



**THE COURT OF APPEAL
CIVIL**

**High Court Record No. 2019/169JR
Court of Appeal Record No. 2021/01
Neutral Citation No. [2023] IECA 63**

NO REDACTION NEEDED

**Barniville P.
Murray J.
Noonan J.**

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT/APELLANT

– AND –

THE LEGAL AID BOARD

RESPONDENT

– AND –

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Mr. Justice Murray delivered on the 22nd of March 2023

1. In my first judgment in this matter ([2023] IECA 19), I rejected the claim of the applicant that notwithstanding that it is a body corporate it was a *'person'* for the purposes of those provisions of the Civil Legal Aid Act 1995 (*'the 1995 Act'*) addressing eligibility to apply for, and obtain, legal aid from the respondent. Although the applicant had contended, amongst other things, that it had a right to seek legal aid for certain types of proceedings pursuant to Article 47 of the EU Charter on Fundamental Rights and Freedoms, I found that this did not advance the claim it made in this action as an interpretation of the 1995 Act that rendered bodies corporate eligible to apply for and obtain legal aid pursuant to that statute would be *contra legem* the statute.

2. Nonetheless, observing that there might be an argument that the complete exclusion of legal persons from the possibility of obtaining legal aid in cases involving issues of EU law might, at least in certain circumstances, present a breach of Article 47(3) of the Charter of Fundamental Rights of the EU, and noting that the issue of whether a reference should be made to the CJEU regarding this question had not been argued in the course of the appeal, I allowed the applicant the opportunity to make further submissions (if it wished) as to the basis for such a reference. I made clear in my judgment that any consideration of the issue of making a reference must proceed on the assumption that the interpretation of the 1995 Act urged by the applicant would be *contra legem* that Act, as I had found.

3. The applicant accepted that invitation and made most helpful submissions, as did the respondent and the Attorney General in reply. The applicant wishes to have the following questions referred to the CJEU:

- i. *Whether Article 47 of the Charter requires Member States to have in place a legal aid scheme that may be availed of in cases involving litigation that engages EU law, that is open in principle to legal persons?*
- ii. *Whether, having regard to a combination of Article 47 of the Charter, and Article 9 of the Aarhus Convention, there is an enhanced or different obligation to provide access to legal aid in environmental matters, as opposed to other litigation?*

4. In my judgment, I noted some potential difficulties in making such a reference. The only case made by the applicant both in this Court, and before the High Court, was that the relevant provisions of the 1995 Act must be interpreted as extending to corporate persons, and the argument around Article 47 of the Charter was presented on that – and only on that – basis. Given that I had decided that the 1995 Act could not be so interpreted, I was concerned as to how an argument based on Article 47 could advance the applicant’s case.

5. In response, the applicant says that in these proceedings it did not take any issue with the provision of legal aid to natural persons. Therefore, it did not seek any orders questioning the lawfulness of the 1995 Act. Instead, it made two points – (a) that EU law requires at least the possibility of legal aid for bodies corporate and (b) that in the light of this the 1995 Act should be given a conforming interpretation so that the applicant’s application for legal aid could be determined on the merits. While the

applicant accepts that it has failed on the second of these issues, it says that the first *'remains open for determination in this case'*.

6. The applicant further points to the fact that it sought a declaration that the respondent's refusal to consider the application for legal aid breached the applicant's rights *inter alia* under Article 47. It says that that declaration *'is wide enough to grant the Applicant the necessary relief in the event that a reference to the Court of Justice is made and that Court agrees with the applicant'*. It notes that the Attorney General was joined to the proceedings by order of the High Court and participated fully at first instance and on appeal. It says that pursuant to Order 84 Rules 18(1) and 18(2) the Court may grant any relief which it considers appropriate even though this has not been specifically claimed (citing *O'Shea v. Legal Aid Board* [2019] IEHC 385). Accordingly, it is said *'this Court is not prevented from granting appropriate relief, notwithstanding that it has not been specifically sought'*.
7. There will be cases in which infelicity in the drafting of relief sought, or grounds pleaded, in Judicial Review proceedings might not in themselves require that an applicant be precluded from either agitating an important point of EU law or seeking the making of a reference to the CJEU where it is otherwise appropriate to obtain clarification from that Court on such a question. Here, however, the difficulty goes far beyond this. The reference sought by the applicant does not involve a mere adjustment to its case to embrace an issue of EU law, it is predicated on an entirely new case being made against a party against whom no relief was claimed in the action.
8. In this action as originally constituted, the only respondent was the Legal Aid Board. It is a body established by statute, whose powers and functions are defined exhaustively by the 1995 Act. The declaration sought that the Board's refusal to consider the

application for legal aid which gave rise to the proceedings breached the applicant's rights pursuant to Article 47 of the Charter, necessarily presupposed that the Board could, within the four corners of the 1995 Act, provide such aid. If the Board could not in fact have provided such aid, it is very difficult to see that the Court could be asked to declare that it had acted unlawfully in not so doing, at least without finding (a) that those parts of the 1995 Act which precluded the grant of such relief should be disapplied as being contrary to EU law and/or (b) that the Legal Aid Board was the emanation of the State on which the obligation to entertain such an application fell.

9. The first of these arguments was not advanced - the case was based solely on the contention that the relevant provisions of 1995 Act should be interpreted so as to bring the applicant within their terms. Not only was the second not advanced either, but it is hard to see how the argument could have been made, as any obligation as a matter of EU law to provide such aid would naturally fall upon the State in the first instance, there being no basis disclosed here on which it could be concluded that any such function had been devolved to the Board, whose powers are as I have observed necessarily limited. For these reasons, it is unsurprising that the only ground in the Statement of Grounds relating to the Charter is framed in terms that are directed solely to an interpretative obligation:

'It is the Applicant's case that the Respondent erred in law in failing to interpret its jurisdiction in conformity with the requirements of Article 47 of the Charter. It is the Applicant's case that the Charter is engaged in these proceedings ...'

10. The case proceeded in the High Court on this basis and against the Legal Aid Board alone. After judgment was reserved in the High Court, the trial judge decided to invite the Attorney General to appear and become a notice party in respect only of the possible

application of the Aarhus Convention to the case. The Attorney General, accordingly, addressed only that issue. He did not have the opportunity to adduce any evidence in the case, or to make submissions on any other aspect of the applicant's claim.

11. So, in order for the applicant to now make the case it wishes to advance in the context of its request for a reference (i.e. that the State is obliged to craft a legal aid scheme which would allow persons in the position of the applicant to seek legal aid for certain types of environmental law proceedings) it would (a) have to join a new party as a respondent, (b) do so at the point of the conclusion of the hearing of and adjudication on the substantive appeal, (c) allow the applicant to claim an entirely new relief against that party, and (d) do so in a context where that party had been heard at the trial on only one small aspect of the case, and had not had the opportunity to make submissions regarding or to adduce evidence impacting upon the issue it is now sought to have referred.

12. This would require not merely a reorientation, but a complete overhaul of the applicant's case. Not least of all in a context in which these judicial review proceedings are framed by the order granting leave, I do not believe that it would appropriate or fair to permit the proceedings now to be re-directed in the way contended for by the applicant. It must follow that the Court should not make a reference in the terms suggested: the answers to the questions it is proposed should be referred would not affect in any way the outcome of the case actually before the Court (*Consortoio Italian Management e Catania Multiservizi and Catatani Multiservizi* Case C-561/19 at para. 34). Accordingly, I am satisfied that no reference to the CJEU should be made by this Court. I would, therefore, refuse the applicant's application.

13. Barniville P. and Noonan J. are in agreement with this judgment and the order I propose.

14. Should the parties not be in a position to agree the disposition of the costs, they should advise the Court within three weeks of the date of this judgment and a short hearing will be convened to address costs.