011 Act, which provides a similar rule for proceedings to which that section applies, and section 4 of the Act, which applies the section to actions for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or to certain other planning requirements, where the failure to ensure such compliance with, or enforcement of, such requirement has caused, is causing, or is likely to cause, damage to the environment.

23. In addition, Article 15.2 of the Constitution of Ireland provides as follows:

2.1° The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.

2° Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures.

#### **Question of European law arising**

24. As discussed in the No. 1 judgment, it seems to me that a question of European law arises in the proceedings, which relates to the interpretation rather than application of EU law, that an answer is necessary for the decision of this court, that the answer is not *acte clair* or *acte éclairé*, and that I consider it appropriate in all circumstances to make a reference to the Court of Justice of the European Union under article 267 TFEU.
25. I received submissions from the applicant and the State on the question. The board and the notice parties did not get involved.

#### **The question**

26. The question is:

**Is a challenge to be considered as falling outside the interpretative obligation whereby in proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive, either as not being one where the application of national environmental law is in issue or as not within the sphere of EU environmental law, merely because it involves a challenge to the validity of an instrument adopted under a statutory provision based on domestic public law or constitutional law (for example, a challenge on the basis of national administrative law principles and constitutional provisions regarding the exercise of the legislative function in accordance with the separation of powers as between the legislature and the executive) in a context relating to the environment or by way of a challenge to the**

**procedure by which guidelines with environmental relevance (assessed under directive 2001/42) were adopted.**

27. The applicant's position is that No, for the same reasons as were advanced in relation to the referred questions in *Enniskerry* [2022] IEHC 338. Where an act of a public authority is adopted pursuant to a provision of national law relating to the environment, Article 9(3) of the Aarhus Convention applies to all grounds of challenge that are not already covered by Article 9(2). It is irrelevant for this purpose that the ground of challenge alleges that the measure pursuant to which the decision was adopted is contrary to national law relating to the environment, or that the national law relating to the environment is itself invalid by reference to principles of national administrative law or constitutional provisions regarding the exercise of legislative functions. It is sufficient that the act is alleged to be invalid and that the law pursuant to which that act is adopted is a provision of national law relating to the environment. An act contravenes national law relating to the environment if the national law in question is invalid, because in that instance national law relating to the environment is something other than that which it purports to be, and the contravention of the actual national law relating to the environment (as opposed to the purported but invalid national law) is sufficient to engage the applicability of Article 9(3) of the Convention.
28. The State's position is that the premise of the challenge before the Court is that the Guidelines under scrutiny amount to a challenge to the validity of an instrument adopted under a statutory provision. That instrument is being challenged. Therefore, the claim cannot proceed save on the premise that the Minister acted in a legislative capacity. The challenge is taken pursuant to long-standing national law relating to the separation of powers. The law upon which the challenge rests does not relate to the environment: it is an administrative/constitutional law principle. Therefore no national law relating to the environment is contravened if (as alleged) the Minister acted *ultra vires*. The capacity in which the Minister acted is clearly legislative in that the product of his acts in this regard is a normative instrument with binding effect. The Minister will in several contexts be a public authority, while not being such when acting in a legislative capacity (a "temporal function-related exclusion": see *Flachglas* (Case C-204/09) as explained in *Friends of the Irish Environment* (Case C-470/19)). Insofar as it is asked whether a Minister, in promulgating an instrument such as this one acts in a "legislative capacity" therefore, the proposed answer is 'yes'. Insofar as it is asked if the consequence of this is that such action is outside the scope of article 9(3) of Aarhus, the proposed answer is 'yes'.
29. My proposed answer to the question is "No". First by way of context, in terms of national law it is not strictly accurate to say that the Minister in making the guidelines was acting in a "legislative" capacity. The sole and exclusive power to make laws in the State is vested in the Oireachtas. The Minister is not a subordinate legislature for the purposes of Article 15.2 of the Constitution. Rather the Minister in adopting guidelines is adopting a measure of general application, much as a planning authority adopts measures of general application for its own area in the form of a Development Plan. The fact that a public body (including a Minister)

adopts a general instrument does not mean that the act of adopting that instrument ceases to be the act of a public authority. Such general instruments frequently constitute plans or programmes that require assessment under the SEA directive

30. On the merits of the question, in my view the meaning of national environmental law is autonomous and, therefore, does not depend on how the grounds of challenge are characterised by the law of a particular member state. It follows that the fact that particular grounds are characterised as “separation of powers grounds” or in any other way is irrelevant for the purposes of the application of the obligations under Aarhus, if the grounds of challenge are aimed, directly or indirectly, at securing an environmental objective such as challenging a particular development consent or other environment-related decision. This is reinforced here by the fact that the 2018 guidelines were assessed under directive 2001/42 and allow the board to override the Dublin City Development Plan which was also assessed under directive 2001/42.
31. The reason for the reference of this question is that in the absence of legislation in Ireland comprehensively implementing the Aarhus interpretative obligation, the scope of costs protection for the applicant in the case against the State will depend on the CJEU’s decision on whether the challenge is covered by that interpretative obligation. If “separation of powers” grounds are excluded from the protection of enforceable Aarhus convention rights here then the applicant’s challenge will not benefit from costs protection.

**Order**

32. Accordingly, the order will be that the questions set out in this judgment be referred to the CJEU pursuant to article 267 TFEU.