

Role of review of administrative decisions in implementing pillar III of the Aarhus Convention – the Case of Iceland

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Introduction

The Aarhus convention, with its three pillars of Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, reflects Principle 10 of the Rio Declaration. Iceland ratified the Aarhus Convention on 20th October 2011 and thus became the 45th Party to the legally binding Convention. Legislation to fulfil the obligations under the Convention was enacted and changed as of 1st January 2012. On that date Act no. 130/2011 entered into force establishing an Environmental and Natural Resource Board of Appeal and some twenty plus laws were changed to reflect aforementioned obligations and allow for a review procedure by the Board. For the purposes of examining the role of administrative appeal in Iceland in relation to Article 9 of the Aarhus Convention, paragraphs 2, 3 and 4 the most notable laws are Act. no. 106/2000 on Environmental Impact Assessment, which corresponds to Art. 6 of the Aarhus convention, Act. no. 123/2010 on Planning, Act no. 160/2010 on Construction and Act no. 7/1998 on Health and Protection from Pollution. In a nutshell both administrative decisions taken during the EIA process in and of itself as well as the final decision on whether to permit proposed activities and projects are subject to an appeal.

In general one could say that in the wake of the financial crash in 2008 the awareness of rights has increased in Iceland. At the same time with the devaluing of Iceland's national currency tourism has been on the rise which has led to increased infrastructure and at the same time increased the strain on nature which is the main draw for tourists to visit. Meanwhile larger projects and activities are planned or underway in a recovering economic society. These are all contributing factors to an increased number of cases concerning projects and activities that have an environmental impact. These cases are brought forward by environmental organisations, interest organisations and individuals alike.

For ease this paper is presented in a manner similar to the Aarhus Convention Implementation Guide i.e. addressing the situation in Iceland with regard to what can be reviewed in an administrative appeals process, who can ask for a review, who carries out the review, scope of the review as well as its adequacy and effectiveness.

What can be reviewed?

As stated before some twenty plus laws allow for a review procedure by the Environmental and Natural Resource Board of Appeal. For the purposes of this discussion the most relevant is that an appeal can be brought to the Board against the following decisions based on Act. no.

106/2000 on Environmental Impact Assessment, which corresponds to Art. 6 of the Aarhus convention, of the National Planning Authority:

- Whether projects shall be subject to an EIA
- Whether interrelated projects shall be subject to a joint EIA
- Whether an EIA report shall be subject to revision

In addition permits for activities and projects subject to EIA are subject to appeal, these include development consent, license to operate, building permits etc. (Act. no. 123/2010 on Planning, Act no. 160/2010 on Construction and Act no. 7/1998 on Health and Protection from Pollution.)

However, with regards to providing for access to justice in line with international obligations it is important to note there is an ongoing discussion on whether “omissions” are subject to an appeal to the Board. No case law exists on this matter in Iceland and in general the legal framework is tailored to try to bring about a decision which can then be appealed. The EFTA Surveillance Authority considers this unsatisfactory and in a Reasoned Opinion delivered on 4th of May 2016¹ the authority came to the conclusion that Iceland has failed to fulfil its obligations arising from Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

The authority considered the wording of Act no. 130/2011 and arguments put forward by the Icelandic government but finally held that: “The lack of possibility to challenge omissions before the Ruling Committee could lead to a situation where, if a public authority in Iceland failed to take a decision that was legally required, the public concerned, including non-governmental environmental organisations, would have no remedy available under Icelandic law. The Directive acknowledges that such a situation can arise and specifically provides for the right to challenge omissions before the prescribed review procedure in Article 11(1) of the Directive.”

The Icelandic government has two months to take measures to comply with the opinion, i.e. until 4th of July 2016, and is currently engaged in discussion on possibilities of legislative changes.

Who can ask for a review – the issue of standing?

According to Act no. 130/2011 anyone with legal interest regarding the environmental decision in question can appeal the decision to the Board of Appeal. In Iceland this is understood to mean that the claimant must have direct and individual interest with regard to the decision under appeal. There is established case law on this issue that rarely gives rise to

In addition environmental NGOs, outdoor organisation and other interest organisations that fulfil a certain criteria are deemed to have sufficient legal interests in order to appeal decisions on whether projects shall be subject to EIA, whether two or more related projects shall undergo a joint EIA and on whether an EIA assessment report shall be revised. The same applies to decisions on issuing permits (operation permit, development consent, building permit) for projects and activities subject to EIA.

The criteria stated by law is that the organisation has a least 30 members and that an appeal against the decision in question is compatible with the goals of the organisation. In addition

¹ <http://www.eftasurv.int/media/esa-docs/physical/792444.pdf>

the organisation must be open for membership by the public, publish a yearly report on its activities and its accounts must be subject to audit.

So far this criteria has not been an issue in Iceland and NGOs are exercising their right to appeal. However it has been pointed out by academic professionals that there may be cause for considering the number of members needed in light of the ECJ ruling in case C-263/08 which concerned the former criteria in Sweden for NGOs. In particular this could affect local organisations in municipalities with less than 2000 inhabitants².

Who carries out the review?

In its implementation report in 2014 Iceland stated that articles 9(2), 9(3) and 9(4) are implemented by Act. No 130/2011 on Environmental and Natural Resources Board of Appeal. However it is not mandatory to refer a case to the Board, appeals against administrative decision may also be brought directly before the courts. Due to the fact that Iceland has not availed itself of the opportunity to require that claimants exhaust the appeals process before going to court there are instances where there are many different proceedings.

Indeed several cases have been brought directly before the courts due to the Boards backlog, especially where there are high interests at stake. Such is the case of Suðurnesjalína 2, a high voltage power line to be erected overhead. Ten different cases have been brought to the Board of Appeal appealing against six different decisions. Two these decisions have been brought directly to court as well which means that all the cases related to those are put on hold by the Board until the courts rule. At the same time the Icelandic Supreme Court has ruled in cases concerning the decisions to allow expropriation of land due to Suðurnesjalína 2.³ Those sort of decisions are not subject to appeal to the Board but the findings of the Supreme Court may be relevant to one of the cases pending before the Board. Thus the situation can become quite complex.

Decisions by the Board are binding but they can also be brought before the courts where they are either quashed or upheld, these cases are rare however. Decisions by the Board can be the subject of complaints to the Ombudsman, although his opinions are not binding they are usually followed in practice. Again not many decisions of the Board are brought to the Ombudsman.

In recent cases before the Board the claimant has asked the Board to refer to the EFTA Court for a preliminary ruling. The Board is examining these requests with a view to Icelandic legislation⁴ and European case law, e.g. C-222/13 where the ECJ found that it does not have jurisdiction to answer questions referred by Denmark's Teleklagenævnet as it does not fulfil criteria for a tribunal for the purposes of Article 267 TFEU.

Scope of the administrative review?

² In a recent case the Board of Appeal examined an appeal brought by individuals and an interest organisation concerning waste treatment in a small rural community. Examination by the Board showed that members of the organisation involved numbered 40 and thus it met the criteria set down in law.

³ The Supreme Court quashed the decision to allow expropriation due to the fact that in the process no assessment had been made of the possibility to install the power lines underground rather than overhead.

⁴ Act no. 21/1994 on request of advisory opinion of the EFTA Court.

It is safe to say that the right to appeal is used in Iceland and cases so far involve projects and activities such as fish farming, high voltage electricity lines, installations for the production of e.g. aluminium and silicon, mining, roadworks, dams, hotels and service centres for tourism situated in rural areas. In order to rule on such a variety of matters there are nine appointed members of the Board, four of these are legal experts and five are experts in different fields. Three or five members are called to rule on each case by decision of the Chairman who is a legal expert.

Procedure, form and content of the decisions that are subject to appeal to the Board are all scrutinized. However the scope is limited in that the powers of the Board only stretch so far as to quashing the appealed decision. The Board does not take a new decision or instruct the authority involved on how to act. The authority will however need to obey the ruling of the Board and repeat the procedure in question in order to arrive at a new decision in line with the ruling. That decision can then be challenged anew before the Board.

Adequacy and effectiveness of the administrative review process.

Oftentimes the result of a quashing by the Board of Appeal is that the intended project or activity comes to a standstill, halts or is abandoned. In order to prevent potential damage the claimant can ask the Board to provide interim injunctive relief i.e. putting a stop to the project or activity pending a final ruling by the Board. The Board is obliged to rule on this question as soon as possible and in the event that relief is provided the authority in question is obliged to put an immediate stop to the project or activity, if need be with the assistance of police. If relief is provided the case is fast tracked upon request of the operator so that disturbance of operation is minimized in case the appealed decision is upheld.

The criteria for providing interim injunctive relief is provided for in Art. 5 of Act no. 130/2011 where it is stated that this is an exception to the rule and the project or activity in question must have begun or be immediate. The travaux préparatoire to the act further explains that when it comes to project and operations that impact the environment the right to appeal can become meaningless without a possibility to provide interim injunctive relief. However it is important to take into consideration whether the appeal in question has merit. Further consideration should be given to general principles of administrative law which provide that it must be weighed whether relief should be provided and when looking at the issue the rightful interests of all involved must be considered. Public interest should also be considered and in all cases it should be weighed what sort of damage can follow a ruling.

Act no. 130/2011 presumes that a fair, equitable and timely review is provided for in Iceland. The Board of Appeals is established by that act where Art. 1 provides that the Board is independent. All its members are appointed by the Minister of Environment and Natural Resources, the Chairman and Vice Chairman for a period of five years and other members for four years. The act in Art. 4(5) further states that after a claim is received the Board shall receive all information and arguments from the authority in question within 30 days. The deadline can be extended by 15 days in more complex cases. The Board then has three months to rule on the subject matter which can be extended up till six months in complex cases. Combined this means that even in the most complex cases there should be a result within eight months after a claim is received.

Unfortunately this is rarely the case and all of these time frames are frequently exceeded. The cause is twofold; on the one hand when the Board of Appeal was established some 125 cases

were unresolved from its predecessor, on the other hand a far larger number of cases has been brought before the Board than was envisaged. Instead of a projected 20% increase in case load the increase is close to 55%. Thus in 2014 there were examples of cases where one would measure their age in years rather than months. In order to combat this trend and try to bring proceedings back in line with international obligations further resources were channelled to the Board which could then increase personnel in the year 2015 with the result that all of the inherited cases from the previous Board have been settled and headway made in increasing the timeliness of proceedings. More remains to be done but there is awareness of this within the government which has proposed an increased budget for the Board as of 2017.

It should be noted that even though the timeliness of proceedings can be questioned there are tools available to try and prevent damage from occurring due to delays. The first is interim injunctive relief and a subsequent fast tracking as discussed above. The second is the fact that the Board of Appeal has certain leeway in prioritising the cases pending before the Board. Thus the Board can pull a case from the docket queue if there are arguments to do so pertaining to the urgency or time sensitive nature of the matter involved.

There are no costs involved in bringing proceedings before the Board of Appeal. The threshold to file a case is low and requires minimal effort by the claimant, the administrative Act no. 37/1993 requires the Board, just as any other authority, to give guidance to claimants. If a claimant chooses to use an attorney these costs are borne by the claimant but it should be stressed that the Board is not bound by the arguments put forward by the parties. Once a matter is brought before the Board it has the duty to investigate the case and look at all aspects of the decision making in question. This is underlined in Art. 4(5) of Act no. 130/2011 where it says that the Board shall gather evidence and opinions and visit sites as needed until enough information has been gathered.

All rulings of the Board of Appeal are in writing and made public on its website www.uua.is which is frequently visited.

Final remarks

On the whole there are many lessons to be learned in Iceland from the last few years in allowing for access to justice in environmental matters.

The administrative review has a lot to recommend to it, there is certain flexibility in the process with a view to prevent future damage, there is high awareness of the right to appeal and there are mechanisms in place to address the issues arising.

There are challenges involved as well, most notably pertaining to the timeliness of proceedings but progress is also being made here so that the phrase justice delayed is justice denied will not be applicable. The other challenge currently under discussion in the administration is how to respond to the opinion of the EFTA Surveillance Authority pertaining to the possibility to appeal against omissions.