[2024] IEHC 690

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2024.0000588]

BETWEEN

PATRICK MCGREAL

APPLICANT

AND

THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE OF IRELAND

RESPONDENT

(II)

JUDGMENT of Humphreys J. delivered on Friday the 6th day of December 2024

1. The applicant seeks to challenge exempted development regulations which facilitate housing of international protection seekers and displaced persons. The applicant having been granted leave to challenge such regulations in the abstract without reference to a specific development, the State now seeks to discharge the leave order. The issue is whether the criteria for discharge have been met.

Judgment history

2. The applicant, a litigant in person, has brought previous proceedings in order to challenge particular accommodation facilities in County Tipperary, on the basis of the purported invalidity of Planning and Development (Exempted Development) (No. 4) Regulations 2023 (S.I. No. 376 of 2023) (**the 2023 regulations**), in proceedings numbered 2024 No. 971 JR. On 31st July 2024, the applicant's *ex parte* application for an injunction seeking to restrain the use of those accommodation facilities was refused by Holland J.: *McGreal v. Minister for Housing* [2024] IEHC 520 (which I will refer to as *McGreal I*). As the State emphasises, that application was made on similar grounds but in the context of a challenge to the use of a particular accommodation facility, the present proceedings seek to impugn generally the validity of the 2023 regulations without reference to any particular accommodation facility. To distinguish, these proceedings can be referred to as *McGreal II*.

Facts

3. There are no specific facts related to any specific development involved in the challenge. The point made is a general and abstract one, so the background is addressed in legal analysis below.

Procedural history

4. By *ex parte* docket dated variously 29th and 30th April 2024, with the record number of the present proceedings, the applicant sought a number of reliefs against the respondent, including injunctive relief, declaratory relief, and relief by way of prohibition, to prevent the provision of accommodation to displaced persons and persons seeking international protection in the State.

5. The actual date was presumably 30th April 2024 because the record number was assigned on that date when a statement of grounds was filed.

6. Whatever about seeking an injunction in the *ex parte* docket, there was no basis to seek prohibition or declarations because those would be for a substantive hearing of a judicial review. The *ex parte* docket should have sought leave to seek those reliefs.

7. The applicant's *ex parte* application came on for hearing before Hyland J. on 30th April 2024 whereupon Hyland J. naturally enough declined to grant the applicant the reliefs being sought, noted that no application for leave to apply for judicial review had been made, and adjourned the matter for mention to 17th June 2024, when an application for leave to seek judicial review could be brought.

8. On 17th June 2024, the applicant applied *ex parte* for leave to apply for judicial review seeking the following reliefs:

> "(1) Injunction - prevent the use of S.I. No. 376/2023 - Planning and Development (Exempted Development) (No 4) Regulations 2023.
>
> (2) Injunction - prevent the movement of displaced persons or persons seeking international protection throughout the state into accommodation that is not within the scope of the provisions of the Planning and Development Act 2000.
>
> (3) Injunction - prevent the movement of displaced persons or persons seeking international protection throughout the state into accommodation that is not within the scope of the provisions of the Constitution of Ireland.
>
> (4) Prohibition - prevent action being taken to accommodate any displaced persons or persons seeking international protection outside the provisions of the Planning and Development Act 2000.

(5) Prohibition - prevent action being taken to accommodate any displaced persons or persons seeking international protection outside the provisions of the Constitution of Ireland.
(6) Declaration - A declaration that any action being taken to accommodate any displaced persons or persons seeking international protection must adhere to the provisions of the Planning and Development Act 2000.
(7) Declaration - A declaration that any action being taken to accommodate any displaced persons or persons seeking international protection must adhere to the provisions of the Constitution of Ireland."

9. On 17th June 2024, Hyland J. granted the applicant leave to apply for judicial review for all of the reliefs on the grounds set out in the applicant's statement required to ground his application for judicial review dated 29th April 2024.

10. The respondent was served with the applicant's judicial review papers on 19th June 2024.

11. The substantive notice of motion was filed on 25th June 2024.

12. On 24th October 2024, the respondent filed a notice of motion seeking to set aside leave, grounded on the affidavit of an official of the Department of Housing, Local Government and Heritage.

13. The applicant replied by affidavit filed on 11th November 2024. Two points stand out.

(i) Firstly, a number of provisions of the affidavit, including paras. 50 to 68 (alleging fraud and perjury by various persons) and 122 to 129 (irrelevantly alleging bias in previous proceedings) and 165 (alleging perjury) and 195 (possible offences) are dubious on various grounds. The State in correspondence of 27th November 2024 raised the issue of striking out inappropriate averments under O. 41 r. 16 RSC, specifically at paras. 50 to 84 and 172 to 175. At the hearing the State did not make any formal application but reserved its position in that regard.

(ii) Secondly, it is not permissible to expand the pleaded case by way of affidavit. That brings us to the question of how much latitude a court should allow in permitting a litigant in person to amend a statement of grounds in order to incorporate points that are not properly pleaded but are elsewhere in her papers. I will come to that later.

The 2023 regulations

14. At the risk of generalisation, the main categories of persons requesting reception provision on arrival in the State are individual applicants for asylum/ subsidiary protection, who arrive individually or in family groups, and displaced persons from Ukraine who have arrived by way of mass displacement since the Russian Federation's full-scale war of aggression.

15. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof provides for the temporary reception of displaced persons.

16. Separately, the State is required to provide accommodation to protection seekers in line with its obligations under EU law and the European Communities (Reception Conditions) Regulations 2018 (S.I. No. 230 of 2018).

17. Class 20F of exempted development was initially inserted into the Planning and Development Regulations 2001 by the Planning and Development (Exempted Development) (No. 4) Regulations 2022 (S.I. No. 605 of 2022) ("the 2022 regulations"), in order to include as part of that class the temporary use of such structures for the purpose of accommodating or supporting persons who were displaced from Ukraine as a result of the Russian Federation's full-scale invasion of Ukraine and who were entitled to temporary protection in Ireland under EU law. The 2023 regulations insert an exemption for the following development:

"Temporary use by or on behalf of the Minister for Children, Equality, Disability, Integration and Youth to accommodate or support displaced persons or persons seeking international protection of any structure or part of a structure used as a school, college, university, training centre, social centre, community centre, non-residential club, art gallery, museum, library, reading room, sports club or stadium, gymnasium, hotel, convention centre, conference centre, shop, office, Defence Forces barracks, light industrial building, airport operational building, wholesale warehouse or repository, local authority administrative office, play centre, medical and other health and social care accommodation, event and exhibition space or any structure or part of structure normally used for public worship or religious instruction."

18. The specification of developments of that class as exempted developments is subject to certain specific conditions and limitations, including that the temporary use is to be only for the purposes of accommodating displaced persons or for the purposes of accommodating persons seeking international protection, and that such use is to be discontinued by particular dates.

19. The 2023 regulations are made under ss. 4 and 262 of the 2000 Act. Section 4 provides:

"Exempted development.

4.—(1) The following shall be exempted developments for the purposes of this Act—

(a) development consisting of the use of any land for the purpose of agriculture and development consisting of the use for that purpose of any building occupied together with land so used;

(aa) development by a local authority in its functional area (other than, in the case of a local authority that is a coastal planning authority, its nearshore area);

(ab) development by a coastal planning authority that—

(i) owns the maritime site on which the development is proposed to be situated, or

(ii) is the holder of a maritime area consent granted for the occupation of a maritime site for the purposes of the proposed development,

in its nearshore area;

(ab) development consisting of the carrying out of relevant works or related activities over principal burial land, ancillary burial land or ancillary land within the meaning of the Institutional Burials Act 2022;

(e) development consisting of the carrying out by a local authority of any works required for the construction of a new road or the maintenance or improvement of a road;

(f) development carried out on behalf of, or jointly or in partnership with, a local authority, pursuant to a contract entered into by the local authority concerned, whether in its capacity as a planning authority or in any other capacity;

(fa) development to which section 179A applies;

(g) development consisting of the carrying out by any local authority or statutory undertaker of any works for the purpose of inspecting, repairing, renewing, altering or removing any sewers, mains, pipes, cables, overhead wires, or other apparatus, including the excavation of any street or other land for that purpose;

(h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;

(i) development consisting of the thinning, felling or replanting of trees, forests or woodlands or works ancillary to that development, but not including the replacement of broadleaf high forest by conifer species;

(ia) development (other than development consisting of the provision of access to a national road within the meaning of the Roads Act 1993) that consists of—

(I) the construction, maintenance or improvement of a road (other than a public road) that serves a forest or woodland, or

(II) works ancillary to such construction, maintenance or improvement;

(j) development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such;

(k) development consisting of the use of land for the purposes of a casual trading area (within the meaning of the Casual Trading Act, 1995);

(l) development consisting of the carrying out of any of the works referred to in the Land Reclamation Act, 1949, not being works comprised in the fencing or enclosure of land which has been open to or used by the public within the ten years preceding the date on which the works are commenced or works consisting of land reclamation or reclamation of estuarine marsh land and of callows, referred to in section 2 of that Act.

(1A) Subject to subsection (1B), the following classes of development shall also be exempted development for the purposes of this Act if carried out wholly in the maritime area:

(a) development for the purposes of any survey for archaeological purposes;

(b) development for the purposes, or consisting, of—

(i) the exploration for petroleum, within the meaning of Part II of the Petroleum and Other Minerals Development Act 1960, in accordance with a licence under section 8, 9 or 19 of that Act or a lease under section 13 of that Act,

(ii) the working, within such meaning, of such petroleum, in accordance with such lease or licence, or

(iii) the restoration of the area in which such exploration or working has taken place;

(c) development consisting, or for the purposes, of the construction or operation, in accordance with a consent under subsection (1) of section 40 of the Gas Act 1976, of an upstream pipeline,

(d) development for the purposes, or consisting, of dumping within the meaning of the Dumping At Sea Act 1996;

(e) development authorised under section 638 of the Merchant Shipping Act 1894 or section 3 of the Merchant Shipping (Commissioners of Irish Lights) Act 1997 by the Commissioners of Irish Lights for the purposes, or consisting, of the placement of aids to navigation;
(f) activities that are the subject of, or require, a licence under Part 5 of the Maritime Area Planning Act 2021;
(g) development consisting of the use of any land or maritime site for the purposes of—
(i) the harvesting of shellfish, or
(ii) activities relating to fishing or aquaculture.
(1B) Development referred to in paragraph (a), (d), (e) or (g) of subsection (1A) shall not be exempted development if an environmental impact assessment of the development is required.
(1C) Development referred to in paragraph (a), (d), (e) or (g) of subsection (1A) shall not be exempted development if an appropriate assessment of the development is required.
(2) (a) The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that—
(i) by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or
(ii) the development is authorised, or is required to be authorised, by or under any enactment (whether the authorisation takes the form of the grant of a licence, consent, approval or any other type of authorisation) where the enactment concerned requires there to be consultation (howsoever described) with members of the public in relation to the proposed development prior to the granting of the authorisation (howsoever described).
(b) Regulations under paragraph (a) may be subject to conditions and be of general application or apply to such area or place as may be specified in the regulations.
(c) Regulations under this subsection may, in particular and without prejudice to the generality of paragraph (a), provide, in the case of structures or other land used for a purpose of any specified class, for the use thereof for any other purpose being exempted development for the purposes of this Act.
(3) A reference in this Act to exempted development shall be construed as a reference to development which is—
(a) any of the developments specified in subsection (1) or (1A), or
(b) development which, having regard to any regulations under subsection (2), is exempted development for the purposes of this Act.
(4) Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.
(4A) Notwithstanding subsection (4), the Minister may make regulations prescribing development or any class of development that is—
(a) authorised, or required to be authorised by or under any statute (other than this Act) whether by means of a licence, consent, approval or otherwise, and
(b) as respects which an environmental impact assessment or an appropriate assessment is required,
to be exempted development.
(5) Before making regulations under this section, the Minister shall consult with any other State authority where he or she or that other State authority considers that any such regulation relates to the functions of that State authority."

20. Section 262 provides:
"Regulations generally.
262.—(1) The Minister may make regulations for prescribing any matter referred to in this Act as prescribed or to be prescribed, or in relation to any matter referred to in this Act as the subject of regulations.
(2) Regulations under this Act may contain such incidental, supplemental and consequential provisions as appear to the Minister to be necessary or expedient.
(3) Before making any regulations under this Act, the Minister shall consult with any relevant State authority where the regulations relate to the functions of that State authority.
(4) Where regulations are proposed to be made under section 4(2), 19(3), 25(5), 100(1)(b), (c) or (d), 126(4), 126A(2), 176, 179(1), 181(1)(a), 221(4), 230(1) or 246, a draft of the regulations shall be laid before both Houses of the Oireachtas and the regulations shall not be made unless a resolution approving the draft has been passed by each such House.
(5) Every regulation made under this Act (other than a regulation referred to in subsection (4)) shall be laid before each House of the Oireachtas as soon as may be after it is made

and, if a resolution annulling the regulation is passed by either such House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly but without prejudice to the validity of anything previously done thereunder."

21. The text of the 2023 regulations is as follows:

"S.I. No. 376/2023 - Planning and Development (Exempted Development) (No. 4) Regulations 2023

Notice of the making of this Statutory Instrument was published in
'Iris Oifigiúil' of 21st July, 2023.

WHEREAS I, DARRAGH O'BRIEN, Minister for Housing, Local Government and Heritage, am of the opinion that development to which the following regulations apply would not offend against principles of proper planning and sustainable development by reason of the nature and limited effect of development belonging to that class on its surroundings;

AND WHEREAS a draft of the following regulations has been laid before each House of the Oireachtas and a resolution approving that draft has been passed by each such House;

NOW I, DARRAGH O'BRIEN, Minister for Housing, Local Government and Heritage, in exercise of the powers conferred on me by sections 4 (2) and 262 of the Planning and Development Act 2000 (No. 30 of 2000) (as adapted by the Housing, Planning and Local Government (Alteration of Name of Department and Title of Minister) Order 2020 (S.I. No. 408 of 2020)), hereby make the following regulations:

Citation and construction

1. (1) These Regulations may be cited as the Planning and Development (Exempted Development) (No. 4) Regulations 2023.

(2) These Regulations shall be included in the collective citation Planning and Development Regulations 2001 to 2023.

Amendment of Part 1 of Schedule 2 to Planning and Development Regulations 2001

2. Part 1 of Schedule 2 to the Planning and Development Regulations 2001 (S.I. No. 600 of 2001) (as amended by Regulation 2 of the Planning and Development (Exempted Development) (No. 4) Regulations 2022 (S.I. No. 605 of 2022)) is amended by the substitution for the matter set out at CLASS 20F the following:

'CLASS 20F

Temporary use by or on behalf of the Minister for Children, Equality, Disability, Integration and Youth to accommodate or support displaced persons or persons seeking international protection of any structure or part of a structure used as a school, college, university, training centre, social centre, community centre, non-residential club, art gallery, museum, library, reading room, sports club or stadium, gymnasium, hotel, convention centre, conference centre, shop, office, Defence Forces barracks, light industrial building, airport operational building, wholesale warehouse or repository, local authority administrative office, play centre, medical and other health and social care accommodation, event and exhibition space or any structure or part of structure normally used for public worship or religious instruction.

1. The temporary use shall only be for the purposes of accommodating displaced persons or for the purposes of accommodating persons seeking international protection.

2. Subject to paragraph 4 of this class, the use for the purposes of accommodating displaced persons shall be discontinued when the temporary protection introduced by the Council Implementing Decision (EU) 2022/382 of 4 March 20221 comes to an end in accordance with Article 6 of the Council Directive 2001/55/EC of 20 July 20012 .

3. The use for the purposes of accommodating persons seeking international protection shall be discontinued not later than 31 December 2028.

4. Where the obligation to provide temporary protection is discontinued in accordance with paragraph 2 of this class, on a date that is earlier than 31 December 2028, the temporary use of any structure which has been used for the accommodation of displaced persons shall continue for the purposes of accommodating persons seeking international protection in accordance with paragraph 3 of this class.

5. The relevant local authority must be notified of locations where change of use is taking place prior the commencement of development.

6. 'displaced persons', for the purpose of this class, means persons to whom temporary protection applies in accordance with Article 2 of Council Implementing Decision (EU) 2022/382 of 4 March 2022.

7. 'international protection', for the purpose of this class, has the meaning given to it in section 2 (1) of the International Protection Act 2015 (No. 66 of 2015).

8. 'temporary protection', for the purpose of this class, has the meaning given to it in Article 2 of Council Directive 2001/55/EC of 20 July 2001.'

GIVEN under my Official Seal,
19 July, 2023.
DARRAGH O'BRIEN,
Minister of Housing, Local Government and Heritage.
1 OJ No. L 71, 04.03.2022, p. 1.
2 OJ No. L 212, 07.08.2001, p. 12.7"

Relief sought in statement of grounds

22. The reliefs sought in the statement of grounds are as follows:

"(1) Injunction - prevent the use of S.I. No. 376/2023 - Planning and Development (Exempted Development) (No. 4) Regulations 2023.

(2) Injunction - prevent the movement of displaced persons or persons seeking international protection throughout the state into accommodation that is not within the scope of the provisions of the Planning and Development Act 2000.

(3) Injunction - prevent the movement of displaced persons or persons seeking international protection throughout the state into accommodation that is not within the scope of the provisions of the Constitution of Ireland.

(4) Prohibition - prevent action being taken to accommodate any displaced persons or persons seeking international protection outside the provisions of the Planning and Development Act 2000.

(5) Prohibition - prevent action being taken to accommodate any displaced persons or persons seeking international protection outside the provisions of the Constitution of Ireland.

(6) Declaration - A declaration that any action being taken to accommodate any displaced persons or persons seeking international protection must adhere to the provisions of the Planning and Development Act 2000.

(7) Declaration - A declaration that any action being taken to accommodate any displaced persons or persons seeking international protection must adhere to the provisions of the Constitution of Ireland."

Applicant's grounds in statement of grounds

23. The grounds for relief in the statement of grounds are as follows:

"(e) Grounds upon which such relief is sought:

1. I hereby give notice to the court that I will now proceed to exhibit the detailed grounds upon which the requested injunctive reliefs, prohibitions, and declarations are sought.

2. I say that I have put a consolidated exhibit together with various documents which I have marked with the letters 'PMG1'

3. I will now enter into evidence section S.I. No. 376/2023 - Planning and Development (Exempted Development) (No. 4) Regulations 2023. refer to PMG 1, page 001-006

4. I will now enter into evidence Section 10 of the Planning and Development Act 2000. refer to PMG 1, Page 007-008

S.I. No. 376/2023 - Planning and Development (Exempted Development) (No. 4) Regulations 2023 contravenes Section 10 of the Planning and Development Act 2000 in the following ways:

5. Legal Framework: Section 10 of the Planning and Development Act 2000 (2000 Act) mandates that development plans must include objectives for the provision or facilitation of community services, such as schools, childcare facilities, and other essential amenities to support the local population.

6. S.I. No. 376/2023 Exemptions: The statutory instrument allows for the temporary use of certain structures to accommodate displaced persons or individuals seeking international protection. While this serves a critical humanitarian purpose, the regulations do not explicitly address the requirement for proper planning of essential community infrastructure.

7. Community Services Obligations: The 2000 Act emphasizes the importance of integrating community services into development plans to ensure sustainable and socially-integrated planning. By not requiring provisions for essential services in the context of accommodating displaced persons, the regulations overlook the long-term impact on the local community.

8. Impact on Local Infrastructure: The influx of displaced persons or asylum seekers necessitates considerations beyond temporary accommodation. Adequate provision of schools, healthcare facilities, childcare services, and other amenities is crucial to support both the newcomers and the existing community.

9. Planning Authority Oversight: While the regulations mandate notification to the local authority, this does not sufficiently address the comprehensive planning needed to ensure the seamless integration of temporary accommodation with essential community services.

The absence of specific requirements for community infrastructure planning raises concerns about the adequacy of oversight.

10. Sustainable Development Goals: Sustainable development principles encompass social, economic, and environmental considerations. Neglecting the planning for essential community services in temporary accommodation arrangements will hinder the achievement of sustainable development goals and compromise the well-being of both the newcomers and the host community.

11. Long-Term Implications: While the exemptions in S.I. No. 376/2023 are temporary in nature, the lack of explicit provisions for community services planning raises questions about the long-term impact on the local area. Failure to address these aspects during the temporary use period will lead to challenges in transitioning or integrating the facilities into the community post-exemption.

12. Overall Compliance: In light of the Act's emphasis on community service provision within development plans, the absence of specific requirements in the regulations for accommodating displaced persons is a deviation from the legislative intent of ensuring comprehensive and sustainable development that meets the needs of all residents.

13. Conclusion: The temporary exemptions provided by S.I. No. 376/2023, while serving an important humanitarian purpose, fall short of the requirements set forth in Section 10 of the Planning and Development Act 2000 regarding community services provision.

Addressing this gap is essential to ensure holistic and sustainable planning that considers the well-being of both the incoming population and the existing community.

14. I will now enter into evidence Section 20 of the Planning and Development Act 2000. Refer to PMG 1, page 009-010

S.I. No. 376/2023 - Planning and Development (Exempted Development) (No. 4) Regulations 2023 contravenes Section 20 of the Planning and Development Act 2000 in the following ways:

15. Public Consultation Requirement: Section 20(1) of the Act mandates that the planning authority must engage in comprehensive public consultation before preparing, amending, or revoking a local area plan. This consultation process is crucial for gathering input from local residents, public sector agencies, non-governmental organizations, community groups, and commercial interests within the area.

16. Consultation with Údaras na Gaeltachta: Section 20(2) specifically requires consultation with Údaras na Gaeltachta for local area plans that include Gaeltacht areas. This consultation ensures that the unique cultural and linguistic considerations of Gaeltacht areas are taken into account in the planning process.

17. Notification and Publication Requirements: Section 20(3) outlines the specific steps that the planning authority must follow, including sending notices of proposed local area plans to the Board and prescribed authorities, publishing notices in newspapers, and providing opportunities for public inspection and submission of feedback. These requirements are designed to ensure transparency and public participation in the planning process.

18. Requirement to Send Local Area Plan: Section 20(5) mandates that the planning authority must send a copy of any local area plan to bodies consulted during the planning process, the Board, and any prescribed bodies. This step ensures that all relevant stakeholders have access to the final plan and are informed of the decisions made.

19. Contravention by S.I. No. 376/2023: The S.I. No. 376/2023 regulations do not align with the rigorous consultation and notification requirements set out in Section 20 of the Act. The regulations lack explicit provisions for public consultation, consultation with Udaras na Gaeltachta, and the detailed notification and publication procedures outlined in the Act.

20. Impact on Stakeholder Engagement: The absence of robust consultation processes in the regulations limit the opportunities for community input, leading to decisions that do not fully reflect the needs and preferences of local residents, organizations, and businesses. This lack of engagement undermines the principles of transparency, inclusivity, and accountability that underpin effective planning processes.

21. Legal Compliance and Good Governance: By not adhering to the consultation requirements specified in Section 20 of the Planning and Development Act 2000, the S.I. No. 376/2023 regulations are at risk of contravening the legal framework established to ensure meaningful stakeholder engagement and participatory decision-making in the local area planning process.

22. Conclusion: The S.I. No. 376/2023 regulations fall short of the comprehensive consultation, notification, and stakeholder engagement standards set forth in Section 20 of the Planning and Development Act 2000. Addressing these deficiencies is essential to

uphold the principles of transparency, inclusivity, and effective governance in the local area planning process.

23. I will now enter into evidence Article 45 - Directive Principles of Social Policy in the Irish Constitution. ref er to PMG 1, page O11

S.I. No. 376/2023 - Planning and Development (Exempted Development) (No. 4) Regulations 2023 is repugnant to several aspects of Article 45 - Directive Principles of Social Policy in the Irish Constitution:

24. Article 45.1 establishes that the State shall strive to promote the welfare of the whole people by securing a social order based on justice and charity. The S.I. No. 376/2023 regulations, by exempting temporary accommodation for displaced persons or asylum seekers from normal planning requirements, fails to adequately consider the long-term welfare and integration of these vulnerable groups within the broader community.

25. Article 45.2(i) directs the State to ensure citizens have an adequate means of livelihood through their occupations. The regulations' lack of explicit provisions for integrating community services and economic opportunities for the affected population is undermining this principle. By not requiring proper planning for essential infrastructure like schools, childcare, and job opportunities, the regulations will hinder the ability of displaced persons or asylum seekers to achieve reasonable provision for their domestic needs.

26. Article 45.2(ii) and (iii) call for the distribution of material resources and control of essential commodities to best serve the common good, without concentration in the hands of a few. The exemptions in the regulations, by not mandating comprehensive community consultation and planning are neglecting these principles of equitable distribution and causing the concentration of resources.

27. Article 45.2(iv) states that the constant and predominant aim in the control of credit shall be the welfare of the people as a whole. The regulations' lack of integration with local authority planning and community needs assessments fail to ensure that the temporary accommodation arrangements are aligned with this directive to prioritize the overall public welfare.

28. Article 45.4(1) pledges the State to safeguard with especial care the economic interests of the weaker sections of the community and provide support where necessary. The gaps in community service provision and economic integration under the regulations contradict this directive to protect the vulnerable.

29. Article 45.4(2) requires the State to ensure the strength, health, and age of workers are not abused, and that citizens are not forced by economic necessity into unsuitable occupations. The regulations' failure to adequately consider the long-term impacts on the local community, including the strain on public services and infrastructure is neglecting these principles of worker protection and preventing economic exploitation.

30. In summary, the S.I. No. 376/2023 regulations, by exempting temporary accommodation uses from normal planning requirements and lacking explicit provisions for comprehensive community consultation, service integration, and economic support contravene several of the Directive Principles of Social Policy outlined in Article 45 of the Irish Constitution. The gaps in addressing the welfare, livelihood, resource distribution, and protection of vulnerable groups under the regulations is undermining the State's constitutional obligations to promote social justice and the common good.

31. I will now enter into evidence Article 40 - Fundamental Rights and Personal Rights in the Irish Constitution. refer to PMG 1, page 012-013

S.I. No. 376/2023 - Planning and Development (Exempted Development) (No. 4) Regulations 2023 is repugnant to several aspects of the Fundamental Rights and Personal Rights outlined in Article 40 of the Irish Constitution:

32. Article 40.3.1° establishes the State's guarantee to respect, defend, and vindicate the personal rights of citizens, particularly protecting life, person, good name, and property rights. The 5.1. No. 376/2023 regulations, by exempting temporary accommodation for displaced persons or asylum seekers from normal planning requirements, fails to adequately consider the long-term impact on the personal rights and wellbeing of both the affected population and the local community.

33. The lack of explicit provisions in the regulations for ensuring the provision of essential community services and infrastructure, such as healthcare, education, and social support is a failure to properly defend and vindicate the personal rights of the displaced persons or asylum seekers. Without access to these basic services, their right to an adequate standard of living and personal development is compromised.

34. Article 40.4.1° guarantees that no citizen shall be deprived of personal liberty save in accordance with law. The gaps in community service provision and integration will indirectly impact the personal liberty and rights of both the displaced persons/ asylum

seekers and the local community. The inability to access essential services or participate fully in the community is an indirect deprivation of personal liberty.

35. Article 40.5 enshrines the inviolability of the dwelling of every citizen, which shall not be forcibly entered save in accordance with law. The temporary accommodation arrangements enabled by the regulations may raise concerns about the potential for intrusion into the private dwellings of citizens, even if indirectly. The lack of clear safeguards and consultation processes in the regulations are failing to adequately protect this fundamental right to the inviolability of the home.

36. Article 40.6.1 ° guarantees the State's protection of the rights of citizens to express their convictions and opinions freely, to assemble peaceably, and to form associations and unions, subject to regulation in the public interest. The lack of comprehensive public consultation and community engagement requirements in the 5.1. No. 376/2023 regulations is undermining these personal rights and liberties, even if the regulations are intended to serve a public interest.

37. The exemptions provided by the regulations, without adequate provisions for community integration and participation are failing to strike a proper balance between the public interest and the personal rights and freedoms of both the affected population and the local community. This is a contravention of the State's duty to respect, defend, and vindicate the fundamental rights enshrined in Article 40.

38. In conclusion, the 5.1. No. 376/2023 regulations, through their exemptions from normal planning requirements and gaps in addressing community needs and personal rights contravene several key aspects of Article 40 - Fundamental Rights, Personal Rights in the Irish Constitution. The lack of comprehensive safeguards and integration measures undermine the State's obligations to protect the life, liberty, and personal rights of all citizens.

39. I will now enter into evidence Article 15 - The National Parliament, Constitution and Powers in the Irish Constitution. refer to PMG 1, page 014-015

S.I. No. 376/2023 - Planning and Development (Exempted Development) (No. 4) Regulations 2023 directly contravenes the provisions of Article 15 - The National Parliament, Constitution and Powers in the Irish Constitution:

40. Article 15.2.1° states that the sole and exclusive power of making laws for the State is vested in the Oireachtas. However, the S.I. No. 376/2023 regulations were not enacted directly by the Oireachtas, but rather by the Minister for Housing, Local Government and Heritage under the powers conferred by the Planning and Development Act 2000. The regulations were not made through the exclusive legislative process of the Oireachtas as mandated by Article 15.2.1°, but rather through a delegated legislative power.

41. By allowing the executive branch, in the form of the Minister, to enact regulations that exempt certain developments from normal planning requirements, the 5.1. No. 376/2023 regulations are undermining the sole and exclusive law-making authority of the Oireachtas.

42. The Oireachtas is constitutionally vested with the power to make laws for the State. The regulations, by providing exemptions without direct Oireachtas involvement are contravening this core constitutional principle.

43. Article 15.2.2° does allow for the creation or recognition of subordinate legislatures. The regulations are a unilateral executive action, rather than a product of the Oireachtas' legislative process.

44. The lack of direct Oireachtas involvement in the enactment of the S.I. No. 376/2023 regulations, combined with the broad exemptions they provide directly contravene the exclusive law-making powers of the Oireachtas as enshrined in Article 15.2.1° of the Constitution.

45. In conclusion, the S.I. No. 376/2023 regulations, by being enacted by the executive branch rather than the Oireachtas, and by providing broad exemptions from normal planning requirements directly contravene the sole and exclusive law-making authority of the Oireachtas as outlined in Article 15 of the Irish Constitution.

46. Final conclusion, the S.I. No. 376/2023 regulations, through their exemptions from normal planning requirements and gaps in addressing community needs and personal rights contravene various provisions of the Irish Constitution, including the fundamental rights and personal liberties outlined in Article 40, the directive principles of social policy in Article 45, and the community service and public consultation requirements of the Planning and Development Act 2000.

47. I pray this Honourable Court grant the requested injunctive reliefs, prohibitions, and declarations sought-after orders, in my EX PARTE MOTION DOCKET."

Relief sought in motion

24. The reliefs sought in the notice of motion are as follows:

"1. An Order pursuant to the inherent jurisdiction of this Honourable Court setting aside the Order of this Honourable Court made on 17 June 2024 and perfected on 18 June 2024 granting the Applicant leave to apply for judicial review.

2. Further or in the alternative, an Order pursuant to the inherent jurisdiction of this Honourable Court and/or pursuant to O. 19, r. 28 of the Rules of the Superior Courts striking out the Statement required to ground the application for judicial review herein dated 29 April 2024 as disclosing no reasonable cause of action against the Respondent and being frivolous, vexatious and bound to fail.

3. Such further or other Order as this Honourable Court shall deem fit; and

4. Costs."

The objections in principle to the motion

25. The applicant launches a number of overall objections in principle to the motion. But ultimately these lack sufficient merit:

(i) The fact that the leave order was lawfully made in the first place does not mean it can't be set aside.

(ii) It is not the law that a leave order can only be set aside in exceptional circumstances. Doing so on grounds of non-disclosure would be exceptional, but on grounds such as time, standing, inadequate pleading or lack of arguability is routine (although one needs to add on a pragmatic note that there is a strong school of thought (a school of which I happen to be a member) that opposing parties would normally be better advised to keep their powder dry and reserve their position, in order to be able to launch an all-out defence at a single hearing). The general rule is that any *ex parte* application can be set aside on the application of any other party that was not heard in the first instance. Setting aside leave is only a special example of that general rule, and there is no logical reason why the test should be significantly higher in such a case, aside from the exceptional case of non-disclosure which is not something to be raised on weak grounds.

(iii) As regards delay by the respondent, there is no undue, still less disqualifying, delay. Opposition papers have yet to be filed.

(iv) Insofar as the applicant is acting in good faith (which I accept with the qualification that that does not entitle him to accuse other people of fraud, perjury and criminal offences and the like merely for, in effect, positing a legal position that he disagrees with) and insofar as he raises issues of public importance (which I do accept), that doesn't get an applicant very far. Compliance with O. 84 in all respects is required.

(v) The complaints that various people have committed criminal offences misunderstand criminal law.

(vi) The allegation that the strike-out motion is inadequately reasoned falls flat. A court in such a situation can readily evaluate the pleadings and the existence or otherwise of arguable grounds.

(vii) The demand for a jury trial is a misconception because that procedure does not apply to judicial review.

(viii) The miscellany of other points adds nothing decisive to the mix.

26. We will turn then to the specific issues raised by the respondent.

Whether the grounds are arguable

27. The position in relation to the applicant's grounds is as follows:

(i) Grounds 1 to 3 are not legal grounds as such.

(ii) Grounds 4 to 13, which are related, allege in substance breach of either s. 10 of the 2000 Act or of the requirements of proper planning and sustainable development. Insofar as s. 10 is concerned, that does not apply to exempted development regulations. It relates to the making of plans and impacts downstream on developments for which permission is required. The putting in place of exempted developments is not expressly constrained by s. 10. However s. 10 may not be wholly irrelevant in assessing the reasonableness of a ministerial opinion of limited impact for exempted development, but is not a ground of challenge as such. The concept of proper planning and sustainable development does apply to the making of exempted development regulations, and I will deal with that separately. I note that Ground 10 relates to sustainable development goals (which on its ordinary meaning relates to UN goals adopted in 2015: https://sdgs.un.org/goals). However these are not justiciable on any basis identified by the applicant so would be persuasive only in terms of the meaning of the term "sustainable development".

(iii) Grounds 14 to 22 relate to the lack of consultation procedures. However those procedures don't apply to exempted development regulations, and aren't such as to

make regulations *ultra vires* for not going through comparable procedures. This aspect is misconceived as pleaded. But again, while not a ground of challenge in themselves, the provisions of the Act related to the framework for permissions may be relevant to the reasonableness of a decision that impacts of an exemption are limited.

(iv) Grounds 23 to 30 complain about breach of Article 45, which is not justiciable as a ground of challenge to the validity of an enactment. So this is unstateable.

(v) Grounds 31 to 38 claim a breach of Article 40 and a breach of equality. Unfortunately, in the sense presented, that is a political complaint. Allowing a change of use of some properties to provide accommodation to one person rather than another may be perceived as unequal by persons outside the category concerned, but who should be accommodated where is something that requires policy choices and political decisions that are far outside the competence of the judicial branch of government. Furthermore, a case based on human rights generally has to be brought by the rights-holder. In the context here, this complaint blends into *ius tertii*.

(vi) Grounds 39 to 45 allege excessive delegation in breach of Article 15 of the Constitution. But the arguments addressed in *Conway v. An Bord Pleanála* [2024] IESC 34 also apply here *mutatis mutandis* – delegation to make exempted development regulations on the sort of conditions in, and within the framework of, the 2000 Act, is not an abdication of legislative power or otherwise unconstitutional. No arguable basis to conclude otherwise has been pleaded. Insofar as points were made in argument that no quorum was present in the Houses when the resolutions were passed, I don't have any reason to doubt the applicant's belief that fewer members than the quorum were present, and I will assume that one can see this on Oireachtas TV or the relevant webcast on the Oireachtas website, but that happens fairly often. The complaint misunderstands the nature of the quorum rule. Business is not invalid in the absence of a quorum. Rather such absence permits any member to "call a quorum". If a quorum is not present at that time, members are summoned by bells, and if the quorum remains absent thereafter then the House adjourns. But if nobody calls a quorum in the first place, business can proceed with fewer members. In any event that is an indoor management rule, not a ground to invalidate legislation. Separately the fact that the draft regulations state that they have been passed is a misreading. The contents of the draft are conditioned by the nature of the document as itself being a draft. So when a draft states that it has been passed, that is a draft statement, not an assertion of an incorrect position. The miscellany of other unpleaded but submitted points don't advance the position: Article 6 of the Constitution is a general principle, not a basis for invalidating laws of this nature; the application to strike out the leave order is a recourse to Articles 34 and 35 of the Constitution not a breach of those provisions; rights under Article 40.3 can only be asserted by rights-holders and only on specific facts.

(vii) Ground 46 is repetitive.

(viii) Ground 47 is not a legal ground as such.

28. Apart from the issue of the reasonableness of the conclusion of limited impact in terms of the requirements of proper planning and sustainable development, which may or may not have been formally pleaded but doesn't seem to have been argued or decided in those terms in *McGreal I*, going by the judgment, an analysis that the other grounds are not arguable is consistent with that judgment.

The regulations and the requirement of proper planning and sustainable development

29. The legislation requires the Minister to be:

> "of the opinion that—
>
> (i) by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, …"

30. The basic thrust of the applicant's complaints under the heading of proper planning and sustainable development is that the Minister's conclusion of no offending against those principles is incorrect. Unfortunately, one can't simply plead that a decision-maker's evaluative conclusions are incorrect. One has to either identify an issue of law or non-evaluative fact, or plead that such conclusions are irrational or disproportionate.

31. The issue should have been put as a complaint that the ministerial conclusion recited in the regulations was irrational having regard to specified facts deposed to as to significant impacts of such developments which warranted development control in the interests of proper planning and

sustainable development. How far a court can go in rewriting the claims of a litigant in person to make them more legally palatable is a potentially delicate matter.

32. This sort of question was basically the issue in *O'Doherty and Waters v. Minister for Health* [2022] IESC 32, [2023] 2 I.R. 488, [2022] 1 I.L.R.M. 421 *per* O'Donnell C.J. at para. 29:

> "The respondents agreed that *G. v. DPP* is the appropriate threshold to apply in this case but disagreed with the appellants' claim that they have surmounted it. They argued that the threshold is not whether an arguable case could be made that a measure is unlawful, but whether, on the facts and pleadings of these proceedings, an arguable case has, in fact, been made. It is the respondents' contention that this threshold has not been met."

33. O'Donnell C.J. referred to extensive additional authorities and indeed extensive factual matters, drawn from public domain material it would appear, relied on by Hogan J. in a dissenting judgment that would have granted leave, and said at para. 96:

> "However, the sheer breadth and novelty of the material relied on in the judgment point to the fact that the matter focused upon and discussed at length in the judgment is certainly radically, and in my view, fundamentally, different to the case made by the appellants. This raises a difficult question as to the extent to which it is permissible for a court considering the grant of leave to seek judicial review, or indeed an appeal from a refusal to grant leave, to remould or refashion the claim. Put shortly, given the short time limits in judicial review, the constraints imposed by the doctrine of res judicata, and the rule in *Henderson v. Henderson* (1843) All E.R. Rep. 378, I do not consider that, even allowing for the importance of clarity and precision in pleadings as set out in O.84, r.20(3) that an applicant's case must be considered solely on the precise formulation of the case contained in the pleadings: some latitude may be allowed. However, I consider that the length to which it is necessary to go to reach the position set out in the judgment of Hogan J. is well beyond any permissible adjustment of the case being advanced by the applicants and has only the most tenuous connection to it."

34. Indeed he went on to characterise the reformulation in the dissent as follows:

> "Here the approach advocated by Hogan J. would, at least in my view, involve the grant of leave for a challenge to regulation which were not challenged by the applicants, or even in existence when these proceedings were commenced, and by reference to evidence which has not been adduced in respect of the course of the pandemic and the development of scientific knowledge in relation to it and by reference to arguments not advanced by the applicant. Indeed, it is a further objection to this course, that it would appear to foist upon the applicants an argument not only not made by them, but which, in so much as it depends upon an acceptance that general restrictions were justified by the scientific evidence at least at the outset of the pandemic, runs counter to the arguments which the applicants did make. I would not grant leave to seek judicial review on the basis suggested by Hogan J."

35. He referred in a number of places to the point (the right to protest) on which the dissent would have granted leave as not being the "focus" of the applicant's complaint, and said at para. 114:

> "However, I do not agree that it would now be permissible for the Court to attempt the radical surgery necessary to convert these proceedings into the almost entirely different claim envisaged by Hogan J."

36. One point I do need to make is that the test for amendment is the same for lay litigants and represented litigants – the interests of justice judged by reference to arguability to the appropriate threshold, explanation and lack of irremediable prejudice. The issue is not the test for amendment – well canvassed elsewhere. But the question is how far the court should go to itself identify the appropriate amendment in the case of an unrepresented litigant. In doing so I prefer not to think in terms of *assisting* a lay litigant but rather trying to *even the scales* to avoid a situation where a party is avoidably prejudiced due only to her lack of legal knowledge, particularly procedural knowledge.

37. So one can envisage a spectrum of situations where the court might be asked to reformulate the claim when granting leave (or later, such as in a discharge of leave application):

(i) a point is included in some form in the material put before the court by the litigant and is the "focus" of the argument but its "precise formulation" as a pleaded ground is lacking or inadequate;

(ii) a point is included in some form in the material put before the court by the litigant although not the focus of the argument made, but any reformulation of the formal pleaded grounds would not be radical and would be a "permissible adjustment";

(iii) a point is not the focus of the argument although it is included by a legally inadequate reference in the material put before the court by the litigant, but any reformulation would amount to "radical surgery"; or

(iv) a point is not only not included and not the focus, but is "counter" to points actually made by the applicant.

38. *O'Doherty and Waters* was a case coming in at levels (iii) and (iv) of the spectrum. While to someone coming to those formulations academically might think that the distinction between permissible adjustment and radical surgery is opaque if not circular, that is a misconception. If O'Donnell C.J. would forgive me for respectfully saying so, those are elegant formulations which will prompt an instinctive reaction in most lawyers as to where in the spectrum any given matter would fall. Written language is not just a replaceable form of symbols equivalent to mathematics or logic – it is also poetry that can capture fleeting feelings and fine distinctions and may illuminate more penetratingly than wholly dispassionate abstractions.

39. I might recall here (by way of giving credit) that counsel for the National Transport Authority in *Kelly v. An Bord Pleanála* [2024] IEHC 364 (Unreported, High Court, 19th June 2024) characterised the concept of "permissible adjustment" in an analogous situation of a leave application by a personal litigant with the equally poetic and useful phrase "benevolent redrafting". The adjustment is benevolent not just to the applicant but in the sense that it does not, unfairly to opposing parties, expand the substantive scope of the applicant's case beyond points that an applicant has attempted to make on the material presented, even if not in her formal pleaded grounds. Secondly it is redrafting in that such an approach tries to phrase such a point in legal language and as a legal ground, and it is thus in substance an attempt to present the applicant's point in a better drafted manner, as opposed to re-writing and certainly not re-writing from scratch.

40. Applying that legal spectrum here, this is a classic case (i). The applicant pleaded that the ministerial opinion was wrong – he should have pleaded that it was irrational. The point was included in the applicant's material in some form, was the focus of the proceedings, and the surgery required is not radical. This point should not be ruled out at the leave stage (or at the setting aside of leave stage), but the court could grant leave (or allow leave to stand) on a redrafted basis if other criteria are satisfied and provided that there were sufficient factual averments to support the ground. That isn't the case unfortunately but the applicant could potentially revisit the issue in future proceedings.

41. The State's argument was that this adjustment hadn't been made at the leave stage and so didn't arise now. I think that's unduly formalistic. If this was the only issue, rather than set aside the leave on this point I would have allowed the applicant to amend the pleadings to make the correct point. But there are other problems.

42. To summarise the import of *O'Doherty and Waters* under this heading, a court can reformulate grounds and allow an unrepresented party to amend her pleadings in those terms on the following conditions:

(i) the point as reformulated by the court is not counter to the applicant's case;
(ii) the point is one actually being made by the applicant (including where it is accepted by the applicant on considering any reformulation suggested by the court);
(iii) the point has a basis in the material and arguments actually put forward by the applicant even if it has erroneously been omitted from the pleadings proper and even if it is not the focus of such material and argument, provided that the following condition in particular is met;
(iv) the reformulation of the pleadings to include the point is permissible adjustment and not radical surgery; and
(v) the tests for amendment to include the point, properly formulated, in the pleadings are otherwise met.

Whether the reliefs are arguable

43. One overarching point that needs to be made about reliefs is that the pleading of reliefs is a lot less crucial than the pleading of grounds, because the court has power to grant unpleaded relief, but only within the pleaded grounds: *Concerned Residents of Treascon and Clondoolusk v. An Bord Pleanála & Ors*. [2024] IESC 28 (Unreported, Supreme Court, 4th July 2024) *per* Murray J.

44. That said however, there is no plausible basis for injunctive relief against the operation of the regulations. Measures of general application (like enactments or measures such as development plans) could only be stayed in truly exceptional circumstances, particularly where it appeared more likely than not that the measure would ultimately be held to be invalid. We are nowhere near that here. The idea for example that people challenging development plans could simply walk in at leave stage and pick up an *ex parte* injunction against the plan is wholly improper, and doubly so if such applicants fail to draw the court's attention to the strident contrary authority. Any general measure should only be stayed in extraordinary circumstances, and then only on notice to the Attorney General or the public law entity that enacted the measure or both.

45. Prohibition is not the appropriate relief either. The correct relief (not pleaded) would have been a declaration that the 2023 regulations are *ultra vires*. That problem isn't in itself unfixable and a redrafting of the reliefs would not be radical surgery in the circumstances.

Whether the applicant has named the appropriate parties

46. A challenge to an enactment or other measure of general application should name Ireland and the Attorney General. These proceedings don't do that. Furthermore the words "of Ireland" in the Minister's title are inappropriate. That's understood in any domestic context.

47. Again the surgery involved would be minor rather than major. But unfortunately for the applicant there is a more significant problem.

Whether the requirements of standing, the existence of a concrete dispute and the related requirements of time have been satisfied

48. The problem under the heading of standing and the related problem of the abstract nature of the challenge and of time is that an applicant can't simply wander into court to challenge measures of general application in isolation (a point made in *McGreal I* at para. 6).

49. As regards time specifically, a measure of general application (such as an Act, other enactment like the regulations here, a policy statement or guideline) can be challenged from time to time as applied to new persons and new situations. An Act passed in, say randomly, 1861, can be challenged in, say, 1988 or 2024 or whenever it is applied to some new fact situation. But what you can't do is to wander into court and say maybe this Act you have just looked up is unconstitutional. Indeed in oral submissions the applicant sought to phrase the time issue in terms that were uncomfortably close to time running from when he became aware of the regulations. That is not the correct approach. Rather, the challenge must be brought as ancillary to a specific application of the enactment or other measure, being an application that is itself brought within time. Such an application can be prospective (if there is a reasonable basis to anticipate the future application of the measure) or after-the-event (where the measure has actually been relied on). But if after-the-event, the challenge must be brought within whatever period is fixed for challenge to the individual act of reliance on the measure. This is sometimes misunderstood by applicants who like general challenges. If an applicant is out of time for a challenge to an individual decision, she doesn't have standing to challenge the enactment or measure in the abstract merely because there was an unchallenged individual decision previously.

50. This is compatible with the Court of Appeal decision in *Muldoon v. Minister for the Environment and Local Government* [2023] IECA 61 (Unreported, Court of Appeal, 16th March 2023) *per* Costello J. at para. 127:

> "The grounds for the application to challenge the 1978 Regulations, based upon the case advanced, was when those regulations first impacted the individual appellant."

51. The concept of "first impact[ing on] the individual applicant" is linked to "the case advanced". In other words, failure to challenge a law that say prevents an applicant from challenging discrete development A does not prevent her from bringing a separate challenge to such law in the context of some later and different development B. What such failure does prevent is a belated attempt to challenge development A by a side-wind of later seeking to strike down the law in question in some more abstract sense, outside of the original time limit. And even if the applicant succeeds in getting the law invalidated in case B, that doesn't invalidate the unchallenged decision A, and nor would an analogous belated challenge in a criminal context open the prisons of the nation, or cause any other sort of nightmare scenario that people often seem to resort to when the issue of invalid legislation comes up for discussion.

52. At para. 121 Costello J. noted that:

> "[I]n *Mungovan* [*v. Clare County Council* [2020] IESC 17] ... Charleton J. held that where an individual was impacted by delegated legislation on a continuing basis they have standing to sue for so long as they are so impacted."

53. The point for present purposes is that you have to be impacted to sue. So you can't wander into court to challenge a general measure in the abstract and justify that by saying that you have challenged it within eight weeks or three months of its adoption, as the case may be. The requirements of time and standing are interrelated. A timely action without standing is as impermissible as a standing-based action brought out of time – as long as we understand time in the latter context as running from the acquisition of standing, and as continuing in the event of a continuing impact, and not from the enactment of the measure.

54. Standing is the critical issue in a context such as the presently worded proceedings: see *Cahill v. Sutton* [1980] I.R. 269 *per* Henchy J. at p. 282; *Lancefort Ltd. v. An Bord Pleanála (No. 2)* [1998] IESC 14, [1999] 2 I.R. 270 *per* Keane J. at pp. 310 – 311; *Mohan v. Ireland* [2019] IESC 18, [2021] 1 I.R. 293 *per* O'Donnell J. at para. 11.

55. Situating a challenge to legislation in a practical and fact-specific context also allows the court to assess standing based on the applicant's involvement with the facts in question. If an applicant avers that she would have, but for the exemption, made observations on a particular, specific, planning application, then that would generally be enough to confer standing. But it also allows the court to look at how the impugned measure impacts in practice.

56. There are many reasons for such rules but we can put most of them under the heading of judicial restraint. Separation of powers requires that the courts, who have no policy-making

competence and who can't fill gaps in legislation that their orders may create, need to step back from invalidating general measures unless it is necessary to do so. It isn't necessary to do so in the abstract. O'Donnell C.J. emphasised these issues in clear terms in *O'Doherty and Waters*.

57. Applying this to the present case, while on balance the applicant has a potentially arguable point as to the reasonableness of the factual premise of the regulations, a challenge based on that must be in the context of specific facts insofar as they relate to the applicant. A generalised objection to the legislation based on citizenship or commitment to democratic values isn't sufficient to satisfy the caselaw, contrary to what the applicant believes the law to be. Maybe in a different system one could make a case for the law being that way, but we have to deal with things as they have been laid down by appellate courts on many occasions. The application here is abstractly premised on the latter type of general objection and lacks the necessary factual engagement to sustain a grant of leave. The Roman law concept of *actio popularis* began as (and, to an extent, even in our system, remains) a primarily criminal concept:

> "But in general the matter was managed by permitting any citizen, quivis ex populo, to bring an action against the wrongdoer asking for his punishment rather than for compensation. The victim of the wrong was preferred as prosecutor, but if he did not come forward anyone else might. And from this fact, what we call a criminal prosecution was called in Rome an actio popularis or publicum iudicium." (Max Radin, "A Glimpse of Roman Law", *The Classical Journal*, Vol. 45, No. 2 (Nov., 1949), pp. 71-79, https://www.jstor.org/stable/3293384, The Johns Hopkins University Press)

58. Such a concept has never been that popular in the civil law sphere. There are exceptions of course but they are rare. The present type of action is not one of them.

Costs

59. Costs were argued at the hearing and were not to be left over to post-judgment on the basis of a provisional disposition, which would be the norm in other cases. Thus I can deal with costs now.

60. The State sought costs if they won on the basis of being entirely successful. They relied on the Legal Services Regulation Act 2015 (which of course expressly exempts environmental rules) but argued that the Aarhus convention did not arise due to the lack of pleaded environmental grounds. The State asked that if they lost, costs would be reserved.

61. The applicant asked for costs to cover stamp duty if he won, and said that if he lost he would leave costs to the court to decide.

62. There are two decisive reasons why I would be inclined towards no order as to costs:

(i) First of all, the State were not wholly successful in the sense of the legislation, which requires not only that you win the event but that you win all of your argued points. I don't accept that the applicant's propositions are wholly unarguable, if one is to allow for a little permissible redrafting and for the need for more factual fleshing-out specific to the applicant and to a definite context. I did accept the State's main point – the abstract nature of the claim – but not all of their arguments in their entirety. So s. 169(1) of the 2015 Act is not a strait-jacket here. The court thus has a discretion, and I would apply it towards no order for reasons I will come to.

(ii) Even if I am wrong and s. 169(1) does apply, it does not wholly defeat the court's discretion because it is only a default – it applies "unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties," including specified matters. There are three special factors in that regard which I would rely on individually and cumulatively:

  (a) the quasi-environmental nature of the proceedings is such as to tilt the balance in favour of no order;

  (b) the applicant had the benefit of an existing order of leave from Hyland J. which involved a judicial determination that there was some arguable point in his proceedings; and/or

  (c) if the applicant had had a lawyer he would inevitably have been advised to seek advance confirmation of costs protection, and in the event of a dispute, to have that determined before this hearing, so he shouldn't be severely disadvantaged through lack of procedural knowledge.

63. If I am wrong on all of those points, we come to the partly domestic and partly European issue of s. 169(5) and the Aarhus Convention. That would require serious thought and consideration and I would have put the matter off for further hearing. In that context one could not in principle preclude a reference to the CJEU. So I would not like to express a settled view on it without proper argument and perhaps the assistance of relevant *amici*, given the applicant's unrepresented status. Even if one were to hypothetically take the most negative available view and accuse the applicant

of frivolity, something I am not saying, even such an applicant can't be subjected to prohibitively expensive costs if Aarhus applies.

64. So no order is the pragmatic option here, albeit that it may on one view require the court to draw on its now unfashionable discretion in the matter of costs.

Summary

65. It is a fine line between explaining what steps an applicant has omitted versus advising their proofs, but at the risk of the latter accusation I can say that the applicant has succeeded in identifying a potentially arguable point in relation to the regulations, namely the reasonableness of the conclusion that the impacts of such developments were limited so as to warrant exemption. From that point of view, I agree with Hyland J. that there is a potentially arguable point arising from the case. However I can now say with the benefit of full *inter partes* argument not available at the leave stage that to progress that point the applicant would need to:

(i) confine the grounds to that arguable point or other arguable points (if any);
(ii) plead that point in legally correct and particularised terms;
(iii) set out factual matters sufficient to ground such a point;
(iv) plead appropriate declaratory relief;
(v) join the appropriate respondents;
(vi) name such respondents correctly;
(vii) situate the challenge in the context of an appropriate challenge to a specific development or proposed development;
(viii) bring such a challenge within eight weeks of that development taking place, in the case of an after-the-event challenge, or in anticipation of the development, in the case of an apprehended step;
(ix) depose to facts demonstrating standing in such a factual context; and
(x) omit any inappropriate matter from his papers.

66. As the applicant hasn't done any of this, and as some of these problems are not matters that can be solved by permissible adjustment of the precise formulation of the pleaded case, leave must be discharged here. But I will make clear in the order that this is without prejudice to the right of the applicant to seek relief in any future properly pleaded proceedings. If the applicant does at any future point bring further proceedings, I trust he won't mind me recommending, in his own interests as much as anybody's, that he err on the side of leaving out the accusations of crime, fraud and perjury. Generally speaking, that kind of thing doesn't really assist the court in this type of context.

Order

67. For the foregoing reasons, it is ordered that:

(i) without prejudice to the right of the applicant to seek similar relief in any future properly constituted proceedings, there be an order pursuant to the inherent jurisdiction of the court setting aside the order of the court made on 17th June 2024 and perfected on 18th June 2024 granting the applicant leave to apply for judicial review, as sought at para. 1 of the notice of motion;
(ii) there be no order as to costs; and
(iii) the present order as the final order in the proceedings be perfected forthwith without further listing.