



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

S:AP:IE:2021:000067

High Court Record No. 2019/249 MCA

High Court Record No. 2019/250 MCA

**O'Donnell C.J.
MacMenamin J.
O'Malley J.
Baker J.
Hogan J.**

**IN THE MATTER OF THE EUROPEAN COMMUNITIES (ACCESS TO
INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007-2018**

BETWEEN/

RIGHT TO KNOW CLG

Appellant/Respondent

- AND -

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

Respondent/Respondent

- AND -

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

Respondents/Appellants

- AND -

OFFICE OF THE SECRETARY GENERAL TO THE PRESIDENT (OSGP)

Notice Party

RULING of the Court on costs delivered on 28th day of June 2022

1. In its judgment on the substantive issue, this Court allowed the appeal of the State parties against the order of the High Court and dismissed the respondent's cross-appeal: [2022] IESC 19. In brief, the judgment concerned the question of whether the President of Ireland is amenable to a request for information under the European Communities (Access to Information on the Environment) Regulations 2007-2014 ("the AIE Regulations") or the Directive 2003/4/EC ("the AIE Directive"), and the separate question of whether the President could properly be described as a "public authority" within the meaning of the AIE Regulations or the AIE Directive. The conclusion of Baker J., with whom the other members of the Court agreed, was that as a result of the constitutional immunity afforded to the President by Article 13.8.1° of the Constitution, the President is not amenable to a request for information under the AIE Regulations or the AIE Directive. Further, that the President is not a "public authority" in the sense intended by the legislation, the AIE Regulations and/or as a matter of European law.

2. Right to Know CLG ("Right to Know") submits that it should be awarded all, or alternatively a portion of, its costs of the appeal against the State parties, primarily on the grounds that the litigation raised novel and general questions of public importance, and that the proceedings were not seeking a private personal advantage. In the High Court, by agreement Barr J. made no order as to costs as against the State parties in either the proceedings bearing Record No. 2019/249MCA ("the Head of State Appeal") or the proceedings bearing Record No. 2019/250MCA ("the Council of State Appeal").

3. No order for costs is sought against the Commissioner.

4. The parties agree that the starting point for the consideration of costs in this appeal is s. 3(1) of the Environment (Miscellaneous Provisions) Act 2011 ("the Act of 2011") which

provides a presumptive position that there be no order as to costs. The State parties propose accordingly that there should be no order for costs of these two appeals. Right to Know contends that it should be awarded its costs, notwithstanding that it was unsuccessful on appeal and rely, in this regard, on s. 3(4) of the Act of 2011 and Regulation 13 of the AIE Regulations.

5. Section 3(4) of the 2011 Act provides that s. 3(1) does not affect a court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case, it is in the interests of justice to do so. Right to Know argues however that the relevant governing provision is Regulation 13(3) of the AIE Regulations which entitles a court to order some or all of the costs of an appeal if it considers that the point of law concerned is "of exceptional public importance", and that in the circumstances it does not require to demonstrate that, in the special circumstances of the case, it is in the interests of justice to award costs.

6. The State parties do not accept that any difference in approach is discernible between the provisions of the Act of 2011 and those of the AIE Regulations.

Decision

7. The Court considers that no order for the costs in this Court should be made in favour of any party for the following reasons:

8. First, this Court considers that it is not necessary for it to consider whether a difference in approach is to be discerned between the provisions of the Act of 2011 and those of the AIE Regulations, as Right to Know does not meet the test in either the Act of 2011 or AIE Regulations, if the latter creates a lower threshold. Right to Know was unsuccessful on every point argued on the appeal and on its cross-appeal. It is true that the appeal did concern a matter of "exceptional public importance" within the meaning of the AIE Regulations, but the constitutional threshold required for leave to appeal to this court for the most part also requires this test to be met. The Court comments further on this point below. The interests of justice

would not in the Court's view be served by granting costs to the unsuccessful party against the party who succeeded on all grounds: see McKechnie J. in *Godsil v. Ireland* [2015] 4 I.R. 535 where he noted that when a party successfully defends a claim and is shown therefore to have been justified in the stance it adopted to litigation, and *ipso facto* to an appeal, that it would be unjust that such successful party should "suffer any financial burden doing so".

9. Second, as regards the argument that this appeal raised matters of general public importance, as this Court has already noted in its ruling on costs in *Minister for Communications, Energy and Natural Resources v. Wymes* [2021] IESC 63, the fact that a question considered in an appeal is a matter of general public importance cannot of itself be a basis on which a determination on liability for costs could be made, as most, if not all, appeals to this Court could be said to fall into that category by reason of the constitutional threshold to grant of leave to appeal. More recently in *Sohby v. Chief Appeals Officer* [2022] IESC 16, which concerned what was undoubtedly a matter of systemic importance regarding the welfare entitlement of an undocumented person who whilst employed in the State was making the appropriate social welfare contributions, the Court considered that the justice of the case was properly met by making no order as to the costs of the appeal or of the High Court, and noted that whilst the result had a direct consequence for the appellant, it was equally likely to impact on a large number of persons. The Court there departed from the normal rule that costs follow the event, as it made no award of costs in favour of the losing party, but rather made no order for costs against her to reflect the importance of the point raised and the fact that the judgment might have systemic importance.

10. Third, Right to Know argues that it should be awarded its costs because there was a dearth of authority on the constitutional powers of the President, and also because this is the first case which has considered the role of the Council of State. The Court notes that, whilst there is no significant body of case law on the role of the President or the Council of State, such

case law as does exist was clearly inconsistent with the case made by Right to Know. Further, the scope of the immunity afforded to the President by the Constitution was considered in some detail in the decision of the Commissioner. The point concerning the scope and reach of the presidential immunity could not in the circumstances be said to be “novel” in the true sense as legal argument was had on that point before the Commissioner and Right to Know did not further advance the argument in its submissions on the appeal.

11. Fourth, Right to Know argues that the appeal did not admit of an obvious answer, but the appeal was decided primarily on the view of the Court on the meaning and scope of the Presidential immunity, and this point did not play a large part in the oral argument or written submissions of Right to Know in this appeal, the focus of which was the Regulations and its interaction with European law.

12. Fifth, insofar as Right to Know argues that clarity as to whether the President is a “public authority” is of broad public benefit and importance, this Court notes that this was an issue identified by the Court itself in its Determination granting leave to appeal ([2021] IESCDET 90) as Right to Know did not identify that as a separate issue. In those circumstances it would not be appropriate or fair to the State parties that it bear the costs of Right to Know regarding this aspect of the case, or that the costs award of this Court should have regard to the importance of that distinct issue.

13. Sixth, these proceedings did not involve constitutional rights touching on sensitive aspects of the human condition as envisaged in *Collins v. Minister for Finance* [2014] IEHC 79.

14. Seventh, this was not in any sense a “lead case”, and reliance on *Sherry v. Minister for Education and Skills* [2021] IEHC 224 is therefore misconceived.

15. Eight, as the Commissioner did not appeal the order for costs made against him by the High Court in the Council of State appeal, bearing record number 2019/249MCA, he accepts

that that order stands. This Court has regard to the fact that Right to Know thus has the benefit of a costs order which is capable of being enforced, and considers that this will meet its arguments regarding the deterrent effect of it obtaining no contribution to its costs in litigation in which it has no personal interest, and which it conducts litigation as a recognised NGO in the area of information law, noting however the decision of the Court *An Taisce v. An Bord Pleanála* [2022] IESC 18, that this in itself is not a reason to award costs in its favour.

Overall conclusions

16. Subject, therefore, to the order already made in the Council of State proceedings in the High Court, the Court considers that the appropriate order is that there should be no order as to costs.