

2022 **NGO**

ENGAGEMENT GUIDE SERIES

Guide to the *Amicus Curiae* Procedure in the Republic of Ireland





This project is a cross-border collaborative effort between law firms and NGO partners to develop guidelines on recourses to action for the NGO community in the areas of UN and EU mechanisms, judicial review and the appointment of an *amicus curiae*.

The pathways to justice described in these guides are all too often overlooked or misunderstood due to the overwhelming amount of complex or academic information on these mechanisms. These guidelines steer our NGO partners through easily accessible resources on the different avenues to accessing justice.

The Free Legal Advice Centre (FLAC), The Public Interest Law Alliance (PILA), a project of FLAC based in Dublin, and The Public Interest Litigation Support (PILS) Project in Belfast identified a need in the NGO community for better information and resources on legal recourses to action in the following areas:

1. Individual non-court mechanisms at European level
2. Engagement with UN Special Procedures mandate holders
3. Taking individual complaints to UN treaty bodies
4. *Amicus curiae* procedure
5. Judicial Review

To address this need, PILA, The PILS Project and Arthur Cox offices in Belfast and Dublin collaborated to develop and finalise guideline documents in each of the target areas. The guides were written or revised by the Arthur Cox offices on a *pro bono* basis and were peer reviewed by colleagues from the legal sector in the North and South.

The aim of this project is to provide NGOs with the information they need to understand the available recourses to action and to determine which (if any) to pursue. Should an NGO decide to explore a recourse to action further, the NGO may contact PILA or The PILS Project for assistance through the respective *pro bono* referral schemes.

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Information sources and useful websites are hyperlinked throughout this guide. Updated links to the NGO Engagement Guides are available on the Public Interest Law Alliance website (www.pila.ie) and the PILS Project (www.pilsni.org) website.

The *amicus curiae* Procedure in Ireland

What does the phrase *amicus curiae* mean?

In most Court cases, there are opposing sides, called parties, and the relevant dispute is decided based on the legal and factual positions of the parties alone. However, this approach might not take into account the fact that the issues involved in some disputes may also affect many other people who aren't themselves parties. The Courts do not take into consideration the views, interests or rights of those other people because, as they are not represented parties, such views, interests or rights are not presented to the Court as part of the case.

Amicus curiae (often referred to simply as an "*amicus*") translates to "friend of the Court." An *amicus* is someone who is separate from (and does not have to be appointed or invited by) any party to a Court case, but who seeks/applies to intervene in that case in order to offer information to the Court on a relevant issue (including how that Court case may affect the interests and rights of third parties). The involvement of an *amicus* can give the Court an opportunity to consider how the impact of its decision in an individual case may be felt more widely than by the direct parties and to make a more informed decision in that regard.

While the role of *amicus* can, therefore, be an important one, it does have limitations and is very different to being a party to a case. An *amicus* cannot commence proceedings, expand the proceedings, lead evidence or control the Court proceedings in any way; instead, their function is limited to making legal submissions to the Court that it would not otherwise hear on the potential wider considerations of the case before it, based on the *amicus*' experience or expertise in a particular area.

Why would an NGO act as an *amicus*?

Since the primary role of an *amicus* is to provide the Court with objective information, NGOs are often uniquely placed to assist in this way.

NGOs often have expertise and/or insight on the issues coming within their remit that parties to a case may not. Where the outcome of a case may have ramifications for society as a whole or a particular group within society, NGOs will also often be best placed to represent that collective interest before the Court; unlike the direct parties to a case, NGOs can act purely in the public interest, or the interests of particular groups other than themselves, and make submissions from that perspective.

Some ancillary societal benefits of NGOs pursuing *amicus* roles are that such participation may help to raise more awareness around relevant issues and contribute to the democratic legitimacy of the Courts. As Courts are, in Ireland at least, not elected by the people, but made up of judges who are appointed, they can sometimes be too far removed from certain political and social issues which should be considered when making a decision that will affect those issues. The *amicus* can lessen the impact of this by raising such issues before a Court during the course of a trial.

Acting as an *amicus* may also have benefits for the individual NGO itself; such action may serve as a reminder for the public that that NGO exists and operates as an effective watchdog for issues within its remit and can also enhance that NGO's reputation and gravitas in the field in which it operates.

Intervening as an *amicus*

The involvement of an *amicus* is quite rare in Irish Court proceedings.

Currently, there is only one organisation, the Irish Human Rights and Equality Commission (the "IHREC"), that has been expressly recognised in Irish law as having a general right to apply to intervene as an *amicus* in any Irish Court proceedings involving human or equality rights. Even with this express general recognition, the IHREC cannot insist on intervening in any particular case; whether it is allowed to intervene is left completely up to the Court in which the case is being heard.

For all other individuals, companies or other organisations (including NGOs), it is still possible to apply to the Court in which the relevant case is being heard to intervene as an *amicus*. However, such applications are only likely to be successful in very limited circumstances as the Irish Supreme Court has stated that the Courts' power to allow the intervention of an *amicus* should be exercised sparingly.





Making an application to intervene as an *amicus*

Applications can only be made to intervene as an *amicus* in cases which already exist. As set out above, an *amicus* cannot commence proceedings.

As the process can be complex and the requirements demanding, it is advisable to instruct a solicitor and/or barrister to assist with any *amicus* application. However, that is not mandatory.

To make an application to a Court, you will need to know the Court record number and the names of the parties. It is advisable to write to all parties involved in the proceedings in advance stating that you wish to be joined as an *amicus* and the reasons why. This letter should also seek their consent to the application. Even if they consent, you will be required to make the application as it is a matter for the Court to decide if it is prepared to join you as an *amicus*.

In order to bring the application you will have to lodge a Notice of Motion with the Courts Service seeking an Order of the Court that you are joined as an *amicus*. The Notice of Motion is a standard form document identifying the case and the parties, identifying a date and place when and where the application will be heard and importantly the specific Order that you are asking the Court to make. This application will have to be on notice to all other parties in the proceedings.

Importantly, the Notice of Motion must be accompanied by a sworn affidavit which will need to address the key issues that the Court will assess in determining whether to grant the application. These are set out in more detail below but in essence, the affidavit will need to define who you are, why the issues in the proceedings are relevant to you and in particular why in the wider public interest (rather than simply in pursuit of your own interests) you consider that you can bring a particular insight and perspective to the legal issues to be determined that might not otherwise be before the Court. Furthermore, the Court will also want assurance that you are not going to duplicate legal arguments being made by other parties, that you will comply with the Courts directions, that you will not cause any delay in the conduct of the proceedings and that you will bear your own legal costs.

Determination of the application

Irish Courts are, in general, quite reluctant to allow such interventions. In determining any application, the Court will assess the individual, company or organisation and consider the following factors:

1. Why does the applicant want to intervene as an *amicus* in this case?

The Court will consider whether the applicant has a bona fide interest in the subject of the case – i.e. does the applicant have a genuine, honest and important stake in the outcome of the proceedings? The applicant should not be merely meddling in the case; the outcome of the case must have the potential to impact the applicant or those that the applicant represents in more than a trivial way.

2. In what type of case does the applicant wish to intervene?

For an *amicus* application to be successful, the Court must generally be deciding a case with a public law dimension and its decision must affect a great number of persons.

3. What value can the applicant's intervention bring to the Court?

The Court will only allow an intervention if it believes that the applicant can make a valuable contribution to the case by having particular expertise or a perspective that is useful and that would not otherwise be brought before the Court when it hears the case.

Applications from individuals, companies and organisations who hold a recognised role (whether under Irish or international law) connected to the subject matter of the case are more likely to be successful.

The Court will also consider whether the addition of the applicant as an *amicus* may actually delay proceedings or make them more expensive; in which case, an application is unlikely to succeed. As set out above, applicants must confirm in

advance that they will not cause any delay in the conduct of the proceedings and will bear their own legal costs. As a result, if an applicant succeeds in being joined as an *amicus*, they will often be expected to work to very short deadlines.

4. Is the applicant neutral?

The Court will consider whether the applicant is likely to provide it with neutral and independent insight and information or whether it is likely to attempt to sway the Court's decision (whether because it has a connection to one or more of the parties or otherwise) in the same way as an existing party to the case.

While an *amicus* does not have to be entirely neutral (and, indeed, the Irish Courts have recognised that, despite their formal independence, inevitably an *amicus* will have preferences about what the outcome of the case should be), the Court is less likely to determine that an applicant has a valuable contribution to make if it believes they are merely going to advocate for the same outcome (and in the same way) as one of the parties.

For example, a society representing Jehovah's Witnesses in Ireland was refused the right to intervene in proceedings between a patient (who was a Jehovah's Witness and refused a blood transfusion on the basis of her religious beliefs) and the hospital that was treating her because the Court felt that the society would not have presented any insight or information in a substantially different way to the patient herself.

5. In what Court is the case being heard?

Generally, the more senior the Court, the greater the impact that its decisions may have and, therefore, the more likely that an *amicus* application before it will be accepted. Given this, applications to intervene as an *amicus* are generally more likely to succeed when made to the Court of Appeal or Supreme Court than when they are made to the High Court or other lower Courts.

Where a case involves a question of EU law which needs to be referred to the Court of Justice of the European Union for determination, the Irish Courts are also more likely to approve an *amicus* application.

What will an *amicus* do during the case?

This depends on what Court the case is in.

In the Court of Appeal and the Supreme Court, only questions of law are decided, not questions of fact, so an *amicus* will be limited to making legal submissions.

Although questions of fact are decided in lower Courts (such as the High Court), the role of the *amicus* is limited to making legal submissions only, and not to present evidence of facts. In very exceptional circumstances, it is possible for a Court to permit an *amicus* to make submissions of fact, where they can establish that they have some particular expertise as regards that factual issue. However, even if the *amicus* has such expertise, the decision to allow the evidence is entirely up to the Court and the *amicus* cannot insist on making any witness statements or giving factual evidence even where the other parties to the case agree to it doing so. We have not seen any cases in Ireland where an *amicus* has been given permission to present evidence, as *amici curiae* are still relatively unusual in Ireland. However, we may see this at some stage in the future.

While the *amicus* is independent of the parties and neutral, ordinarily, the order of submissions in Court do not necessarily reflect this. Very often, the Court will direct that the *amicus* submit its submissions after the plaintiff/appellant, with the *amicus* then responding to both sets of submission. Once the respondent has replied, the *amicus* is not entitled to a reply.

Can an *amicus* appeal a decision in the case?

No, an *amicus* can only make a contribution to the case whilst it is being heard by the Court, and has no right to appeal the Courts' decision once it has been made.

Becoming an *Amicus curiae* before the European Courts

Amicus curiae procedure before the ECtHR

The European Court of Human Rights (the “ECtHR”) is responsible for enforcing the rights of citizens of States that are members of the European Convention on Human Rights (the “ECHR”) (which includes all EU Member States, including Ireland), against those States. The ECHR is an international treaty to protect human rights and political freedoms in Europe. Once cases are admissible before the ECtHR they are considered by a Chamber of 7 Judges.

To start a case before the ECtHR, you must have been directly affected by the action of the State which is being complained about. Because of this, NGOs are often not able to start cases themselves. The parties in any case heard by the ECtHR will instead be the person claiming to have had their ECHR rights breached and the State said to be responsible for that breach.

Instead, participating as an *amicus* is often the most effective way for an NGO to bring particular issues to the attention of the ECtHR. Where the ECtHR is involved, intervening as an *amicus* is often called a “third-party intervention,” and this is governed by article 36 of the ECHR and article 44 of the Rules of the ECtHR.

The ECtHR can invite a person or organisation to make an *amicus* submission, or a person or organisation can bring their own application to do so. If an application is made, it is completely up to the ECtHR whether it allows *amicus* submissions or not.

Any application to participate as an *amicus* must be made within 12 weeks of the person who has started the Court proceedings giving the relevant State notice of their application to bring a complaint to the ECtHR. The application doesn’t have to be in any particular form, although it must be “duly reasoned” and written in either English or French and it is advisable to include details such as the name and number of the case in which the applicant is applying to participate, who the applicant is, contact details of the applicant, their relevant experience and interest, and why they are in a particular position to make a contribution to the Court. The application should not comment on the particular facts or merits of the case. The application is submitted by letter to the President of the Chamber that is hearing the case.

It should be marked for the attention of the President of the Chamber hearing the case, including the case name and number, and posted to:

The Registrar
European Court of Human Rights
Council of Europe
F-67075 Strasbourg
Cedex
France

There is no application fee and no requirement to notify the parties to the case of the application. It is best to send the letter by registered post so the Court has evidence of the date it was sent. If the application is granted, the Court will contact the applicant setting out conditions for their contribution to the case. These conditions are likely to include a maximum length for the written submissions (usually 10 to 15 pages), a time limit for lodging the submissions and the matters which can be covered by the submission. Generally, the Court will tell the applicant that their intervention should also not comment or make submissions on the particular facts or merits of the case.



Amicus curiae before the Court of Justice of the European Union

The Court of Justice of the European Union (the “CJEU”) is the judicial authority of the EU – it interprets and ensures the correct application of EU law. As part of its role, the CJEU accepts “preliminary references” from the Member States’ national Courts containing questions on how parts of EU law should be interpreted. The CJEU’s decisions on interpretation are then binding on the Member States’ national Courts.

While Member States and the European Commission can intervene in cases being heard by the CJEU by submitting written observations, there is no *amicus curiae* procedure for individuals or other third parties.

However, as discussed above, *amicus curiae* applications before the High Court in Ireland have a greater chance of being successful if there is going to be a preliminary reference made to the CJEU.



Case Study: *H.I. v Minister for Justice, Equality and Law Reform* [2003] IESC 42

This case marked the first instance in which the Supreme Court addressed the role of *amicus curiae* in the Irish legal system. This judgement revolved around an application made on behalf of the United Nations High Commissioner for Refugees, requesting leave to appear as an *amicus curiae* in this appeal. The Court held that, although there was no statutory provisions or rules of Court providing for the appointment of an *amicus curiae*, it did have an inherent jurisdiction where it appeared that it might be of assistance in determining an issue before the Court. However, Keane CJ qualified this point holding that admitting an *amicus curiae* should be done sparingly. The Court, in making its judgement, looked to the *amicus curiae* processes in foreign jurisdictions such as the United States of American, the United Kingdom and Australia. The Court noted that, 'As the experience in other common law jurisdictions demonstrates, such an intervention is particularly appropriate at the national appellate level in cases with a public law dimension.'

The original High Court case involved the appellant applying for an order of certiorari (a writ or order by which a Court reviews a case tried in a lower Court) to quash the decision of the Minister for Justice to refuse Hippolitus Iwuala, the appellant, refugee status. The High Court refused to grant the order, however, the Court held that the decision involved an important point of law of 'exceptional public importance,' and it would be best practice to refer the case to the Supreme Court. As a result of this referral, the UNHCR applied to the Supreme Court to act as an *amicus curiae* in the appeal.

Case Study: O'Brien v. Personal Injuries Assessment Board (No. 1) [2005] 3 I.R. 328.

The applicant in this instance brought judicial review proceedings against the Personal Injuries Assessment Board (PIAB) for adopting a procedure of refusing to communicate with claimant's solicitors. Mr O'Brien, who had suffered an injury whilst at work, had contacted PIAB through his solicitor Mr Boland. However, the Board indicated to Mr Boland that it would not deal directly with solicitors. As a result, Mr O'Brien instigated judicial review proceedings on the basis that there was no legislative basis for PIAB to exclude legal counsel. The Law Society of Ireland requested to be joined as *amicus curiae*, given that the case revolved around the role of solicitors and the profession in general. In particular, The Law Society of Ireland contended that the importance of the solicitor-client relationship is well recognised throughout the law. The Court held that there were a number of considerations to take into account when deciding whether an *amicus* application is successful: (1) the applicant must have a bona fide interest in the matter, (2) the matter must be in the public law dimension and (3) affect a large number of people. In this instance, the Court held that the Law Society met those criteria and allowed them to join as *amicus curiae*.

The Law Society, acting as *amicus*, contended that had the Oireachtas intended for legal representation to be excluded from PIAB proceedings, then it would have explicitly stated so in the Personal Injuries Board Act 2003. Likewise, they highlighted the fact that since the right to legal representation is so fundamental, the Court ought to be reluctant to interpret the Act in a way that would exclude it. The Court ultimately held that any exclusion of legal representation from PIAB proceedings would have to be explicitly stated in legislation and, since the 2003 Act did no such thing, PIAB had contravened the Act.



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