



Professor Jan Darpö
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Dear Professor Darpö,

Ireland welcomes the opportunity to comment on the draft report, dated 29th January 2020, analysing the 2018 questionnaire responses on Access to Justice in Information Cases. While the report provides an interesting and useful discussion of the issues, there are a number of factual inaccuracies in respect of Ireland which I refer to below.

Page 9, Question 1

“In quite a few Parties, the consequence of not meeting the deadline is that this “silence” is regarded as a refusal (EU, ME, PT, MD, RS, SK, CH), enabling the applicant to appeal that “decision” by the authority.”

This is also the case in Ireland. Article 10(5) of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (hereafter referred to as the AIE Regulations) provides:

“Where a decision is not notified to the applicant within the relevant period specified in article 7, a decision refusing the request shall be deemed to have been made by the public authority concerned on the date of expiry of such period.”

Page 12, Question 4

“Moreover, there do not appear to be any costs in the administrative appeal phase, irrespective of whether this is performed as administrative reconsideration or review by an information tribunal. But of course, there are also exceptions from this rule, the €50 standard fee for an appeal to the Irish CEI being one such example.”

It should be noted that there is a reduction in this standard fee for a holder of a medical card, a dependent of a holder of a medical card or an appeal by a person, other than the applicant, who would be incriminated by the disclosure of the environmental information concerned. The cost of an appeal for these categories of



people is reduced to €15. Furthermore, the legislation provides that the Commissioner may waive or refund fees in certain circumstances.

The cost of making an appeal must also be considered in light of the costs of the earlier stages of making an AIE request, there is no cost in initially making a request and charges for receipt of information are generally very low (some charges may arise if there is a significant level of photocopying, however, in practice, this is unlikely to be a significant level of costs). Furthermore the Irish AIE regime provides for an initial internal review, which is free of charge.

Page 12, Question 4

“What costs (fees, charges) are connected to review before the court of law or other review bodies in these cases?”

“...the Loser Pays Principle (LPP) seems also to be quite common (EU, DE, IE, CH)...”

It is not correct to say that the loser pays principle applies in Ireland. Section 3 of the Environment (Miscellaneous Provisions) Act 2011 provides special cost rules under which each party to judicial proceedings bears their own costs in proceedings with discretion for the court to award costs against a party in certain cases (e.g. frivolous, vexatious or in contempt of court etc.). These cost rules mean that an applicant will very rarely be obliged to pay the costs of a respondent, even if they are unsuccessful (except in cases where the litigation is, for example, vexatious) and that they may still be awarded costs if their case is a matter of exceptional public importance (section 3(4)). Section 5 of this Act applied these cost rules to proceedings relating to a request for information under the AIE Regulations.

Section 7 of the Environment (Miscellaneous Provisions) Act 2011 provides that a party to such environmental proceedings can apply to the Court at any time before or during the proceedings for a determination that the cost rules apply to those proceedings.

To further reduce costs, it is open to anyone taking a case in environmental matters to enquire from legal practitioners if they are willing to take the case on a ‘no foal, no fee’ basis. Under such an agreement, if an applicant wins a case they will be entitled to recover costs from the losing side, and if they lose the case, their legal representatives will have agreed not to seek their fees.



Excerpts from Environment (Miscellaneous Provisions) Act 2011¹

Costs of proceedings to be borne by each party in certain circumstances.

3.— (1) Notwithstanding anything contained in any other enactment or in—

(a) Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986),

(b) Order 66 of the Circuit Court Rules (S.I. No. 510 of 2001), or

(c) Order 51 of the District Court Rules (S.I. No. 93 of 1997),

and subject to subsections (2), (3) and (4), in proceedings to which this section applies, each party (including any notice party) shall bear its own costs.

(2) The costs of the proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant, or as the case may be, the plaintiff, to the extent that he or she succeeds in obtaining relief and any of those costs shall be borne by the respondent, or as the case may be, defendant or any notice party, to the extent that the acts or omissions of the respondent, or as the case may be, defendant or any notice party, contributed to the applicant, or as the case may be, plaintiff obtaining relief.

(3) A court may award costs against a party in proceedings to which this section applies if the court considers it appropriate to do so—

(a) where the court considers that a claim or counter-claim by the party is frivolous or vexatious,

(b) by reason of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of the court.

(4) Subsection (1) does not affect the court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.

(5) In this section a reference to "court" shall be construed as, in relation to particular proceedings to which this section applies, a reference to the District Court, the Circuit Court, the High Court or the Supreme Court, as may be appropriate.

¹ <http://www.irishstatutebook.ie/eli/2011/act/20/enacted/en/html>



Proceedings relating to Information Regulations.

5.— (1) Section 3 applies to civil proceedings, other than proceedings referred to in subsection (2), instituted by a person relating to a request referred to in Regulation 6 of the Information Regulations.

(2) Section 3 shall not apply to proceedings instituted by the Commissioner for Environmental Information or a public authority pursuant to the Information Regulations.

(3) In this section—

“Information Regulations” means the European Communities (Access to Information on the Environment) Regulations 2007 (S.I. No. 133 of 2007);

“public authority” has the meaning assigned to it by the Information Regulations.

Application to court for determination that section 3 applies to proceedings.

7.— (1) A party to proceedings to which section 3 applies may at any time before, or during the course of, the proceedings apply to the court for a determination that section 3 applies to those proceedings.

(2) Where an application is made under subsection (1), the court may make a determination that section 3 applies to those proceedings.

(3) Without prejudice to subsection (1), the parties to proceedings referred to in subsection (1), may, at any time, agree that section 3 applies to those proceedings.

(4) Before proceedings referred to in section 3 are instituted, the persons who would be the parties to those proceedings if those proceedings were instituted, may, before the institution of those proceedings and without prejudice to subsection (1), agree that section 3 applies to those proceedings.

(5) An application under subsection (1) shall be by motion on notice to the parties concerned.



Page 12, Question 4

“...mandatory use of representation by a lawyer (EU, IE, PT, CH)”

In the same paragraph on page 12 Ireland is included in the list of parties that require mandatory representation by a lawyer. There is in fact no requirement in Irish courts for a party to be represented by a lawyer.

Courts Service - Guidelines for persons representing themselves in the High Court

<http://www.courts.ie/Courts.ie/Library3.nsf/0/D5525C20377167E880258061004120D1?OpenDocument>

Excerpt from, Rules of the Superior Courts, Order 84² Judicial Review

“

20. (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

(2) An application for such leave shall be made by motion ex parte grounded upon:

(a) a notice in Form No 13 in Appendix T containing:

(i) the name, address and description of the applicant,

(ii) a statement of each relief sought and of the particular grounds upon which each such relief is sought,

(iii) where any interim relief is sought, a statement of the orders sought by way of interim relief and a statement of the particular grounds upon which each such order is sought,

(iv) the name and registered place of business of the applicant's solicitors (if any), and

(v) the applicant's address for service;” [emphasis added]

² <https://beta.courts.ie/rules/judicial-review-and-orders-affecting-personal-liberty>



Page 13, Question 6

In a last category of Parties, a separate enforcement procedure must be initiated by the information requester in order to have the judgment executed (IE, KZ).

This does not accurately reflect the Irish AIE regime. Article 12(5) of the AIE Regulations provides that where the Commissioner receives an appeal he or she shall review the decision of the public authority, affirm, vary or annul the decision, specifying the reasons for his or her decisions, and where appropriate, require the public authority to make available environmental information to the applicant.

Article 12(7) of the AIE Regulations provides that a public authority shall comply with a decision of the Commissioner within three weeks of the date it received the decision.

Article 12(8) of the AIE Regulations provides that where a public authority fails to comply with a decision of the Commissioner within the three week period set down in article 12(7), the Commissioner may apply to the High Court for an order directing the public authority to comply with his or her decision, and on the hearing of such application, the High Court may grant such relief accordingly.

The Commissioner has not had to use his powers under article 12(8) to date.

There is no requirement on the applicant to issue enforcement proceedings.

Page 14, Question 8

“Do you have any experience of situations/cases where individuals or ENGOs asking for environmental information have been penalized, persecuted or harassed in any way for their involvement?”

Summary of the responses

There are no such experiences according to this study, save for two examples. One of the Irish respondents says that there is anecdotal evidence that harassments occurs...”

On page 14 there is a reference to anecdotal evidence that harassments occur in the context of making AIE requests in Ireland. I would be extremely concerned if this were the case in Ireland and have endeavoured to find the source of this anecdotal evidence, including contacting the respondent, who conveyed the anecdotal evidence in question, for further details, with no success. I believe that the publication of an allegation has the effect of giving it credibility, which in this case, in the absence of



evidence, it has not earned and does not deserve. I therefore request that unless the Task Force can provide evidence for this allegation, it be removed from the study. I believe that such an allegation is in no way characteristic of the Access to Information on the Environment system in Ireland.

The independent Office of the Commissioner of Environmental Information has confirmed that they are not aware of any reports of an applicant for environmental information being subjected to harassment.

Page 18, Remarks and Discussions

“On the other hand, the litigation costs in some of the studied Parties can be quite substantial (EU, IE).”

Here I refer again to the information above on the cost rules in the Environment (Miscellaneous Provisions) Act 2011.

Thank you for this opportunity to submit observations on the draft report on Access to Justice in Information Cases. Please contact me if you require any further clarification or information.

Yours sincerely,

Aoife Joyce
National Focal Point for the Aarhus Convention