

**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/16/0034

Date of decision: 6 July 2017

Appellant: Darragh McDonagh

Public Authority: Galway Harbour Company (GHC)

Issue: Whether GHC is a public authority within the meaning of the AIE Regulations

Summary of Commissioner's Decision: The Commissioner found that GHC is a public authority within the meaning of the AIE Regulations

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal 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

On 30 June 2016 the appellant submitted an AIE request to GHC. GHC replied by email on the same day saying that “AIE regulations only refer to Public Authorities and in the circumstances I am not at liberty to extend the information requested”. On 26 July 2016 the appellant requested an internal review of that decision. On 30 August 2016 the appellant appealed to my Office, saying that there had been “no further contact from the public body”.

Scope of Review

In submissions to my office, GHC contended that it is not a public authority under the AIE Regulations. Article 11(5)(a) provides that I may review a decision to refuse a request for environmental information made "on the ground that the body or person concerned contends that the body or person is not a public authority". My review in this case is limited to determining whether GHC is a public authority within the meaning of the AIE Regulations.

In conducting my review I took account of the arguments put forward by the appellant and GHC. I had regard to: the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister’s Guidance); Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based; the 1998 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); and *The Aarhus Convention—An Implementation Guide* (Second edition, June 2014). In particular, I had regard to the Supreme Court decision in the case of the *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 (NAMA).

Relevant AIE provisions

Article 3(1) of the Regulations provides the following definition of the expression '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 (2) provides that notwithstanding anything in sub-article (1), ‘public authority’ does not include any body when acting in a judicial or legislative capacity.

GHC’s position

GHC submitted that the Supreme Court held in *NAMA* that the applicable tests for determining whether an entity falls under the definition of public authority are those set out in the judgment of the Court of Justice of the European Union in *Fish Legal and Emily Shirley v*

Information Commissioner and Others United Utilities Water Plc, Yorkshire Water and Services Ltd and Southern Water Services Ltd [\[2014\] 2 C.M.L.R. 36](#).

In respect of public authorities falling under paragraph (b) of the definition, GHC said that the *Fish Legal* judgment confirms that the following “special powers” test determines whether a body falls within the definition:

“In order to determine whether entities...can be classified as legal persons which perform ‘public administration 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.”

In respect of public authorities falling under paragraph (c), GHC said that the *Fish Legal* judgment confirms that the test to determine whether a body falls within the definition is that of “*genuine autonomy*” stated as being as follows:

“Undertakings...which provide public services relating to the environment are under the control of a body or a person falling within Article 2(2)(a) or (b) of Directive 2003 / 4 [i.e. the equivalent of article 3(1)(a) and (b) of the AIE Regulations] and should therefore be classified as ‘public authorities’ by virtue of Article 2(2)(c) of that Directive [the equivalent of article 3(1)(c) of the AIE Regulations] 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.”

GHC said that the above tests were also applied by me in my decision on case CEI/15/0011 (Dr Edward Fahy and Irish Fish Producers Organisation Limited).

GHC submitted that, in the *NAMA* case, the Supreme Court also considered the implications of sub-articles (i) – (vii) of article 3 on the definition of ‘public authority’ and held that these clarify the scope of the application of article 3 (a) to (c) “*rather than somehow extending them*”. GHC submitted that this interpretation has also been adopted by me in, for example, my decision on case CEI/15/0011, in which I stated that:

“Accordingly, sub-articles (i) – (vii) do not extend the primary definitions of ‘public authority’ contained at (a) and (c).”

GHC further submitted that it is therefore clear that sub-articles (i) – (vii) must be deemed as being permissive, in that they allow entities falling within those definitions to be considered a ‘public authority’ if such an entity also falls within one of the definitions at (a), (b) or (c). It argued that sub-articles (i) – (vii) do not, however, prescribe that the types of entities listed are automatically ‘public authorities’ without being required to first fall within (a), (b) or (c).

GHC submitted that:

- GHC is not captured by the definition of ‘public authority’ in article 3(1)(a) as it is clearly not a “government or other public administration”.
- In respect of article 3(1)(b) of the Regulations, GHC cannot be captured by this definition as, applying the test from the *Fish Legal* case, it could not be considered to have been vested with any “special powers” beyond those which result from the normal rules applicable in relations between persons governed by private law.
- In respect of article 3(1)(c) of the Regulations, it cannot be captured by this definition, when applying the test from the *Fish Legal* case, for the following reasons in particular:
 - It does not have ‘public responsibilities or functions’, nor does it provide ‘public services’, “related to the environment”.
 - It is a private Designated Activity Company limited by shares. Although the majority of the share capital is held by the Minister for Transport, Tourism and Sport (with a minority shareholding held by the Minister for Public Expenditure and Reform), in practice GHC exercises ‘genuine autonomy’, within the meaning of the *Fish Legal* case, in the performance of its functions.

GHC also submitted that it is not a ‘public authority’ falling under sub-articles (i) – (vii), as these do not extend the definition of ‘public authority’. Without prejudice to that position GHC also submitted that it does not fall within sub-articles (i) – (vii) for reasons which it specified in its submission.

The appellant’s position

The appellant chose not to make a submission and noted that there are sufficient authoritative legal precedents to assist my Office in determining the matter.

Analysis

In the *NAMA* judgment the Supreme Court considered the meaning of paragraph (b) of the definition set out in article 3 of the AIE Regulations. This replicates, word for word, the wording of article 2(2)(b) of the AIE Directive. The Court noted (at paragraph 4) that paragraph (b) can be read as applying to “natural or legal persons performing public administrative functions under national law” including but not limited to specific duties, activities or services in relation to the environment.

I accept that sub-articles (i) to (vii) do not extend the primary definition of ‘public authority’ set out in paragraphs (a) to (c).

In paragraph 50 of the *NAMA* judgment, the Court held that:

“The decision in *Fish Legal* provides an authoritative interpretation of the Directive, and moreover does so in the context of a common law system. Applying that test it is clear that NAMA is indeed a public authority exercising public administrative functions. Although like the water companies in *Fish Legal*, it is obliged to act commercially, it is undoubtedly vested with special powers well beyond those which result from the normal rules applicable in relations between persons governed by private law. If anything, the case is clearer here. The water companies in *Fish Legal* were companies established in private law whereas NAMA is established pursuant to a statute which confers upon it substantial powers of compulsory acquisition, of enforcement, to apply to the High Court to appoint a receiver and to set aside dispositions.”

In paragraph 56 of the *Fish Legal* judgment, the Court held:

“... in order to determine whether entities such as the water companies concerned can be classified as legal persons which perform ‘public administrative functions’ under national law, within the meaning of article 2(2)(b) of [the AIE Directive], 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.”

Applying that test in the current case, I note that:

- GHC was established under the authority of the Harbours Act 1996.

- Section 16 of that Act provides that a company established under the Act has the power to “acquire compulsorily any land (whether situate within or outside its harbour) or any interest in or right over any such land, for the purposes of ensuring the implementation of any scheme of development of its harbour or any part thereof which, in the opinion of the company, would prove impracticable without the land, interest or right concerned being included in the scheme”.
- Section 42 provides that a company established under the Act has the power to make bye-laws.

GHC confirmed to my investigator that it:

- was established under the Harbours Act 1996.
- has “a very limited right to compulsory acquire land”.
- may make bye-laws but [this power] is “very specific to navigation and the harbour/property it owns”.

Notwithstanding that GHC considers that its powers are strictly limited, I am satisfied that they are special powers, vested by law, which go beyond the normal rules applicable to relations between persons governed by private law. Because GHC meets the test which was approved by the Supreme Court in *NAMA*, I am satisfied that it qualifies as a public authority for the purposes of the AIE Regulations.

Although it is not necessary for a public authority of the type described in subparagraph (b) of the definition in the AIE Regulations to have any specific duty in relation to the environment, I note that GHC has such a duty. Section 12(d) of the Harbours Act 1996 imposes a duty on a company established under that Act “to have due regard to the consequences of its activities on the environment, the heritage (whether natural or man-made) relating to its harbour and the amenities generally in the vicinity of its harbour”.

Decision

I find that GHC is a public authority under paragraph (b) of the definition set out in the AIE Regulations, in that it is a legal person performing public administrative functions under national law. I expect GHC to now process the appellant’s AIE request and to inform him of the timescale in which he can expect to receive a decision.

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

6 July 2017