AN CHÚIRT UACHTARACH

THE SUPREME COURT

S: AP:IE: 2023:00092

[2024] IESC 34

O'Donnell C.J.
Dunne J.
Hogan J.
Collins J.
Donnelly J.

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000

Between/

JOHN CONWAY

Appellant

AND

AN BORD PLEANÁLA

First Respondent

AND

THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE, IRELAND AND THE ATTORNEY GENERAL

Second, Third and Fourth Respondents

AND

SILVERMOUNT LTD.

NOTICE PARTY

JUDGMENT of Mr. Justice Gerard Hogan delivered 23rd day of July 2024

Part I - Introduction

1. In these judicial review proceedings, the appellant, an environmental activist based in Co. Louth, challenges the constitutionality of s. 28(1C) of the Planning and Development Act 2000 ("the 2000 Act"). This is the provision by which the Minister for Housing ("the Minister") can give binding directions (described as "guidelines") to planning authorities and An Bord Pleanála in relation to specific aspects of the planning process such as building heights. Critically, however, the contents of these guidelines enable the planning authorities and the Board to depart from the terms of local development plans. The guidelines at issue in the present appeal are known as Specific Planning Policy Requirements ("SPPR"). The Minister has published some seven SPPRs to date.

2. These judicial review proceedings originally involved a challenge to the validity of a decision made by An Bord Pleanála ("the Board") to grant planning permission for a Strategic Housing Development ("SHD") comprising 545 build to rent apartments, commercial, retail and office units, a childcare unit and sundry associated site works at Concord Industrial Estate, Naas Road, Walkinstown, Dublin 12 in favour of the notice

party, Silvermount Ltd. In essence, however, the present appeal concerns the constitutionality of s. 28(1C) of the 2000 Act and the vires of certain guidelines made under that sub-section. These challenges were rejected by the High Court (Humphreys J.) in a judgment delivered on 18th April 2023: see *Conway v. An Bord Pleanála* [2023] IEHC 178.

3. The lands in question have a land-use zoning objective Z14 – Strategic Development and Regeneration Areas within the Dublin City Development Plan 2016-2022. Paragraph 14.8.13 of that Plan has a stated objective of seeking "the social, economic and physical development and/or rejuvenation of an area with mixed use, of which residential and 'Z6' would be the predominant uses." Following an application by Silvermount for planning permission in respect of a strategic housing development, Dublin City Council submitted a report to the Board pursuant to s. 8(5)(a) of the Planning and Development and Residential Tenancies Act 2016 ("the 2016" Act"). It recommended the grant of planning permission. The Board duly appointed an inspector for this purpose and the inspector's report of 8th April 2022 also recommended the grant of permission. The inspector considered that the development amounted to a material breach of the development plan, but he nonetheless recommended that permission be granted on the basis that the proposal was in compliance with SPPR 3 of the Building Height Guidelines and, so far as the apartments were concerned, with SPPRs 4, 5, 7 and 8 of the Apartment Guidelines.

4. The Board granted permission for the development on 21st April 2022, having had regard to the contents of the Inspector's report. The Board Direction of 19th April 2022 records that it considered that the grant of permission would materially contravene the Local Area Plan ("LAP") in relation to building heights, residential density and unit numbers. It further considered that the grant of permission would breach the provisions

of the Dublin City Development Plan 2016-2022 in relation to building heights and core strategy numbers. The Board nevertheless concluded that it would be appropriate to grant permission having regard to the provisions of s. 37(2)(b) of the 2000 Act, the material contravention of both the LAP and the Development Plan notwithstanding.

5. The Board justified this decision by reference to the following consideration: First, the development was considered to be of strategic and national importance for the purposes of s. 37(2)(b)(i) of the 2000 Act. Second, the objective of the development plan conflicted with those of the LAP with respect to building heights, such that s. 37(2)(b)(ii) applied. Third, the Board took the view that the proposed development should be granted having regard to Government policies as "set out in the Project Ireland 2040 National Planning Framework, in particular National Policy Objectives 13 and 15, provisions set out in the Eastern and Midland Regional Assembly Regional Spatial and Economic Strategy 2019-2031, in particular Regional Policy Objective 5.4, the Urban Development and Building Height Guidelines for Planning Authorities, issued by the Department of Housing, Planning and Local Government in December 2018, in particular the Specific Planning Policy Requirement 3(a)." Fourth, regard was had to neighbouring permissions in the area, including the pattern of regional density and building height granted in respect of three other development.

6. It is clear – indeed, it is admitted – that the Board thereby relied on the Specific Planning Policy Requirement 3a of the Building Height Guidelines in arriving at its decision: see paragraph 5 of the judgment of Humphreys J. Requirement 3a is in the following terms (along with some accompanying text so that the import of this can be understood):

> "To support proposals at some or all of these scales, specific assessments may be required and these may include:

• Specific impact assessment of the micro-climatic effects such as downdraft. Such assessments shall include measures to avoid/ mitigate such micro-climatic effects and, where appropriate, shall include an assessment of the cumulative micro-climatic effects where taller buildings are clustered.

• In development locations in proximity to sensitive bird and/or bat areas, proposed developments need to consider the potential interaction of the building location, building materials and artificial lighting to impact flight lines and / or collision.

• An assessment that the proposal allows for the retention of important telecommunication channels, such as microwave links.

• An assessment that the proposal maintains safe air navigation.

• An urban design statement including, as appropriate, impact on the historic built environment.

• Relevant environmental assessment requirements, including SEA, EIA, AA and Ecological Impact Assessment, as appropriate. Where the relevant planning authority or An Bord Pleanála considers that such criteria are appropriately incorporated into development proposals, the relevant authority shall apply the following Strategic Planning Policy Requirement under Section 28 (1C) of the Planning and Development Act 2000 (as amended).

SPPR 3

It is a specific planning policy requirement that there:

(A) 1. An applicant for planning permission set out how a development proposal complies with the criteria above; and

2. The assessment of the planning authority concurs, taking account of the wider strategic and national policy parameters set out in the National Planning Framework and these guidelines;

then the planning authority may approve such development, even where specific objectives of the relevant development plan or local area plan may indicate otherwise."

7. In effect, this SPPR enables the planning authorities and the Board to grant permission for certain developments that meet with these criteria, the provisions of a development plan stipulating to the contrary notwithstanding.

8. As Humphreys J. also makes clear, it does not seem to be in dispute but that the Board in substance also relied on the Apartment Guidelines in arriving at its decision. It is also common case that the SPPRs are not just simply administrative guidelines, but that the SPPR guidelines issued under s. 28(1C) of the 2000 Act are legally binding: see the judgment of Collins J. in *Spencer Place Development Co. Ltd. v. Dublin City Council* [2020] IECA 268 at paragraphs 22 and 27. This was likewise recognised by Owens J. in *Murtagh v. An Bord Pleanála* [2023] IEHC 345 when he stated (at paragraph 47) that SPPRs "will override contrary provisions in a development plan." As Humphreys J. put it (at paragraph 29), the SPPR guidelines "create legally enforceable, self-executing binding obligations on actors to whom they are addressed, with directly legal implications for third parties directly affected."

9. The applicant's principal ground of appeal is that this legislation infringes Article 15.2.1º of the Constitution by giving the Minister what amounts to legislative power. He also contends that the legislation infringes Article 28A inasmuch as it enables the Minister (effectively) to override local government decisions taken democratically,

particularly decisions of directly elected members when making development plans in the manner provided for by ss. 9-12 of the 2000 Act.

10. By a determination dated 13th October 2023, this Court granted the applicant leave to appeal directly from the High Court pursuant to Article 34.5.4º: see *Conway v. An Bord Pleanála* [2023] IESCDET 118.

Part II - The locus standi of the applicant

11. It is clear that in the ordinary way if the legislation in question were found to be unconstitutional that the planning permission which had been granted to Silvermount would have to be quashed. This is because the very validity of that decision rests in turn on the validity of the SPPRs and, by extension, the constitutionality of s. 28(1C) itself. As it happens, however, when at the case was at hearing in the High Court, the Board and, subsequently, Silvermount, sought to be released from the proceedings. The parties ultimately agreed that this should be done and, furthermore, that the applicant would no longer seek to have the planning permission quashed. For their part, the State parties agreed not to raise issues of *locus standi.* This did not mean that, so to speak, the applicant was free to treat the constitutional challenge as if it were in the style of an Article 26 reference: it was agreed that he would continue to be bound by factual context in which the proceedings had commenced. In effect, therefore, the applicant was still free to point to the breadth of the alleged delegation of legislative power by reference, for example, to the SPPRs that had in fact been made by the Minister which had been relied upon by the Board in the present case and not, for instance, by reference to some hypothetical SPPR which the Minister might make at some future time.

12. The existence of this agreement has, admittedly, a slightly unsettling quality since the question of standing is essentially akin to a jurisdictional issue which is ultimately for

the Court itself. The existence (or otherwise) of the appropriate *locus standi* in respect of a constitutional challenge cannot be foreclosed by some form of private agreement between the parties. The issue of *locus standi* may be described as a prudential rule of practice designed to conserve the judicial power and to ensure that it is only exercised in appropriate cases and circumstances: see, for example, the comments to this effect of Henchy J. in *Cahill v. Sutton* [1980] IR 269 at 283-287. As Henchy J. said, there are very practical reasons associated with the proper administration of justice justifying such a rule of practice (at 283):

> "To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality. There is also a risk that the person whose case has been put forward unsuccessfully by another may be left with the grievance that his claim was wrongly or inadvertently presented."

13. So far as the present case is concerned, I have come to the conclusion – not, admittedly, without some initial misgivings – that the appellant should be deemed to have the appropriate standing in this case. I take this view for the following reasons. First, Humphreys J. has already ruled on the merits of constitutional issue. In these circumstances it would be desirable that the question would be resolved one way or another by this Court. Second, the constitutional challenge remains a real one and it has been advanced with skill and vigour. Third, there is no suggestion that there is some other litigant apart from this applicant who will be better placed than him to advance it.

14. In that regard, we were informed at the oral hearing that there are many other similar cases in which the constitutionality of s. 28(1C) has been challenged which are awaiting the outcome of this appeal in the High Court. If this applicant is deemed to have lost the necessary *locus standi* by reason of the fact that the validity of the underlying planning permission is no longer at issue, then all that this would mean is that a question mark would continue to hang over the use of an important feature of the planning process. This lingering uncertainty and further delay would not be in the public interest. Finally, there is the fact that the State reached an agreement with the applicant in relation to this very issue. It would be fundamentally unfair to the applicant if, having reached such an agreement which was designed to save costs and expense, it were later to transpire that he had thereby lost his opportunity to have the constitutionality of this measure determined on the merits.

15. For these reasons, therefore, I propose presently to consider the merits of the constitutional argument. Before passing to this it is necessary first to set out the text of the relevant legislative provisions as well as SPPR 3. I will then consider the judgment of the High Court itself.

Part III – The relevant legislative provisions

Section 28 of the 2000 Act

16. Section 28 of the 2000 Act (as amended) provides as follows:

> "(1) The Minister may, at any time, issue guidelines to planning authorities regarding any of their functions under this Act and planning authorities shall have regard to those guidelines in the performance of their functions.

(1A) Without prejudice to the generality of subsection (1) and for the purposes of that subsection a planning authority in having regard to the guidelines issued by the Minister under that subsection, shall—

(a) consider the policies and objectives of the Minister contained in the guidelines when preparing and making the draft development plan and the development plan, and

(b) append a statement to the draft development plan and the development plan which shall include the information referred to in subsection (1B).

(1B) The statement which the planning authority shall append to the draft development plan and the development plan under subsection (1A) shall include information which demonstrates—

(a) how the planning authority has implemented the policies and objectives of the Minister contained in the guidelines when considering their application to the area or part of the area of the draft development plan and the development plan, or

(b) if applicable, that the planning authority has formed the opinion that it is not possible, because of the nature and characteristics of the area or part of the area of the development plan, to implement certain policies and objectives of the Minister contained in the guidelines when considering the application of those policies in the area or part of the area of the draft development plan or the development plan and shall give reasons for the forming of the opinion and why the policies and objectives of the Minister have not been so implemented.

(1C) Without prejudice to the generality of subsection (1), guidelines under that subsection may contain specific planning policy requirements with which planning authorities, regional assemblies and the Board shall, in the performance of their functions, comply.

(1D) A strategic environmental assessment or an appropriate assessment shall, as the case may require, be conducted in relation to a draft of guidelines proposed to be issued under subsection (1).

(2) Where applicable, the board shall have regard to any guidelines issued to planning authorities under subsection (1) in the performance of its functions.

(3) Any planning guidelines made by the Minister and any general policy directives issued under s. 7 of the Act of 1982 prior to the commencement of this Part and still in force immediately before such commencement shall be deemed to be guidelines under this section.

(4) The Minister may revoke or amend guidelines issued under this section.

(5) The Minister shall cause a copy of any guidelines issued under this section and of any amendment or revocation of those guidelines to be laid before each House of the Oireachtas.

(6) A planning authority shall make available for inspection by members of the public any guidelines issued to it under this section.

(7) The Minister shall publish or cause to be published, in such manner as he or she considers appropriate, guidelines issued under this section."

17. It should also be noted that insofar as SPPRs impact on individual planning applications, their function is to support Government or national policy. This is expressly stated in s. 34(2)(d) of the 2000 Act as regards normal planning applications.

Section 9(3)(c) of the 2016 Act expressly applies this to the strategic housing development procedure:

> "In this subsection 'specific planning policy requirements' means such policy requirements identified in guidelines issued by the Minister to support the consistent application of Government or national policy and principles by planning authorities, including the Board, in securing overall proper planning and sustainable development".

Part IV - The judgment of the High Court

18. As I have already noted, Humphreys J. rejected the applicant's challenge to the constitutionality of this measure. Although both parties had accepted that in the light of recent developments that the law on Article 15.2.1º had moved on from the standard "principles and policies" test in *City View Press Ltd. v. An Comhairle Oiliúna* [1980] IR 381 at 399, Humphreys J. nonetheless observed (at paragraph 40) that this issue "lives on as an important factor".

19. Humphreys J. then went on to ask (at paragraph 41) the following questions:

> "The more appropriate test is to ask whether, by reason of the delegation, the parent decision-maker has abdicated its function having regard to all the circumstances, and in particular having regard to (i) any principles and policies governing the delegated function, (ii) the nature of the functions delegated and the issues to which they relate, (iii) the system of which the delegated function concerned forms part, and (iv) the safeguards restricting or regulating the exercise of the delegated function."

20. Humphreys J. concluded (at paragraph 65) that "there are very significant principles and policies that govern its exercise when one has regard to the other provisions of the

2000 Act." The functions governed by the guidelines were themselves highly technical aspects of planning policy and (at paragraph 71) "it would be impractical to engage in the required level of detail by means of primary legislation." One also had to have regard to the statutory context, thus (at paragraph 80), Humphreys J. concluded that "the vast powers given to local authorities under the 2000 Act renders it implausible that a more limited power given to the Minister must be unconstitutional." And while the judge accepted (at paragraph 83) that "the level of supervision retained by the Oireachtas as it virtually the most minimal level possible is not in itself fatal to the constitutional validity of sub-s. (1C). It is a factor to be considered but is not in itself determinative."

21. While Humphreys J. accepted that (at paragraph 90-91) that there were some indicia in favour of the applicant's position, "specifically the fact that s. 28 itself is light on principles and policies, and the lack of meaningful parliamentary scrutiny beyond the bare minimum." The judge nonetheless concluded that:

> "Important as those points are, they are in my view outweighed by the cascade of factors favouring the conclusion that this is a permissible delegation of power, in particular the following:
>
> (i) the overall principle that the powers conferred by s. 28(1C) can only be exercised for the purposes of proper planning and sustainable development;
>
> (ii) the fact that sustainable development has a clear meaning;
>
> (iii) the reinforcing principles set out in Article 37 of the EU Charter of Fundamental Rights and s. 3 of the Climate Action and Low Carbon Development Act, 2015, as subsequently amended;
>
> (iv) the extensive principles and policies set out in other provisions of the 2000 Act beyond the terms of s. 28, particularly Parts II, IV, X, XAB and XIII;

(v) the fact that some of these principles and policies derive from legally operative provisions of EU law;

(vi) the fact that s. 28(1C) does not allow modification of primary law, or of secondary law other than as made by the board, regional assemblies and local authorities,

(vii) the constraint that insofar as individual planning applications are concerned, guidelines can only be made insofar as they support the consistent application of government or national policy and principles;

(viii) the objective need for flexibility arising from the inherent nature of the subject-matter concerned;

(ix) the technical, complex and expert nature of the field;

(x) the fact that the planning area is particularly subject to changing circumstances;

(xi) the fact that s. 28(1C) is primarily addressed to public bodies rather than directly to private law entities and that the sub-section does not directly create criminal offences, impose financial penalties, cut across fundamental human rights, or interfere with freedom of contract;

(xii) the inaptness and impracticability of incorporating guidelines in this area into primary law;

(xiii) the fact that the delegation-of-policy argument is much stronger if applied to the delegation of power to local authorities to make plans in the first place, hence implying that if planning policy powers cannot be delegated, virtually the whole 2000 Act is unconstitutional, not merely s. 28(1C);

(xiv) the historical precedents for the power in question and in particular the much wider power to approve or veto land-use planning schemes given to the Minister in 1934;

(xv) the limited nature of the powers conferred directly on local authorities by Article 28A of the Constitution;

(xvi) that fact that the powers under s. 28 cannot, in general, be exercised in respect of any individual case; and

(xvii) the requirement for public participation and reasons in any instance where guidelines invoking sub-s. (1C) are required to be subjected to SEA or AA.

Having regard to the four headings discussed above, in my view the overwhelming conclusion is that while sub-s. (1C) appears wide on its face, there are in fact sufficient principles, policies and constraints to limit it significantly, that it is a reasonable and non-abdicating conferral of a power to make secondary law in circumstances where there is an objective need for flexibility in relation to the subject matter, and where the system of which the power forms part is one that relies very considerably on the delegated exercise of functions, including policy-making functions, by local authorities. Section 28(1C) of the 2000 Act is not an unconstitutional delegation of legislative power."

22. Humphreys J. then concluded (at paragraph 87) that s. 28(1C) was not unconstitutional by reference to Article 28A because the sub-section "does not skeletonise local government but merely qualifies the exercise of certain defined functions."

Part V- Whether the SPPRs are ultra vires

23. Perhaps the first issue which might conveniently be examined is whether the SPPRs at issue here are in fact ultra vires s. 28(1C). This claim was but lightly pressed during the course of the appeal. Whatever might be the situation with regard to another case, it is

perhaps sufficient to record the view of Humphreys J. (at paragraph 94) to the effect that the appellant did not particularly point "to anything in these guidelines that breached the principle of proper planning or sustainable development, for example, by mandating the approval of projects that were impermissibly unsustainable."

24. It is, I think, fair to say that on the appeal to this Court the appellant has also not pointed to anything in the relevant provisions of either the Building Height Guidelines or Apartment Guidelines which were applied by the Board in the present case which might be said to be ultra vires. In these circumstances, I propose to proceed to a consideration of the constitutional issue on the assumption that neither of these guidelines have been shown to be ultra vires.

Part VI - Whether s. 28(1C) infringes Article 15.2.1º

25. There is now an abundance of case-law on the scope of Article 15.2.1º of the Constitution which vests the Oireachtas with exclusive jurisdiction to make laws for the State. It is clear from recent authority that the jurisprudence on whether the Oireachtas has improperly delegated its legislative functions for the purposes of Article 15.2.1º has moved away from a straightforward consideration of whether the legislation contained sufficient principles and policies in the manner originally outlined by this Court in *City View Press Ltd. v. An Chomhairle Oiliúna* [1980] IR 381. So, while the *City View Press* "principles and policies" test remains helpful, it "cannot be considered an infallible guide": see *Director of Public Prosecutions v. McGrath* [2021] IESC 66, [2021] 3 IR 785 at 818, per O'Donnell J.).

26. Accordingly, while these *City View Press* principles and policies criteria are still important, they have to some extent been superseded by a more holistic, broader-based consideration of this question. This is illustrated in cases such as *Bederev v. Ireland*

[2016] IESC 34, [2016] 3 IR 1 and *Náisiúnta Leictreach Contraitheroir Éireann v. Labour Court* [2021] IESC 36, [2022] 3 IR 515: see generally, Casey, "The Supreme Court and the Reformation of the Non-Delegation Doctrine" (2022) 4 *Irish Supreme Court Review* 36.

27. *Bederev* stressed that the legislation in question should be considered as a whole. And in *Náisiúnta Leictreach,* MacMenamin J. gave a helpful exposition of the contemporary thinking in respect of the requirements of Article 15.2.1º ([2022] 3 IR 515 at 544-545):

> "First, an assessment of the Act in order to determine whether or not it contains sufficient principles and policies, should be based on a reasonable, but not far-reaching, examination of the provisions. Second, the purpose of the various principles and policies criteria is to ask whether the legislation sets boundaries, in the sense of defining rules of conduct, or guidelines. Third, does the legislation have defined subject matter, and contain basic conditions of fact and law? Fourth, is the legislative purpose of the provisions discernible by identification of objectives or outcomes, as well as principles? Fifth, is the power delegated sufficiently delimited? Sixth, does the exercise of the subordinate power contain sufficient safeguards? Seventh, the primary question, is there an abdication by the Oireachtas of its constitutional role? These are the key questions.
>
> But legislation may nonetheless contain broad definitions, provided they are sufficiently definite and precise to permit a court to determine compliance with Article 15.2.1.º The Oireachtas *does not vest* a decision-making body with a decision-making power which involves choices. These may be broad, or more narrow, dependent upon the legislation. A court will ensure that a subordinate

> body is not vested with an absolute and untrammelled discretion. A court may also have to assess the extent to which a policy is discernible within viable legislative choices." (Emphasis supplied)

28. I should observe in passing that the words which I have just taken the liberty of highlighting seem, with respect, to be somewhat awkwardly expressed as they do not seem to chime with the rest of the passage just quoted. I would accordingly suggest that the sentence should be read as if it stated that the Oireachtas may vest a decision-making body with a decision-making power which involves choices.

29. If one applies these principles to the present case, then it can first be said that this provision envisages simply the making of binding guidelines concerning specific "*specific planning policy requirements* with which planning authorities, regional assemblies and the Board shall, *in the performance of their functions*, comply." (Emphasis supplied). While it may be said that these words have a pithy and laconic quality, they nonetheless place significant constraints upon the Minister. The Minister is not at large in exercising the s. 28(1C) powers. The guidelines must relate exclusively to planning policy and the performance of the functions conferred on local authorities and the Board. The powers must furthermore be exercised within the four corners of the 2000 Act, and it follows by extension that any guidelines must further relate to proper planning and sustainable development: see s. 34(2)(a) of the 2000 Act.

30. If the guidelines contained rules which might be said not to relate reasonably to these objectives, they could and would be declared ultra vires by the courts. As Humphreys J. noted, the 2000 Act itself contains a large swathe of highly prescriptive rules, regulations and statutory standards, many of them prescribed by the requirements of the EU law itself.

31. Other limiting factors mentioned by Humphreys J. are also important. Section 28(1C) does not allow the Minister to amend other law, so that issues which arose in cases such as *Cooke v. Walsh* [1984] IR 710 and *McDaid v. Sheehy* [1991] 1 IR 1 are not present in this case. Nor does this provision seeks to create criminal offences or regulate or impact on aspects of private law. The guidelines likewise do not impact on fundamental rights.

32. In all of these respects it may be said that s. 28(1C) sets definite boundaries and enjoys a defined subject matter. The legislative purpose is also discernible: it is to enable the Minister to set national standards in relation to a range of highly technical and sometimes fluid planning considerations bearing on matters such as urban density, transport connectivity, the avoidance of urban sprawl and building heights. This is further expressly confirmed by the provisions of s. 34(2)(d) of the 2000 Act as regards ordinary planning applications and by s. 9(3)I of the 2016 Act so far as SHD applications are concerned. The scope of the delegation is also constrained in that there are defined standards by which the vires of the guidelines could readily be challenged in an appropriate case.

33. Nor can it be said that the Minister is thereby empowered to make important policy choices of a kind that are often regarded as the hallmark of legislative power. Here a comparison with the recent decision of this Court in *Director of Public Prosecutions v. McGrath* [2021] IESC 66, [2021] 3 IR 785 is instructive. In that case this Court held that a District Court rule which purported to exclude the making of an award of costs against members of An Garda Síochána was ultra vires. As O'Donnell J. explained ([2021] 3 IR 785 at 852):

> "…the underlying choice here goes beyond any question properly consigned to the rule-making authority as to practice and procedure including costs and

> involves a broad-ranging policy decision which lies within the function of the Oireachtas under Article 15.2.1°. It might be said that the reason why law-making for the State is reserved to the Oireachtas is that there are decisions which must be made by the representatives of the people, and this decision, to exempt one class of prosecutor from the possibility of an award of costs in summary prosecutions is one that requires democratic justification rather than technocratic expertise."

34. Here by contrast the matters which are to be the subject of regulation by guidelines are matters which are quintessentially ones for technocratic expertise. If the Minister were ever to make guidelines which materially went beyond the setting of technical standards and strayed into major policy questions, this would immediately raise issues as to the vires of any such guidelines.

35. To that extent, it may be said that this examination of the scope of s. 28(1C) demonstrates that the sub-section satisfactorily meets the first six of the seven standards articulated by MacMenamin J. in *Náisiúnta Leictreach.* There remains for consideration the seventh consideration articulated by him, namely, has there been an abandonment by the Oireachtas of its constitutional role? In the High Court Humphreys J. described the level of supervision retained by the Oireachtas as being at "…virtually the most minimal level possible".

36. Democratic accountability and publicity are key features of this form of legislative supervision. One may start with the issue of publicity. Publicity is an essential part of the rule of law in any democratic state. In the case of Acts of the Oireachtas this finds expression in Article 25.4.2° which provides that the President must cause a notice to be published in the *Iris Oifigiúil* stating that a Bill has been signed by him and become law. In the case of statutory instruments, the printing, notice of making, numbering and

their mode of citation are all governed by the Statutory Instruments Act 1947 ("the 1947 Act"). The phrase "statutory instrument" is defined by s. 1 of the 1947 Act as meaning "an order, regulation, rule, scheme or by-law made in exercise of a power conferred by statute." It is accepted that the SPPR guidelines are not statutory instruments for the purposes of the 1947 Act and they were not published or documented as if they were. By contrast, the extended definition of "statutory instrument" contained in s. 2(1) of the Interpretation Act 2005 is broad enough to include a guideline of this kind. In summary, therefore, while the SPPRs are not *published* as statutory instruments – because they are not in fact statutory instruments as defined by the 1947 Act–, they can nonetheless be *interpreted* by a court as if they were.

37. Given that the SPPR guidelines made under s. 28(1C) of the 2000 Act at issue here have a binding character of general application which affects third parties, they must be deemed to have at least some of the appurtenant qualities of secondary legislation. The democratic character of the State provided for by Article 5 of the Constitution ordains, therefore, that at least basic publication requirements must be provided for in the case of guidelines with binding normative qualities in respect of third parties such as the s. 28(1C) guidelines which are at issue in the present case.

38. The question, therefore, is whether s. 28(1C) meets these minimum publication standards. Section 28(5) provides that any guidelines made under this section (i.e., both "ordinary" and "binding" guidelines alike) must be laid before the Houses of the Oireachtas. Section 28(6) provides that any planning authority must make any guidelines issued to it "available for inspection by members of the public." Finally, s. 28(7) provides that the Minister "shall publish or cause to be published, in such manner as he or she considers appropriate, guidelines issued under this section." This

publication requirement is, in my view, clearly sufficient to meet constitutional standards pertaining to the rule of law and ordinary democratic norms.

39. Turning to the question of democratic accountability, it must be acknowledged that the provisions contained in s. 28 for supervision of guidelines made by the Minister under that section by the Houses of the Oireachtas simply require that the guidelines have to be "laid" before both Houses in accordance with the procedures contained in Houses of the Oireachtas (Laying of Documents) Act 1966 and Part 13 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013. There is, admittedly, no procedure provided for in either in s. 28(1C) itself or elsewhere in the 2000 Act whereby any guidelines made under these provisions can be the subject of a formal approval or nullification resolution in either House. Yet it must be recalled that as the guidelines will have been made by the Minister pursuant to a statutory power, he or she will also be answerable to Dail Éireann in accordance with Article 28.4.1°. An important element of democratic supervision is therefore present.

40. Summing up on this point, therefore, it may be said that while the seven standards articulated by MacMenamin J. in *Náisiúnta Leictreach* are not intended to be viewed as an exhaustive checklist, they nonetheless provide very valuable guidance on the Article 15.2.1° issue. To repeat, in essence what is called for is an overall holistic consideration of the legislative provision at issue measured by factors such as the existence of statutory standards constraining the exercise of legislative powers and the retention of adequate democratic accountability and supervision in respect of the powers thereby conferred.

41. Viewed in the round, it can be said that s. 28(1C) meets these standards. It is for these reasons that I would reject the challenge based on Article 15.2.1º grounds. I propose now to turn to the challenge based on Article 28A.

Part V–I - The argument based on Article 28A

42. The Constitution as originally enacted made no express provision for the recognition of local government. There was, admittedly, a limited form of indirect recognition of the existing local government structure in that Article 12.4.2º provides that "the Councils of not less than four administrative Counties (including County Boroughs) as defined by law" could nominate a citizen for the office of President. All of this was changed by the insertion of Article 28A by the 19th Amendment of the Constitution Act 1999.

43. Article 28A provides as follows:

> "1. The State recognises the role of local government in providing a forum for the democratic representation of local communities, in exercising and performing at local level powers and functions conferred by law and in promoting by its initiatives the interests of such communities.
>
> 2. There shall be such directly elected local authorities as may be determined by law and their powers and functions shall, subject to the provisions of the Constitution, be so determined and shall be exercised and performed in accordance with law.
>
> 3. Elections for members of such local authorities shall be held in accordance with law not later than the end of the fifth year after the year in which they were last held.

4. Every citizen who has the right to vote at an election for members of Dáil Éireann and such other persons as may be determined by law shall have the right to vote at an election for members of such of the local authorities referred to in section 2 of this Article as shall be determined by law.

5. Casual vacancies in the membership of local authorities referred to in section 2 of this Article shall be filled in accordance with law."

44. It is true that Article 28A re-inforces the democratic quality of local government. Moreover, Article 28A.2, Article 28A.3, Article 28A.4 and Article 28A.5 all contain specific and definite guarantees in that regard in respect of local government elections and the franchise. As McKechnie J. observed in *Kiely v. Kerry County Council* [2015] IESC 97, [2016] 2 IR 1 at 14: "Whatever the exact designation of [Article 28A], it is however clear that the importance of democracy, through local elections, has been enshrined in our law at constitutional level."

45. One might also say that Article 28A.1 implies that certain definite powers which might appropriately be exercised at local government will be conferred on such bodies by law. As this Court pointed out in *Heneghan v. Minister for Housing, Planning and Local Government* [2023] IESC 18, [2023] 2 ILRM 97, it may be presumed that when effecting constitutional change, the People intended that such would be meaningful and efficacious. The Oireachtas could not therefore empty Article 28A.1 of any real meaning and, for example, decline to grant local authorities *any* real or substantial powers whatsoever.

46. While Article 28A is, therefore, an admittedly important provision, the changes it effected are, nevertheless, on the whole relatively modest. The State remains a unitary state and it was never intended – least of all by Article 28A – that local authorities

should enjoy some sort of autonomous and largely inviolate powers in the manner comparable perhaps to the devolved powers enjoyed by the German Länder or the Swiss cantons. There are, of course, unitary states which make express provision in their constitutional systems for the grant of autonomous powers to defined regions – the provisions of Article 116 and Article 117 of the Constitution of Italy are perhaps a good example in point – but Article 28A cannot be regarded as one such provision.

47. It is true that in one of the relatively few cases where the possible impact of Article 28A was considered by this Court – *Killegland Estates Ltd. v. Meath County Council* [2023] IESC 39 – I observed (at paragraph 58) that the traditional reluctance of the courts to interfere with the democratic decisions of local authorities' representatives was re-inforced by the subsequent adoption of Article 28A.1. Apart from the fact that this was simply a passing comment of mine, it is worth recalling that the background to *Killegland Estates* itself shows the extent of central government controls over the policy aspects of the planning process. While s. 10(1) of the 2000 Act provides that the development plan adopted by the elected members shall set out the "overall strategy for the proper planning and sustainable development of the area of the development plan", s. 10(1A) of the 2000 Act is a highly prescriptive provision which stipulates that the development objectives in the development plan "are consistent, as far as practicable, with national and regional development objectives set out in the National Planning Framework and the regional spatial and economic strategy and with the specific planning policy requirements specified in guidelines under subsection (1) of section 28." (The guidelines mentioned here are those made pursuant to s. 28(1) and are not the SPPR guidelines made under s. 28(1C) which are at issue in the present appeal.)

48. Section 10(2A) goes even further and requires each local authority to ensure that the zoning proposals contained in the development plan accord with a variety of national

policies specified by the Minister. As McDonald J. observed in *Highlands Residents Association v. An Bord Pleanála* [2020] IEHC 622, statutory provisions of this nature are "clearly designed to ensure that the development objectives in a development plan are consistent, as far as practicable, with national and regional development objectives."

49. At all events, one of the principal issues in *Killegland Estates* was whether the development plan which been adopted by Meath County Council did in fact comply with these statutory requirements. And, as it happens, this Court held that it did. The real point, however, is that *Killegland Estates* shows the extent of central government statutory controls, even in respect of a function – such as the making of a development plan – which has traditionally been a core function of elected representatives of local authorities. One could also point to the fact that s. 34(2)(ba) of the 2000 Act provides that where SPPR guidelines made under s. 28 (i.e., whether the "ordinary" guidelines made under s. 28(1) or the "binding" guidelines made pursuant to s. 28(1C)) "differ from the provisions of a development plan of a planning authority, then those requirements shall, to the extent that they so differ, apply instead of the provisions of the development plan."

50. Other provisions in s. 31 are in a similar vein, enabling the Minister for give specific directions to planning authorities. So, for example, s. 31(1)(b) provides where the Minister is of opinion that a development plan "fails to set out an overall strategy for the proper planning and sustainable development of the area", the Minister may "for stated reasons, direct a planning authority to take such specified measures as he or she may require in relation to that plan." Even away from the system of central government controls provided for in the 2000 Act, many other statutory examples of this kind could be cited to illustrate this general point. It is perhaps sufficient to point to the provisions of s. 69(1)(e) of the Local Government Act 2001 which provides that when a local

authority exercises any of its statutory functions it must have regard to "policies and objectives of the Government or any Minister of the Government in so far as they may affect or relate to its functions."

51. All of this may serve to put the real import of s. 28(1C) in its proper context. The section is fundamentally designed to enable the Minister for Housing to issue binding guidelines and directions to planning authorities in respect of matters such as height, density and so forth. It is the binding character of these guidelines vis-à-vis third parties which perhaps serves to differentiate them from, for example, a direction from the Minister communicated to a local authority by letter or by circular. Yet none of this can take from the fact s. 28(1C) is in reality another form of central government control in respect of the planning process (including the development plan process). If s. 28(1C) is thought to violate Article 28A.1, then the same can be said of great number of other central government controls of this kind.

52. In the end I find myself unpersuaded that a provision of this kind infringes Article 28A.1. Parsing the language of this constitutional provision it may be said that the State has indeed provided "a forum for the democratic representation of local communities" by establishing and maintaining a democratically elected system of local government. The local authorities exercise and perform "at local level powers and functions conferred by law" by, inter alia, making the development plan in the manner contemplated by the 2000 Act. That law (in this case, the 2000 Act) itself provides for a series of in-built control mechanisms (such as s. 28(1C)) which are all part and parcel of the planning process. It cannot be said that the Oireachtas has not vested local authorities with meaningful powers in respect of which local authorities enjoy substantial – although admittedly not complete – autonomy.

53. In the end, the case under this heading pretty well amounts to saying that the Oireachtas is precluded by Article 28A.1 from providing by law for central government controls of this kind. If this proposition were, however, correct, it would mean that the State would then have begun to take on a federal or quasi-federal character with local authorities assuming autonomous powers free from many existing forms of central government control. Leaving aside the very special provisions of Article 15.2.2º designed to accommodate the existence of a subordinate legislature in what is now Northern Ireland in the event of the reunification of the island of Ireland at some future stage, there is nothing at all in the Constitution to suggest that the State has anything else other than a unitary character. It may be recalled that in *Re Article 26 and the Health (Amendment) Bill (No.2) 2004* [2005] IESC 7, [2005] 1 IR 105 at 188 this Court stressed that in view of the breadth of language contained in Article 15.2.1º the Oireachtas may in principle legislate on any topic, with Murray C.J. adding that "The Oireachtas is the parliament of a unitary state."

54. All of this means that while the State must provide for a system of local government with some real powers which are exercisable at local level, this does not mean that the exercise of these powers by local authorities is in some way inviolable or beyond the reach of ministerial controls. Quite the contrary: the Oireachtas was fully entitled to ensure that local authority powers are exercisable in a manner which conform to national policy standards and for this purpose to enable the Minister to give directions to local authorities of the kind exercisable by means of the s. 28(1C) guidelines procedure.

55. For all of these reasons, I would reject the argument that s. 28(1C) of the 2000 Act was unconstitutional having regard to the provisions of Article 28A.1.

Part VIII – Overall conclusions

56. It remains to sum up my principal conclusions.

57. I consider that s. 28(1C) meets the standards articulated by MacMenamin J. in *Náisiúnta Leictreach.* It therefore does not amount to an unconstitutional delegation of legislative power contrary to Article 15.2.1º. While the *Náisiúnta Leictreach* standards do not in themselves represent an exhaustive checklist, they nonetheless are of great assistance in that they require the court to engage in a broad-based, holistic assessment of this question by reference to factors such as the adequacy of standards contained in the legislation; the extent to which the delegate of the power is thereby constrained and the retention of democratic supervision and accountability. Judged by these standards, I consider that s. 28(1C) is not unconstitutional.

58. Although Article 28A is an important re-affirmation of democratic accountability in respect of local government, the effects of this provision are, on the whole, relatively modest. While Article 28A requires that the State must provide for a system of local government with some real powers which are exercisable at local level, this does not mean that the exercise of these powers is in some way inviolable. Quite the contrary: the Oireachtas was fully entitled to ensure that local authority powers are exercisable in a manner which conform to national policy standards and for this purpose to enable the Minister to give directions to local authorities of the kind exercisable by means of the s. 28(1C) guidelines procedure.

59. For all of these reasons, I would reject the argument that s. 28(1C) of the 2000 Act was unconstitutional having regard to the provisions of Article 28A.1.

60. I would therefore affirm the decision of the High Court and dismiss the appeal.