

Access to Cross-Border Justice on the Island of Ireland post-Brexit

Item 4 Stocktaking of recent developments and upcoming.

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Background Context:

This presentation summarises issues identified in two separate but related collaborative research projects on cross border environmental co-operation and justice issues that I participated in 2022.

These were:

1. “Finding Common Ground” an all-island study of implementation of the Aarhus Convention in Ireland/Northern Ireland, an Irish Research Council funded project, which was conducted collaboratively with Irish and Northern Irish NGOs and academics. (Hough, Finding Common Ground: All Island Synthesis Report, 2022) <https://www.findingcommonground.ie/>
2. “Linking the Irish Environment” which was commissioned by the IEN and NIEL, the two network membership organisations for environmental NGOs on the island, funded by CFI/CFI NI joint funding. This research sought to map pathways to cross-border co-operation in the environment sector on the island of Ireland, to deal with the shared challenges and post Brexit. Ciara Brennan, Finbarr Brereton, Mary Dobbs, Viviane Gravey, Hannah Gould, Alison Hough & Lisa Whitten (2023) ‘Linking the Irish Environment: Interim Report’ Environmental Justice Network Ireland Research Report, January 2023 <https://ejni.net/wp-content/uploads/2023/01/Linking-the-Irish-Environment-Interim-Report-Jan-2023-1.pdf>

I addressed the Taskforce last year, on behalf of EJNI, about issues with Access to Justice caused by Brexit. These included the issues with recognitions and enforcement of judgements, the loss of the cross-border legal aid Directive, and issues with access to justice standards, e.g. in the area of costs. Those issues are still outstanding, in addition to the other issues highlighted below. The most significant of these is the issue of regulatory divergence/loss of the level playing field, putting obstacles in the way of all-island environmental protection, which will be addressed in more detail under Item 4.

This in the context of the research showing that Northern Ireland has had serious environmental governance problems generally and low levels of enforcement, resulting in a picture of already ineffective environmental protection (Brennan, Purdy and Hjerp, 2017; Brennan, Dobbs and Gravey, 2019).

The Aarhus Convention presents an as yet poorly utilised opportunity to maintain coherence of environmental governance post-Brexit (Brennan, et al., 2022), and has strong supportive relationships to other applicable human rights instruments such as the Good Friday/Belfast Agreement (GF/BA), the European Convention on Human Rights (ECHR). There are many problems in access to justice in both jurisdictions such as own costs, standing, standard of review, and courts dysfunction/delay.

Some key issues in relation to access to justice in a cross-border context are:**1. Cost barriers in Northern Ireland:**

Campaigners highlighted that “no-foal, no-fee” /contingency fee arrangements are not lawful. The reverse costs cap introduced in 2017 means that the applicant can only recover up to €35,000, and while there is provision for applicants to ask to have this made higher, activists indicated that doing so could result in other problems so they generally didn’t feel that they could do so. This leaves applicants liable for own costs over and above this.

2. Cost barriers in Ireland:

Section 50B costs rules in the Planning and Development Act 2000 as amended introduced in 2011 were only recently clarified by the Irish Supreme Court in the [Heather Hill case](#) (Nov 22) to cover all aspects of the Plaintiff’s claim. This protects an applicant against other side costs. However, as in the NI situation, own costs can still be substantial and prohibitive (as noted in [Ireland’s EIR 2022](#)). Under new legislative proposals contained in the Planning and Development Bill 2022, this situation would be made worse by the removal of the capacity to recoup costs for the successful applicant.

3. Standard of Review (Ireland & Northern Ireland):

The Courts in both jurisdictions defer to the expert tribunal and only offer substantive review in exceptional circumstances (irrationality threshold or Tameside cases (failure to make reasonable enquiries) in NI). This interacts negatively with the lack of equal rights of appeal in NI (objectors cannot appeal the initial planning decision, only judicially review, while developers have administrative appeal) because it means that in many cases there is no substantive appeal, administrative or judicial. The ACCC have been critical of these discrepancies between the rights of the public/NGOs and the rights of developers regarding lack of administrative appeal for applicants/NGOs in previous decisions (para 143 of ACCC/C/2013/90) as have the PAC and other institutions in Northern Ireland, but this issue remains. The issue of standard of review is currently under consideration by the ACCC in ACCC/C/2017/156.

4. Evidential issues in Northern Ireland:

Activists have highlighted the issue of the weight accorded by decision makers to respective evidence of expert witnesses, and the failure to give reasons for choices made in relation to this. This is well illustrated by the [High Court judgment in River Faughan Anglers Ltd](#)¹ case which went on to be considered by the ACCC in the [findings ACCC/C/2013/90](#) who noted that the failure of the Court to engage with the substantive issue of negative EIA screening. See also [Re MORA's Application for Judicial Review \[2022\] NIQB 40](#) (paras 82-97) for failure of the Court to engage with a factual error of the decision maker.

5. Loss of the [Cross Border Legal Aid Directive](#), removing reciprocal legal aid arrangements between Northern Ireland and Ireland.**6. Loss of the Brussels Regulation II Bis (Regulation 1215/2012):**

There is currently no common agreement in place between the EU & UK for jurisdiction of claims and recognition/enforcement of civil judgments. The EU’s recent accession to the Hague Convention will not replace the framework (and the UK have not yet joined).

¹ In the matter of Dean Blackwood representing the River Faughan Anglers Ltd vs Derry & Strabane District Council [2018] NIQB 87, available at https://www.judiciaryni.uk/sites/judiciary/files/decisions/Blackwood%27s%20%28Dean%29%20Application_0.pdf

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