ENVIRONMENTAL OBJECTIONS AND APPEALS – WHAT ACCESS TO JUSTICE?

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"I would like to have the power of the Mayor of Shanghai… I would like that we can get through the consultation problem as quick as possible." An Taoiseach Bertie Ahern, Shanghai, January 2005.

This paper will suggest that two key determinants of access to justice are 1) the legal and regulatory structures and 2) the attitudes of decision makers operating within those structures.

It will be suggested that the structures are geared against effective public access and that this trend is intensifying. It will be suggested also that the available evidence indicates that attitudes of decision makers are not supportive of those seeking access to justice in the area of environmental regulation.

Let us first identify the key decision makers. These include: -

- Environmental Protection Agency
- An Bord Pleanala
- NAOSH which also calls itself the Health and Safety Authority
- Local Authorities
- National Government
- EC Institutions
- Courts

Headings under which we may analyse the legal and regulatory structures: -

- Formal Rules i.e. Statutory or Regulatory Provisions
- Informal Rules
- Barriers to Participation; particularly costs, in the absence of funding or legal aid; and also for example wilfully impenetrable legislation.

Headings under which we may analyse attitudes of decision makers: -

- Identity of decision makers
- Appointment of decision makers
- Security of decision makers' position
- Remuneration of decision makers
- Decision makers' background and education
- Access to decision makers
- Comments by decision makers
- Accountability of decision makers
- Liability of decision makers

To analyse each decision maker under each heading would require a separate seminar. This paper will therefore focus on some issues and examples drawn from practice which illustrate the general picture as I see it in operation.

It is noteworthy that some of the most severe criticism of Irish governance in relation to the environment comes from outside Ireland, in particular from the European Court of Justice. Consider the case of *Commission v Ireland* C-494/01. This case has its origins in the dim and distant past – the 1990's- but as it has proceeded through the system it has built up massive momentum. It now encompasses a range of complaints against Ireland so serious in nature that the Advocate General has found that our Governments – and that means successive Governments – have engaged in institutionalised lawbreaking, and in doing so have endangered human health and caused environmental harm .

Endangering human health and causing environmental harm is not what any government wants on its CV. But that is exactly what the Irish Government has been doing in the opinion of the Advocate General of the European Court of Justice. The Government has engaged in 'persistent widespread and serious' failure to comply with EU waste law he says. Advocate-General Geelhoed told the Court in September last that as a result of this failure the Government has endangered human health and caused environmental harm. In a formal opinion delivered to the Court the Advocate-General recommends that the Court should declare Ireland to be in breach of no fewer than four separate Articles of the Waste Directive and also in breach of Article 10 of the EC Treaty. The Advocate-General's opinion is not binding but is normally followed by the Court. Judgment is due on April 26th.

Because of the great significance of the issues at stake in the case, both parties' arguments had been heard by the Court's Grand Chamber (full Court). The vast majority of cases are dealt with by a smaller number of Judges in a limited panel or Chamber. The EU Commission brought the case to the Court following complaints about breaches of EU waste law at twelve separate locations throughout the country, including Dublin, Cork, Waterford, Wexford, Limerick, Carlow, Laois and Louth.

Government lawyers had claimed during the hearing of the Case last July that these were only 'isolated incidents' and that there was no evidence of 'actual environmental harm'. The Advocate General flatly rejected these claims and in an unusually strongly worded opinion said that there were sufficient grounds for establishing that Ireland had infringed the Waste Directive in a 'general and structural manner' - in effect institutionalised lawbreaking. The Government has, he says, infringed its obligations because, among other reasons, it has failed to 'prevent the abandonment, dumping and uncontrolled disposal of waste, thereby endangering human health and causing environmental harm'.

This is the first time any EU Member State has been criticised for breaching EU health and environment law in a 'general and structural manner'. The Advocate General's opinion is likely to prove devastating to the Government's defence strategy in this landmark case. His recommendation that Ireland should pay the legal costs of the case would see a hefty legal bill for the Irish taxpayer - another consequence of the 'persistent widespread and serious' failure by Government to

obey and uphold a fundamental law which is supposed to protect public health and the environment.

The Government press response claimed that this was ancient history and that things are different now does not stand up.

Following the embarrassment of the Advocate General's remarks in September came further bad news from the Commission in January - Environment Commissioner Mr Stavros Dimas announced the Commission's intention to take legal action against Ireland for eight breaches of EC Environmental Law including failure to transpose directives, some which dated back to 1991. The breaches related to: -

- delays in upgrading town sewage plants;
- bad odours from sewage plants;
- the disposal of contaminated construction waste at Tynagh mines in Co Galway;
- the removal of waste and the restoration of wetlands in the Boyne estuary;
- the failure to submit reports on the use of certain ozone depleting substances;
- the failure to submit a plan to limit certain air pollutants, and
- the failure of the State to properly implement the EU Directive on the use Environmental Impact Assessments.

In relation to the delays in upgrading town sewerage systems, the Commission specifically mentioned plants at Bray, Co Wicklow; Shanganagh and Howth, Co Dublin, Letterkenny, Co Donegal, Sligo town and Tramore, Co Waterford.

The Commission said it had "*a duty to ensure that each member-state lives up to its commitments to safeguard the environment and human health*".

This time the Minister for the Environment, Mr. Roche, was angry. He criticised the Commission for announcing its intentions *"by press release"*. He claimed to the Irish Times that many of the actions *"would never get to Court"*. Well time will tell, but of course Case C 494-01 has already been to Court and the omens are not good for the Minister.

Matters have not improved since January. This week the Commission again provoked the Minister's ire: the Commission announced its intention to take Court action alleging breaches of the EU Framework Directive on Waste. It cited broken Government promises in relation to what waste treatment plants including Ringsend:

"Legislation promised by the Irish Government to better regulate the management of such plants has not yet materialised".

The Minister again slammed the Commission's action as you will have seen in the papers this week.

It might be worth recalling at this point the formal steps undertaken between the Commission and Member States in relation to possible Court action against a member state. The most important enforcement instrument in the hands of the Commission is under Article 226 of the EC Treaty:

> *"If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter, after giving the state concerned the opportunity to submit its observations. If the state concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice".*

You will see that there is a careful and measured three stage procedure each of which stages can take months if not longer, and the first stage only begins after painstaking time-consuming consideration of the basic complaint: -

1. Formal Notice of Breach sent in writing to the Member State. The Member State has the opportunity to respond and to justify its position.
2. Issue of a reasoned opinion, again in writing, having taken careful account of the Member States response (if any). Again, the Member State can respond.
3. Application to the Court of Justice.

So the Minister's claim to have been taken by surprise is itself surprising.

At least the Minister gets the documents in writing from the Commission. The public, including the complainant, is not so lucky. Regrettably the Commission does not make public either the letter of formal notice or the reasoned opinion. As Dr Ludwig Kramer points out in his leading textbook EC Environmental Law (5th ed. London 2003) there is no justification in the wording of the Article for this secrecy. To keep the public fully in the dark the Government decided two years ago to introduce similar secrecy conditions on correspondence received from the Commission or replies sent to the Commission. (This veil of secrecy was breached in spectacular fashion, against the wishes of the Government and the local authority supported initially by An Bord Pleanala, at last year's Oral Hearing before An Bord Pleanala in relation to a highly critical Reasoned Opinion issued by the Commission concerning the proposal by Waterford County Council to construct a landfill next to the River Lickey which is a candidate SAC).

In the context of this afternoon's topic it is essential to note that the private citizen has absolutely no right of access to the European Court of Justice for the purpose of enforcing Environmental Legislation. Access to the Court is for all practical purposes controlled by the Commission. If the Commission decides not to act that is the end of that legal road as far as the ordinary citizen of Europe is concerned. In turn, even where the Commission does bring proceedings the sanctions available through the Court have serious limitations. For example it seems that the Court will not use its power to grant injunction type orders which may well be the only

effective orders available to remedy an imminent breach having irrevocable consequences.

Having noted these limitations and flaws, what is remarkable in my view is the intemperate response by the responsible Minister to the threat of proceedings. Unfortunately, it appears that the view I heard expressed in by one Local Authority official at an oral hearing may be widely shared. He claimed that European Directives were drawn up to deal with problems in places like Germany which were already heavily polluted and so were not really relevant to Ireland. It appears that we are not sufficiently polluted yet. As a lawyer, I know there is no legal basis for the claim that the validity of EC Directives stops at the Rhine and I understand from my friends in the scientific community that it has no scientific validity either but it would account for the type of reaction we have seen from the Minister.

I have focused on the views of our elected political leadership because they are important in themselves and they give an insight into how policy is formed. They are also important because they reflect the views of those who appoint many of the decision makers in the key decision making bodies. It would be human nature to appoint decision makers whose views are not fundamentally at odds with one's own. All the more so when one is confronting an issue which has about it the air of crisis as the waste management issue does currently.

The purpose of public administration is to avoid the necessity for crisis management by anticipating problems before they become critical. Unfortunately, that objective of good public administration has not been met in relation to the waste issue. Let us consider how that administrative failure has had an effect on decision making with regard to, for example, incineration.

The formal measures undertaken to tackle, for example, the issue of hazardous waste seem straightforward at first sight. The Government asked the EPA to prepare a National Hazardous Waste Management Plan and that was duly compiled and approved by Government. The Plan therefore represents National Policy. It contains a set of proposals and sets targets. It explains how those targets are to be met. It lists nine priority actions to be undertaken by 2006 all intended to assist in the attainment of those targets. One target is to either eliminate the necessity to incinerate hazardous waste or, alternatively, to limit the amount of hazardous waste to be incinerated to a maximum of 18,000 tonnes per annum. Not feeling at all abashed and despite the advice of its own Senior Inspector, An Bord Pleanala gave permission for a 50,000 tonne incinerator in Ringaskiddy.

In addition to devising a National Plan, given the well known public concern on the question of possible health hazards from waste facilities, the Minister for the Environment at the time, Mr. Dempsey, asked the Health Research Board to compile a detailed report on the human health impacts of landfill and incineration of waste. Announcing the request to the Board in 2002, the Minister explained that this was to reassure the public and allay public concerns.

When the Board published its Report in 2003, however, the Minister's hopes must have been dashed. Instead of confirming his view that the public were worrying unnecessarily the Report said some things which were very disconcerting indeed. It found that Ireland did not have the resources to carry out adequate risk assessment of proposed landfill and incineration facilities. Neither did we have the resources to carry out the necessary monitoring of human health impacts from these facilities. Both these matters needed to be addressed immediately. The Report confirmed that such facilities were capable of having adverse human health effects. It was clear that while Ireland had a serious problem and the Board pulled no punches in identifying what needed to be done. (The Report sadly is now out of print but is accessible at www.hrb.ie)

It is astonishing to consider the response to the Report of this Statutory Advisory Body. There was in effect no response at Government level. At the level of the EPA and An Bord Pleanala, decision-making rolled on unhindered. Planning Permissions and Operating Licences continued to issue from those bodies in respect of incinerators and landfills up and down the country. It was as if the Health Research Board Report had never been sought and certainly never written. One of the Reports eminent medical authors was so concerned at the non-implementation of its findings that he volunteered to attend and give evidence to the recent EPA oral hearing on the proposed Ringaskiddy incinerators. The silence of the decision makers on the Report's findings was and continues to be deafening. How can this be?

Let us remind ourselves that the entire complex web of agencies and bodies with responsibility in the environmental field was created for a very simple purpose – to protect human health and the environment. That of course was the original reason for setting up local authorities in the 19th Century – to manage waste and water and so to preserve public health. As the number of agencies has grown, it appears that the awareness of the purpose for which they exist has crumbled away. Each agency has it seems decided that assessing health effects is some other agency's job. A month after the HRB Report was published, EPA Director General, Dr. Mary Kelly wrote to the Secretary General of the Department of Health asserting that responsibility for monitoring human health was not a job for the EPA but was rather a responsibility for the Department of Health. She described in admirably plain terms that the EPA simply looked at relevant standards, applied those standards once it was satisfied that an applicant could meet them, and then presumed that once those standards were met, no human health damage could occur. That is a point of view. It does not have any medical basis that I can ascertain but at least it has the merit of clarity. The Health Service Executive (as successor to the Health Boards) does not take responsibility for assessing health impacts of major pollution-risk projects. An Bord Pleanala is in effect still precluded from considering health in relation to those projects requiring EPA approval. Health is nobody's child. They say success has many fathers but that failure is an orphan.

Dr Kelly's point of view was reiterated more recently by another member of the EPA Board who has gone on record to say that because the relevant Directives state that

they have as their objectives the prevention, reduction or minimisation of harm that it follows that any standards applied by definition prevent harm. That absolute assertion is not of course sustainable. The Directives' parallel aims of reduction or minimisation have become 'non-words' as far as the proponents of this view are concerned.

There are other serious problems with that assertion but from the perspective of access to justice the most difficult is this: in the case of *O'Keeffe v An Bord Pleanala* [1993] 1 Irish Reports 39, the Supreme Court made it clear that it did not want to be required to act as a kind of last-ditch appeal forum against decisions of bodies like An Bord Pleanala. Such bodies, and these would include the EPA, are considered expert in their field in the view of the Court. They are set up on a statutory basis and are shown great deference by the Court. In one sense this is of course a very understandable view especially bearing in mind the intense and unremitting pressure on Court resources – pressure which judges feel personally every day. Accepting that, in my view the situation has now reached a point of considerable danger. It appears that while the judges understandably do not wish to have to behave as if they were also scientists, we are at a point where because of judicial reticence in engaging with environmental law disputes, the scientists are in effect left to be the judges. By this I mean that the scientists in the EPA are left to make decisions secure in the knowledge that those decision are all but beyond judicial control. That is not healthy. We all behave better if we are accountable. Environmental law is perhaps in the position Family Law was in 30 years ago – seen as not really law. It is seen too readily as purely technical, a matter for technical experts, not lawyers. That is to place it above the law. That is dangerous and wrong in my view.

It appears that in too many cases environmental decision makers are only accountable to the politicians who appoint them, if they are even accountable to them. Yet so far as can be established the Board or the Agency is made of people who have no legal expertise. Perhaps more significantly, neither do they possess medical expertise. They do not appear to be willing even to hire in such expertise from independent medical experts or research institutes. Indeed, they seem even to be reluctant to liaise formally with An Bord Pleanala when dealing with applications that come before both the Agency and the Board. In two recent cases in which I was involved the Board wrote as it is entitled to do under the law to the EPA inviting it to assist the Board by commenting on the applications in question. In one case there was no reply from the EPA. In the second the EPA said that because it was dealing with a licence application for the activity it was unable to respond!

In this hermetically-sealed world decision makers can with the best will in the world make mistakes. There is another factor worth noting here. The EPA Act confers legal immunity on the Board of the Agency for its actions. In the legal scheme of things they are the new holders of what used to be called sovereign immunity – a rare privilege indeed at a time when the sovereign (in Ireland the State on behalf of

the people taking the place of the sovereign) is no longer immune. Rare but not unique – a similar blanket of immunity is given to the NAOSH/HSA. Why should bodies with such immense power to authorise pollution of the environment on which all depend for our health and wellbeing not be answerable if they make mistakes? The consequences of those mistakes can be exceptionally serious. Why should they be above the law?

Community organisations in Ireland have traditionally accepted at face value assurances that they entitled to participate in decision making processes which may affect their interests. When as happens all too often they are in fact ignored massive disillusionment sets in. The purpose of allowing public participation is to improve the quality of the decision making. Decision makers do not know everything. The public have something to bring to the table. It should be unnecessary to repeat such an obvious statement and yet it is necessary to repeat it. Experience suggests to me that the attitude towards public participation is too often begrudging if not downright hostile. The public are seen as trouble. Yet when dealing for example with an oral hearing into a local authority project the public concerned are paying three times over: they pay for their own presentation and witnesses, while also contributing to the wages of the decision makers, and of the people on the other side of the room including the authority's expensive consultants. And still they are liable to be insulted or patronised. With honourable exceptions, all too often people within the decision-making structures barely tolerate public input. This is understandable taking into account the lead given by the Minister and the Taoiseach. These men have expressed views which contaminate the entire decision making hierarchy. That is regrettable and it should not be so. If we are really only pretending that people have a right to be consulted, if we are in fact only humouring them, marking time until the decision is handed down, we are engaged in a dangerous game. It is positively damaging to our democratic system if it is allowed to continue.

I quoted the Taoiseach's Shanghai remarks earlier. In conclusion let us return to China. We see reports this week of riots erupting in a rural area when 3,000 farmers finally lost patience with State Authorities who were failing to control chemical plants operating beside their community. Their farmland had been compulsorily acquired and given to the factory operators to build the plants. The operators were beyond effective control. Now the crops were failing and the people's health was suffering dramatically. And so peaceful law-abiding people would take no more. Whatever about the choice between Boston or Berlin, the Shanghai model is not a model our political or administrative elite should be seeking to impose here.

All of us at this conference have some role to play in promoting good environmental decision making. My invitation to you is to recognise the importance of your own role in promoting environmental justice, and to continue to fulfil that role independently of inappropriate pressures from others however elevated.

Joe Noonan

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