

To: Fiona Marshall, Aarhus Compliance <email addresses redacted>
From: Pat Swords <email address redacted>
Date: 08/18/2016 10:25AM
Cc: David Malone, Neil van Dokkum <email addresses redacted>
Subject: Recent Irish High Court Referral to ECJ on Article 9(3) - Relevant to C/112

Dear Fiona

Further to my recent e-mail in relation to the 'judgement' in my Court case, of relevance is that the Irish High Court has recently referred another case on Aarhus protective costs to the European Court of Justice for clarification in relation to Article 9(3) of the Aarhus Convention, which is only partly legislated for in Irish domestic legal order. This is now published, see below. Note: Under Article 29.6 of the Irish Constitution; "[no] international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas" {Parliament}.

- North East Pylon Pressure Campaign Limited & anor -v- An Bord Pleanála & ors (No. 2):
- <http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/760a10d1a4bb989180258011003f545d?OpenDocument>

For instance:

- *(iv) whether a national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, should interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in art. 9(3) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25th June, 1998 (a) in a procedure challenging the validity of a development consent process involving a project of common interest that has been designated under Regulation No. 347/2013 of the European Parliament and of the Council of 17th April, 2013 on guidelines for trans-European energy infrastructure, and/or (b) in a procedure challenging the validity of a development consent process where the development affects a European site designated under Council Directive 92/43/EEC of 21st May, 1992 on the conservation of natural habitats and of wild fauna and flora;*

While the Judge in my case refused to rule on the applicability of Article 9(3) and my right and entitlement to a protective costs order, the above confirms that in practice such measures do not exist in domestic Irish law. As such they now need to be adjudicated on by the European Court of Justice with respect to the rights under European Law.

Finally, while it has been raised before in front of the Compliance Committee, I would just like to add a reminder with respect to the situation with pertained in 2010 and the then unavailability of access to justice in Irish Courts with regard to litigation within the scope of the Convention. This was raised at that time on C/54 with respect to

- Klohn -v- An Bord Pleana

- http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20communicant/frCommC54Annex_Klohn_V_An_Bord_Pleanala_5Sept2011.pdf
- "With regard to the Aarhus Convention, this Convention is not applicable as the Ireland has not ratified it"

In that case after a long drawn out affair in the Irish High Court, the plaintiff had to carry €86,000 of the State's legal costs plus his own. Ireland may well have now ratified the Convention, but it very deliberately has failed to give effect to it in Irish domestic law, so in effect nothing has changed. Therefore, as then, it takes a very brave person(s) to enter the Irish Courts to challenge on these issues. There most certainly is no certainty with respects to rights related to access to justice.

Regards

Pat