

**Decision of the Commissioner for Environmental Information on an appeal  
made under article 12(5) of the European Communities (Access to  
Information on the Environment) Regulations 2007 to 2014 (the AIE  
Regulations)**

**Case CEI/15/0026**

**Date of decision:** 28 November 2016

**Appellant:** Mr Lar McKenna

**Issue:** Whether a property arbitrator appointed by the Reference Committee under the Acquisition of Land (Assessment of Compensation) Act 1919 falls within the definition of a "public authority" set out in article 3(1) of the AIE Regulations. Whether such a property arbitrator acts in a judicial capacity for the purposes of article 3(2), and is therefore not a "public authority" for the purposes of the AIE Regulations.

**Summary of Commissioner's Decision:** In accordance with article 12(5) and article 11(5)(a) of the AIE Regulations, the Commissioner reviewed the contention by Mr Michael Neary, a property arbitrator appointed by the Reference Committee under the Acquisition of Land (Assessment of Compensation) Act 1919, that he is not a public authority for the purposes of the AIE Regulations. The Commissioner found that the property arbitrator falls within paragraphs (a) and (b) of the definition of "public authority" set out in paragraph 3(1) of the AIE Regulations, and is therefore a "public authority" for the purposes of the AIE Regulations. The Commissioner found that the property arbitrator does not fall within paragraph (c) of the definition.

The Commissioner also considered whether the property arbitrator is excluded from the definition of "public authority" by virtue of article 3(2) of the AIE Regulations, as a person acting in a judicial capacity. The Commissioner found that article 3(2) does not apply to the Office of property arbitrator.

The Commissioner stated that the property arbitrator should process the appellant's request in line with the AIE Regulations.

**Right of Appeal:** A party to this appeal or any other person affected by this decision may appeal this decision to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

## **Background**

The Acquisition of Land (Assessment of Compensation) Act 1919 (the 1919 Act) established a statutory arbitration system to decide questions of compensation and apportionment of rent in circumstances where the State compulsorily acquires land. Under this Act, a statutory body called the Reference Committee was established (currently comprised of the Chief Justice, the President of the High Court and the President of the Society of Chartered Surveyors), and was empowered to appoint arbitrators and to make rules regulating the arbitration process. The Property Values (Arbitrations & Appeals) Act 1960 provides for the Office of "property arbitrator", which combines the functions of three earlier statutory arbitrators, including "official arbitrators" under the 1919 Act. The Reference Committee has made rules to govern the arbitration procedure, including the Acquisition of Land (Assessment of Compensation) Rules 1920 and the Property Values (Arbitrations and Appeals) Rules 1961. At present, the Reference Committee has appointed one full-time property arbitrator, Mr Michael Neary, and a number of part-time property arbitrators.

On 24 June 2015, the appellant wrote to Mr Neary (the property arbitrator) and requested two categories of information under the AIE Regulations. Mr Neary replied to the appellant on 21 July 2015, and contended that the AIE Regulations did not apply to the Office of property arbitrator. The appellant requested an internal review of this decision on 6 August 2015, stating that the property arbitrator fell within the AIE Regulations as a body established "under statute". Mr Neary replied on 2 September 2015, restating his view that the AIE Regulations did not apply to the Office of property arbitrator. An appeal to my Office was made on 30 September 2015.

## **Scope of Review**

In his correspondence with the appellant, Mr Neary contended that as a property arbitrator he is not a public authority under the AIE Regulations. Article 12(3) of the Regulations provides a right of appeal to my Office where a request for environmental information has been refused. Article 11(5)(a) of the Regulations specifies that I may review refusals made "on the grounds that the body or person concerned contends that the body or person is not a public authority". Consequently, a question of threshold jurisdiction arises as to whether the property arbitrator falls within the definition of "public authority".

Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (the Directive) implements the first pillar of the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention"). The Directive is transposed into Irish law by the AIE Regulations. In making this decision I have had regard to the *Guidance for Public Authorities and others on implementation of the Regulations* (May 2013) [the Minister's Guidance] published by the Minister for the Environment, Community and Local Government; and *The Aarhus Convention: An Implementation Guide* (Second edition, June 2014) [the Aarhus Guide].

## **Relevant Legal Provisions**

### **The AIE Regulations**

Article 3(1) of the AIE Regulations provides the following definition of 'public authority':

"'public authority' means, subject to sub-article (2)-

- (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 paragraph (a) or (b),

and includes-

- (i) a Minister of the Government,
- (ii) the Commissioners of Public Works in Ireland,
- (iii) a local authority for the purposes of the Local Government Act 2001 (No. 37 of 2001),
- (iv) a harbour authority within the meaning of the Harbours Act 1946 (No. 9 of 1946),
- (v) the Health Service Executive established under the Health Act 2004 (No. 42 of 2004),
- (vi) a board or other body (but not including a company under the Companies Acts) established by or under statute,
- (vii) a company under the Companies Acts, in which all the shares are held-

- (I) by or on behalf of a Minister of the Government,
- (II) by directors appointed by a Minister of the Government,
- (III) by a board or other body within the meaning of paragraph (vi), or
- (IV) by a company to which subparagraphs (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information".

Article 3(2) provides that, notwithstanding anything contained in article 3(1), the definition of "public authority" does not include any body when acting in a judicial or legislative capacity.

### **Irish Law**

In *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 (the *NAMA* case) O'Donnell J. interpreted the structure of the definition of "public authority" as "reproducing the international and European law terms, and thereafter attempting to clarify the scope of application of those terms within the Irish legal system, rather than somehow extending them." Accordingly, paragraphs (i) to (vii) do not extend the primary definitions of "public authority" contained at (a) to (c), which are necessary considerations in every case. At paragraphs 4 and 36 of his decision in the *NAMA* case, O'Donnell J. interpreted the last part of paragraph (b) as meaning that public administrative functions include but are "not limited to" specific duties, activities or services in relation to the environment. Accordingly, only paragraph (c) of the definition requires that the responsibilities, functions or services at issue must relate to the environment.

### **Court of Justice of the European Union Jurisprudence**

In his decision in the *NAMA* case, O'Donnell J. applied the judgment of the Court of Justice of the European Union (CJEU) in *Fish Legal and Emily Shirley v Information Commissioner and Others* (C-279/12), which considers the meaning of "public authority" under Articles 2(2)(a), (b) and (c) of Directive 2003/4 (replicated as paragraphs (a), (b) and (c) of the definition of "public authority" in the AIE Regulations).

Paragraphs 51 and 52 of the *Fish Legal* judgment clarify what entities are captured by the first two parts of the definition, stating:

"51. Entities which, organically, are administrative authorities, namely those which form part of the public administration or the executive of the State at whatever level, are public authorities for the purposes of Article 2(2)(a) of Directive 2003/4. This first category includes all legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve.

52. The second category of public authorities, defined in Article 2(2)(b) of Directive 2003/4, concerns administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law."

With regard to the meaning of "public administrative function" in Article 2(2)(b), the CJEU proposed a "special powers" test in the following terms:

"In order to determine whether entities...can be classified as legal persons which perform 'public administrative functions' under national law...it should be examined whether those entities are vested, under the national law which is applicable to them, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law."

The Court also clarified the legal test to be applied when assessing whether a body is a public authority under Article 2(2)(c), ruling that:

"Undertakings...which provide public services relating to the environment are under the control of a body or person falling within Article 2(2)(a) or (b) of Directive 2003/4, and should therefore be classified as 'public authorities' by virtue of Article 2(2)(c) of that directive, if they do not determine in a genuinely autonomous manner the way in which they provide those services since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on their action in the environmental field."

### **The appellant's submission**

The appellant submitted that the property arbitrator is a public authority falling within paragraphs (a), (b) and (c) of the definition. The appellant noted that the Office of property arbitrator is established by statute, and an arbitrator can only be removed from Office by the State. The appellant noted that the property arbitrator was publicly funded, unlike a private arbitrator appointed by parties pursuant to a private contract.

With regard to article 3(2), the appellant sought to rely on the decision of the CJEU in *Flachglas Torgau GmbH v Bundesrepublik Deutschland* (C-204/09), where the Court held:

"...[the equivalent provision to article 3(2) of the AIE Regulations] must be interpreted as meaning that the option given to Member States by that provision of not regarding bodies or institutions acting in a legislative capacity as public authorities can no longer be exercised where the legislative process in question has ended."

The appellant contended by analogy to the *Flachglas* case that, where the property arbitrator has concluded an arbitration process, he could no longer rely on the provisions of article 3(2) as an exemption from the definition of "public authorities" in respect of information on the concluded process.

The appellant also suggested that the Courts Service, as "employer" of the property arbitrator, was the appropriate public authority to respond to his AIE request of 24 June 2015.

### **The property arbitrator's submission**

As a preliminary point, Mr Neary submitted that his role did not fall within paragraphs (a) to (c) of the definition of "public authority", as he does not form part of government or other public administration, he does not carry out a public administrative function, and he is not under the control of a public authority when carrying out his functions. He stated "I am a wholly independent valuation expert charged, where requested, to conduct an arbitration, in a private dispute between two parties, strictly limited to the issue of financial compensation only."

The property arbitrator submitted that the decision of the European Court of Justice in *Fish Legal* did not govern bodies acting in a judicial capacity, and was of limited application when considering the facts of this appeal. The arbitrator further contended that he was not vested with special powers as described by the ECJ in the *Fish Legal* case.

As a secondary argument, the property arbitrator submitted that he acted in a quasi-judicial manner in carrying out his statutory function, and that pursuant to article 3(2) of the AIE Regulations, he was expressly excluded from the definition of a "public authority" as a person acting in a judicial capacity.

The property arbitrator submitted that he had no power to delegate a request to another person for the purpose of carrying out an internal review under article 11 of the AIE Regulations, and so it would be impossible for him to implement the AIE Regulations.

### **Analysis and Findings**

**Does the property arbitrator fall within the definition of "public authority" set out in article 3(1)?**

Is the property arbitrator part of "government or other public administration, including public advisory bodies, at national, regional or local level"?

The appellant contended that the property arbitrator constitutes public administration for the purposes of paragraph (a) of the definition of "public authority". The Aarhus Guide states that the first category includes "agencies, institutions, departments, bodies, etc., of political power — at all geographical or administrative levels". I note that in his decision in the *NAMA* case O'Donnell J. considered the first category of public authority as defined in the text of the Aarhus

Convention, which refers to "Government at national, regional and other level". O'Donnell J. considered this category to be "reasonably clear", although he added "there may perhaps be some debate at the margins as to what is captured by that definition".

Directive 2003/4/EC suggests a broader view of this category than that set out in the Convention, to include not just government but also "other public administration, including public advisory bodies". The CJEU in *Fish Legal* interpreted this category as including "all legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve". I note that a property arbitrator has legal personality and is subject to judicial review (see for instance *Manning v. Shackleton* [1996] 3 IR 85). I am satisfied that the Office of property arbitrator has been set up by the State and I also note that only the State can dissolve the Office of property arbitrator, which would require an amendment of national legislation. The question of what constitutes "public law" is not straightforward, but legislation which regulates the relationship between individuals and the State is often characterised as "public law". The 1919 Act established a statutory mechanism for arbitration of disputed matters relating to the compulsory acquisition of private property by the State. In his judgment in *Manning v. Shackleton* [1996] 3 IR 85, Keane J. stated that the legislative intent of the 1919 Act was "to afford to the parties a machinery for determining the value of the compulsorily acquired land which would avoid the necessity for litigation and be final and binding". While I acknowledge that such "machinery" is also available to parties as a matter of private law, in this instance the State has regulated the process by which individuals' property rights are quantified.

Were I only required to consider the text of the Aarhus Convention and the Aarhus Guide, I would be slow to find that the property arbitrator constituted government or an example of "political power". However, I am bound to follow the text of Directive 2003/4/EC and the interpretative approach of the CJEU in *Fish Legal*, which clearly indicates that bodies established by the State and governed by public law fall within this category. I am satisfied that a property arbitrator appointed by the Reference Committee under the 1919 Act is governed by public law, including the legislative directions to property arbitrators contained in the Acquisition of Land (Assessment of Compensation) Act 1919 (as amended), and related rules made by the Reference Committee. I therefore find that a property arbitrator falls within the meaning of paragraph (a) of the definition of "public authority", as public administration.

Is the property arbitrator a "person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment"?

I have also considered whether the property arbitrator falls within paragraph (b) of the definition of "public authority" as a "person performing public administrative functions under national law". I note that the CJEU in *Fish Legal* described such bodies as entities entrusted with the performance of services of public interest and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

In circumstances where the law provides for compulsory purchase of land by the State, Section 1(1) of the 1919 Act, as amended, provides for the referral of certain questions to a property arbitrator. The property arbitrator determines questions of disputed compensation and certain questions as to the apportionment of rent. Rule 7 of the Property Values (Arbitrations and Appeals) Rules 1961 provides that where a question referred to in section 1 of the Act of 1919 has arisen, "any party to or affected by, the acquisition in relation to which

the question has arisen may, at any time after the expiration of fourteen days from the date on which notice to treat was served in relation to the acquisition, send to the Reference Committee an application in writing for the nomination of a property arbitrator". Rule 8 of the 1961 rules provides that, whenever the Reference Committee receives an application under rule 7, it shall "nominate a property arbitrator for the purpose of the reference and determination of the question to which the notice relates" and must notify the parties accordingly. Accordingly, proceedings before the property arbitrator can be triggered unilaterally by one party, resulting in a mandatory arbitration process where binding determinations of compensation can be made. Further to this, Section 3(4) of the Act of 1919 provides that a property arbitrator is entitled "to enter on and inspect any land which is the subject of proceedings before him".

Under the normal rules of private law, parties enter into arbitration on the basis of mutual agreement. The statutory property arbitrator is vested with special powers beyond the rules of private law - specifically the power to conduct arbitrations irrespective of the consent of the parties to his jurisdiction.

I therefore find that the property arbitrator falls within paragraph (b) of the definition of "public authority" as a "person performing public administrative functions under national law".

Is the property arbitrator a "person having public responsibilities or functions, or providing public services, relating to the environment under the control" of a higher public authority?

I have considered whether a property arbitrator is a "person having public responsibilities or functions, or providing public services, relating to the environment under the control" of a public authority for the purposes of paragraph (c) of the definition. The CJEU in *Fish Legal* defined such control in terms of a loss of genuine autonomy brought about due to the exercise of decisive influence on the part of the higher public authority. Notwithstanding the question of whether the functions of a property arbitrator relate to the environment, I am satisfied that the administrative and legislative scheme underpinning the Office of property arbitrator creates an independent system of determining certain questions. Accordingly, I am satisfied that no other public authority exercises control over a property arbitrator for the purposes of article (c).

Is a property arbitrator appointed by the Reference Committee acting in a "judicial capacity for the purposes of article 3(2) of the AIE Regulations?

Article 3(2) of the AIE Regulations excludes persons acting in a judicial capacity from the definition of "public authority". The Aarhus Guide provides the following commentary on this provision:

"Bodies or institutions acting in a legislative or judicial capacity are not included in the definition of public authorities. This is due to the different character of such decision-making from many other kinds of decision-making by public authorities....Regarding decision-making in a judicial capacity, tribunals must apply the law impartially and professionally without regard to public opinion. Many provisions of the Convention are not suitable to be applied directly to bodies acting in a judicial capacity, given the need to guarantee an independent judiciary and to protect the rights of parties to judicial proceedings...."

The Minister's Guidance adopts a broad view of what bodies may be considered to be acting in a "judicial capacity", suggesting that judicial capacity refers to "processes of determination (normally statutory in nature) which are open to the hearing of submissions from different parties, and where the authority concerned is required to act in a judicial manner."

Property arbitrators conduct a quasi-judicial process: arbitration proceedings are conducted at public hearings, parties are typically represented by lawyers, evidence is heard on oath, and the property arbitrator may make awards of costs relating to proceedings.

In other respects, the statutory arbitration process is unlike a formal judicial process. I note that in *Manning v Shackleton*, the Supreme Court held that a property arbitrator was not obliged to give a reasoned judgment, stating:

"It is obvious that, if arbitrators appointed under the 1919 Act were to be required to give a reasoned judgment in every case, the inevitable result would be a multiplicity of applications by dissatisfied claimants or acquiring authorities which, although doubtless couched in the language of judicial review, would be in effect attempts to appeal from the award. Such a consequence would be inconsistent with the policy underlining the arbitration procedure..."

I acknowledge that proceedings before a property arbitrator bear many of the hallmarks of judicial proceedings, and that independence and impartiality are essential features of the statutory functions performed by property arbitrators. Nevertheless, I am not satisfied that every quasi-judicial function engaged in by public authorities can be regarded as a "judicial function" for the purpose of article 3(2). The Office of property arbitrator has a limited remit to determine questions of fact relating to compensation and apportionment of rent, and cannot make determinations on questions of title. Further to this, the Supreme Court's decision in *Manning v Shackleton* supports the view that the property arbitrator operates in a limited judicial capacity, as required to meet the policy objectives of the 1919 Act (i.e. it may depart from the rules generally applicable to judicial entities where necessary to provide an effective alternative to litigation).

I consider that it would extend the ordinary meaning of article 3(2) to find that public authorities which make limited determinations of a quasi-judicial nature are excluded from the definition of "public authority" in the same manner as the courts. Accordingly, I am not satisfied that the exception under article 3(2) applies to a property arbitrator appointed by the Reference Committee.

#### Is it possible for a property arbitrator to apply the appeal provisions of the AIE Regulations?

Article 11(2) of the AIE Regulations provides that, following receipt of an internal review request under article 11(1), "the public authority concerned shall designate a person unconnected with the original decision whose rank is the same as, or higher than, that of the original decision-maker" to review the initial decision. I consider that the intent of this provision is to ensure independent reconsideration of AIE requests at an appropriate organisational level.

Mr Neary brought to my attention the fact that property arbitrators act independently of other persons in performing their functions, and stated that he could not designate another person of the same or higher rank to carry out an internal review. I do not accept this argument as it is



possible to nominate a person of equivalent rank in an external or related organisation to carry out an internal review. I note for example that property arbitrators have administrative links to the Courts Service. Even if such a person could not be identified, an appeal to my Office would nevertheless be possible on the basis of a deemed refusal under article 10(7) of the AIE Regulations.

Is the Courts Service the appropriate public authority to process AIE requests made to a property arbitrator?

The appellant invited me to examine whether the Courts Service is the appropriate body to reply to an AIE request made to a property arbitrator. I note that the appellant made his AIE request directly to the property arbitrator. I am satisfied that, although there are administrative links between the Courts Service and the Office of property arbitrator in terms of the provision of accommodation and payroll services, these two bodies were clearly established to operate separately for all functional purposes, including responses to AIE requests.

**Decision**

In accordance with article 12(5) and article 11(5)(a) of the Regulations, I have reviewed the contention by Mr Neary, a property arbitrator appointed by the Reference Committee under the Acquisition of Land (Assessment of Compensation) Act 1919, that he is not a public authority for the purposes of the AIE Regulations. Having considered the definition of "public authority" contained in article 3(1) of the AIE Regulations and the jurisprudence of the Court of Justice of the European Union, I find that the property arbitrator falls within paragraphs (a) and (b) of the definition, and is therefore a "public authority" for the purposes of the AIE Regulations. I find that that property arbitrator does not fall within paragraph (c) of the definition.

I have also considered whether the property arbitrator is excluded from the definition of "public authority" by virtue of article 3(2) of the AIE Regulations, as a person acting in a judicial capacity. I find that article 3(2) does not apply to the Office of property arbitrator in this instance. On the basis of this finding, it is not necessary for me to consider the applicability of the CJEU's judgment in the *Flachglas* case to the present facts.

Accordingly, where no appeal of this decision is made to the High Court, the property arbitrator should process the appellant's request in line with the AIE Regulations.

**Appeal to the High Court**

A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Peter Tyndall  
Commissioner for Environmental Information  
28 November 2016