



Cúirt Uachtarach na hÉireann Supreme Court of Ireland

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

Right To Know CLG v. Commissioner For Environmental Information & Ors

On appeal from: [2021] IEHC 273

Judgment delivered on 29 April 2022

[2022] IESC XX

Headline

The Supreme Court found that the immunity conferred on the President from Article 13.8.1° excludes the President and his officials, as well as the Council of State from the obligations of disclosure and the enforcement mechanisms provided by the European Communities (Access to Information on the Environment) Regulations 2007-2018 (“the AIE Regulations”).

Composition of Court

O’Donnell CJ, MacMenamin, O’Malley, Baker, Hogan JJ.

Background to the Appeal

This is an appeal of the State parties, and a cross appeal from Right to Know CLG from the High Court judgment [\[2021\] IEHC 273](#), in a statutory appeal from the refusal of the Commissioner for Environmental Information of requests made by Right to Know CLG for two categories of information and documents under the European Communities (Access to Information on the Environment) Regulations 2007-2018 (the AIE regulations): these documents were first, in relation to two speeches made by the President; and the second in

relation to records held by or on behalf of the Council of State concerning consultation with the President for the purpose of considering whether to refer the Planning and Development Bill 1999, and s. 24 of the Housing (Miscellaneous Provisions) (No. 2) Bill 2001 to the Supreme Court under Article 26 of the Constitution. The High Court held that information related to the two speeches ought to be disclosed, but information held by the Council of State falls under the legislative exception to the AIE regulations, and were not subject to an obligation to release.

Judgment

The Supreme Court today has allowed the appeal of the State parties, and has dismissed the cross-appeal of Right to Know, as it reasoned that to make the information and documentation related to the work of the President subject to obligatory disclosure under the AIE regulations would in effect make the President answerable to the courts, which is precluded by Article 13 of the Constitution. Therefore the President is exempt from the disclosure provisions of Article 2(2) of the AIE Directive. The Court also considered that an obligation to disclose is not necessitated by the supremacy of EU law. The Court further held that the President is not a “public authority” under the Directive as the President has no role as decision maker in the realm of environmental policy.

Reasons for the Judgment

Baker J. delivered the unanimous judgment of the Court. She held that the notice party, the Office of the Secretary General to the President, does not have a separate legal identity, and the President’s Secretary cannot be said to hold papers on his or her personal behalf independent from the President. The Council of State equally has no separate function by which it would independently hold information that might be the subject of a request for disclosure as its function is to assist the President in the performance of his or her constitutional role [para.

75][120]. The President can be said to be “above politics”, as the constitutional functions of the President are in no sense decision-making or policy-making functions, but rather operate at a constitutional level and as a reflection of domestic values and principles [77]. The making of a reference to the Supreme Court under Article 26 could not be called the exercise of a “legislative function”, and Baker J. held that the High Court was incorrect to so determine.

The consistent approach of the courts has been to decline to adjudicate upon any challenge to the President in the performance of his or her functions and the immunity from legal sanction or order is a constitutional prohibition on the jurisdiction of the courts to analyse, challenge, adjudicate upon, or make an order in relation to, the performance of the President’s functions [93]. The only means by which a President can be called to account is by the impeachment process provided for under Article 12.10 of the Constitution. This reflects the fact that the President has no power to affect, limit or enhance the rights of individuals or legal persons, and the President does not need to be answerable to the judicial branch of government, precisely because he does not have such power [97].

The powers of the Commissioner for Environmental Information to invoke the court process is inextricably linked with the judicial process, and any review in the High Court or on appeal to this Court or to the Court of Appeal would be an indirect or collateral attempt to make the President answerable for a refusal to disclose information or otherwise respond to the Commissioner. The Presidential immunity precludes the President making a choice to submit to the Commissioner and/or to a court, as the immunity must be seen as absolute in the sense that it has the effect of limiting scrutiny by the courts and is not a voluntarily assumed privilege but one inherent in the constitutional order [108]. Thus, to compel either the Council of State or the Secretary to the President to engage with a request from the Commissioner, and

thereafter to permit the invocation of court scrutiny of that request by the various means available from the AIE Regulations, would involve scrutiny of an answer by those bodies who act at all times on behalf of the President [123].

Baker J. rejected the argument of Right to Know that the supremacy of EU law requires that the President be subject to a request for environmental information under the AIE Directive, and *ipso facto* to the jurisdiction of the Commissioner, and thereafter on appeal or for the purposes of enforcement, to the courts. She held that EU law permits the exclusion of a power of review where the Member State's constitutional order so requires, and therefore does not necessitate that the clear constitutional immunity of the President be abrogated for the purpose of the AIE Directive [152]. Given the clarity of the constitutional prohibition on making the President answerable to any legal or administrative process (other than that specified by Article 13.8.2), it would have been "superfluous" or unnecessary to make express provision for any such exemption in the national implementing measure [154].

With regard to the exclusion in art 3(2) of the Directive, Baker J. held that the President or the Council of State do not act in either a judicial or legislative capacity and therefore the exclusion is not applicable. The President is not a "public authority" because he or she acts outside the policy and decision making realm [182]. The power to make decisions which affect or are capable of affecting the environment, or policy on the environment, is the key institutional and functional test to determine if a body is a "public authority". Functionally, the President's powers are constitutionally defined and are constrained to those ceremonial, symbolic and limited reserved or discretionary powers, none of which involve the President in any decision-making role and in no case does the President exercise any role as decision maker in the realm

of the environment nor does the exercise of their role impact on policy or the rights of any individual [187].

Note

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Case history

14-15th December 2021

[\[2021\] IESCDET 90](#)

[\[2021\] IEHC 273](#)

Oral submissions made before the Court

Supreme Court Determination granting leave

High Court Decision under appeal