UNAPPROVED
THE COURT OF APPEAL

Appeal Number: 2020/227
Neutral Citation Number: [2023] IECA 68

Noonan J.
Faherty J.
Binchy J.

In the matter of the European Communities (Access to Information on the Environment) Regulations 2007-2018

BETWEEN/

RIGHT TO KNOW CLG

APPLICANT/
APPELLANT

- AND -

AN TAOISEACH AND MINISTER FOR COMMUNICATIONS, CLIMATE ACTION AND THE ENVIRONMENT, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 24th day of March 2023

1. This is an appeal by Right to Know CLG ("Right to Know") against the decision of the High Court (Meenan J.) of 28 February 2020 in which he refused an application for judicial review of two decisions said by Right to Know to constitute a refusal by the first respondent of a request made by Right to Know pursuant to the European Communities (Access to Information on the Environment) Regulations 2007 – 2018 ("the AIE Regulations").

2. The AIE Regulations transposed into law the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information ("the AIE Directive").

3. The fundamental question presented in the High Court and on appeal to this Court is whether the requirement set out in Article 6(1)(b) of the AIE Regulations that an applicant for information on the environment state that the request is made pursuant to the AIE Regulations accords with the object and purpose of the AIE Directive.

The legislative background

4. To best understand the issues arising in the appeal, it is apposite, at this juncture, to set out the salient provisions of both the AIE Directive and the AIE Regulations.

5. The broad purpose of the AIE Directive is well-settled. In summary, it provides for a general right under EU law for the public to access environmental information held by public authorities, subject to certain limited exceptions which must be construed narrowly.

6. The objectives of the AIE Directive are evident in the Recitals to the Directive. Recital 1 recognises that increased public access to environmental information and the dissemination of such information "contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment". Recital 8 refers to it being "necessary to ensure that any natural and legal person has a right of access to environmental information held by or for public authorities without his having to state an interest". Recital 9 refers to the necessity "that public authorities make available and disseminate environmental information to the general public to the widest extent possible…".

7. Pursuant to Recital 13, information pertaining to the environment is to be made available to applicants as soon as possible and within a reasonable time and having regard

to any time scale specified by the applicant. Recital 14 states that public authorities should make environmental information available in the form or format requested by the applicant unless it is already publicly available in another form or format or it is reasonable to make it available in another form or format.

8. Recital 15 provides:

> "Member States should determine the practical arrangements under which such information is effectively made available. These arrangements shall guarantee that the information is effectively and easily accessible and progressively becomes available to the public through public telecommunications networks, including publicly accessible lists of public authorities and registers or lists of environmental information held by or for public authorities."

9. Pursuant to Recital 24, the provisions of the AIE Directive shall not affect the right of a Member State to maintain or introduce measures providing for broader access to information than required by the AIE Directive.

10. Article 1 of the AIE Directive provides:

> "The objectives of this Directive are: (a) to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise; and (b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. To this end the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted."

11. Article 3 sets out the obligations on Member States, as follows:

> "Access to environmental information upon request

1. Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.

2. Subject to Article 4 and having regard to any timescale specified by the applicant, environmental information shall be made available to an applicant:

   (a) as soon as possible or, at the latest, within one month after the receipt by the public authority referred to in paragraph 1 of the applicant's request; or

   (b) within two months after the receipt of the request by the public authority if the volume and the complexity of the information is such that the one-month period referred to in (a) cannot be complied with. In such cases, the applicant shall be informed as soon as possible, and in any case before the end of that one-month period, of any such extension and of the reasons for it.

3. If a request is formulated in too general a manner, the public authority shall as soon as possible, and at the latest within the timeframe laid down in paragraph 2(a), ask the applicant to specify the request and shall assist the applicant in doing so, e.g. by providing information on the use of the public registers referred to in paragraph 5(c). The public authorities may, where they deem it appropriate, refuse the request under Article 4(1)(c).

4. Where an applicant requests a public authority to make environmental information available in a specific form or format (including in the form of copies), the public authority shall make it so available unless:

(a) it is already publicly available in another form or format, in particular under Article 7, which is easily accessible by applicants; or

(b) it is reasonable for the public authority to make it available in another form or format, in which case reasons shall be given for making it available in that form or format.

For the purposes of this paragraph, public authorities shall make all reasonable efforts to maintain environmental information held by or for them in forms or formats that are readily reproducible and accessible by computer telecommunications or by other electronic means.

The reasons for a refusal to make information available, in full or in part, in the form or format requested shall be provided to the applicant within the time limit referred to in paragraph 2(a).

5. For the purposes of this Article, Member States shall ensure that:

(a) officials are required to support the public in seeking access to information;

(b) lists of public authorities are publicly accessible; and

(c) the practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised, such as:

— the designation of information officers;

— the establishment and maintenance of facilities for the examination of the information required,

— registers or lists of the environmental information held by public authorities or information points, with clear indications of where such information can be found.

Member States shall ensure that public authorities inform the public adequately of the rights they enjoy as a result of this Directive and to an appropriate extent provide information, guidance and advice to this end."

12. For reasons that will become apparent, Article 3(5) of the AIE Directive is of particular import in this appeal.

The AIE Regulations

13. Article 5(1) of the AIE Regulations states, in relevant part:

"A public authority shall-

(a) inform the public of their rights under these Regulations and provide information and guidance on the exercise of those rights…"

14. Article 6 of the AIE Regulation, headed *"Request for environmental information"* provides:

"6. (1) A request for environmental information shall—

(a) be made in writing or electronic form,

(b) state that the request is made under these Regulations,

(c) state the name, address and any other relevant contact details of the applicant,

(d) state, in terms that are as specific as possible, the environmental information that is the subject of the request, and

(e) if the applicant desires access to environmental information in a particular form or manner, specify the form or manner of access desired.

(2) An applicant shall not be required to state his or her interest in making the request."

15. Pursuant to Article 7(4), where a decision is made to refuse, in whole or in part, a request for environmental information, the public authority concerned shall notify the applicant within the time frame provided for and "specify the reasons for the refusal" and "inform the applicant of his or her rights of internal review and appeal" in accordance with the Regulations.

16. Article 7(7) provides that where a request is made to a public authority that "could reasonably be regarded as a request for environmental information" but is not a request made under Article 6(1) of the AIE Regulation or the Freedom of Information Act 2014 ("the FOI Act"), "the public authority concerned shall inform the applicant of his or her right of access to environmental information and the procedure by which that right can be exercised, and shall offer assistance to the applicant in this regard."

17. Article 11 of the AIE Regulations sets out the procedure for an internal review where an applicant's request has been refused in whole or in part. Pursuant to Article 11(2), the person reviewing the original decision shall "(a) affirm, vary or annul the decision, and (b) where appropriate, require the public authority to make available environmental information to the applicant". A decision under Article 11(2) is to be notified to the applicant within one month from the receipt of the request for internal review.

18. Article 12 provides, in relevant part:

> "(3) Where—
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> (a) a decision of a public authority has been affirmed, in whole or in part, under article 11, or
>
> (b) a person other than the applicant, including a third party, would be incriminated by the disclosure of the environmental information concerned, the applicant, the person other than the applicant or third party may appeal to the Commissioner against the decision of the public authority concerned.

…

(5) Following receipt of an appeal under this article, the Commissioner shall—

(a) review the decision of the public authority,

(b) affirm, vary or annul the decision concerned, specifying the reasons for his or her decision, and

(c) where appropriate, require the public authority to make available environmental information to the applicant, in accordance with these Regulations.

…

(9) (a) The Commissioner may refer any question of law arising in an appeal under this article to the High Court for determination and shall postpone the making of a decision until after the determination of the court proceedings…"

19. Article 13 of the AIE Regulations provides that a party to an appeal under Article 12 or any other person affected by the Commissioner's decision "may appeal to the High Court on a point of law from the decision".

20. In *Right to Know v. An Taoiseach & Ors* [2019] 3 IR 2022; [2018] IEHC 372, the High Court (Faherty J.) recognised (at para. 83) the right of access to environmental information guaranteed by EU law as being a fundamental right which could only be refused on grounds permitted in the AIE Directive as replicated in the AIE Regulations. As noted by this Court in *Minch v. Commissioner for Environmental Information and Anor.* [2017] IECA 223, both the AIE Directive and the AIE Regulations seek to give effect in law to one of the underlying objectives of the 1998 United Nations Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention"). In Case C-204/09, *Flachglas Torgau*

GmbH v. Bundesrepublik Deutschland, ECL I: EU: 2012:71, the CJEU put it as follows (at para.31):

> *"…In adopting Directive 2003/4, the European Union intended to ensure the compatibility of European Union law with [the Aarhus Convention] in view of its conclusion by the Community by providing for a general scheme to ensure that any natural or legal person in a Member State has a right of access to environmental information held by or on behalf of the public authorities, without that person having to show an interest".*

The CJEU went on to state, at para. 39, that the aim of the AIE Directive is to seek *"to guarantee the right of access to environmental information held by public authorities and to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public".*

21. As can be seen from the decision of the CJEU in Case C-279/12, *Fish Legal and Shirley v. Information Commissioner* ECL I: EU: 2013: 853, the right provided by the AIE Directive (and the AIE Regulations) is limited to "environmental information" within the meaning of Article 2(1) of the AIE Directive held by public bodies. On the other hand, the FOI Act, which is purely domestic legislation, provides, *inter alia,* for the right of the public to access "records" held by Government Departments (such as the first respondent and second respondent here) and other public bodies as defined by the FOI Act. Any official information held by public bodies can be sought under the FOI Act subject to the exemptions provided for in the FOI Act.

Right to Know's request

22. On 3 August 2018, Right to Know made a request to the first respondent for:

"1. All documents considered by the Government in relation to the appropriate assessment (AA) and strategic environmental assessment (SEA) of the National Planning Framework (NPF).

2. All documents considered by the Government in relation to whether AA and SEA were required for National Development Plan (NDP).

3. All statements made at meetings of the Government in relation to the AA and SEA of the NPF and NDP.

4. Records of any discussions at meetings of the Government in relation to the AA and SEA of the NPF and NDP".

23. It was not disputed by the first respondent that Right to Know had made a request for environmental information and the High Court accepted the request as such.

24. On 7 August 2018, an official in the first respondent's Department sought clarification, by way of email, whether the request was being made pursuant to the FOI Act or the AIE Regulations, to which Right to Know responded on the same day that they had "nothing further to add to our request at this stage and it is considered that a valid request has been made".

25. This communication elicited a further response from the first respondent on 7 August 2018 that the first respondent was "just seeking clarification…as to whether you wish your request to be dealt with as an FOI request OR an Access to Information on the Environment request". It was stated that this clarification was sought in order to assign it to the appropriate personnel.

26. Right to Know's response on 8 August 2018 advised that "A valid request has been made, please deal with it according to your legal obligations". The official in the first respondent's office replied on the same date in the following terms:

> "Further to your emails below, Regulation 6(1)(b) of the Access to the Information on the Environment Regulations 2007…, state that "A request for environmental information state that the request is made under these Regulations". Section 12(1)(a) of the Freedom of Information Act 2014… states that "A person who wishes to exercise the right of access shall make a request, in writing or in such other form as may be determined, addressed to the head of the FOI body concerned for access to the record concerned stating that the request is made under this Act". Until I receive clarification as to which statutory process is being invoked your request cannot be processed."

27. By way of reply on the same date, Right to Know emailed the official requesting that the first respondent "conduct an internal review of its refusal to provide the requested information".

28. There was no response from the first respondent to this communication.

29. On or about 7 September 2018, the time for carrying out an internal review under Regulation 11(3) of the AIE Regulations, which requires a decision on an internal review request under that Regulation to "be notified to the applicant within one month from receipt of the request for the internal review", elapsed.

The judicial review

30. In its judicial review proceedings (pursuant to an Order for leave made by the High Court (Noonan J.) on 22 October 2018), Right to Know says that the initial decision of 7 August 2018 and the internal review decision of 7 September 2018 (being an implied refusal to carry out an internal review of the initial decision) are in breach of the AIE Directive in so far as the decisions impose the requirement set out in Article 6(1)(b) of the AIE Regulations, namely, that Right to Know state whether it was making the information

request as an FOI request or an AIE request. Right to Know says that this is neither permitted nor required by the AIE Directive**.** Accordingly, it sought the following reliefs:

(1) An order of *certiorari* quashing:

- "[T]he implied decision of the first named Respondent made in or about 7 September 2018 [the internal review decision] to refuse to carry out an internal review of the decision of 8 August 2018 [the initial decision] refusing to provide the information sought by the Applicant on 3 August 2018 pursuant to… [the AIE Regulations], as requested by the Applicant on 8 August 2018";
- the initial decision to refuse to provide the information sought on 3 August 2018 pursuant to the AIE Regulations.

(2) A declaration that Article 6(1)(b) of the AIE Regulations imposes an obligation on a party making a request that is not permitted and/or required by the AIE Directive and, therefore, is contrary to the AIE Directive, in particular Article 3 thereof.

(3) A declaration that Article 6(1)(b) of the AIE Regulations, insofar as it purports to transpose the AIE Directive, is invalid as it amounts to an unconstitutional and unlawful exercise of legislative power in breach of Article 15.2.1 of the Constitution.

31. The application was grounded on the affidavit of Ken Foxe, a director of Right to Know.

32. In their Statement of Opposition, the respondents raised a preliminary objection on the ground that Right to Know had failed to exhaust all alternative remedies in advance of commencing judicial review proceedings. They further pleaded that Right to Know was not entitled to rely on the absence of a "formal decision" to justify the failure to lodge an appeal to the Commissioner in circumstances where Right to Know had refused to comply with the requirements of the AIE Regulations and that in any event, the absence of a

formal decision from the first respondent did not prevent the appellate jurisdiction of the Commissioner from being invoked.

33. Without prejudice to those pleas, the respondents went on to deny Right to Know's claim that Article 6(1)(b) of the AIE Regulations breached the AIE Directive or that Article 6(1)(b) in its transposition of the AIE Directive was unconstitutional or amounted to an exercise of legislative power in breach of Article 15.2.1 of the Constitution. The affidavit verifying the Statement of Opposition, and by way of reply to Mr. Foxe's affidavit, was sworn by Ms. Aoife Joyce, Assistant Principal Officer with the second respondent's Department.

34. On 14 May 2019, Mr. Foxe swore a further affidavit in response to the Statement of Opposition and Ms. Joyce's affidavit, essentially taking issue with the respondents' contention that Right to Know should have availed of the appellate mechanisms provided for in the AIE Regulations.

The judgment of the High Court

35. Right to Know's application for judicial review was refused by the High Court on, essentially, three grounds. In the first instance, Meenan J. ("the Judge") held that in light of the correspondence that passed between the parties, there was no refusal by the first respondent to provide the environmental information sought. He considered the response of the first respondent to the request not a refusal "but rather a clarification as to which statutory process was being relied upon because, depending on the statutory basis of the request, different procedures would apply". He noted that this was set out in the replying affidavit sworn by Ms. Joyce when she stated that the first respondent "simply wished to know whether the request was being made pursuant to the AIE Regulations or the FOI Act 2014". Ms. Joyce averred that while both relate to the disclosure of information, "they are

separate statutory regimes each with their own processes and requirements". The Judge also had regard to the following averment by Ms. Joyce:

> "It appears from these proceedings that the applicant intended for the request to be a request under the AIE Regulations. The first named respondent remains willing to deal with the request for environmental information from the applicant in the terms contained in the original request made on 3rd August, 2018."

Accordingly, the Judge found it "hard not to reach the conclusion that there is no basis for this application" and on that basis alone he could dismiss the application. He went on, however, to consider Right to Know's complaint, "namely, that enquiring as to whether the environmental information is being sought under the AIE Regulations is unlawful."

36. The Judge noted that what was in issue in the proceedings was the requirement in Article 6(1)(b) of the AIE Regulation that an applicant shall "state that the request is made under these Regulations".

37. He observed that no objection was taken by Right to Know to any other provisions in the Regulations that dealt with, *inter alia*, the definition of "environmental information", "public authority" and the grounds upon which environmental information may be refused.

38. The Judge next considered the terms of the AIE Directive, noting that Recital 15 to the Directive states that "Member States should determine the practical arrangements under which such information is effectively made available. …"

39. He considered Article 3(5) of the AIE Directive of relevance. He opined that use of the term "such as" in Article 3(5)(c) "clearly indicates that what is listed is not an exhaustive list of the practical arrangements to be put in place to ensure the effective availability of environmental information".

40. The Judge considered that the requirement under Article 6(1)(b) of the AIE Regulations that a person seeking environmental information is to state that the request is

made under the AIE Regulations "does not in any way limit the environmental information that has to be disclosed". He went on to state:

> "22. Rather, it seems to me that it is a practical step so as to ensure easy and efficient access to the information. Article 3(5)(c) provides for "the designation of information officers". It is entirely practical and sensible to ensure that when there is a request for environmental information sought under the AIE Regulations that it is directed towards an officer who is charged with dealing with it. This can only be done by requiring persons seeking the information to state that they are relying on the AIE Regulations. This point is further emphasised by the fact that environmental information may also be obtained under, for example, the Freedom of Information legislation, in which case a different system is followed. This was referred to in the email from the first named respondent, of 8 August 2018 (para. 15 above), and also in the replying affidavit of Ms. Aoife Joyce which I have already referred to.
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> 23. The Directive requires that practical arrangements be put in place for ensuring right of access to environmental information. The requirement under Regulation 6(1)(b) is such an arrangement. Far from being a restriction on access to environmental information, this request actually assists in the provision of information. I am therefore satisfied that Article 6(1)(b) is entirely permissible by the Directive."

41. The third issue that was determined by the Judge was his rejection of Right to Know's argument that Article 6(1)(b) was an exercise of legislative power in breach of Article 15.2.1 of the Constitution. Article 15.2.1 provides:

> "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

42. The Judge noted that Right to Know accepted that the Oireachtas may delegate the power to make regulations which will give effect to the "principles and policies" in the "parent act" provided that the power of delegation is exercised in accordance with such principles and policies. He concluded his analysis of this issue as follows:

> "25. I have already stated that the restriction alleged by the applicant is not a restriction on access to environmental information but rather a practical step to ensure compliance with the Directive. Further, as already stated, the practical arrangements listed in Article 3(5)(c) are not an exhaustive list, and so the State has considerable scope to make practical arrangements so as to ensure the effectiveness of the AIE Regulations.
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> 26. Under s. 3 of the European Communities Act, 1972, in transposing the AIE Directive the State may make Regulations that "contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations …".
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> 27. I am satisfied that the provisions of Regulation 6(1)(b) are permissible by the European Communities Act, 1972 and do not infringe upon Article 15.2.1 of Bunreacht na hÉireann. I therefore also dismiss the application on this ground."

43. Given the views he had expressed with regard to Right to Know's judicial review application, the Judge declined to consider the further submission by the respondents to the effect that there had been a failure on the part of Right to Know to exhaust all alternative remedies in advance of commencing the judicial review proceedings.

44. The Judge's ultimate conclusions were expressed in the following terms:

> "29. I have already expressed the view that I do not believe that there was a factual basis for these judicial review proceedings to be initiated. In looking at the terms of the emails exchanged, there was not a refusal to provide the environmental

information sought. Rather, a request was made by the respondents that the applicant identify the statutory basis for the application, a request that was necessary so that the application could be properly processed.

30. Even if there was such a refusal, I am fully satisfied that Regulation 6(1)(b) of the AIE Regulations represents a lawful transposition of the Directive. I have to say that I found no merit or substance in the application herein and I therefore refuse the reliefs sought."

The issues arising in the appeal

45. Further to the submissions of the parties in the appeal, I consider that the following issues arise for determination:

(1) Whether Right to Know failed to exhaust alternative remedies provided for in the AIE Regulation such that their judicial review application was not justified in all the circumstances.

(2) Whether the Judge was correct to find as he did, namely that the requirement under Article 6(1)(b) of the AIE Regulations to state that the requ is made under the Regulations complied with the "practical arrangements" envisaged by Article 3(5) of the AIE Directive.

(3) Whether the Judge was correct to find that provisions of Article 6(1)(b) were permissible under the European Communities Act 1972 ("the 1972 Act") and thus did not infringe Article 15.2.1 of the Constitution.

Discussion

The alleged failure to pursue alternative remedies

46. In the High Court, as noted by the Judge, the respondents raised a preliminary objection to the judicial review proceedings on the basis that Right to Know had failed to exhaust the remedies available to them under Article 12 of the AIE Regulations which

provides for an appeal to the Commissioner for Environmental Information from a refusal to provide environmental information. For the reason he set out at para. 28 of his judgment, the Judge declined to address the respondents' argument. Albeit that they did not cross-appeal against the Judge's approach to this argument, before this Court, the respondents contend that Right to Know's failure to use the appeal mechanism provided for in the AIE Regulations constitutes a basis for dismissing the appeal. Notably, Right to Know did not argue in this Court that the matter could not be raised by the respondents in the absence of a cross-appeal. In those circumstances, I see no basis upon which the Court should decline to address this issue.

47. As can be seen from the provisions already quoted above, the AIE Regulations establish an appeal framework under which appeals can be brought to the Commissioner for Environmental Information ("the Commissioner") and the High Court. Pursuant to Article 12(3), an applicant for environmental information may appeal a decision of a public authority taken under Article 11 of the AIE Regulations to the Commissioner.

48. The respondents contend that Right to Know could have appealed the first respondent's refusal to provide the information sought (as Right to Know perceived it) to the Commissioner pursuant to Article 12 of the AIE Regulations, which is a full *de novo* appeal on all issues of fact and law.

49. In response to the contention that it failed to exhaust alternative remedies before commencing judicial review, Right to Know says that that argument falls to be addressed in the context of the AIE Directive. It argues that the respondents have not identified any particular aspect of Right to Know's request which required Right to Know to appeal to the Commissioner in the first instance. It further submits that while the AIE Regulations might envisage a linear and sequential pathway from the initial request onto the internal review, thereafter, an appeal to the Commissioner and, ultimately, a possible appeal on a point of

law to the High Court, Article 6 of the AIE Directive, read along with Recital 19, provides that applicants for access should be able to seek not only an administrative review of the acts or omissions of a public authority in relation to a request by an independent and impartial body established by law (Article 6(1)) but also have access to a review procedure before, *inter alia*, a court of law (Article 6(2)).

50. Right to Know says that under Article 6 of the Directive, the judicial review remedy is clearly provided for, in addition to whatever other internal review or administrative review may be provided, and that the judicial review remedy is discrete from and not dependent upon these other internal and administrative review mechanisms. Moreover, it says that even if there was a requirement to exhaust administrative remedies where same are provided, here, the decision of the first respondent is challenged directly by way of judicial review procedures rather than by way of statutory appeal because of the challenge Right to Know is making to the compatibility of Article 6(1)(b) of the AIE Regulations with the AIE Directive, as well as its constitutionality.

51. In other words, Right to Know contends that because the legality of Article 6(1)(b) of the AIE Regulations is being challenged, an issue in respect of which the Commissioner would have no jurisdiction, it would have served no purpose to have exhausted all administrative remedies (with the attendant extra cost and delay) before pursuing a judicial review remedy. It also contends that there was no point in an administrative appeal as it was considered at the relevant time that the Commissioner did not have the statutory authority to disapply Article 6(1)(b) of the AIE Regulations. While it accepts that the CJEU has found otherwise in Case C-378/17 *Workplace Relations* ECL I: 2018: 979, Right to Know says that the CJEU's decision in that case was not rendered until after the application for leave for judicial review was made. It thus contends that had it appealed to

the Commissioner, he would simply have said that Right to Know was required to comply with Article 6(1)(b) of the AIE Regulations.

52. Right to Know also submits that the existence of the right of administrative appeal is not an automatic bar to the entitlement to seek judicial review but rather a matter to be taken into consideration in the exercise of the High Court's discretion (see *Right to Know v. An Taoiseach* [2021] IEHC 233 where, at para. 66, Simons J. cites the decision of the Supreme Court in *Petecel v. Minister for Social Protection* [2020] IESC 25).

53. The necessity to exhaust a statutory appeal instead of initiating judicial review proceedings was addressed in *EMI Records (Ireland) Limited v. Data Protection Commissioner* [2013] 2 IR 669. At para. 34, Clarke J. emphasised that where the Oireachtas has established a statutory appeal, it must be presumed that the intention was for it to be utilised. As put by Clarke J., at para. 41:

> *"The default position is that a party should pursue a statutory appeal rather than initiate judicial review proceedings. The reason for this approach is, as pointed out by Hogan J. in Koczan, that it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which, ordinarily, those dissatisfied with initial decision might be entitled to have the initial decision questioned."*

54. He went on to state at, at para. 42:

> *"However, there will be cases, exceptional to the general rule, where the justice of the case will not be met by confining a person to the statutory appeal and excluding judicial review. The set of such circumstances is not necessarily closed. However, the principal areas of exception have been identified. In some cases an appeal will not permit the person aggrieved to adequately ventilate the basis of their complaint against the initial decision. As pointed out by Hogan J. in Koczan v. Financial*

Services Ombudsman[2010] IEHC 407*, (Unreported, High Court, Hogan J., 1st November, 2010), that may be so because of constitutional difficulties or other circumstances where the body to whom the statutory appeal lies would not have jurisdiction to deal with all the issues. Likewise, there may be cases where, in all the circumstances, the allegation of the aggrieved party is that they were deprived of the reality of a proper consideration of the issues such that confining them to an appeal would be in truth depriving them of their entitlement to two hearings."*

55. If, as appears from the wording of their request of 3 August 2018, the purpose of the request made by Right to Know was to obtain the environmental information identified in the request, and if Right to Know wished to get access to the information sought, and if it considered that its request had not been dealt with in accordance with the AIE Regulations, then, in my view, an appeal ought to have been lodged with the Commissioner following what Right to Know itself perceive as the first respondent's second refusal of the information sought, which refusal Right to Know says became operative on 7 September 2018, after the time period for the internal review elapsed. I also take the view (for the reasons set out below) that even if Right to Know's request to the first respondent was simply being made as the prelude for the "test case" on the compatibility of Article 6(1)(b) with the AIE Regulations that Right to Know says the within proceedings constitute, Right to Know's proper avenue of redress was still by way of an appeal to the Commissioner.

56. It is I believe of some significance that Right to Know confirmed before the High Court that its request to the first respondent was being made pursuant to the AIE Regulations. Indeed, as the respondents point out, this was evident from the title to the within proceedings. That being the case, it begs the question as to why the perceived failure of the first respondent to provide the information was not pursued by way of the appellate mechanisms provided for in the AIE Regulations.

57. If Right to Know had appealed the refusal (as it perceived it) pursuant to Article 12 of the AIE Regulations, the Commissioner, as he was obliged to do, would have considered the request on a *de novo* basis and would have been entitled to direct the first respondent to release the information sought, if same was mandated by the AIE Directive and/or the AIE Regulations. Thereafter, if not satisfied with the decision of the Commissioner following the appeal, Right to Know could have appealed to the High Court on a point of law from the decision of the Commissioner, pursuant to Article 13 of the AIE Regulations. In my view, an appeal on a point of law would have easily accommodated the case that Right to Know seeks to make in the within proceedings, namely that the provisions of Article 6(1)(b) of the AIE Regulations breach the requirements of the AIE Directive. Furthermore, as the respondents point out, Article 12(9)(a) of the AIE Regulations makes provision for the Commissioner himself to refer to the High Court a point of law arising in an appeal, including, as I have said, the point of law Right to Know raises in the within proceedings as to the compatibility of Article 6(1)(b) with the AIE Directive. Accordingly, I agree with counsel for the respondents that the remedies provided for in Article 12 and Article 13 of the AIE Regulations, in particularly the facility to appeal to the High Court on a point of law, were remedies that could have been availed of in this case.

58. Even if the actions or omissions of the first respondent did not constitute a refusal to provide the information sought (albeit Right to Know says otherwise), the appeal mechanism provided for in the AIE Regulations expressly contemplates an appeal to the Commissioner in such a scenario. Article 11(5) of the AIE Regulations provides:

> "In Sub-Article (1) and Article 12(3)(a), the reference to a request refused in whole or in part includes a request that - (a) has been refused on the ground that the body or person concerned contends that the body or person is not a public authority

within the meaning of these regulations, (b) has been inadequately answered, or (c) has otherwise not been dealt with in accordance with Article 3, 4 or 5 of the Directive…" (emphasis added).

59. Here, Right to Know's very complaint is that its request has not been dealt with in accordance with Article 3 of the Directive. The clear remedy for that complaint was first, to avail of internal review procedure (which, incidentally, Right to Know did pursue), and, thereafter, an appeal to the Commissioner. As I have already said, following any adverse decision from the Commissioner, Right to Know could have appealed to the High Court on a point of law and indeed could have done so even if, at the relevant time, the Commissioner considered himself bound to apply Article 6(1)(b) of the AIE Regulations. It is not sufficient for Right to Know to say that an appeal to the Commissioner would have been futile since it was considered at the relevant time that the Commissioner did not have the power to disapply Article 6(1)(b): Right to Know still had the right to appeal to the High Court on a point of law, or to urge upon the Commissioner that he should refer the matter to the High Court.

60. Thus, in all these circumstances, I do not see how this case can be treated (as Right to Know urges the Court to do) as an exception to the general rule that an appellate mechanism should be availed of when same has been provided for. Here, there was an extensive statutory appellate mechanism prescribed for in the AIE Regulations available to Right to Know, including an entitlement for it to appeal on a point of law to the High Court from the decision of the Commissioner (had it appealed to the Commissioner), coupled with the power also given to the Commissioner to refer a point of law arising in an appeal to the High Court.

61. My findings in relation to the requirement on Right to Know to avail of the appellate mechanisms provided for in the AIE Regulations undermine the legitimacy of the current

judicial review proceedings. However, given that the Judge duly dealt with Right to Know's core complaint, and lest I am in error in finding that Right to Know should have invoked the statutory appeals process, I turn now to the principal issue arising from the determination of the High Court, namely, whether the Judge erred in law in finding that Article 6(1)(b) was compatible with the AIE Directive and that Article 6(1)(b) did not offend against, or trespass upon, Article 15. 2.1 of the Constitution. Before doing so, however, it is apposite at this juncture to address a further procedural complaint raised by the respondents in respect of the within proceedings.

62. In their written and oral submissions, the respondents made the case that if Right to Know's primary aim was to challenge the constitutionality of Article 6(1)(b) of the AIE Regulations, then the proper avenue was for Right to Know to do so by way of plenary proceedings rather than embarking on judicial review. Counsel for the respondents relied on *Riordan v. An Taoiseach (No. 2)* [1999] 4 IR 343 and *SM v. Ireland* [2007] 3 IR 283. In *Riordan*, the Supreme Court put it thus:

> *"This court accepts that the system of judicial review referred to in O.84 of the Rules of the Superior Courts, 1986, is a very useful jurisdiction. It recognises also that an application for judicial review commencing with an attack on a particular order or administrative decision, may, as the proceedings unfold, raise constitutional issues and develop into an attack on a particular Act of the Oireachtas. Clearly, the issue ought to have been disposed of in the quickest way possible and the quickest way to do this may be to decide it in the judicial review proceedings…No rigid rule should be laid down on the matter. But when the primary relief claimed by an applicant for judicial review is the validity of an Act or the repugnancy of a Bill, having regard to the Constitution, this Court considers*

that the case is not an appropriate one for judicial review, and that the applicant ought to be left to claim relief, if any, in a plenary action."

63. I am not persuaded that the respondents' reliance on *Riordan* is apt in the circumstances of this case where the primary relief sought is *certiorari* of what Right to Know perceived as the first respondent's refusal to provide the information sought.

Is Article 6(1)(b) a practical arrangement as envisaged by Article 3(5) of the AIE Directive?

64. Albeit that the Judge considered that there had been no refusal of Right to Know's request (and on that basis the judicial review application could be dismissed), he did not refuse relief on this basis. Rather, the gravamen of the judgment was the Judge's conclusion that Article 6(1)(b) of the AIE Regulations *"is entirely permissible by the Directive"*.

65. Right to Know contends that the Judge erred in not finding that the requirement imposed by Article 6(1)(b) of the AIE Regulations was not permitted by the AIE Directive. It argues that the first respondent's refusal (as Right to Know perceived it) to process the request because Right to Know declined to comply with a requirement, which it says is incompatible with the AIE Directive, constitutes, as a matter of law, a refusal of the request and that the first respondent's further refusal to carry out an internal review of the initial refusal is equally incompatible with the AIE Directive. Without embarking on a consideration of whether in fact what occurred in August 2018 constituted a refusal of the information sought, I propose to consider, as the High Court in fact did, whether Article 6(1)(b) of the AIE Regulations constitutes a "practical arrangement" for the purposes of the AIE Directive (as found by the Judge) or a "restriction" on the right of access to environmental information as contended for by Right to Know.

66. Right to Know submits that as a matter of law, Article 6(1)(b) constitutes a restriction on the right of access to environmental information provided for by the AIE Directive. It contends that the proper interpretation of the AIE Directive and the obligation Article 3(5)(c) thereof imposes on Member States to ensure the practical arrangements for enabling persons effectively to exercise the broad right of access to environmental information held by their public authorities, is central to this appeal.

67. Effectively, Right to Know argues that the Judge fell into error in agreeing with the respondents' submission that the imposition of the requirement contained in Article 6(1)(b) is permitted under the AIE Directive and does not infringe the constitutional separation of powers between the Oireachtas and the Executive.

68. The case being made by Right to Know is that the imposition of a requirement that a party making a request under the AIE Regulations must identify that a request is made under the AIE Regulations is incompatible with the State's obligations under the AIE Directive having regard to Article 288 TFEU, which provides that Member States are bound as a matter of primary EU law to ensure the result to be achieved by the AIE Directive, notwithstanding that the choice of form and methods is left to the authorities to determine in order to achieve that result.

69. In aid of his submissions, counsel for Right to Know points to the fact that when transposing Directive 90/313 EEC ("the 1990 Directive"), the predecessor to the AIE Directive, Ireland did not impose the requirement that now constitutes Article 6(1)(b) of the AIE Regulations. He further contends that insofar as the respondents may argue that there was no FOI Act in 1990, that is not an answer to Right to Know's argument. He also points to the fact that by way of contrast with the AIE Regulations, the legislation which the United Kingdom used to transpose the AIE Directive contained no equivalent requirement to Article 6(1)(b).

70. Right to Know relies on the very broad terms in which Article 3(1) of the AIE Directive itself is couched. It says that it is clear from this wording that no pre-conditions are permitted under the AIE Directive to the making a request for access to environmental information. There simply needs to be a request. No conditions are permitted in terms of the format of a request, the language to be used, nor, indeed, is there even a requirement that a request be made in writing.

71. Relying on Article 3(5)(a) of the AIE Directive, Right to Know contends that there is no requirement in that provision that the applicants for information themselves identify the correct official within the public authority to whom a request is addressed. In this regard, counsel points to the second subparagraph of Article 3(5) which requires Member States to "ensure that public authorities inform the public adequately of the rights they enjoy as a result of this Directive and to an appropriate extent provide information, guidance and advice to this end". It is submitted that this is the context within which the EU-law concept of "practical arrangements… for ensuring that the right of access to environmental information can be effectively exercised" falls to be construed. In other words, Right to Know says that "practical arrangements" should not be considered out of the context to what the arrangements at issue are supposed to relate, i.e. to ensuring that the right of access to environmental information can be effectively exercised by members of the public. It argues that arrangements envisaged by Article 3(5)(c) are clearly not intended by the EU legislature to encompass arrangements put in place by public authorities which are subject to dealing with requests under the Directive and that facilitate their administrative treatment thereof, where such authorities may also deal with requests based on wholly discrete, national-law-based access regimes, to wit those under the FOI Act.

72. Pursuant to Article 3(5)(b) of the Directive, Member States are required to "ensure that public authorities inform the public adequately of the rights they enjoy as a result of [the AIE Directive] and to an appropriate extent provide information, guidance and advice to this end." Article 7(7) of the AIE Regulations provides that where a request is made to a public authority which could reasonably be regarded as a request for environmental information but has not been made in accordance with the AIE Regulations or the FOI Act, the public authority is required to inform the applicant of his or her right of access and the procedure by which the right can be exercised and to offer assistance in this regard.

73. Counsel submits that, here, as is clear from the affidavit evidence filed on behalf of the first respondent, the first respondent understood that a request for environmental information was being made and that the AIE Regulations were relevant but nonetheless refused to handle the request unless Right to Know itself nominated a legislative basis for the request. This refusal was based on the formal requirement expressed in Article 6(1)(b) that a person making a request for environmental information must identify that a request is made under the AIE Regulations. Counsel contends that as is clear from the exchanges between Right to Know and the first respondent's Department, the onus was placed entirely on the requestor (Right to Know) to identify a request as being made under the AIE Regulations: hence, the first respondent does not volunteer assistance to requestors to assist them in exercising their fundamental right of access to environmental information under EU law. This, it is argued, is contrary to the AIE Directive.

74. In essence, Right to Know's case is that since the provisions of the AIE Directive are directed towards facilitating effective access for persons seeking information relating to the environment the AIE Regulations are required to follow suit. It argues that the term "practical arrangements", which is an EU law term, falls to be construed purposively in a manner that facilitates the exercise of the fundamental right of access at issue rather than in

restricting or limiting that right. Article 3(5)(c) itself of the AIE Directive falls to be read in light of Recital 15 of the AIE Directive. That being the case, when Article 6(1)(b) is viewed against those provisions it cannot be said that Article 6(1)(b) is providing a "practical arrangement" in the sense contemplated in Recital 15 of the AIE Directive: rather, the provision undermines the right of access to environmental information as provided for in the Directive. Right to Know thus contend that Article 6(1)(b) of the AIE Regulations is incompatible with EU law.

75. It submits that the Judge was incorrect as a matter of EU law when he concluded that Article 6(1)(b) is a practical arrangement as provided for by the AIE Directive and, accordingly, fell into error in finding that the only way a request could be addressed to the appropriate official was by requiring the requestor to identify that the request is made under the AIE Regulations.

76. Moreover, Right to Know says that while Article 6(1)(b) may assist the first respondent in processing the application, it does not assist Right to Know under EU law in the context envisaged by Article 3(5) of the AIE Directive. It submits that the reasoning of the Judge did not have regard to the context provided for in Article 3(5) of the AIE Directive.

77. According to Right to Know, the three indents in Article 3(5)(c) of the Directive exemplify the type of practical arrangements envisaged by EU law. Counsel says that even if this list was not intended to be exhaustive (as indeed concluded by the Judge), the types of arrangements described therein and permitted by the AIE Directive are not equivalent in nature to the requirement in Article 6(1)(b) of AIE Regulations which, it is argued, limits or restricts the right of access to environmental information. The examples given are the designation of information officers, the establishment and maintenance of facilities for the examination of the information required and the establishment of registers or lists of the

environmental information held by public authorities or information points, with clear indications of where such information can be found. These, it is submitted, constitute the practical arrangements as envisaged by Article 3(5)(c) and which are designed to ensure "effective" access for requestors of environmental information and not to impose restrictions on them.

78. In opposing Right to Know's argument**,** the respondents argue that Article 6(1)(b) is a practical arrangement as envisaged by Article 3(5)(c) of the AIE Directive and that Article 6(1)(b) transposes Article 3(5)(c) of the Directive which leave it to Member States to ensure that practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised.

79. The respondents' primary contention is that the requirement contained in Article 6(1)(b) is entirely consistent with Recital 15 and Article 3(5) of the AIE Directive as it allows a public authority to understand the statutory basis for a request so that the request can be properly considered thereby leading to, where appropriate, environmental information being released to the requestor. They argue that the AIE Directive itself envisages the making of procedural rules by a Member State. They point out that in the instant case, the Judge was satisfied that Article 6(1)(b) was a practical arrangement which the AIE Directive requires to be put in place and that it was a provision which *"assists in the provision of information"*.

80. Counsel says that the Judge's findings were entirely consistent with the specific language of the AIE Directive and the manner in which it has been interpreted by the CJEU and the Superior Courts in this jurisdiction. He further points out that requests for environmental information are not the only type of request the first respondent receives. He receives a range of requests for information from a variety of persons and bodies. Those requests range from general requests for information from individuals or media

organisations to more formal requests for access to information under either the AIE Regulations or the FOI Act.

81. The respondents say that based on the evidence in the court below, it was accepted by the Judge that it was necessary for a public authority such as the first respondent to be able to identify the statutory process under which a request is to be considered. It is also argued that while it may be the case that the focus of Article 6(1)(b) of the AIE Regulations is on the requestee as opposed to the requestor, that focus, counsel for the respondents submits, is ultimately of assistance to the requestor in obtaining the requested information in an effective manner.

82. The purpose and objective of the Directive have already been alluded to and need not further be rehearsed save perhaps to state that as the CJEU has determined in Case C-619/19, *Land Baden-Württemberg v. DR* ECL I: 2021:35 that:

> *" the need for the uniform application of EU law and the principle of equality require that terms of a provision of EU law which make no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question…"* (at para. 34).

83. The AIE Directive does not contain the specific procedural rules by which a request for access to information is to be processed. Article 3(5)(c) requires Member States to define the practical arrangements which are implemented for ensuring that the right of access to environmental information can be effectively exercised. As a general principle of EU law, where a directive does not contain the detailed procedural rules for the implementation of the rights that are the subject of the directive, it is for Member States to

determine those rules, subject to the principles of equivalence and effectiveness (see Case C-255/00 *Grundig Italiana SPA* at para. 33).

84. Interpreting Article 6(1)(b) of the AIE Regulations requires a purposive approach. As said by O'Donnell J. (as he then was) in *NAMA v. Commissioner for Environmental Information* [2015] IESC 51, the State's obligation as a Member State of the EU *"requires that the courts approach the interpretation of legislation in implementing a Directive, so far as possible, teleologically, in order to achieve the purpose of the Directive".* Thus, to understand whether Article 6(1)(b) was required for the purposes of giving effect to the AIE Directive, one must in the first instance have regard to the salient provisions of the source document. As can be seen from his judgment, the Judge considered Article 3(5) of the Directive of relevance in this regard.

85. The first question that arises is whether the Judge properly construed Article 3(5) of the AIE Directive when he found that the use of the term "such as" in Article 3(5) indicated that what is listed in Article 3(5) is not exhaustive. In my view, that question can be readily answered in support of the Judge's approach. Article 3(5) of the AIE Directive contains certain minimum standards which must be put in place by Member States in relation to the right of access to environmental information. Pursuant to Article 3(5)(a), officials of requested public authorities are expressly required to "support the public in seeking access to information". This provision is given effect *inter alia* by Article 5(1)(a) of the AIE Regulations, which requires public authorities to inform the public of their rights and to provide information and guidance on the operation of those rights. Article 3(5)(b) of the AIE Directive requires Member States to ensure that lists of public authorities are publicly accessible. Article 5(1)(d) of the AIE Regulations requires a public authority to "maintain registers or lists of the environmental information held by the public authority" and designate information officers or provide an information point "to give clear

indications of where such information can be found". There is no suggestion here that Article 3(5)(b) has not been complied with. Turning then to Article 3(5)(c) of the AIE Directive, clearly this provides a non-exhaustive list of arrangements which can be implemented by Member States. This is evidenced by the language used (*i.e.,* "such as") which shows that this list of arrangements is non-exhaustive, and that Member States are not precluded from implementing other practical arrangements.

86. The issue for the Court is whether in concluding as he did that Article 6(1)(b) constituted a practical arrangement contemplated by Article 3(5) of the AIE Directive, the Judge has correctly interpreted the AIE Directive.

87. As counsel for Right to Know emphasises, there is no express requirement in the AIE Directive that a request for environmental information must include a citation or incantation of the AIE Directive, or national implementing legislation, as a precursor to obtaining environmental information. On the other hand, the AIE Regulations clearly contain such a requirement in Article 6(1)(b). Moreover, the respondents accept that Article 6(1)(b) is a legal requirement and that if the requestor of the environmental information does not comply with that requirement, the request for access to environmental information will not be processed.

88. Manifestly, Article 3(5) of the AIE Directive does not require that a requestor of information on the environment specify that the request for information is being made pursuant to the AIE Directive or any national implementing legislation. However, both Recital 15, Article 1 and Article 3(5) of the Directive envisage Member States putting in place "practical arrangements". Indeed, Article 3(5)(c) expressly requires Member States to ensure that "practical arrangements" are defined "for ensuring that the right of access to environmental information can be <u>effectively exercised</u>" (emphasis added). Thus, the procedural rules which Member States were required to establish must be directed at

guaranteeing the *effective* exercise by members of the public of the specific right to environmental information provided for in the Directive.

89. Much of the argument made by Right to Know is premised on a contention that Article 6(1)(b) of the AIE Regulations operates as a "restriction" on the right of access to environmental information. It is thus necessary to consider this "restriction" argument. The first observation I would make is that there was no evidence before the High Court to support the suggestion that Right to Know's access to information was being restricted save the plea that Article 6(1)(b) operates as such "as a matter of law". Secondly, as counsel for the respondents points out, Right to Know is an entity with significant and extensive experience of the AIE Regulations. Thus, in the context of the present case, the first respondent was dealing with an experienced non-governmental organisation ("NGO") which holds itself out as an expert in both the AIE Regulations and the FOI Act. In those circumstances, I fail to see how it can be said that the clarification sought by the first respondent rendered the facilitation of Right to Know's request more difficult for Right to Know, particularly in circumstances where that entity is a sophisticated requestor of information in relation to the environment.

90. Thirdly, Article 3(5)(c) of the AIE Directive provides for the designation of information officers. The Judge rightly considered this a factor of importance in assessing the compatibility of Article 6(1)(b) of the AIE Regulations with the AIE Directive since what was being required of requestors of environmental information in Article 6(1)(b) would logically lead to a more effective regime, since once it was identified that the information was being sought pursuant to the AIE Regulations, it would be passed to the designated officer established under the AIE Regulations. This would obviate the necessity for consideration within the relevant public body as whether the information sought was

pursuant to the AIE Regulations or the FOI Act or otherwise, hence ensuring the requestor's "effective" exercise of the right to access to information on the environment.

91. Right to Know acknowledges that environmental information may be accessed under national law pursuant to the FOI Act. However, it asserts that it is manifestly the case that national law cannot impose restrictions on access to environmental information based on exceptions not permitted under the AIE Directive. It says that requiring a requestor to nominate the legislative basis for the request for environmental information introduces the risk that it will be handled by an official under the FOI Act (without reference to the AIE Directive) in circumstances where the FOI Act has a range of exceptions to the right to information which are not provided for in the AIE Directive, where the FOI regime is a more expensive process for requestors, and in respect of which the statutory appeal process provided for under the FOI Act does not benefit from costs protection, and does not have the possibility of a preliminary reference to the CJEU.

92. The case being made is that there is a clear onus on public authorities like the first respondent and his department, when applying the AIE Directive, to ensure that requests for access to environmental information under the AIE Regulations that transpose the Directive into Irish law are not handled under parallel wholly discrete national legislation which is more restrictive than the EU law regime. This onus, Right to Know argues, is underscored by the judgment of the CJEU in Case C-378/17, *Workplace Relations Commission* ECL I: EU: 2018: 979.

93. Right to Know also argues that the fact that there is parallel regime under the FOI Act serves to highlight the undermining of the objectives of the AIE Directive brought about by Article 6(1)(b) of the AIE Regulations. It says that contrary to the respondents' arguments, rather than being a practical arrangement, Article 6(1)(b) actually introduces the risk that a requestor will unwittingly make a request for environmental information

under the FOI Act and that such a request may then be wrongly refused on the basis of national exceptions that are not permitted under EU law, and in respect of which the requestor for environmental information may be subject to additional fees and costs, since appeals under the FOI Act do not come within the remit of Part 2 of the Environment (Miscellaneous Provisions) Act 2011. Moreover, it is submitted that a requestor of environmental information pursuant to the FOI Act will be denied the relatively less expensive statutory appeal provided for by the AIE Regulations.

94. I am not persuaded by the submission that the existence of either the FOI regime or the requirement in Article 6(1)(b) of the AIE Regulation to state that the request is being made under the AIE Regulation so as to distinguish the request from one being made under the FOI Act, gives rise to a risk that persons will "unwittingly" submit requests under the FOI Act rather than the AIE Regulations. There was no evidence that such a scenario has occurred. In any event, the statutory regime provided for in the AIE Regulations specifically operates to prevent this occurring. In the first instance, Article 5(1)(a) of the AIE Regulations require public authorities to inform the public of their rights and to provide information and guidance on the operation of those rights. There is no claim here that Article 5(1)(a) is deficient for the purposes of the AIE Directive. Secondly, if a requestor of information pertaining to the environment states that they are making the request under the AIE Regulations (as Article 6(1)(b) behoves them to do), then I cannot conceive how the public body or authority to whom such a request is made could possibly operate under any misapprehension as to the legislative basis upon which the request for environmental information is being made, or deal with a request other than one being made pursuant to the AIE Regulations. Thus, in the instant case, if Right to Know had, pursuant to Article 6(1)(b), advised the first respondent that the information sought in their 3 August 2018 email was being sought pursuant to the AIE Regulations then there was no possibility

that Right to Know would have been pushed towards another statutory regime, whether "unwittingly" or otherwise, given the clear obligations pursuant to the AIE Directive on public bodies to deal with requests by the public for information relating to the environment. Furthermore, insofar as it was suggested otherwise, a request from the first respondent's official for "clarification" (in the absence of the AIE Regulations having been specified by Right to Know in the information request) as to whether the request was being made pursuant to the AIE Regulations or the FOI Act cannot logically, in my view, be seen as something that might cause confusion in the mind of the person seeking information on the environment.

95. Even if the request in issue here had in fact been made by Right to Know under the FOI Act, the first respondent, in accordance with s.12(7) of the FOI Act, having examined the request, may advise the information requestor as to whether the request may be accessed under other regulatory regimes including the AIE Regulations. The fact that the obligation under s.12(7) of the FOI Act is not mandatory cannot assist the argument Right to Know seeks to advance in the within proceedings, in my view, particularly in the absence of any evidence that Right to Know had made such request and had not been advised that the information they were seeking may be obtainable under the AIE Regulations.

96. As explained in Ms. Joyce's affidavit, the first respondent receives requests for information both under the AIE Regulations and the FOI Act (which are separate statutory regimes with their own procedures and requirements), as well as requests without any statutory basis. As noted by the Judge, Ms. Joyce's affidavit highlighted the significant differences between the AIE Regulations and the FOI Act. These include:

- Differences in scope by virtue of the type of information that may be disclosed and the bodies to which the application may be made. It is noteworthy that the

AIE Regulations only apply to "environmental information" defined by Article 3(1) of the AIE Directive. The FOI Act applies to "any record" held by an FOI body. Moreover, the AIE Regulations and the FOI Act contain different definitions of "public authority".

- There are different time frames for initial decisions and internal reviews set out in both schemes.
- There are differences in the manner in which exemptions may be applied and the manner in which the public interest must be weighed. The AIE Regulations involve a public interest test whereby a public authority is required to "weigh the public interest served by disclosure against the interest served by refusal". The public interest balancing test in the FOI Act is not framed in precisely the same manner.
- There are different grounds of refusal in both regimes. Article 10(4) of the AIE Regulations requires grounds of refusal to be interpreted on a restrictive basis.
- There are different time limits provided for appeals to the Commissioner under the AIE Regulations, and the Information Commissioner under the FOI Act.
- There are different fee structures and different cost regimes in the context of appeals to the High Court.

The respondents say that given those differences, it is necessary for the first respondent (or any public authority) to be able to understand whether a request is being made under the AIE Regulations or the FOI Act (or both). Counsel thus asserts that Article 6(1)(b) is entirely in keeping with the scheme of the AIE Directive and the manner in which the right of access to environmental information has been defined, in that Article 6(1)(b) ensures that it is requests for environmental information which are processed under the AIE Regulations.

97. Ms. Joyce's affidavit evidence clearly explains both the rationale for the clarification sought by the first respondent and the rationale underpinning Article 6(1)(b) of the AIE Regulations. As she deposed to, the first respondent receives requests for information from a range of persons relating to different issues and under different statutory regimes. Ms. Joyce avers that the first respondent seeks to deal with all queries and requests in an efficient manner and in a manner consistent with its statutory obligations. She has also indicated that the first respondent was willing to process the request made by Right to Know and simply wished to know whether the request was being made under the AIE Regulations or the FOI Act. As she explained:

> "Given the differences in statutory regimes it is necessary for a Department to understand whether the request is being made subject to the AIE Regulations, the Freedom of Information Act 2014 or both. This permits a Department to process requests efficiently and in accordance with the appropriate regulatory framework."

98. As can be seen from Article 1 of the AIE Directive, the primary obligation on Member States is to guarantee the right of access to environmental information held by or for public authorities. As provided for in Article 1(a), Member States are required to "set out the basic terms and conditions of, and practical arrangements for" the exercise of that right. It is thus for Member States to establish in national law that right of access to information on the environment and to put in place practical arrangements by which that right can be vindicated. Here, the State has enacted the AIE Regulations, which provide for that right of access to environmental information and the practical arrangements by which it can be vindicated.

99. In my view, Article 6(1)(b) is entirely permissible under the AIE Directive and represents the type of practical arrangements envisaged by Recital 15, Article 1 and Article 3(5) of the Directive. In this regard, the language of Article 3(1) of the Directive is of

some significance. As envisaged by Article 3(1), the obligation on public authorities, in accordance with the provisions of the Directive, to make available environmental information held by or for them is triggered when a request is made by an applicant. I find, therefore, that there is force in the respondents' argument that for that obligation to be fulfilled as effectively as possible from the perspective of the person seeking information in relation to the environment, a public authority ought to be in a position to know that it is the AIE Directive (or the national implementing regulations) upon which reliance is being placed by the requestor in seeking to obtain the requested information. In my view, the requirement to advise that a request for environmental information is being made under the AIE Regulations does not equate to a requirement being imposed on a requestor to state an interest in the request which, pursuant to Article 3(1) AIE Directive, an applicant for information does not have to do. Indeed, Article 6 of the AIE Regulations specifically states as much. Hence, I perceive no conflict between Article 6(1)(b) and Article 3(1) of the AIE Directive.

100. It is also of note that Article 3(3) of the AIE Directive envisages that there may be a disruption in the linear requesting of information pertaining to the environment and the response to such request. As provided for in Article 3(3), where the request is formulated in too general a manner, a public authority is mandated, as soon as possible, to ask the applicant to specify the request and, indeed, the public authority is required to assist the applicant in clarifying the request by providing information to the applicant on the use of public registers holding information on the environment (see Article 3(5)(c) of the Directive). Clearly, therefore, the Directive itself envisages that a person seeking information relating to the environment may be asked to provide certain details that will assist the public body in processing the request. The fact that the public body itself is mandated to assist the requestor in providing this detail does not take from the fact that the

Directive envisages that there will be occasions when a public body may have to seek clarification from an information applicant before the request can be processed and in order to ensure the "effective" processing of the request.

101. In his grounding affidavit, Mr. Foxe referred to the fact that in the UK a requestor of information pertaining to the environment does not need to identify that a request is being made under the UK equivalent of the AIE Regulations or even that such regulations exist. He pointed to extracts from the guidance provided by the UK Information Commissioner's Office to public officials who are in receipt of a request for environmental information under the relevant UK Regulation, as follows:

> "Anyone has a right to request environmental information from a public authority. An individual does not have to mention the Environmental Information Regulations when making a request and the request does not have to be directed to a specific member of staff. Under the Regulations, requests can be made verbally or in writing.
>
> When you receive a request for information, you should consider whether the requested information is environmental and should be dealt with under the Regulations. In most cases this will be fairly clear…
>
> When you receive a request, you have a legal responsibility to identify that the request has been made and handle it accordingly. So staff who receive customer correspondence should be particularly alert to identifying potential requests.
>
> …
>
> The Regulations do not specify how a valid request must be made. Requests can be made verbally or in writing, so a request could be made by telephone, letter or email, or using social media sites such as Facebook or Twitter…"

102. While I note the differing approach of the UK (whose Regulations remain in force despite Brexit) to the approach adopted here in Article 6(1)(b), that difference cannot, to my mind, be considered dispositive of the case Right to Know is making in circumstances where as is clear from the AIE Directive, Member States were left with national procedural autonomy when it came to establishing practical arrangements for ensuring effective access to environmental information for the public.

103. One of Right to Know's other complaints is that the respondents have conceded that they understood at all relevant times that the request being made by Right to Know related to the environment. Counsel thus queries why the first respondent's office did not then process the request rather than seeking as it did clarification as to the legislative basis for the request. In my view, the respondents have adequately addressed this complaint by the evidence adduced by Ms. Joyce that there is more than one legal route through which information relating to the environment may be sought by members of the public.

104. In summary, the requirements of Article 6(1) of the AIE Regulations form part of the "practical arrangements" in accordance with which the right of access to information on the environment can be vindicated, as required by Article 1(a) of the AIE Directive. Collectively, and individually, the provisions of Article 6(1) constitute the practical arrangements which give effect to the right that is established by the AIE Directive. They are in line with what is envisaged by the Directive in the context of the actual processing of requests made by applicants. Article 6(1)(b) is but one such enabling provision, to my mind.

105. It is of some note that, like subparagraph (b), subparagraphs (a) and (c) of Article 6(1) of the AIE Regulations (respectively, the requirement on a requestor to make the request in writing or electronic form and to state their name and address and other relevant contact details) are not matters listed in Article 3(5)(c) of the AIE Directive. As its counsel

explained, Right to Know has no issue with any of the other sub-paragraphs of Article 6(1) save sub-paragraph (b). As far as Article 6(1)(a) and (c) of the AIE Regulations are concerned, Right to Know says that these provisions facilitate both the requester and the requestee. Similarly, no issue is taken with Article 6(1)(d) and Article 6(1)(e) as these provisions, Right to Know says, are not practical arrangements but rather are drawn directly from Article 3(3) and Article 3(4) of the AIE Directive. The only aspect of Article 6(1) that is challenged is subparagraph (b).

106. In my view, Right to Know has not provided any rational explanation as to why a distinction can be drawn between that subparagraph (b) and Article 6(1)(a) and (c). The fact that Right to Know takes no issue with these latter requirements of Article 6(1) (which are not provided for in the AIE Directive) lends force both to the conclusion that Member States are entitled to introduce practical arrangements which are not listed in Article 3(5)(c) of the AIE Directive, and to the respondents' contention that Article 1(b) is but a practical arrangement in the same vein as subparagraphs (a) and (c).

107. Clearly, Right to Know understood precisely what was being requested by the first respondent in the email correspondence of 3 and 7 August 2018. The issue here is that Right to Know elected not to indicate to the first respondent that the request was being made under the AIE Regulations. In my view, that election cannot be equated with a restriction imposed on Right to Know in the exercise of the right of access to environmental information. If anything, it was Right to Know's own actions which prevented the request it made for information from being processed. Right to Know has not made out the case that Article 6(1)(b) is not permitted by the AIE Directive. Accordingly, I would uphold the finding made by the Judge at para. 23 of the judgment.

Does Article 6(1)(b) breach the "principles and policies" test?

108. Right to Know submits that if this Court finds that the Judge was correct to hold that Article 6(1)(b) was a practical arrangement and thus permissible under the AIE Directive, then the next question to be determined is whether Article 6(1)(b) was properly enacted by way of regulation/statutory instrument given that the requirements of the provision are not expressly provided for in Article 3(5) of the AIE Directive. It argues that Article 6(1)(b) was required to have been legislated for by an Act of the Oireachtas as it goes beyond the AIE Directive's principles and policies. The case being made, therefore is that the provision is *ultra vires* the 1972 Act and constitutionally impermissible as it contravenes Article 15.2.1 of the Constitution.

109. At paras. 24-27 of his judgment, the Judge addressed Right to Know's argument that the transposition of Article 6(1)(b) of the AIE Regulations amounted to an exercise of legislative power in contravention of Article 15.2.1. At para. 4 of their notice of appeal, Right to Know asserts that the Judge "misinterpreted and misapplied the constitutional requirements concerning the use by the second named respondent of his powers under s.3 of [the 1972 Act] to transpose the AIE Directive by including in the AIE Regulations the requirement provided for in Regulation 6(1)(b) thereof", clearly putting in issue in the appeal the Judge's finding. The written and oral submissions of both parties in this Court also addressed this issue. In response to a question posed by the Court, counsel for the respondents submitted that from Right to Know's perspective, the question of whether Article 6(1)(b) of the AIE Regulations trespassed upon Article 15.2.1 of the Constitution fell to be considered by the Court.

110. The AIE Regulations were introduced by the second respondent pursuant to the 1972 Act. Section 2 of the 1972 Act provides that the treaties and acts of what is now the

EU, and the acts adopted by the institutions of the EU, shall be part of the law of the State. Section 3 permits the making of regulations for enabling s. 2 to have full effect. Section 3(2) provides that such regulations may contain such "incidental, supplementary and consequential provisions" as appear to the Minister making the regulations to be necessary for the purposes of the regulations".

111. For the reasons he set out at paras. 24-27 of his judgment, the Judge held that the provisions of Article 6(1)(b) were permitted by the 1972 Act and thus did not infringe Article 15.2.1 of the Constitution.

112. The circumstances in which the 1972 Act may be used by the State are well established and are limited to those matters which are necessitated by membership of the EU. The test of whether a Directive or other EU instrument is properly implemented by way of statutory instrument under the 1972 Act is by application of the "principles and policies" test as found in *Meagher v. Minister for Agriculture* [1994]1 IR 329 and in *Maher v. Minister for Agriculture* [2001] 2 IR 139. In essence, if the terms of the domestic provision are only to give effect to the principles and policies set out in the parent act (here the AIE Directive) then it is permissible to do so by statutory instrument. As stated by Fennelly J. in *Maher v. Minister for Agriculture*, at p.254:

> *"Meagher v. Minister for Agriculture [1994] 1 IR 329 is clear authority for the proposition that, where a provision of Community law imposes obligations on the State, leaving no room (or perhaps no significant room) for choice, then Article 15.2.1 of the Constitution is not infringed by the use of ministerial regulation to implement it. Both the judgment of the Court and that of Denham J expressly preserve the force of that provision, as it has been interpreted, for cases where such an obligation does not exist. The "principles and policies" test applies mutatis mutandis where the delegated legislation represents an exercise of a power or*

discretion arising from Community-law secondary legislation. It applies with particular clarity to the case of Directives where Article 249EC leaves the choice of forms and methods to Member States."

113. Right to Know contends that in accordance with Article 15.2.1 of the Constitution, the requirement in Article 6(1)(b) should have been implemented by way of an Act of the Oireachtas as Article 6(1)(b) does not give effect to the "principles and policies" set out in the primary legislation (the AIE Directive). It is said that Article 6(1)(b) is therefore *ultra vires* s.3 of the 1972 Act.

114. The case being advanced by Right to Know is that given that the provisions of Article 6(1)(b) of the AIE Regulations are not expressly provided for by Article 3(5) of the Directive, the provision goes beyond the "principles and policies" of the AIE Directive and, thus, is not capable of being implemented by secondary legislation and so offends Article 15.2.1 of the Constitution which vests the Oireachtas with sole and exclusive legislative power. Accordingly, it argues that Article 6(1)(b) was not capable of being authorised by use of the 1972 Act.

115. The respondents say that this argument was properly rejected by the Judge when he held that it was legally permissible for the 1972 Act to have been used as the AIE Directive gives the State *"considerable scope to make practical arrangements so as to ensure the effectiveness of the AIE Regulations"*. Counsel submits that the Judge was correct in this regard and that the use of s. 3 of the 1972 Act was appropriate for the enactment of Article 6(1)(b) as it contains matters which are "incidental, supplementary and consequential", as appeared to the second respondent to be necessary for the purpose of the AIE Regulations giving effect to the AIE Directive.

116. The question of policy choices and their interaction with Article 15.2.1 of the Constitution was considered in *O'Sullivan v. The Sea Fisheries Protection Authority*

[2017] 3 IR 75 in the context of transposing EU law. The case concerned, *inter alia,* the transposition by statutory instrument (the European Union (Common Fisheries Policy) (Point System) Regulations 2014 (S.I. No. 3) ("the 2014 Regulations")) of Council Regulation EC/1224/2009 ("the Control Regulation"). The Control Regulation required Member States to establish a system for the application of points to sea fishing licences for those serious infringements referred to in Article 42(1)(a) of Council Regulation EC/1005/2008 ("the IUU Regulation") in respect of illegal, unreported and unregulated fishing. The 2014 Regulations created a standalone points system. The plaintiffs brought proceedings challenging the validity of the 2014 Regulations on the grounds, *inter alia,* that a standalone points system was not permitted under European law, that the "principles and policies" test required such a system to be introduced by way of primary legislation, and that the 2014 Regulations did not provide fair procedures. The High Court made an order declaring the 2014 regulations invalid having regard to the provisions of Article 15.2.1 of the Constitution and on the basis that they did not comply with fair procedures. The defendants duly appealed to the Supreme Court.

117. The Supreme Court upheld the High Court's finding on the unfairness issue but otherwise upheld the statutory instrument in question, finding that what had been left over to Member States by the EU Regulations in question was the establishment of a process for the allocation of points, with the remainder of the policies having been determined by the parent EU Regulations.

118. In the course of his judgment, O'Donnell J. (as he then was) emphasised that the simple fact that EU legislation gave Member States a choice as to the implementation of EU legislation did not mean that the use of secondary legislation in this jurisdiction will automatically fall foul of the principle and policies test. He stated:

> *"39. The principles and policies test while regularly invoked, has remained somewhat elusive. Indeed it is a difficult test to apply in the present context. At one level the European Regulations are replete with policy. As the respondents point out the European Regulations contain 127 recitals alone, giving cumulatively, a very clear view of the overall thrust of the provisions and the principles and policies embodied in them. On the other hand, the European Regulations very deliberately leave to the Member State the choice of method for establishing a system for the allocation of points to the licence. That means that the domestic authorities must make choices. At one level at least, those choices can be said to involve some policy considerations, since presumably the choice is made on the basis that a particular provision is considered more effective, convenient, compatible or simply better. Certainly the outcome is not dictated or even guided by the European Regulations, Instead what those Regulations show clearly is that the policy of the Regulations is that, in this area at least, the issue is one for the domestic authorities."*

119. In *O'Sullivan* the plaintiffs had argued that there were in theory a significant range of point allocating processes that could have been adopted and similarly a range of procedures which could have been established and that the domestic authorities were at large in this regard thus contravening the principles and policies test, and that the issue for determination by the domestic authorities was one which could only be achieved by primary legislation. O'Donnell J.'s response to that argument was that it would be an *"error"* to approach the issue on the basis that the parent legislation must be *"scoured"* to provide detailed guidance for the subordinate rule maker. He considered that *"every delegate must be left with some choice".* The question was *"the scope of the decision-making left to the subordinate rule maker".* According to O'Donnell J.:

"*The test can be approached negatively. Is the area of rule making delegated, so broad as to constitute a trespass by the delegate or subordinate on an area reserved to the Oireachtas by Article 15.2.1?"*

120. He went on to state:

"This involves a consideration of a number of factors including the function of the parent legislation and the area in which the subordinate has freedom of action. An apparently wide delegation may be limited by principles and policies clearly discernible in the legislation. On the other hand, a very narrow area of delegation may require very little in terms of principles and policies in parent legislation, on the basis that by delegating an area with only a limited number of possible solutions the Oireachtas was plainly satisfied that any one of those outcomes could be chosen consistent with the policy of the Act, and properly be decided on by a subordinate body which might have access to further detailed information, or indeed on the basis that the outcome might be more easily adjusted within the scope left to the subordinate, in the light of changing circumstances."

121. Bearing in mind O'Donnell J.'s remarks, clearly, here, the AIE Directive leaves it to the Member States to identify and implement the "practical arrangements" by which the right of access to environmental information can be exercised. The AIE Directive is silent (save as to three the examples given in Article 3(5)(c)) on the nature of the practical arrangements to be put in place to ensure that the right provided for in the AIE Directive can be effectively exercised. The import of Article 3(5) (c) is to give the State considerable scope to make the requisite practical arrangements. The fact that a choice has been left to the second respondent to determine the practical arrangements does not imply a capacity to determine policy. In those circumstances, the requirement in issue here cannot be said to constitute a policy outside of the principles and policies which inform the AIE Directive

such that, in the words of O'Donnell J. in *O'Sullivan*, it amounts to *"a trespass by the delegate…on an arena reserved to the Oireachtas…".* As O'Donnell J. put it, *"the question is the scope of the decision-making left to the subordinate rule maker".*

122. The scope in issue here amounts to no more than the practical measures that were required by the AIE Directive itself to be put in place to facilitate effective access by the persons seeking information on the environment held by public bodies. Albeit that I accept that the practical arrangements once implemented must be viewed against the overarching objective of the Directive, which provides for public access to information on the environment held by public bodies, and which obligates Member States to ensure that that right of access can be "effectively" exercised, the identification in Article 6(1)(b) of the AIE Regulations of the manner in which a request for information on the environment must be made, does not, to my mind, for the reasons I have already outlined in this judgment, go beyond the principles and policies of the AIE Directive itself.

123. In short, as I have said already, Article 6(1)(b) is a practical step in accordance with the Directive. As it is a practical step, it is thus an incidental provision within the meaning of s. 3 of the 1972 Act and, as such, is entirely consistent with Article 15.2.1 of the Constitution.

124. It is also worth noting that in *O'Sullivan*, O'Donnell J. observed that the choices left to subordinate rule makers may necessarily involve some policy choices such as that a particular provision is considered more effective or convenient in the context of the choice left to the domestic authorities. Bearing that in mind, Article 6(1)(b) is no more than a practical arrangement ordained by the second respondent to segregate requests for information on the environment under the AIE Regulations from other requests, whether made pursuant to other statutory regimes or otherwise, in order to facilitate the "effective" access to information on the environment that the Directive mandates, in accordance with

the principles and policies in the AIE Directive. Given, therefore, the nature of the requirement in Article 6(1)(b) of the AIE Regulation as something that gives effect to a principle or policy already determined by the AIE Directive, the provision does not, as I have said, contravene the requirements of Article 15 of the Constitution and can, in essence, be viewed as incidental, supplemental or consequent to the transposition of the AIE Directive, for the purposes of s.3(2) of the 1972 Act.

Summary

125. For all the reasons set out above, I would dismiss the appeal.

Costs

126. The Court invites the parties to make submissions (not exceeding 2,500 words) on costs within 28 days of the delivery of judgment following which either the Court will pronounce on the issue of costs or convene a short hearing to address same.

127. As this judgment is being delivered electronically, Noonan J. and Binchy J. have indicated their agreement therewith.