[2021] IEHC 273

THE HIGH COURT

[Record No. 2019/249 MCA]

[Record No. 2019/250 MCA]

BETWEEN

RIGHT TO KNOW CLG

APPELLANT

AND

COMMISSIONER FOR ENVIRONMENTAL INFORMATION;
MINISTER FOR COMMUNICATIONS, CLIMATE ACTION AND THE ENVIRONMENT;
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

OFFICE OF THE SECRETARY GENERAL
TO THE PRESIDENT OF IRELAND

NOTICE PARTY

JUDGMENT of Mr. Justice Barr delivered electronically on the 22nd day of April, 2021

Introduction

1. On 9th February, 2017 and 21st June, 2017, the appellant made requests of the notice party pursuant to the European Communities (Access to Information on the Environment) Regulations 2007 (hereinafter referred to as 'the 2007 Regulations'), for production to it of documentation concerning environmental information in relation to two speeches that had been made by the President of Ireland and certain documentation that was before the Council of State, when it advised the President in relation to two particular Bills on which he had consulted them, for the purpose of enabling him to decide whether he would refer the Bills to the Supreme Court for their opinion thereon pursuant Art. 26 of the Constitution.

2. By decisions dated 29th May, 2019 and 17th June, 2019, the first named respondent refused to direct the notice party to produce such documentation to the appellant on the basis that the notice party was included within the immunity given to the President under Art. 13.8.1 of the Constitution.

3. This is an appeal by the appellant pursuant to Art. 13 of the 2007 Regulations (as amended). This provides that a party who has appealed an initial decision to refuse release of documentation, to the Commissioner for Environmental Information (the first respondent), may appeal the Commissioner's decision to the High Court on a point of law.

4. While a number of grounds of appeal where canvassed before the court at the hearing of this appeal, the central issue in the appeal boiled down to the following question: whether the Commissioner was correct in holding that the notice party was excluded from the definition of a public authority provided for in Directive 2003/4/EC of the European Parliament and of the Council of 28th January, 2003 on public access to environmental information (hereinafter 'the Directive'), pursuant to the third sentence in Art. 2.2 of the Directive, which was in the following terms:-

"If their constitutional provisions at the date of adoption of this Directive makes no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition."

5. While that particular provision was not transposed into the 2007 Regulations, which implemented the 2003 Directive, the respondents argued that it was not necessary so to do. They submitted that the Directive was clear in its terms that once a person or body enjoyed immunity from review of its decisions under the constitutional provisions of the law of the Member State at the date of entry into force of the Directive, they were automatically excluded from the definition of public authority contained therein.

6. The appellant argued that the Commissioner had been incorrect in law when acceding to that argument. It was submitted that the true interpretation of that sentence in Art. 2.2. of the Directive, meant that Member States had to take a step when transposing the Directive into domestic law to avail of the option that was given to them to exclude such persons or bodies from the definition of public authority. As that had not been done by the Irish Government when transposing the Directive into Irish law, it was submitted that the notice party was therefore within the definition of public authority in the Directive and in the 2007 Regulations and was therefore obliged to furnish the documentation requested by the appellant.

7. The central issue in the case is whether the words "may exclude" in the third sentence of Art. 2.2 of the Directive, required the government to take a step to formally exclude the President and his staff from the ambit of the Directive; or, as submitted by the respondents, the fact that they were immune from being made answerable by a court under the provisions of the Constitution, meant that they were automatically excluded from the ambit of the Directive.

Background

8. By email sent on 9th February, 2017, the appellant requested the notice party to provide the following documentation: a copy of all records, to include emails, memos, letters, briefing notes, draft speeches and so on, relating to a speech given by President Higgins in Paris in July 2015 at the Summit of Consciences of the Climate and a copy of all records, to include emails, memos, letters, briefing notes, draft speeches and so on, relating to an address given by President Higgins at the New Year's Greeting Ceremony in January 2016.

9. When the appellant received no response from the notice party to that request, it deemed such lack of response to be a refusal and appealed such refusal to the first respondent, who is the Commissioner for Environmental Information. Such appeal is provided for under Art. 12 of the 2007 Regulations.

10. By email dated 21st June, 2017, the appellant sent a further request to the notice party seeking the following records held by the Council of State: copies of any submissions, memoranda, briefing notes prepared with regard to the following pieces of legislation, which were considered by the Council of State: the Planning and Development Bill 1999;

s.24 of the Housing (Miscellaneous Provisions) (No. 2) Bill 2001; copies of the minutes of the Council meetings held with regard to the above pieces of legislation; copies of any communications between the Council of State and the President with regard to the above pieces of legislation and copies of any operating documents or terms of reference prepared in relation to the meetings outlined above.

11. When the appellant received no response from the notice party in relation to that request, it deemed it as a refusal and appealed that refusal to the first respondent on 4th September, 2017.

The decisions of the first respondent

12. In a written decision dated 29th May, 2019, the first respondent gave his decision on a net question. His review was limited to the question of whether the notice party was a public authority for the purposes of the 2007 Regulations, as amended by the European Communities (Access to Information on the Environment) (Amendment) Regulations 2018 (SI 309/2018) (hereinafter referred to as 'the 2018 Regulations').

13. Having reviewed the relevant legislative background, being the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark on 25th June, 1998 (hereinafter 'the Aarhus Convention'), the Directive and the 2007 and 2018 Regulations; the first respondent held that there were two distinct exclusions provided for in Art. 2.2 of the Directive. The first was when a body was acting in a judicial or legislative capacity. The second was when a Member State's constitutional provisions precluded a body's decisions from the review procedure described in Art. 6 of the Directive at the time the Directive was adopted. The first respondent accepted the argument that had been put forward on behalf of the notice party. He stated as follows:-

> *"I accept the OSGP's argument that Article 2(2) of the AIE Directive allows for the continuation of a Member State's constitutional arrangements. It seems to me that the purpose of the second exclusion is to ensure that, where a body's decisions would otherwise be subject to the review requirements in the AIE Directive but a Member State's constitutional provisions preclude such a review, the Member State can maintain the pre-existing constitutional order that is present in that state. This could arise where a Member State's constitution provides for the separation of powers between various organs of government. By providing for the exclusion, a conflict between the AIE Directive and the Member State's constitutional order is avoided."*

14. The first respondent went on to hold that where a Member State's constitutional provisions precluded a body's decisions from being subject to the review requirements in Art. 6 of the AIE Directive at the time the Directive was adopted, that body can be excluded from the definition of public authority. He then looked at the argument put forward on behalf of the appellant that the exclusion provided for in the third sentence of Art. 2.2 of the Directive, required the Member State to take some definitive action in order to avail of that exclusion. He rejected that submission in the following terms:-

"The appellant submits that Article 2(2) of the AIE Directive is a discretionary provision and that by not implementing it (before the enactment of the 2018 Regulations), the legislature intended for the President to be included in the definition of public authority. However, I note that the CJEU in Flachglas clarified that express transposition is not necessary in order for a state to avail of an exclusion in a Directive. Article 13.8.1 of the Constitution which was in place when the AIE Directive was adopted, is clear that the President shall not be answerable to any court for acts done, or purporting to be done, in the exercise and performance of the powers or functions of his or her office. In my view, Article 13.8.1 of the Constitution expressly and unambiguously confers on the President immunity from review including the review procedure prescribed in Article 6 of the AIE Directive. I consider that the dearth of cases involving the President before the courts since the foundation of the State supports my view.

For the reasons given above, I am satisfied that Article 13.8.1 of the Constitution precludes the President from the review procedure prescribed in Article 6 of the AIE Directive. I am also satisfied that Article 13.8.1 of the Constitution, which was in place at the time the AIE Directive was adopted, meets the requirements of the second exclusion in Article 2(2) of the AIE Directive. Accordingly, I am satisfied that the President is excluded from the definition of public authority in Article 3(1) of the AIE Regulations. I am also satisfied that in explicitly excluding the President from the definition of public authority, Article 3(2)(a) of the AIE Regulations merely clarified this pre-existing legal situation and is thus consistent with the AIE Directive in this case, specifically the third provision of Article 2(2)."

15. The first respondent went on in his decision to find that the President's immunity under Art. 13.8.1 of the Constitution necessarily extended to include the notice party when it was providing the President with the means necessary to carry out his or her powers and functions. He held that a finding that the President's immunity did not extend to include the notice party in such circumstances, would in effect, mean that the President's immunity was limited to the person of the President. Accordingly, he held that the immunity under Art. 13.8.1 of the Constitution extended to include the notice party. His conclusion was summarised in the following terms:-

"Having completed my review, I find that in the circumstances of this case the office of the Secretary General to the President is excluded from the definition of public authority pursuant to Article 13.8.1 of the Constitution and Article 3(2)(b) of the AIE Regulations and thus, is not a public authority for the purposes of the AIE Regulations. Accordingly, it was not obliged to process the appellant's request for access to information and I have no further jurisdiction in relation to this matter."

16. In a written decision dated 17th June, 2019, the first respondent refused access to the appellant to the documentation that it had sought in relation to documents held and considered by the Council of State when advising the President in respect of a possible reference under Art. 26 of the Constitution in relation to two particular Bills.

17. In the course of his decision, the first respondent noted that all legislation passed by both Houses of the Oireachtas must be presented to the President for signature and promulgation under Art. 25 of the Constitution. He made a specific finding that the information requested in this case, was information on the President's powers and functions, specifically the President's legislative powers and functions under the Constitution. Having noted the provisions in the Constitution relating to the Council of State, in particular Arts. 31 and 32 and the provisions relating to the obligation on the President to consult the Council of State prior to referring a Bill for the opinion of the Supreme Court pursuant to Art. 26 of the Constitution, and having noted that the primary purpose of the Council of State was to aid and counsel the President on all matters on which the President may consult with it; he came to the following conclusion:-

"I accept that the President's immunity for the exercise and performance of the powers and functions of his or her office or for any act done or purporting to be done by him or her in the exercise and performance of his or her powers and functions under Art. 13.8.1 of the Constitution, necessarily extends to include the Council of State. The constitutional power to refer a Bill (other than a Money Bill) to the Supreme Court for a determination as to its constitutionality is vested in the President. Under Article 13.8.1 of the Constitution the President is not answerable to any court for the exercise and performance of this duty. The constitutional duty of advising the President in relation to this legislative power and function is vested in the Council of State under Article 26 of the Constitution. A finding that the President's immunity under Article 13.8.1 of the Constitution does not extend to include the Council of State would not only limit the President's immunity to the person of the President, but would undermine the Council of State's constitutional advisory role to the President and, in my view, would interfere with the exercise and performance of the President's powers and functions."

18. The Commissioner noted that in the 2018 Regulations, provision had been made therein to specifically exclude the President, the notice party and the Council of State from the definition of public authority for the purposes of the Directive, but he held that those regulations were merely declaratory of the pre-existing law, under which the President and those bodies already enjoyed immunity and came within the exclusion provided for in the second sentence of Art. 2.2 of the Directive. Thus, he held that the 2018 Regulations did not alter the law, but merely clarified the provisions of the pre-existing law in that regard.

19. The first respondent gave a summary of his decision in the following terms:-

"Having completed my review, I find that, in the circumstances of this case, the OSGP and the Council of State are excluded from the definition of public authority pursuant to Article 13.8.1 of the Constitution and Article 3(2)(b) and (c) of the Regulations and thus, neither is a public authority for the purposes of the Regulations. Accordingly, the OSGP was not obliged to process the appellant's request and I have no further jurisdiction in relation to this matter."

20. By originating notices of motion filed on 25th July, 2019, the appellant has brought the present appeal against both of the decisions of the first respondent referred to above.

Relevant legal provisions

21. There are a number of provisions that are relevant to the decision in this case. It will be helpful to summarise the relevant provisions and set out some of the most salient provisions thereof at this point in the judgment. The most relevant provision in this case is Art. 13.8.1 of the Constitution, which is in the following terms:-

> *"The President shall not be answerable to either House of the Oireachtas or to any court for the exercise and performance of the powers and functions of his office or for any act done or purporting to be done by him in the exercise and performance of these powers and functions."*

22. The next relevant document is the Aarhus Convention which was concluded at Aarhus in Denmark on 25th June, 1998. It was signed by a large number of parties, including many states within the EU and a number of states outside the EU, as well as by the EU itself. The Convention provided that it would enter into force on the 90th day after the date of deposit of the 16th Instrument of Ratification, acceptance, approval or accession. The Convention entered into force on 30th October, 2001. The Convention was signed by Ireland on 25th June, 1998 and was ratified by it on 20th June, 2012.

23. It is not necessary to describe in detail the provisions of the Aarhus Convention. The objective of the Convention was set out in Article 1, which provided that in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing, each party to the Convention shall guarantee the rights of access to information, public participation in decision making and access to justice in environmental matters in accordance with the provisions of the Convention.

24. The Convention provided that a "Party" meant a contracting party to the Convention. It provided that "public authority" meant: (a) government at national, regional and other level; (b) natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; (c) any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within paragraphs (a) or (b) above; (d) the institutions of any regional economic integration organisation referred to in Article 17 which is a party to the Convention. The Convention also provided the following exclusion from the definition of "public authority":-

> *"This definition does not include bodies or institutions acting in a judicial or legislative capacity."*

25. The Convention was based on the so called three pillars of access to information, participation in decision making and access to justice in relation to environmental

matters. To that end, the Convention made a number of specific provisions in relation to access to environmental information; the collection and dissemination of environmental information, public participation in decisions on specific activities and access to justice. It is not necessary to set out these provisions for the purposes of this judgment.

26. The provisions of the Aarhus Convention were given effect in European Union law by means of the 2003 Directive. For the purposes of this judgment the most relevant provision of the Directive is Art. 2.2 which deals with the definition of "public authority" and, more importantly, the exclusions that could apply to that definition. Article 2.2 is in the following terms:-

"'Public authority' shall mean:

(a) government or other public administration, including public advisory bodies, at national, regional or local level;

(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and

(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).

Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition."

27. Article 3 of the Directive provides that Member States have to ensure that public authorities were required, in accordance with the provisions of the 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. That Article went on to set out fairly tight timelines within which such information had to be provided.

28. Article 4 of the Directive set out the grounds on which a request for environmental information might be refused. Article 6 deals with access to justice. It provides that the body requested to provide the information must provide an initial internal review in the event that there is a refusal by it to provide the information. The Directive goes on to provide that there should be a further review procedure before a court of law or another independent and impartial body established by law to review the refusal on appeal.

29. As previously noted, the European Union itself was a signatory to the Aarhus Convention on 25th June, 1998. It ratified the Convention on 17th February, 2005. That was done by means of Council decision of 17th February, 2005 on the conclusion, on behalf of the European Community on the Convention on the access to information, public participation

in decision making and access to justice in environmental matters (2005/370/EC). Article 1 of the decision provided that the Aarhus Convention was thereby approved on behalf of the EU.

30. In an annex to the Council decision of 17th February, 2005, the following declaration was made by the Council in accordance with Art. 19 of the Aarhus Convention:-

"Declaration by the European Community concerning certain specific provisions under Directive 2003/4/EC.

In relation to Article 9 of the Aarhus Convention, the European Community invites parties to the Convention to take note of Article 2(2) and Article 6 of Directive 2003/4/EC of the European Parliament and of the Council of 28th January, 2003 on public access to environmental information. These provisions give Member States of the European Community the possibility, in exceptional cases and under strictly specified conditions, to exclude certain institutions and bodies from the rules on review procedures in relation to decisions on requests for information.

Therefore, the ratification by the European Community of the Aarhus Convention encompasses any reservation by a Member State of the European Community to the extent that such a reservation is compatible with Article 2(2) and Article 6 of Directive 2003/4/EC."

31. The 2003 Directive was transposed into Irish law by the European Communities (Access to Information on the Environment) Regulations 2007 (SI 133/2007), which were signed by the Minister for the Environment, Heritage and Local Government on 28th March, 2007. They came into operation on 1st May, 2007.

32. Article 3(1) of the Regulations deals with the definition of certain matters for the purposes of the Regulations. In relation to the definition of "public authority" it provides for the general definition of persons and entities that would qualify as being public authorities as per the definition section of the Directive and also went on to state that those general definitions included a number of specific bodies within the Irish legal system, which persons and bodies were set out in seven subparagraphs in the regulations and included the following: a government minister; the Commissioners of Public Works; local authorities; harbour authorities; the Health Service Executive; a body, not including a company, established under statute and certain companies under the ownership or control of the government.

33. The definition of "public authority" also contained the following exclusion at Art. 3(2):-

"(2) Notwithstanding anything in sub-Article (1) 'public authority' does not include any body when acting in a judicial or legislative capacity."

34. The Regulations go on to make provisions for the duty of public authorities to maintain environmental information in a form or manner that is readily reproducible and accessible by information technology, or other electronic means (Art. 5); requests for environmental

information are dealt with in Art. 6 and the actions that must be taken upon such a request being made are set out in Art. 7. Again, tight timelines were provided for the responses to requests for such information. Mandatory grounds for refusal of a request for information are set out in Art. 8 and discretionary grounds for refusal of information are set out in Art. 9. Internal review of a refusal is provided for in Art. 11.

35. An appeal to the Commissioner for Environmental Information is provided for in Art. 12. The powers which are given to the Commissioner are set out in Art. 12(6) and include the following powers: the Commissioner can require a public authority to make available environmental information to the Commissioner and, where appropriate, can require the public authority to attend before the Commissioner for that purpose; the Commissioner can examine and take copies of any environmental information held by a public authority; he can enter any premises occupied by a public authority and there require to be furnished with such environmental information as he or she may reasonably require, or take such copies of, or extracts from, any environmental information found or made available on the premises.

36. Article 12(7) provides that a public authority shall comply with the decision of the Commissioner under sub-Article (5) within three weeks after its receipt.

37. Article 12(8) provides that where a public authority fails to comply with a decision of the Commissioner within the period specified in the regulations, the Commissioner may apply to the High Court for an order directing the public authority to comply with that decision and, on the hearing of such application, the High Court may grant such relief.

38. Article 12(9) provides that the Commissioner may refer any question of law arising in an appeal to the High Court for determination and shall postpone the making of a decision until after the determination of the court proceedings. The High Court can direct that the costs of such reference be paid by the public authority.

39. Article 13 provides for an appeal on a point of law against a decision of the Commissioner. The purpose of the regulations was to transpose the 2003 Directive into Irish law. The Directive itself was set out in a schedule to the 2007 Regulations.

40. The final relevant piece of legislation for the purposes of this judgment is the European Communities (Access to Information on the Environment) (Amendment) Regulations 2018 (SI 309/2018). These regulations were signed by the Minister for Communications, Climate Action and Environment on 27th July, 2018. The amending regulations are very brief in nature. Their sole purpose was to amend Art. 3 of the 2007 Regulations in the following way:-

> *"2. Article 3 of the European Communities (Access to Information on the Environment) Regulations 2007 (S.I. No. 133 of 2007) is amended by the substitution of the following sub-article for sub-article (2):*

'(2) Notwithstanding anything in sub-article (1), in these Regulations "public authority" does not include—

(a) the President,
(b) the Office of the Secretary General to the President,
(c) the Council of State,
(d) any Commission for the time being lawfully exercising the powers and performing the duties of the President, or
(e) any body when acting in a judicial or legislative capacity.'."

Submissions on behalf of the appellant

41. The appellant's primary argument was that the third sentence of Art. 2.2 of the Directive, merely provided the government with an option to exclude persons or bodies whose decisions enjoyed constitutional immunity from challenge at the date when the Directive was adopted. However, it was submitted that this was not an automatic exclusion. The words "may exclude" indicated that the relevant Member State had to do something to exercise the option that was given to it in the Directive to exclude such persons or bodies from the provisions of the Directive.

42. The appellant submitted that the government had not exercised that option in relation to either the President, the notice party, or the Council of State. Accordingly, it was submitted that the first respondent had been wrong in law to hold that the notice party was outside the scope of the definition of "public authority" as provided for in the Directive.

43. In support of that interpretation, the appellant referred to the declaration to the council decision of 17th February, 2005, which noted that the relevant provisions in the Directive gave Member States *"the possibility, in exceptional cases and under strictly specified conditions, to exclude certain institutions and bodies from the rules on review procedures in relation to decisions on requests for information".* It was submitted that that made it clear that the EU was adopting provisions that would oblige all public authorities to provide such information, while at the same time providing for the possibility that Member States could exclude such entities, if they wished to do so and if their pre-existing constitutional provisions had rendered their decisions immune from review.

44. It was submitted that the declaration had been made to cater particularly for the situation of Sweden, which had provisions in its domestic law, excluding from review certain administrative decisions taken by particular entities. For that reason, Sweden had entered a reservation in relation to the access to justice provisions in the Aarhus Convention, when it ratified it. It was submitted that the purpose of the declaration was to enable the EU to ratify the Convention, while ensuring that by so doing, it was not thereby forcing each of the Member States to abandon any constitutional immunity from review that bodies within its own legal system may have had at the date of adoption of the Directive. For that reason, the Member States had been given the option to secure such constitutional immunity when they implemented the Directive into their own legal systems. However, notwithstanding that option having been available to the Irish

Government, it had not elected to do that in relation to the Office of the President, or the notice party, or the Council of State.

45. In support of this submission, Mr. O'Reilly SC on behalf of the appellant referred to the opinion of Advocate General Sharpston in *Flachglas Torgau GmbH v. Bundesrepublik Deutschland* (case C-204/09), where she stated as follows at para. 43 of her opinion:-

> *"[43.] I therefore consider the third sentence of Article 2(2) of the Directive to embody an option (which Germany has not in any event sought to use) entirely separate from that in the second sentence (which Germany has used). Consequently, the fact that Germany's constitutional provisions did indeed, at the date of adoption of the Directive, allow a review procedure for decisions of bodies such as the Ministry (so that the third sentence of Article 2(2) cannot be invoked in their regard) does not preclude it from making use of the second sentence and, in Paragraph 2(1)(1)(a) of the UIG, excluding from the definition of 'public authority' certain authorities according to the nature of their activity."*

46. Counsel submitted that in its judgment in that case, the CJEU held that the exemptions that were provided in the second and third sentences of Art. 2.2. of the Directive were separate and independent of each other. The court dealt with the third sentence in Art. 2.2 in the following way at paras. 45 to 48 of its judgment. (Although the reader should note that the court refers to the third sentence in Art. 2.2 as being the "second sentence" of the second subparagraph in the Article):-

> *"[45.] It is true that, as the referring court noted, the second sentence of the second subparagraph of Article 2(2) of Directive 2003/4 provides that if their constitutional provisions at the date of adoption of that directive make no provision for a review procedure within the meaning of Article 6 of that directive, Member States may exclude those bodies or institutions from that definition.*
>
> *[46.] However, that provision was intended to deal with the specific situation of certain national authorities, and in particular authorities acting in an administrative capacity, whose decisions, at the date of adoption of Directive 2003/4, could not, according to the national law in force in certain Member States, be subject to review in accordance with the requirements of that directive.*
>
> *[47.] That interpretation is supported by the Declaration by the European Community concerning certain specific provisions under Directive 2003/4.*
>
> *[48.] Therefore, that provision has neither the aim nor the effect of limiting the option given to the Member States to exclude bodies and institutions acting in a legislative capacity from the scope of the directive, an option which is, moreover, provided for without restriction by the Aarhus Convention itself."*

47. Mr. O'Reilly SC submitted that the 2018 Regulations supported his interpretation as to the necessity for some step to be taken in order for the exclusion that had been provided for

by the third sentence in Art. 2.2 to be relied upon; because in those regulations the government had specifically stated that the President, the notice party and the Council of State were to be excluded from the definition of "public authority" provided for in the Directive and the implementing regulations. Thus, it was clear that in 2018, the government had taken the step that was necessary under the 2003 Directive to activate the relevant exclusion.

48. Insofar as the explanatory note to SI 309/2018 stated that the purpose of the regulations was to amend the 2007 Regulations "*to clarify the status of certain offices*", such explanatory memorandum could not be relied upon to provide an interpretation of the 2018 Regulations; much less could it be relied upon as a definitive statement as to the existing state of the law prior to the enactment of those regulations. In support of the former proposition he referred to the provisions of the Interpretation Act, 2005, and in particular s.18 thereof.

49. A number of subsidiary arguments were also put forward on behalf of the appellant. It was submitted that the requests that had been made by the appellant concerned sight of documentation and as such, that was outside the ambit of the immunity conferred on the President by Art. 13.8.1. They were merely requests for production of documentation concerning environmental matters. That could not be seen as raising any question in relation to the exercise or performance of the powers and functions of the Office of the President. Alternatively, it was submitted that the making of the two speeches which were the subject matter of the first request, could not be seen as the exercise by the President of any of the powers and functions cast upon him by the provisions of the Constitution. It was submitted that in these circumstances, the requests fell outside the immunity that had been conferred on the President by Art. 13.8.1 of the Constitution.

50. It was further submitted that when the President consulted with the Council of State in relation to the two Bills, that did not come within the legislative function envisaged within the exception contained in Art. 2.2 of the Directive; therefore such documentation was available for production to the applicant pursuant to the terms of the Directive.

51. In support of these two propositions, counsel referred to the decision in *The State (Walshe) v. Murphy and the Attorney General* [1981] IR 277, which concerned a challenge to the validity of the appointment of the first respondent as a judge of the District Court. In that case, the court had allowed the challenge to go ahead, notwithstanding that the appointment of the first respondent to the office in question had been made by the President in pursuance of his power to appoint judges under the Constitution.

52. The appellant made two further submissions in relation to the 2018 Regulations. Firstly, it was submitted that having regard to the terms of those regulations and having regard to the fact that legislation must be presumed not to interfere with vested rights, unless specifically stated in the legislation itself; the 2018 Regulations could not be seen as having any retrospective effect. This meant that the enactment of the 2018 Regulations, could not affect whatever right of access the appellant had to the information in question

under the 2007 Regulations and the Directive, prior to the enactment of the 2018 Regulations.

53. Secondly, counsel sought to rely on a number of email exchanges between officials in the first respondent's office and officials in the Department of Communications, Climate Action and Environment in 2017 and 2018 in relation to the drafting of the 2018 Regulations, which in his submission, supported the proposition that the 2007 Regulations had not made adequate provision for the immunity enjoyed by the President under Art. 13.8.1 and for that reason efforts were being made by the relevant department to "plug the hole" by the enactment of the 2018 Regulations. These emails had only come to the attention of the appellant pursuant to various requests that had been made by him for access to documentation. He had obtained the 2017 emails in April 2019. The emails which passed in 2018, were released to the appellant's solicitor on 2nd March, 2020. The court was urged to have regard to this evidence in reaching its decision.

54. It was also submitted on behalf of the appellant that if the court were to adopt the interpretation of Art. 2.2 as put forward by the appellant, that would not of necessity mean that the President would be made answerable to a court. Firstly, it would only mean that he, or members of his staff, would become answerable to the first respondent and secondly, it was well established that the President could be represented by members of his staff and therefore there was no question that he personally would have to appear before a court at any stage.

55. It was submitted that having regard to all of these matters, the first respondent had erred in law in reaching the decision that the notice party was not within the definition of "public authority" as provided for in the Directive, or in the regulations; the matter should be remitted to him for reconsideration, with such directions as the court might think appropriate.

Submissions on behalf of the respondents

56. The first respondent was represented by Mr. McCullagh SC and the remaining respondents, being the State respondents, were represented by Ms. Barrington SC. The notice party did not appear at the hearing of this appeal. It is not a discourtesy to the submissions made by counsel on behalf of the respective respondents, that I am going to take their submissions globally rather than individually, as both sets of respondents sought to argue in favour of the decision that had been made by the first respondent on largely similar grounds.

57. By way of opening argument, counsel pointed to the fact that the President enjoyed a very wide ranging immunity by reason of Art. 13.8.1. It was submitted that this immunity had been emphatically recognised by the courts on a number of occasions: see *Draper v. Attorney General* [1984] IR 277*; O'Malley v. An Taoiseach* [1990] ILRM 460 and *Haughey v. Moriarty* [1999] 3 IR 1.

58. It was submitted that the immunity provided for in Art. 13.8.1 was a prohibition on the President being "*answerable […] for the exercise and performance of the powers and*

functions of his office". It was submitted that that was more than an immunity from a legal sanction or order; it was a constitutional prohibition on the President's performance of his or her functions being made subject to any kind of legal analysis or order.

59. Insofar as the applicant had sought to rely on the decision in *State (Walshe) v. Murphy*, it was submitted that that decision was not an authority for the proposition that the President could be made answerable for the exercise of any of his powers or functions performed under the Constitution. That case turned exclusively on the fact that in appointing the District Justice (as they were then known), the President was acting "*on the advice of the Government*" and therefore he had no discretion in the matter. His action in formally appointing the judge was in reality the act of the Executive. It was on that basis that the court had held that presidential immunity could not prevent a review of the decision to appoint the judge, because it was in effect an act of the Executive. It was submitted that that case was not an authority for the proposition that any powers or functions exercised by the President could be the subject of review by a court.

60. Insofar as it had been argued that the particular functions undertaken by the President on the occasions in question, being the making of the two speeches and his consulting with the Council of State, were not within the ambit of his powers and functions as provided for under the Constitution; it was submitted that such argument was incorrect. As Head of State, one of his powers and duties was to make speeches in such capacity on ceremonial occasions. Accordingly, the making of the speeches could not be seen as an activity done outside the scope of his duties as President. His consultation with the Council of State was mandated by the Constitution itself when the President was considering making a reference of a Bill to the Supreme Court under Art. 26 of the Constitution. As such, it was submitted that that was also the exercise of his powers and functions as President. It was therefore immune from challenge under the provisions of Art. 13.8.1.

61. In relation to the assertion that the making the President amenable to a hearing before the Commissioner, was not making him amenable to the court; was to ignore the powers that were enjoyed by the Commissioner pursuant to Art. 12 of the 2007 Regulations. It was clearly envisaged therein that there could be recourse to the courts either (a) where under Art. 12(8) of the Regulations, the Commissioner could apply to the High Court for an order directing a public authority to comply with his decision and (b) under Art. 12(9) the Commissioner could refer a question of law to the High Court prior to making his decision. In addition, either party to the decision had a right of appeal to the High Court pursuant to Art. 13 of the regulations. It was submitted that in such circumstances it could not be argued that the bringing of an appeal under the regulations before the first respondent, did not envisage or entail the possibility that the President could ultimately be made answerable to the High Court in the course of such procedure.

62. Insofar as it was argued that the making of the requisite direction by the first respondent would only affect the staff employed by the President, rather than the President himself, it was submitted that there was clear authority that the immunity enjoyed by the

President under Art. 13.8.1 extended to his support staff, being the notice party, and the Council of State, whom he consulted when considering whether to make a reference of the two Bills under Art. 26 of the Constitution. It was submitted that it would be absurd to hold that the immunity provided for under Art. 13.8.1 was confined to the President himself. To do so would render the immunity practically worthless.

63. In this regard, counsel referred to the provisions of the Presidential Establishment Act, 1938 and in particular to the long title thereof and to s.6 thereof, which established the position of Secretary to the President. Counsel also referred to the Civil Service Regulation (Amendment) Act 2005 and in particular to s.27 thereof, which established the Office of the Secretary General to the President. It was submitted that it was clear from the provisions of these Acts and in particular from the long title to the 1938 Act, that the main function of the notice party was to assist the President in the carrying out of his duties and functions under the Constitution. As such, it was submitted that the notice party would be entitled to the immunity conferred upon the President by Art. 13.8.1.

64. Turning to the central argument raised on behalf of the appellant, it was submitted that both the opinion of AG Sharpston and the decision of the CJEU in the *Flachglas* case made it clear that the third sentence in Art. 2.2 was to provide an immunity for persons or bodies whose decisions enjoyed constitutional immunity from review in the domestic law of various Member States, at the time when the Directive was adopted. As the immunity conferred on the President and his staff had been in existence since the enactment of the Constitution in 1937, there was no question but that the immunity was in existence at the date of adoption of the Directive. Accordingly, it was submitted that it was not necessary for the government to take any further step in order to provide that the President and his staff were excluded from the definition of "public authority" contained in the Directive. It was submitted that that position was made very clear in the declaration to the Council decision of 17th February, 2005.

65. It was submitted that the Directive, the decision in the *Flachglas* case and the content of the declaration, made it clear that in ratifying the Convention, the European Union had taken care to protect the individual position of the various Member States, so as to ensure that they were not thereby obliged to abandon any immunity from review that may exist under their domestic legal systems. It was submitted that that had been safeguarded by the third sentence in Art. 2.2 of the Directive.

66. It was submitted that in these circumstances, the immunity that was enjoyed by the President and the notice party and the Council of State pursuant to Art. 13.8.1 of the Constitution, remained intact after the transposition of the Directive into Irish law by means of the 2007 Regulations.

67. Without prejudice to that assertion, it was submitted by the State respondents that as the Council of State had been consulted by the President pursuant to the mandatory obligation on him to do so when considering a reference pursuant to Art. 26 of the Constitution, and as such step was part and parcel of the enactment of legislation, such documentation was clearly within the exclusion for bodies acting in a legislative capacity

as provided for in the second sentence of Art. 2.2 and in Art. 3(2) of the 2007 Regulations.

68. In relation to the 2018 Regulations, it was submitted that these were not relevant to the appeal, due to the fact that the first respondent had explicitly stated in both of his decisions that he had not relied on the 2018 Regulations to reach the decision that he had done, due to the fact that he had held that the pre-existing law prior to the enactment of those Regulations, provided an immunity for the President, the notice party and the Council of State. He had made it abundantly clear that he regarded the 2018 Regulations as merely clarifying the pre-existing legal position. It was submitted that as the 2018 Regulations had not been relied upon by the first respondent in reaching his decisions, they did not form part of the appeal herein.

69. Without prejudice to that contention, it was submitted that as the 2018 Regulations had been enacted prior to the date on which the first respondent had made his decisions, they had clarified the issue beyond doubt and therefore his decision that the President, the notice party and the Council of State did not come within the definition of "public authority", was correct.

70. It was submitted that in these circumstances, the court should dismiss the appeals in relation to both decisions of the first respondent herein.

Decision on subsidiary issues

71. Before coming to the central issue in this appeal, I propose to deal first with a number of ancillary questions that arose for determination during the course of the appeal. Firstly, in relation to the argument that by making the President answerable to the first respondent for a refusal to provide information to a person who had requested same, that that would not be contrary to the immunity conferred on the President by Art. 13.8.1; I am satisfied that making any decision taken by the President, or his staff to refuse access to such information, being amenable to review by the first respondent, would contravene that Article in the Constitution, because it would effectively make the President answerable to the High Court for the exercise of one of his powers or functions.

72. I have reached that conclusion having regard to the extensive powers enjoyed by the first respondent under Art. 12 of the 2007 Regulations. Once an appeal has been lodged with the Commissioner, he can require the public authority concerned to attend before him; he can examine and take copies of any environmental information held by the public authority; he can enter any premises occupied by the public authority and there demand to be furnished with such environmental information as he or she may reasonably require; if a public authority fails to comply with a decision of the Commissioner, he can apply to the High Court for an order directing the public authority to comply with that decision. In the course of hearing an appeal, the Commissioner may refer any question of law to the High Court. Any party dissatisfied with a decision given by the Commissioner, has a right of appeal to the High Court under Art. 13 of the 2007 Regulations. In these circumstances, I am entirely satisfied that if a decision of the President to refuse access to information, were to be made amenable to review by the

Commissioner, that would almost inevitably expose him to becoming answerable to the High Court, either in the course of such process, or at the conclusion thereof.

73. I am satisfied that the first respondent was correct in his decision that by making the President amenable to a review before him, he would in effect be making the President answerable to the courts contrary to the immunity conferred on the President by Art. 13.8.1 of the Constitution.

74. The second question which arises is whether the notice party is entitled to the immunity that is conferred on the President by Art. 13.8.1 of the Constitution. I am satisfied that the first respondent was correct in his determination that the immunity conferred on the President, extends to include his staff within the notice party. It is clear from reading the provisions of the 1938 Act, including its long title, that the notice party was established to support and assist the President in the carrying out of his duties and functions as President under the Constitution. I accept the argument put forward on behalf of the respondents that it would be absurd to hold that while the person of the President may be immune from being amenable to the Oireachtas or the courts, his support staff in the notice party would not be so immune. To reach such a conclusion would in effect reduce the immunity to one enjoyed by the President himself, but not by his support staff, which would be absurd. It would reduce the effectiveness of the immunity almost to a nullity. Accordingly, I find that the Commissioner was correct to hold that the immunity enjoyed by the President under Art. 13.8.1 extends to the notice party.

75. The next question which arises is whether the Council of State comes within the immunity provided for the President under Art. 13.8.1. I am satisfied that the Commissioner was correct to hold that they did come within that immunity. The Council of State were clearly advising the President in carrying out one of his powers and duties under the Constitution. That is their specific function as provided for in Arts. 31 and 32 of the Constitution.

76. This is particularly so when they advise the President when he is considering referring a Bill for the opinion of the Supreme Court pursuant to Art. 26 of the Constitution. It is mandatory for him to consult with the Council of State prior to taking that step. In such circumstances, the seeking of such advice from the Council of State and their imparting of advice to the President, has to be seen as part and parcel of the exercise of his duties and functions under the Constitution.

77. In relation to the argument put forward on behalf of the appellant to the effect that in making the two speeches which were the subject matter of the first request, the President was not carrying out any of the powers and duties conferred on him by the Constitution, I do not think that such argument is sound. The President is the effective Head of State and as such, one of his duties is to make speeches as Head of State on ceremonial occasions. Accordingly, I am satisfied that in delivering the speeches as President, he was exercising the powers and functions placed upon him under the Constitution.

78. I hold that for the purposes of the determination of the central question in this case, the notice party and the Council of State are the same as the President in terms of his immunity under Art. 13.8.1 of the Constitution. By making either of those bodies amenable to review before the first respondent, would be the same as making the President amenable to such review.

79. In relation to the submission made on behalf of the appellant that the President would never have to appear before a court, because he could be represented by one of his civil servants employed in the notice party; I do not think that that is a good argument. By making the President's representatives answerable to the first respondent, that would in effect be making the President answerable to him. As I have already pointed out, that would also effectively mean that the President and his representatives would be answerable before the courts contrary to Art. 13.8.1. To hold that the representatives of the President could be held answerable, but that that would not in effect mean that the President was answerable, would render the immunity conferred on the President by Art. 13.8.1, a nullity.

80. Turning to the evidential point, being whether the court can have regard to the emails that were obtained by the appellant and its solicitor in April 2019 and May 2020, I am satisfied that as this is an appeal on a point of law from a decision of the first respondent and as such material was not before the first respondent when he made his decision, it is not appropriate for this Court to have regard to that material when determining the validity of the appeals herein.

81. The nature of an appeal on a point of law is somewhat limited: see *Fitzgibbon v. The Law Society* [2015] IR 516 (at paras. 127 and 128) and *Petecel v. Minister for Social Protection* [2020] IESC 25. It is not open to this Court on an appeal on a point of law, to overturn a decision on the basis of material that was not placed before the decision maker at the time of reaching his decision.

82. Even if I am wrong in that conclusion, I am satisfied having regard to the content of those emails, and the explanation thereof as contained in the affidavits sworn by Ms. Dolan and Mr. McCormick, that the exchange of emails between Ms. Dolan and representatives of the Minister, in relation to the drafting of the 2018 Regulations does not assist the court in the interpretation thereof.

83. It should also be born in mind that at the time when those emails passed between the respective parties in July 2017 and January 2018, the first respondent was adjudicating on a deemed refusal to provide information by the notice party to the appellant. As such, there was nothing improper in there being communications between the first respondent and the Department of Communications, Climate Action and the Environment in relation to whether further regulations were anticipated, or were being prepared by the Department at that time. It has to be remembered that while that Department is one of the respondents to this appeal, it was not a party to the dispute that was then pending before the first respondent.

84. I am satisfied of the veracity of the explanation given by Ms. Dolan in her affidavit, that the communications in question arose due to the fact that the first respondent was considering whether he might make a referral on a point of law to the High Court prior to making his decision, but had determined to hold off so doing pending the production of further regulations which were in the pipeline. The communications were merely designed to elicit information as to whether any such regulations would be in place prior to the anticipated date for his decision. In the events which transpired, those regulations were in place prior to the date of his decisions herein, although the Commissioner did not base his decisions on the content of the 2018 Regulations.

85. Before passing from this point, the court would just sound one cautionary note; that a decision maker must act absolutely independently in his functions and should take extreme caution not to consult with or communicate with any parties who might be seen as having any interest in the outcome of a decision then pending before him. However, for the reasons set out above and in particular for the reasons set out by Ms. Dolan in her affidavit, which I accept, I do not feel that there was any wrongdoing on the part of the first respondent in the circumstances of this case.

86. Turning then to the issue of the 2018 Regulations themselves, the first question which arises is whether the first respondent relied on the 2018 Regulations in reaching his decision. I am satisfied that on a reading of the entirety of the decision of the first respondent in each case, that he did not rely on the 2018 Regulations in reaching his decision that the notice party and the Council of State were excluded from the definition of "public authority" under the Directive and the regulations.

87. The first respondent stated clearly on a number of occasions that his view was that, having regard to the third sentence of Article 2.2 and the pre-existing constitutional immunity of the Office of the President under the Constitution, which included the notice party and the Council of State, they were all excluded from the definition of public authority and were therefore immune from being made amenable under Art. 6 of the Directive.

88. The first respondent made it clear that he regarded that immunity as existing prior to the transposition of the Directive into Irish law and it was not affected by such transposition, because that immunity from review was specifically catered for in the Directive, which he held had effectively declared that they were excluded from the definition of public authority.

89. Accordingly, for the purposes of this appeal, the 2018 Regulations are not relevant, because the first respondent held that they did not change the law, but merely clarified the legal position which had pertained prior to that time.

90. In other words, the Commissioner did not make the decisions that he did, to the effect that the President, the notice party and the Council of State were not public authorities, due to the 2018 Regulations. Accordingly, they are not relevant to this appeal, as they

did not form the basis of his decision, save to the extent that he held them to have been declaratory of the pre-existing legal position.

Decision on the central issue

91. Turning then to the central issue in this appeal, which is whether the exemption provided for in the third sentence of Art. 2.2 excluded the President, the notice party and the Council of State from the definition of public authority *ab initio*, or whether it merely provided Member States with an option to exclude such persons and bodies, if the Member State chose to do so and if such persons and bodies were immune from review under the constitutional provisions of the Member State at the time of the adoption of the Directive.

92. To answer that question, the court has adopted the approach to the interpretation of laws mandated by EU law, as laid down by O'Donnell J in *NAMA v. The Commissioner for Environmental Information [*2015] 4 IR 626 at para. 13: -

> *"While it will be necessary to address the specific questions of interpretation arising here in some detail, it is necessary to make some general observations at this stage on the approach to interpretation of a statutory instrument introduced into Irish law pursuant to the State's obligations to implement in national law the provisions of a directive of the European Union which itself was adopted in compliance with an obligation undertaken by the European Union (and Ireland) under an international agreement. It does not seem to me to be possible, and if possible, would not be correct, to approach the question of interpretation solely through the prism of national law, and the sometimes elaborate approach to statutory interpretation in Irish law in particular. There are rules for the interpretation of legislation introduced implementing an international treaty. In particular, this specific obligation undertaken by Ireland as a member of the European Union 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. But furthermore, the language used in this statutory instrument, and in particular subparas. (a) to (c) is derived directly from Directive 2003/4/EC addressed to member states and intended to take effect in different national legal systems. That language is in turn derived from an international treaty negotiated between and agreed upon by a large number of international states with different legal systems."*

93. One must look at the history behind the implementation of the Directive and its transposition into Irish law. As outlined by AG Sharpston in the *Flachglas* case, the Directive constituted the implementation in European Law of the provisions of the Aarhus Convention. That Convention was based on the three pillars of access to environmental information; participation in decision making concerning environmental matters and access to justice. Thus, there is a thread flowing from the Aarhus Convention to the Directive, to the decision of the Council in 2005, with the declaration, and the transposition of the Directive into Irish law by means of the 2007 Regulations.

94. It is noteworthy that the definition of public authority in the Aarhus Convention only had one exclusion which provided that the definition *"does not include bodies or institutions acting in a judicial or legislative capacity".*

95. However, in the 2003 Directive, an additional exemption was furnished in the third sentence of Art. 2.2. The exact genesis of that provision is not clear. In her opinion to the court, AG Sharpston was of the view that it may have been included to take account of the position of Sweden, which had indicated that it would ratify the Aarhus Convention, but subject to a reservation. That reservation stated: *"Sweden lodges a reservation in relation to Article 9.1 with regard to access to a review procedure before a court of law of decisions taken by the Parliament, the Government and Ministers on issues involving the release of official documents*". The Advocate General opined that it may have been due to the intention to lodge that reservation, that the third sentence in Art. 2.2 was inserted into the Directive. She stated as follows at para. 41:-

> *"The alternative reading proposed by the German Government and the Commission might appear more persuasive. The Swedish legal system did not permit judicial review of decisions involving the release of official documents taken by Parliament, the Government or Ministers. Sweden therefore entered a reservation in relation to Article 9(1) and 9(2) of the Convention with regard to judicial review of such decisions. It is understandable that Sweden would have been unwilling to bind itself by the Directive to an obligation to which it was intending to enter a reservation in international law. It would therefore have needed the Directive to allow a Member State in its specific circumstances to create a blanket exclusion for certain bodies, rather than an exclusion by reference to the capacity in which they were acting. The Declaration appears to support such a reading. It points out that Articles 2(2) and 6 give Member States the possibility, 'in exceptional cases and under strictly specified conditions', to exclude certain institutions and bodies from the rules on review procedures, and specifies that EU ratification of the Convention encompasses any reservation by a Member State which is compatible with those articles. The Declaration thus itself embodies a reservation, which enabled the EU to accede to the Convention without undermining a position adopted by any of its Member States."*

96. Whatever the basis for it may have been, the Directive had two grounds of exemption. In *Flachglas*, the appellant sought to argue that the two sentences were effectively only one exemption; which was provided for in the second sentence of Art. 2.2, but was qualified by the limiting provisions of the third sentence. Neither AG Sharpston, nor the CJEU agreed with that contention. Both held that the exclusions provided for in the second and third sentences of Art. 2.2, were separate and independent exclusions.

97. At the hearing of his appeal, all parties were agreed that the first respondent was correct in his finding that the exclusions provided for in the second and third sentences of Art. 2.2 were separate and independent of each other.

98. The Directive was followed by the decision of the Council of 17th February, 2005, with the declaration amended thereto. AG Sharpston was of the opinion that the declaration provided for EU ratification of the Convention which encompassed any reservation by a Member State, which was compatible with those articles. The declaration thus embodied a reservation, which enabled the EU to accede to the Convention without undermining a position adopted by any of the Member States.

99. Curiously, when Ireland came to transpose the Directive into Irish law, it did make provision for the exemption provided for in the second sentence of Art. 2.2 of the Directive, when it provided in Art. 3(2) of the 2007 Regulations that "public authority" does not include any body when acting in a judicial or legislative capacity. However, the 2007 Regulations were entirely silent in relation to the third sentence of Art. 2.2 of the Directive. It was left out of the 2007 Regulations completely.

100. This brings me to the central question whether it was necessary for Ireland to do anything in order to avail of the exemption or exclusion provided for by the third sentence of Art. 2.2. of the Directive. In interpreting that provision of the Directive it is instructive to look at the exemption provided for in the second sentence of Art. 2.2. That sentence stated that Member States "*may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity".* In Ireland the government took a step to make that provision by inserting Art. 3(2) in the 2007 Regulations.

101. Similarly, as seen in the *Flachglas* case, the German Government in their implementing legislation made provision for exclusion of bodies engaged in the legislative process when in para. 2(1)(1)(a) it expressly excluded "*the highest Federal authorities, when acting in the context of a legislative process or issuing regulatory instruments",* (quoted at para. 17 of the Sharpston opinion).

102. It is clear that in relation to the exclusion provided for in the second sentence of Art. 2.2. of the Directive, both the Irish and German Governments had taken a specific step to make provision for that exclusion. Thus, the words "may provide" in the Directive were taken to mean that Member States had an option to exclude from the definition of "public authority" bodies which were included in the legislative process. To avail of that option, the Member States had specifically included such a provision in their transposing legislation or measures.

103. The applicant argues that exactly the same option was given to Member States by the words "*may exclude*" in the third sentence of Art. 2.2, save that their freedom in this regard was limited by the criterion that such exclusion could only be for persons or bodies whose decisions had enjoyed immunity from review under the constitutional provisions of the Member States at the date when the Directive was adopted.

104. It was submitted on behalf of the appellant that the Directive did not provide an automatic exclusion from the definition of "public authority" for all persons and bodies in Member States whose decisions enjoyed immunity from review under the constitutional provisions of the laws of the Member States at the time when the Directive was adopted.

Instead, it was submitted that the Directive provided an option to Member States to choose to exclude those people from the definition of public authority, if they enjoyed immunity from review under the laws of the Member State at the relevant date; but the Member State was not bound to do so.

105. It was submitted that the Member State might take the view that having regard to the importance of public access to environmental information, it would choose not to make those persons in its legal systems, whose decisions were immune from review generally, to be immune from challenge to their decisions on access to environmental information held by them. In which case, the Member States may choose not to exclude such persons for the purposes of the Directive.

106. It was submitted that it was for that reason that the Directive gave Member States an option to include such an exclusion if they wished to do so; but again, as with the exclusion provided for in the second sentence of Art. 2.2, the Member State had to actively elect to avail of that option by including such exclusion in its transposing legislation or measure.

107. The court is satisfied that the appellant's argument in this regard is correct. In interpreting the third sentence of Art. 2.2, one has to have regard to its place in the overall legislative framework on both the public international law plain and at the level of EU and domestic law.

108. What one has here, is effectively a cascade of rights. At the top of the pyramid is the Aarhus Convention which operates at the level of public international law; at which level it binds the states that have signed and ratified the Convention. It has been ratified by a very large number of states, both within and beyond the EU. It has also been ratified by the EU itself. It was signed by Ireland on 25th June, 1998 and ratified on 20th June, 2012. As far as the court is aware, Ireland did not enter any reservation when ratifying the Convention.

109. Below the level of public international law, one has the Directive at the level of EU law. It provides for various rights for individuals. It also provides in Recital 24 that the 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 Directive.

110. One then comes to the transposition of the Directive into Irish law by means of the 2007 Regulations. The Irish Government availed of the exclusion provided for in the second sentence of Article 2.2., but did not include in the regulations any provision catering for the exclusion provided for in the third sentence of Art. 2.2.

111. Having regard to the provisions of Recital 24 of the Directive, one can reasonably assume that the Irish Government chose to adopt a more expansive approach to the rights encompassed in the Directive, by deliberately choosing not to avail of the exclusion provided for in the third sentence of Art. 2.2 of the Directive.

112. Alternatively, there is the possibility that nobody considered the position of the President when transposing the Directive into Irish law. However, this Court should not speculate that a particular measure was not included in the 2007 Regulations due to oversight, when there is a logical explanation for its exclusion.

113. The respondents have argued that directives do not need to be transposed into the domestic laws of Member States in order for their provisions to have direct effect in those states. They submit that the third sentence of Article 2.2. makes it clear that once the decisions of a person or body enjoyed immunity from review under the constitutional provisions of the domestic law of the Member State at the time of adoption of the Directive, they were automatically excluded from the definition of "public authority" in the Directive, without anything more needing to be done by the Member State.

114. The court does not consider that argument well founded. The wording of the Directive, in particular that Member States *"may exclude"* certain persons and bodies, indicates that the Member State may make provision for the exclusion of specified persons and bodies in certain circumstances. If the Directive had intended to give a blanket immunity to such persons in all Member States, it would have said something like: "Persons or bodies whose decisions are immune from review under the laws of Member States in existence at date of adoption of this Directive, shall not be included in the definition of 'public authority' in this Directive". No such definitive language was used in the Directive. By using the word "may" it is clear that Member States were given the option to make that category of exclusion, if they chose to do so.

115. Having regard to the overall purpose of both the Aarhus Convention and the Directive and adopting the approach to the interpretation of directives as set out in the *NAMA* case, I am of the view that the correct interpretation of the words "may exclude" in the third sentence of Art. 2.2, was to give Member States the option of excluding qualifying persons and bodies from the definition of "public authority", if they chose to do so.

116. I am satisfied that this interpretation of the Directive is consistent with the views expressed by AG Sharpston and adopted by the court in the *Flachglas* case.

117. Furthermore, while the 2018 Regulations may not have been relied upon by the first respondent in reaching his decision, the fact of their enactment in 2018 is not without significance. If the law was as claimed by the respondents, there was no need for the 2018 Regulations to be enacted. I am not at all convinced by the explanation which was adopted by the first respondent, that the 2018 Regulations were merely put in place to clarify the existing legal position. While the explanatory note that accompanies the Regulations says that, there is no indication in the Regulations themselves that that was in fact the case.

118. Accordingly, I hold that a correct interpretation of the third sentence of Art. 2.2 provides that the Member States were given the option of excluding people and bodies within their legal system, whose decisions were immune from review at the date of enactment of the Directive. Ireland did not avail of that option; therefore, the President and the notice

party and the Council of State were "public authorities" within the meaning of the Directive.

119. That interpretation of the Directive means that the Directive and Art. 13.8.1 were in direct conflict. Article 29.4.6 of the Constitution provides that no provision of the Constitution would invalidate any laws enacted, acts done, or measures adopted by the State necessitated by the obligations of membership of the European Communities, or European Union, as the case may be. Having regard to that provision in the Constitution, I am satisfied that the Directive and the implementing regulations of 2007, must prevail as regards the pre-existing immunity enjoyed by the President under Art. 13.8.1 of the Constitution.

120. Having regard to those findings and applying them to the requests for information submitted by the applicant, I hold that the first respondent was wrong to hold that the notice party was not a public authority in relation to the request for access to the background material to the two speeches made by the President, which was the subject matter of the appellant's request dated 9th February, 2017.

121. In relation to the request made on 21st June, 2017 for access to the materials relating to consideration by the Council of State of the two Bills, I hold that the first respondent was correct to form the view that the appellant was not entitled to that material, although it is arguable that he did not reach that conclusion for the right reason.

122. The Council of State is established by Art. 31 of the Constitution. Its role is specifically to advise the President. It must be consulted by the President when he is considering making a referral of a Bill to the Supreme Court for its opinion, pursuant to Art. 26 of the Constitution. It is clear that in so doing, the President is acting as part of the legislative process, as a Bill does not become law until it is signed by the President.

123. In such circumstances, the seeking of advice from the Council of State and the furnishing of advices by it to the President in the context of the consideration of an Art. 26 reference, clearly comes within the legislative process. This was clearly provided for in the *Flachglas* case where the CJEU held that a functional interpretation of the phrase "*bodies or institutions acting in a […] legislative capacity*" had to be adopted: see para. 49 of the judgment. Similarly, the court held that a broad interpretation of "*legislative process"* should be adopted: see para. 56 of the judgment.

124. In these circumstances, I am satisfied that the argument that was put forward on behalf of the State respondents and as pleaded at para. (viii) of the statement of opposition, is correct; the papers and information held by the Council of State does not have to be produced, as the Council of State was not a public authority at the time, as it was engaged in the legislative process.

125. Accordingly, I find that the first respondent was correct to reach the decision that the appellant was not entitled to the documentation held by the Council of State, as both the Council of State and the President were clearly acting as part of the legislative process

when considering the possible reference of the Bills in question to the Supreme Court pursuant to Art. 26 of the Constitution. They came within the exception provided for in Art. 3(2) of the 2007 Regulations.

126. That leaves the question what should the court do as regards the enactment of the 2018 Regulations. As I have found that the first respondent did not rely on the 2018 Regulations as a basis for his decisions, but that he wrongly held that those Regulations merely clarified the existing legal position, the issue of the effect of the 2018 Regulations, retrospective or otherwise, on the appellant's requests, was not considered by the Commissioner and therefore does not form part of this appeal.

127. However, in deference to the arguments of counsel, and as an assistance to the Commissioner who will have to reconsider the request for the material concerning the speeches made by the President, the court will make the following observations by way of *orbiter dicta*: The court is of the view that as the Oireachtas gave the Member States the option to exclude persons whose decisions were immune from review and as the Irish Government chose not to exercise that option until 2018 and in the absence of anything in the amending regulations to suggest that their provisions were to have retrospective effect and having regard to the principle that legislation is presumed not to affect vested rights unless specifically provided for therein; the court is of the view that the appellant's right to have sight of the documentation in respect of the speeches made by the President, was not affected by the regulations which were signed into force by the Minister on 27th July, 2018. However, these observations are not binding on the first respondent when he comes to reconsider the matter.

128. Having regard to the findings made by the court in this judgment, the court proposes to make an order in the following terms:-

(a) Allow the appeal insofar as it relates to the request for documentation concerning the speeches made by the President and set aside the finding of the first respondent that the notice party was not a public authority at the time of that request;

(b) remit the matter to the first respondent for him to consider the request in light of this judgment;

(c) dismiss the appeal brought by the appellant in respect of the decision of the first respondent to refuse the appellant access to the material sought concerning the Council of State, as contained in their request dated 21st June, 2017;

(d) the court affirms the decision of the Commissioner dated 17th June, 2019 that the notice party and the Council of State were acting in a legislative capacity and were therefore not public authorities within the meaning of the Directive;

(e) there will be a stay on this judgment for 28 days from perfection of the final order and if a notice of appeal is lodged by any party within that period, the stay will continue until the final determination of the matter by the Court of Appeal;

(f) costs will be determined after receipt of submissions thereon from the parties.

129. As this judgment is being delivered electronically, the parties will be allowed a period of four weeks within which to furnish written submissions in relation to the terms of the final order and on any ancillary matters that may arise.