

THE SUPREME COURT

Supreme Court Appeal No. 159/2013

**IN THE MATTER OF  
THE EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT)  
REGULATIONS 2007 to 2011 (S.I. No. 133/2007)**

**AND IN THE MATTER OF  
AN APPEAL PURSUANT TO THE PROVISIONS OF ARTICLE 13 OF THE EUROPEAN  
COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT)  
REGULATIONS 2007 to 2011**

Between

**NATIONAL ASSET MANAGEMENT AGENCY**

Appellant

**AND**

**COMMISSIONER FOR ENVIRONMENTAL INFORMATION**

Respondent

**SUBMISSION OF GAVIN SHERIDAN**

**Introduction**

1. This is a request for a priority listing in the Supreme Court of an Appeal against a decision of the High Court dated 27 February 2013 that the Appellant is a public authority for the purposes of The European Communities (Access to Information on the Environment) regulations 2007 to 2011 (SI 133/2007 as amended) (**Regulations**).
2. In a judgment dated 19 April 2013 the High Court refused to stay its decision pending an Appeal to the Court. However, on 31 May 2013 this Court agreed to continue the stay and my understanding was that the continuation was agreed on the basis that a priority listing would be granted.
3. I am now asking the Court to grant my request for a priority listing.

## Background

4. On 3 February 2010 I requested access to certain environmental information held by or on behalf of the Appellant. The Appellant refused that request on the basis that it was not a public authority for the purposes of the Regulations.
5. On 13 September 2011 the Respondent held that the Appellant was a public authority on the basis of indent (vi) of the definition of public authority contained in Article 3 of the Regulations. The Respondent appealed that decision to the High Court.
6. The Respondent did not adjudicate on the issues of whether the information sought was environmental information and, if it was, whether it should be exempt from release under the Regulations. Presumably the procedure will continue in the Respondent's office at the conclusion of this case.
7. The High Court upheld the decision of the Respondent in a decision dated 27 February 2013.
8. I have set out the chronology of this case in an Appendix to this submission.

## Why do we have public rights of access to environmental information?

9. A right of access to environmental information is one of the three pillars of the Aarhus Convention (the **Convention**), which is binding on the EU and its Member States, including Ireland.
10. The Aarhus Convention Implementation Guide<sup>1</sup> sets out the rationale for access to environmental information.

### ACCESS TO INFORMATION

Access to information is the first “pillar” of the Convention. The environmental rights outlined in its preamble depend on the public having access to environmental information, just as they also depend on public participation and on access to justice.

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#### **Purpose of access-to-information pillar**

Under the Convention, access to environmental information ensures that

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<sup>1</sup> The Aarhus Convention: An implementation guide Page 67. (United Nations 2nd ed Text Only Version, April 2013) Available at [http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus\\_Implementation\\_Guide\\_second\\_edition\\_-\\_text\\_only.pdf](http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus_Implementation_Guide_second_edition_-_text_only.pdf)

members of the public can understand what is happening in the environment around them. It also ensures that the public is able to participate in an informed manner.

11. In other words, access to environmental information provides the public with the knowledge that is necessary to participate in environmental decision-making as well as to have access to justice in regards to environmental matters.
12. The Convention mandates a maximum of 2 months within which access to environmental information should be provided and a timely judicial procedure in cases where a decision needs to be challenged in the courts.
13. A constraint on access to information through delay frustrates the public from exercising its rights under the Convention. In particular, long delays that exceed and, indeed, extend well beyond the time frame in which decisions are taken are entirely at odds with the spirit and letter of the Convention.

#### **Justification for a priority listing**

14. My justification for a priority hearing is that it is necessary to vindicate my rights under the Convention to access environmental information in a timely manner. Without a priority listing the ensuing delay in this matter will be measured in years and both myself and the general public will be prevented from accessing environmental information held by the Appellant, in breach of the Convention.
15. There have already been significant delays in this case. The Respondent and the High Court each took in the region of 17 months to make a decision. The matter has now been before this court for more than 7 months. In total it is more than 44 months since I lodged my request with the Appellant.
16. Because of these delays and the ongoing breach of the Convention there is a strong public interest and urgency in granting a priority listing.
17. I would like to make the Court aware of several decisions of the Aarhus Convention Compliance Committee (**ACCC**), whose role is to issue decisions binding on the parties to the Convention (including Ireland and the EU) in relation to complaints brought by members of the public concerning alleged breaches of the Convention.
18. In a 2008 ruling the ACCC stated<sup>2</sup>:

Access to justice must indeed be provided when it is effectively possible to

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<sup>2</sup> European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 35

challenge the decision permitting the activity in question.

19. Applying this principle in a later case<sup>3</sup> the ACCC was of the view that a delay of 8 months was a breach of Article 9 of the Convention:

Regarding the requirement of timely remedies, a decision on whether to grant suspension as a preventive measure should be issued before the decision is executed. In the present case, it took eight months for the court to issue a decision on whether to grant the suspension sought for the Urbanization Project. Even if it had been granted, the suspension would have been meaningless as construction works were already in progress. The Committee has already held that “if there were no opportunity for access to justice in relation to any permit procedures until after the construction has started, this would definitely be incompatible with article 9, paragraph 2, of the Convention. Access to justice must indeed be provided when it is effectively possible to challenge the decision permitting the activity in question” (ECE/MP.PP/2008/5/Add.10, para. 56 (European Community)). In the present case, since no timely, adequate or effective remedies were available, the Party concerned is in non-compliance with article 9, paragraph 4.

20. In the case of my request it is hard to see how delays of 44 months and probably much longer can be said to provide the public the access to information needed in order to access justice before a decision has been taken.
21. It may be helpful for the Court to consider the Respondent’s own view in relation to the compatibility with the State’s obligations under the Convention and delays in dealing with access to information.
22. In case CEI/2012/0005 (*Mr. Pat Swords and the Department of Environment, Community and Local Government*), the Respondent issued her final decision 14 months and 10 days after an appeal was lodged.
23. Responding to submissions by Mr Swords concerning the delay and its compatibility with the Convention the Respondent stated:

As I have highlighted in my Annual Reports, since its inception, the OCEI has encountered a number of practical difficulties arising from the operation of the AIE regime. One problem is the matter of resources. Although the OCEI is a legally independent Office, to date, it has not received any funding allocation from the State and must rely entirely on the resources that can be made available from the

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<sup>3</sup> Spain ACCC/2008/24; ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010, para.112

very limited resources available to the Office of the Information Commissioner. Consequently, there generally are considerable delays in bringing AIE appeals to completion. The delays are certainly regrettable and arguably not in keeping with the State's obligations under the Aarhus Convention, and I apologise for any inconvenience caused. However, it must be acknowledged that the delays will be difficult to overcome given the demands of the AIE regime as it currently operates in Ireland on the one hand and the dearth of available resources on the other.

24. In other words, the Respondent considered it arguable that a delay of 14 months to deliver a final decision was a breach of the Convention. In the present case the Respondent took more than 17 months to produce a decision on a preliminary matter – whether the Appellant is a public authority or not. Over the course of the last 44 months no adjudication has taken place on the remaining issues that need to be resolved to achieve a final, binding decision.
25. Whatever way one looks at it the significant delays at almost every stage of this request are on their own breaches of the Convention and without a priority listing it now seems I must wait several more years for a preliminary matter to be resolved and for my appeal to the Respondent to resume. In total it would not be an exaggeration to estimate that it could take a decade to process this request for access to environmental information.
26. Therefore, I would urge the Court to grant this application for a priority listing in order to mitigate the violations of my and the public's right to access environmental information under the Convention.

GAVIN SHERIDAN  
16 October 2013

## Appendix 1 - Article 9 of the Aarhus Convention

### Article 9

#### ACCESS TO JUSTICE

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be **fair, equitable, timely and not prohibitively expensive**. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

## Appendix 2 - Chronology

Phase	Date	Time (months/days)	Cumulative Total
Initial request	February 3, 2010		
First refusal	February 16, 2010	13 days	13 days
Internal appeal decision	March 19, 2010	1 month 3 days	1 month 16 days
Appeal to OCEI	March 19, 2010	1 day	1 month 16 days
Decision of OCEI	September 13, 2011	17 months 25 days	19 months 10 days
Decision of High Court	February 27, 2013	17 months 14 days	36 months 24 days
Application for priority listing	October 17, 2013	7 months 18 days	44 months 14 days