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No redactions required*



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

**S:AP:IE:2023:00092
[2024] IESC 34**

**O'Donnell CJ
Dunne J
Hogan J
Collins J
Donnelly J**

**IN THE MATTER OF AN APPLICATION PURSUANT TO
SS. 50, 50A AND 50B OF THE PLANNING & DEVELOPMENT ACT, 2000**

BETWEEN:

JOHN CONWAY

Appellant

AND

AN BORD PLEANÁLA,

THE MINISTER FOR HOUSING, LOCAL GOVERNMENT & HERITAGE,

IRELAND & THE ATTORNEY GENERAL

Respondents

AND

SILVERMOUNT LIMITED

Notice Party

JUDGMENT of Mr Justice Maurice Collins delivered on 23 July 2024

1. I agree that this appeal should be dismissed. I share the concerns expressed by my colleagues as to the manner in which the application for judicial review was advanced here but I agree that, for the reasons set out by Hogan J in his judgment, the Court should nonetheless proceed to determine the issues raised by the appeal.
2. I agree with Hogan J's analysis of the Article 28A issue and with his conclusion that Section 28(1C) of the Planning and Development Act 2000 (which in its current form derives from the Planning and Development (Amendment) Act 2018) is not invalid by reference to the provisions of Article 28A and I have nothing to add to his analysis.
3. All members of the Court agree that the only other ground of challenge to section 28(1C) – based on the contention that the conferral by the Oireachtas on the Minister for the Environment (“*the Minister*”) of a power to issue guidelines containing *specific planning policy requirements*, with which planning authorities and An Bord Pleanála must comply in the performance of their functions, constitutes an impermissible delegation of legislative power in breach of Article 15.2 of the Constitution – must also be rejected. However, there are certain points of difference between the analyses of my colleagues on this issue and in the circumstances it appears appropriate to briefly set out my position.
4. In my view, the ultimate issue that arises in every Article 15.2 challenge is whether the Oireachtas has abdicated its Article 15.2.1 law-making function. In addressing that fundamental issue, the presence or absence of “*principles and policies*” in the parent

legislation will be a relevant factor. So too the presence or absence of an ongoing supervisory role for the Oireachtas and the nature and scope of that role. But these are factors in a broader assessment of whether the Oireachtas has, in any given instance, impermissibly abdicated its function under Article 15.2.1, rather than free-standing or additional tests. Other factors will also be relevant to that assessment, including most obviously the breadth, subject-matter and significance of the rule-making power conferred and whether it involves an area of regulation requiring particular expertise that the Oireachtas may not itself possess. A rule-making power may permissibly involve some element of policy choice though significant policy decisions are, pursuant to Article 15.2, reserved to the Oireachtas.

5. I agree with the Chief Justice that there is no separate test of “*democratic accountability*” in this context, whether arising from Article 15.2 or Article 5 of the Constitution. As I understand the Article 15.2 jurisprudence, the presence or absence of a formal supervisory mechanism involving the Oireachtas is not determinative. I expressed that view, and explained the basis for it, in my judgment in *Delaney v Personal Injuries Assessment Board* [2024] IESC 10 (at para 173). Some such mechanism is of course a feature of most legislation that confers rule-making power on subordinate bodies. Such is the case here: section 28(5) of the 2000 Act requires that guidelines made by the Minister be formally laid before each House of the Oireachtas. In addition to that formal statutory mechanism, the Minister is of course answerable to the Dáil in relation to the exercise of his section 28 functions. Further, the Oireachtas retains its competence to legislate further in this area should it consider it necessary to do so. As a matter of principle, however – as *Delaney* illustrates – it does not follow

from Article 15.2 that a formal supervisory mechanism – less still any particular form of supervisory mechanism - is an *a priori* condition for permissible delegation in every case.

6. As to Article 5, as I indicated in *Delaney* (at para 198) I do not consider that it entitles a court to review legislation enacted by the Oireachtas on the basis that, in the court's view, such legislation is inconsistent with the democratic character of the State. While Article 5 is an important statement of general principle as to the nature of the State constituted by the 1937 Constitution, the State's democratic character is defined and delineated by the specific provisions that follow, including – but not limited to – Article 15.2. Article 15.2 contains important prescriptions as to the role of the Oireachtas and its entitlement to confer rule-making powers on other bodies. Where the Oireachtas legislates to confer rule-making authority on a subordinate body, then, provided that the legislation is within the permissible bounds of Article 15.2, the grant of such authority is democratically mandated and such legislation is not subject to separate review by reference to Article 5. Democratic accountability is, in this context, satisfied by ensuring that the power of the delegate is properly delimited by the democratically elected legislature so that the delegate is not impermissibly left at large. I agree with the Chief Justice's analysis in that respect.

7. All members of the Court agree that publication is an essential requirement of a valid law, including (as here) rules having normative status made pursuant to legislative authority. All agree that the requirement for publication is satisfied in this case, having regard to the provisions of section 28(5)–(7) of the 2000 Act. There are, however,

differing views as to where in the Constitution that publication requirement is properly located.

8. This issue was not the subject of any real argument in this appeal. But as it is addressed in the judgments of my colleagues, I shall express my view also.

9. Promulgation/publication has long been understood as a fundamental aspect of the rule of law and the principle of legality. In *The Morality of Law* (Rev ed, 1969), Lon Fuller identified eight requirements of the rule of law, the second being that laws must be widely promulgated and publicly accessible.¹ Similarly, in chapter 3 of *The Rule of Law* (2010), Tom Bingham identified accessibility of law – including but not limited to the principle that law should be publicly available – as the first essential ingredient of the rule of law.

10. The European Court of Human Rights has consistently emphasised that accessibility is an essential requirement of a valid law, the absence of which means that any interference with a Convention right will not be “*prescribed by law*” or “*in accordance with law*”. The approach of the Strasbourg Court is illustrated by *Nolan v Russia* (Application no. 2512/04) (2009) EHRR 262 which was referred to by this Court in *Minister for Justice v Adach* [2010] IESC 33, [2010] 3 IR 402. One of the complaints made in *Nolan* was of a breach of Article 5 ECHR arising from the applicant’s detention in Moscow Airport. While there were guidelines in place which might have authorised

¹ At page 39 and following.

such detention, those guidelines had not been published or made accessible to the public. In these circumstances, the ECtHR found a breach of Article 5, stressing that:

“[W]here deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. In laying down that any deprivation of liberty must be effected ‘in accordance with a procedure prescribed by law’, Article 5 § 1 does not merely refer back to domestic law; like the expressions ‘in accordance with the law’ and ‘prescribed by law’ in the second paragraphs of Articles 8 to 11, it also relates to the ‘quality of the law’, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. ‘Quality of law’ in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness”
(para 98).

As is evident from this passage, and the jurisprudence of the ECtHR more generally, the requirement that law be accessible is not confined to Article 5 cases.

11. Article 25.4 of the Constitution provides for the *promulgation* as law of Bills signed by the President by the publication of a notice in *Iris Oifigiúil*. In *Minister for Justice v Adach* [2010] IESC 33, [2010] 3 IR 403, the Court (per Hardiman J) rejected the contention that the *publication* of a newly enacted Bill was necessary in order for the Bill to become law. The factual context in *Adach* was that 10 weeks had elapsed

between the commencement of the Criminal Justice (Miscellaneous Provisions) Act 2009, which made various amendments to the European Arrest Warrant Act 2003, and the publication of the Act on the Oireachtas website. One such amendment made any appeal from the High Court in an EAW matter subject to prior certification by that court. During the period between the commencement of the 2009 Act and its publication, Mr Adach filed an appeal to the Supreme Court, without first obtaining a certificate from the High Court. The Minister then moved to strike out the appeal, based on the absence of a certificate. In response Mr Adach argued that the requirement for a certificate could not apply prior to the publication of the 2009 Act. Hardiman J rejected that argument on the basis that the question of whether a Bill passed by the Oireachtas has become law “*is one to be answered exclusively in terms of the Irish constitutional arrangements, which are set out in Article 25...*” and it was common case that the 2009 Act had been promulgated in accordance with that Article (para 36). While he accepted that an issue would arise if a person was in jeopardy of being deprived of their liberty under a law that was “*not at all accessible*”, Hardiman J appears to have located that entitlement/protection in Article 5 ECHR rather than in the Constitution (*ibid*). In any event, that did not avail Mr Adach because the relevant amendment to the 2003 Act was “*a procedural law regulating the right of access to the Supreme Court by way of appeal*” (para 30).

12. *Adach* was cited in *Minister for Justice v Tobin* [2012] IESC 37, [2012] 4 IR 147, another European arrest warrant case. The facts in *Tobin* were complex but involved an amendment to section 10 of the 2003 Act made by the 2009 Act, the effect of which was to make Mr Tobin liable to surrender in circumstances where previously he was

not. After the amendment was commenced – but before the publication of the 2009 Act in its enacted form – the European arrest warrant was endorsed. On that basis, it was argued on Mr Tobin’s behalf that he had been deprived of his liberty other than “*in accordance with law*” and it was said that his surrender would be in breach of Article 5. While that argument failed on the facts – *inter alia* because the 2009 Act had been published by the time of Mr Tobin’s actual arrest – in the course of his judgment O’Donnell J (as he then was) characterised the accessibility of law as “*an essential component of a valid or at least respectable, legal system*” and a principle of “*fundamental importance to a functioning legal system*” (para 394).

13. In neither *Adach* nor *Tobin* was it necessary for this Court to address whether and to what extent the Constitution generally requires publication of Acts of the Oireachtas and no issue arose as to the publication of secondary legislation made pursuant to Article 15.2.

14. In *Nolan v Russia*, the ECtHR observed that the rule of law principle is “*inherent in all the Articles of the Convention*” (para 98). Equally, in my view, the rule of law (and the closely related principles of legality and legal certainty) are inherent in the text and structure of our Constitution. That the law should be accessible is a fundamental requirement in any State based on the rule of law. It is a necessary condition to the proper administration of justice, criminal and civil. It would be wholly at variance with the Article 38.1 guarantee that no one shall be tried on a criminal charge “*save in due course of law*” were it permissible to try a person for breach of a law that was not, at the time of the alleged offence, published and accessible. Equally, Article 40.4’s

prohibition on deprivation of liberty “*save in accordance with law*” necessarily requires that such “*law*” should be publicly accessible. But these are only particular instances of a broader principle, which also finds reflection elsewhere in the Constitution: in a State governed by law, the law must be accessible.

15. Accessibility is of course only one aspect of “*the quality of law*”. That is illustrated by *King v Attorney General* [1981] IR 233 – to which Donnelly J refers in her judgment – and the many authorities which have come after it. But it is accessibility – in the sense of publication – that we are concerned with here and that in the specific context of accessibility of legislation, rather than of other sources of law such as common law rules. Furthermore, no issue arises here as to the consequences of non-publication. The issue is whether, as a matter of general principle, the Constitution requires the publication of laws made pursuant to Article 15.2.

16. I have no doubt that such laws must, in principle, be published. Article 15.2 authorises the Oireachtas to make laws “*for the State*” and it seems to me necessarily to follow that the content of such laws must be published *to* the State and its citizens. In a constitutional democracy founded on the rule of law, in which the legislature is answerable to the People either directly (in the case of Dáil Éireann) or indirectly (in the case of Seanad Éireann), the People are entitled to have access to the law enacted on its behalf. That those affected by such a law – whether positively or negatively – should know in advance what the law requires of them or provides to them is no doubt an important consideration in this context. But it seems to me that there is a more fundamental consideration at play, namely the relationship between the legislature and

the People, the ultimate source of all law-making authority in our constitutional settlement.

17. Article 25.4 cannot, in my view, be read as an exhaustive statement of what the Constitution requires in terms of the promulgation and/or publication of laws enacted by the Oireachtas. Article 25.4 is, in part, concerned with identifying the end-point of the legislative process. It is also concerned with ensuring that some minimal public notice should be given of the enactment of legislation. Promulgation of laws enacted by the Oireachtas in accordance with Article 25.4.2 is, of course, a constitutional requirement in every case but it is only a first – and very limited – step in the process of making such laws accessible to the public, which also requires making the *content* of such laws generally available.
18. The same rationale for publication applies, in principle, to secondary legislation made pursuant to Article 15.2.2. If laws enacted by the Oireachtas pursuant to Article 15.2.1 are subject to a requirement of publication – as in my view is the case – it must surely follow that the authority of the Oireachtas to confer rule-making power on subordinate bodies pursuant to Article 15.2.2 – a power which can extend to making rules of far-reaching effect, as with the Ministerial order at issue in *Bederev* – must be regarded as being subject to a requirement for the appropriate publication of the rules so made.
19. General provision for the publication of statutory instruments is, of course, made in the Statutory Instruments Act 1947. Where – as here – that Act does not apply, Article 15.2,

read in conjunction with Article 25.4, requires that some sufficient provision be made for publication. Unlike enactments of the Oireachtas, which normally are of general application, secondary legislation varies in its reach and so the extent and means of publication may legitimately vary. Generally, publication must, at a minimum, be sufficient to reach those sectors of the population potentially affected by such legislation. That was clearly the case here, having regard to what is contained in section 28 of the 2000 Act.

20. I therefore agree with the Chief Justice, and also with Dunne J, that the publication requirement here derives from Article 15.2 rather than from Article 5.

21. Subject only to the points of disagreement I have identified, I agree with the judgment of Hogan J and in particular I agree with his analysis of section 28(1C) and with his conclusion that it is not inconsistent with Article 15.2.1 of the Constitution and with the reasons he gives for that conclusion.