



**AN CHÚIRT UACHTARACH  
THE SUPREME COURT**

**S:AP:IE:2023:000092  
[2024] IESC 34**

**O'Donnell C. J.  
Dunne J.  
Hogan J.  
Collins J.  
Donnelly J.**

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS. 50, 50A AND  
50B OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED**

**BETWEEN:**

**JOHN CONWAY**

**Appellant**

**AND**

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

**Respondents**

**AND**

**SILVERMOUNT LIMITED**

**Notice Party**

## **Judgment of Ms Justice Elizabeth Dunne delivered on the 23<sup>rd</sup> day of July 2024**

1. This case concerns the constitutionality of s. 28(1C) of the Planning and Development Act 2000 (“the 2000 Act”). Under the provisions of s. 28(1C), the Minister for Housing can make binding directions to planning authorities (known as guidelines). Those guidelines have the effect of enabling a planning decision to be made for a particular development notwithstanding that it would otherwise be in breach of a local development plan.
2. I have read the judgments of O’Donnell C.J. and Hogan J. in this matter. Both have concluded that s. 28(1C) of the 2000 Act is not unconstitutional. I have also read the judgment of Donnelly J. who agrees with that conclusion. I, too, agree that s. 28(1C) of the 2000 Act is not invalid, having regard to the provisions of the Constitution. I also agree with the conclusions of the other members of the Court on the issue of *locus standi* which was raised in this case.
3. The judgments of O’Donnell C.J. and Hogan J. diverge somewhat on the route to their respective conclusions that s. 28(1C) of the 2000 Act is not unconstitutional. The purpose of this judgment is to explain my position in relation to the approaches taken by O’Donnell C.J. and Hogan J.
4. The question at the heart of this case concerns the authority found in s. 28(1C) of the 2000 Act, enabling the Minister to make guidelines: “*The Minister may, at any time, issue guidelines ...*”. It was contended that enabling the Minister to issue guidelines was a breach of the exclusive legislative jurisdiction of the Oireachtas found in Article 15.2.1<sup>o</sup> of the Constitution. The case law on this important provision of the Constitution is voluminous. Reference has been made in the judgments of O’Donnell C.J. and Hogan J. to some of the relevant case law. In his judgment, Hogan J., at para. 25 *et sequente*, considers cases such as *Cityview Press v. An Comhairle Oiliúna* [1980] I.R. 381,

*Director of Public Prosecutions v. McGrath* [2021] IESC 66, [2021] 3 I.R. 785, *Bederev v. Ireland* [2016] IESC 34, [2016] 3 I.R. 1, and *Náisiúnta Léictreach Contraitheoir Éireann v. The Labour Court* [2021] IESC 36, [2022] 3 I.R. 515. Having considered the case law, and whether or not the guidelines at issue in these proceedings amounted to an impermissible breach of Article 15.2.1<sup>o</sup> of the Constitution, Hogan J. contrasted the power to make the guidelines with the decision of this Court in *Director of Public Prosecutions v. McGrath*, in relation to the making of District Court Rules, and observed at para. 34 of his judgment herein:

*“Here by contrast the matters which are to be the subject of regulation by guidelines are matters which are quintessentially ones for technocratic expertise. If the Minister were ever to make guidelines which materially went beyond the setting of technical standards and strayed into major policy questions, this would immediately raise issues as to the vires of any such guidelines”.*

5. He went on to consider whether or not there had been an abandonment by the Oireachtas of its legislative powers and role. This question centred on the extent to which the Minister’s guidelines were subject to scrutiny or supervision by the Oireachtas. This raised issues as to the contrast between the guidelines and statutory instruments, and the question of publication of the guidelines.
6. In this context, Hogan J. has helpfully set out the steps to be taken by the Minister in relation to laying the guidelines before the Houses of the Oireachtas, making the guidelines available to the public, and publishing the guidelines (see paras. 36 to 38 of his judgment). Whilst O’Donnell J., at para. 20 of his judgment, agreed that promulgation and publication are “*essential to the validity of rules and guidelines made under legislative authority*”, he departs from Hogan J., who derives the requirement for

promulgation and publication from the provisions of Article 5 of the Constitution. He was of the view that it followed from the power of the Oireachtas, in the exercise of its powers under Article 15.2, to give to a delegate the power to make rules or regulations with normative effect, and that, accordingly, he centred the power of the Minister in Article 15.2 and 25.4. Therefore, he was of the view that the terms of Article 5 of the Constitution did not arise in this case and did not assist in resolving the issues herein. O'Donnell C.J. further rejected the proposition that there is a separate test for the assessment of the validity of guidelines by reason of a requirement of democratic accountability, concluding that there is no such separate test.

7. Does Article 5 of the Constitution give rise to a separate test of democratic accountability by which the guidelines in this case have to be assessed? In the circumstances of this case, are the guidelines saved by virtue of the fact that, under the terms of s. 28 of the 2000 Act, they must be laid before each House of the Oireachtas (s. 28(5)), that planning authorities are obliged to make any guidelines issued available to members of the public for inspection, and further, that the Minister is obliged to publish guidelines considered under the section?
8. It would be difficult to accept that the guidelines at issue in these proceedings, to which planning authorities “*shall have regard ... in the performance of their functions*”, would be valid in the absence of publication. As Donnelly J. observed in her judgment:

*“All the members of this Court are satisfied that promulgation and publication are essential to the validity of these guidelines (being normative rules that are not Bills passed by the Oireachtas), and that these have been satisfied here”.*

I agree with that statement.

9. Given that there is no difference in the views of the members of the Court as to the necessity for the guidelines to be promulgated and published, the question that might

arise is, where does the requirement for such promulgation and publication come from? As mentioned previously, O'Donnell C.J., in his judgment at para. 20, concluded that the requirement for publication and promulgation derives from Article 25.4, rather than being a requirement that derives from the provisions of Article 5.

10. A law has to be promulgated in accordance with Article 25.4.2° of the Constitution. Promulgation encompasses publication. Statutory instruments must also be printed and made available to the public in general (see s. 3 of the Statutory Instruments Act 1947). The guidelines in this case do not come within the definition of a statutory instrument, but it is hard to imagine any basis upon which it could be said that the guidelines could have validity without being made known to those affected by them, given their binding effect. Does that requirement of promulgation and publication derive solely from the provisions of Article 25.4.2° of the Constitution, as is contended for by O'Donnell C.J., or does it derive from Article 5 of the Constitution?
11. It seems to me that the primary requirement for promulgation and publication of the guidelines in this case derives from Article 25.4.2°. Here, the Minister has been given a power by the Oireachtas to make guidelines, and the Minister in doing so has to comply with obligations under the provisions of s. 28(1C) of the 2000 Act in laying the guidelines before each House of the Oireachtas. That much is clear. As to promulgation and publication, measures are set out also in s. 28 to that end. One could take the view that it is unnecessary to go further than this when assessing where the requirement for promulgation and publication comes from.
12. Nevertheless, whether Article 5 has any role to play in this requirement must be considered as well. Article 5 provides that "*Ireland is a sovereign, independent, democratic State.*" Such a state is founded on the rule of law (see, for example, *In Re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999* [2000] IESC 19, [2000]

2 I.R. 360, at p. 385). This Court considered the provisions of Article 5 in detail in the recent judgment of *Costello v. Government of Ireland* [2022] IESC 44. Much of the focus in that case was on the concept of sovereignty as used in Article 5 (see, for example, my judgment in that case). The focus was not on the concept of democracy as that word is used in Article 5. In the recent judgment of this Court in *In the Matter of Article 26 of the Constitution and In the Matter of the Judicial Appointments Commission Bill 2022* [2023] IESC 34, the Court considered the democratic nature of the State, saying at para. 11:

*“The entire structure of the Constitution presupposes the existence of a state and a legal system governed by the rule of law. Article 5 describes the State as a democracy, yet without the appropriate rule of law guarantees, the essential democratic character of the State could not be assured. As was observed in Costello v. Ireland [2022] IESC 44, this constitutional commitment to the democratic order is perhaps the most defining feature of the State’s own constitutional identity. All of this means the Constitution has created a society governed by the rule of law, because it is principally through the enactment of legislation duly passed by a majority in a democratically elected Oireachtas that law is made for the State in accordance with Article 15.2.1°. This in turn means that citizens are entitled to regulate their affairs by reference to legislation enacted by the Oireachtas and, where applicable, by the corpus of common law and pre-1937 legislation carried over by Article 50.”*

13. In short, the use of the word “democracy” recognises that the People, in giving us our Constitution in 1937, made a broad statement as to the type of state Ireland was - a democracy. However, while a broad statement as to the nature of the State is to be found in Article 5, the specific details of how that democracy is to operate are to be found in

subsequent parts of the Constitution. Provision is made in specific terms for the President, the Oireachtas and the Courts, amongst other important matters set out in the Constitution. Thus, Article 25 of the Constitution deals with the signing and promulgation of laws.

14. In a democratic state founded on the rule of law, it could hardly be said that someone bound by, or subject to guidelines drawn up by a Minister, having been delegated a power to do so under legislation such as s. 28(1C), is not entitled to have knowledge of those guidelines. That can only be provided through promulgation and publication. The provisions of Article 25.4.2° of the Constitution are prescriptive in terms of what must be done in order for a bill to become law. The requirements in this regard underpin the fact that this is a democratic state founded on the rule of law, and that, as such, its citizens are entitled to know the extent to which they are bound by legislation, be that primary legislation, secondary legislation, or, indeed, the guidelines at issue here. For my part, I do not see Article 5 as creating a separate test for assessing whether legislation, be it primary or secondary legislation, is valid, having regard to the provisions of the Constitution. I would view the situation as being one in which Article 5 is a broad statement as to the democratic nature of the State. Such a state is, as stated elsewhere, underpinned by the rule of law. The details as to how our democracy is to work are set out in subsequent parts of the Constitution and Article 25.4.2° is a detailed and prescriptive provision in relation to the promulgation of legislation. The provisions of the Constitution of relevance in this case are to be found in Article 25.4.2° as to the manner in which legislation is promulgated. I, therefore, do not see that there is a separate test under Article 5 for the assessment of the validity of legislation. Thus, in my view, Article 5 is part of the broader constitutional structure, of which Article

25.4.2° is a more detailed and prescriptive provision, in relation to the functions of the Oireachtas as a legislative body.

15. I also agree with the observations of O'Donnell C.J. at para. 28 of his judgment as to democratic accountability, to the effect that it is "*perfectly possible to have an entirely valid regulation or guideline adopted pursuant to statutory authority, and which is never even laid before the Houses of the Oireachtas*". As he went on to note, the power delegated to the Minister in this legislation was within a very limited area and there was a significant degree of democratic control because of the requirement to lay these guidelines before the Oireachtas, and because the Minister was accountable to the Dáil. In the circumstances, I find myself in agreement with the remarks made by Donnelly J. in this regard at paras. 8, 9 and 10 of her judgment.
16. The core question in this case is whether s. 28(1C) is invalid, having regard to the provisions of the Constitution, and, in particular, Article 15.2 of the Constitution. For the reasons explained in the judgments of Hogan J. and O'Donnell C.J., with which I am in agreement, I am satisfied that there is no such breach. Guidelines which have a binding effect and which do not provide for promulgation and publication would be at serious risk of being found to be invalid. In the absence of publication of these guidelines, I would have had a concern about their validity, but that is not the case here.
17. Further, it is a matter of some significance in this case that the Minister was obliged to lay the guidelines before each House of the Oireachtas. In that way, clearly, the Minister can be made accountable to the Oireachtas, if the Oireachtas came to the view that the Minister had exceeded the statutory power which had been delegated to him.
18. In all the circumstances, I, too, would dismiss the appeal.