



**AN CHÚIRT UACHTARACH  
THE SUPREME COURT**

**Record No: S:AP:IE:2023:000092  
High Court Record No: 2022 474 JR**

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

**In the Matter of an Application Pursuant to Section 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**

**Judgment of Ms. Justice Donnelly, delivered on this 23<sup>rd</sup> day of June, 2024.**

1. I agree with O'Donnell C.J. and Hogan J. that this appeal must be dismissed. I agree with both judgments on the issue of *locus standi*. I also agree with Hogan J. that it has not been shown that the Building Height Guidelines or Apartment Guidelines were *ultra vires* s. 28(1C) of the Planning and Development Act 2000 ("the 2000 Act").
2. Two main issues presented in this appeal concerning the constitutionality of s. 28(1C) of the 2000 Act. The first issue concerns Article 28A of the Constitution and I agree with Hogan J for the reasons set out in his judgment that the s. 28(1C) is not invalid having regard to the provisions of Article 28A of the Constitution.
3. On the second issue of whether the said section is invalid having regard to the provisions of Article 15.2 of the Constitution, I also agree with his conclusion that it is not invalid. I agree with much of his reasoning as to why it did not so infringe the Constitution, specifically with his reasoning at para 29 as to the constraints placed on the Minister by the wording in s. 28(1C). The Chief Justice has raised two specific instances where he departs from the reasoning of Hogan J.; these concern the location within the Constitution of rule of law considerations, and the issue of democratic accountability. As I do not entirely agree with either one or the other of the judgments, it is important that I set out, briefly, where and why I depart from what is set out in each judgment.
4. All the members of this Court are satisfied that promulgation and publication are essential to the validity of these guidelines (being normative rules that are not Bills passed by the Oireachtas) and that these have been satisfied here. While it is perhaps, as the Chief Justice says, not critical to the resolution of this case, to resolve precisely where in the Constitution such a requirement resides, the differences in approach between the Chief Justice and Hogan J. nonetheless requires to be addressed. Hogan J. finds the requirement for publicity, for normative rules such as these ministerial guidelines, to be found in Article 5 by virtue of the democratic nature of the State

whereas the Chief Justice locates it by analogy with the promulgation requirements in Article 24.5.2 of the Constitution.

5. The decision of this Court in *King v Attorney General* [1981] IR 233 in striking down the vague and arbitrary provisions of s. 4 of the Vagrancy Act, 1824, as repugnant to the Constitution, is a resounding statement of the principle of legality even though that phrase is not mentioned in the judgments. Henchy J. memorably stated “that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is at variance”. Publicity of laws as part of the principle of legality or the rule of law may arise under many headings; for example, non-promulgation would violate the right to a fair criminal trial in due course of law (Article 38.1) as well as Article 25.4.
6. The Chief Justice states that “the obligation of publication of laws is not derived from the concept of democracy, but rather for something more basic, a principle of legality and the rule of law”. While he may be correct that the rule of law is not derived from the concept of democracy, I am satisfied that the concept of democracy necessarily encompasses the rule of law. That is a view I have articulated previously as follows: “It is a basic principle underpinning democracy that the state will function in accordance with law” (*Minister for Justice v Celmer (No.1)* [2018] IEHC 119). In that case there is reference to the contents of a European Commission communication to the European Parliament and the Council entitled “A new EU Framework to strengthen the rule of law (COM) (2014) 158 Final/2” in which the Commission stated that “[t]he rule of law is the backbone of any modern constitutional democracy. It is one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU and, as such, one of the main values upon which the Union is based”.

7. At the time of the enactment of Bunreacht na hÉireann in 1937, this State considered, and was entitled to consider, itself a modern constitutional democracy. Therefore, there is nothing unusual or difficult in stating as a proposition that Article 5, which provides “Ireland is a sovereign, independent, democratic State”, envisages a State which is based upon the rule of law. As this Court said in *In Re Article 26 and the Judicial Appointments Bill, 2022* [2023] IESC 34: “The entire structure of the Constitution presupposes the existence of a state and a legal system governed by the rule of law. Article 5 describes the State as a democracy, yet without the appropriate rule of law guarantees, the essential democratic character of the State could not be assured”. The Court in that case refers to a number of constitutional provisions – and standard common law rules and presumptions - in which the principle of the rule of law finds expression. I do not read the judgment as excluding Article 5 from those constitutional provisions in which the rule of law finds expression. Indeed the judgment quotes from this Court’s judgment in *In Re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360 at 385 in which the Court prefaced its remarks concerning the constitutionally protected right of access to the courts to enforce legal rights by saying “[i]t would be contrary to the very notion of a state founded on the rule of law, as this State is ...”.
8. While there may be a number of constitutional provisions which require promulgation of laws, in my view, the constitutional necessity for such promulgation and publication of ministerial guidelines fits easily into the positive statement provided in Article 5 of Ireland’s democratic nature, which by every yardstick is underpinned by the rule of law. While such a rule may be found by analogy with the very explicit publication requirements of Article 25.4.2, a state which is democratic must have such a rule. As Hogan J. states, the provisions of Article 25.4.2 expressly refer to the promulgation of a Bill once President signs it by publication in the *Iris Oifigiúil*. These guidelines, which

are not statutory instruments as defined by the Statutory Instruments Act, 1947, do not require publication in *Iris Oifigiúil*, and therefore a direct analogy breaks down. Article 25.4.2 is an explicit statement as to how Ireland must fulfil the rule of law requirements in respect of law made by the Oireachtas. Those rule of law requirements may be fulfilled without having to reach for any analogy, in accordance with Article 5, by less prescriptive means in the case of other normative rules such as these guidelines. I therefore agree with the judgment of Hogan J. when he says at paragraph 37 that “[t]he 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 [these] guidelines...”.

9. On the other hand, I agree with the judgment of the Chief Justice when he says that democratic accountability is not a separate test in the overall assessment of whether s. 28(1C) of the Planning and Development Act, 2000, infringes the sole and exclusive power of legislation conferred upon the Oireachtas by Article 15.2. I agree too that this Court has in recent years adopted the “more holistic broader based consideration of the question” described by Hogan J. in his judgment. The law, as the Chief Justice indicates, has been surveyed recently by Collins J. in *Delaney v Personal Injuries Assessment Board* [2024] IESC 10 in paragraphs which the majority of that Court agreed. These cases include *O’Sullivan v Sea Fisheries Protection Authority* [2017] 3 IR 751, *Bederev v Ireland* [2016] IESC 34 (“*Bederev*”), [2016] 3 IR 1, and *Náisiúnta Leictreach Contraitheoir Éireann v Labour Court* [2020] IEHC 303 (“*NECP*”) and *The People (DPP) v McGrath* [2021] IESC 66 (“*McGrath*”).
10. As Collins J. said at para 170, “the ultimate issue that arises under Article 15.2 is whether (as it was put by McMenamin J. for the Court in *NECI*) “*there has been a usurpation, arrogation, or trespass on the legislative power of the Oireachtas*” (at para

61) or (as it was put by O’ Donnell J (as he then was) for the Court in *McGrath*), “*whether the Oireachtas has abdicated its function under Art 15.2.1*” (at para 69)”. It is now clear beyond doubt that “the presence or absence of some supervisory mechanism is not determinative in itself” (Collins J. at para 173) although it is undoubtedly a relevant factor.

**11.** If there is some other aspect of democratic accountability that might stem from Article 5, it has not been argued in this case. Indeed, it is difficult to see the shape such argument might take which would extend the parameters beyond the careful principles enunciated by this Court when considering Article 15.2 in the recent cases as set out above. Consideration within those principles has been given to what is required by a legislature in a democratic society. MacMenamin J. in *Bederev* stated with respect to the choice left to the delegate decision maker by the Oireachtas as follows: “The delegated choice may be narrow or broad, but the Constitution will not be interpreted in a manner which would deny the Oireachtas the necessary attributes of a legislature in a democratic society, including a degree of legislative flexibility, provided the exercise of the choice is consistent with the terms of the Constitution itself”. From this and from the other judgments referred to above, it can be seen that the test as to *usurpation* or *abdication* of the constitutional function/role of the Oireachtas has taken account of what is required in a democratic society by the Oireachtas itself so long as that is in accordance with the terms of the Constitution. In our democracy, the Oireachtas is the representative body of the People and if there is a *usurpation* or *abdication* of its function that is inherently undemocratic.

**12.** For the reasons set out I would dismiss this appeal.