HIGH COURT

[RECORD NO. 2015/50 MCA]

IN THE MATTER OF THE EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007 – 2014 S.I. NUMBER 133 OF 2007

AND IN THE MATTER OF AN APPEAL PURSUANT TO ARTICLE 13 OF THE EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007 – 2014

AND IN THE MATTER OF SECTION 7 OF THE ENVIRONMENTAL (MISCELLANEOUS PROVISIONS) ACT 2011

BETWEEN

STEPHEN MINCH

APPELLANT

AND

THE COMMISSIONER FOR ENVIRONMENTAL INFORMATION

RESPONDENT

AND

THE DEPARTMENT OF COMMUNICATIONS, ENERGY AND NATURAL RESOURCES

NOTICE PARTY

Judgment of Ms Justice Baker delivered on the 16 day of February, 2016.

1. This is a statutory appeal from the decision of the Commissioner for Environmental Information (hereinafter, "the Commissioner") given on the 15th December, 2014 by which he refused the request made by the appellant to the notice party (hereinafter, "the Department") on the 18th May, 2013 for access to a report entitled "Analysis of Options for Potential State Intervention in the Role out of Next-Generation Broadband" (hereinafter, "the Report").

2. The request for access to the Report was rejected by the Department on the 17th July, 2013 on the grounds that the information sought was not "environmental information" as defined in the Regulations. The appellant appealed to the Commissioner by letter dated the 24th July, 2013 and the Commissioner rejected the appeal on the same ground.

3. The appeal was filed by originating notice of motion in accordance with the requirements in Order 84C on the 16th February, 2015.

The Report

4. The report was prepared by consultants, Analysys Mason and is described as an economic analysis of the various options available to Government to achieve generalised rollout of high speed broadband services within the State. It seems that the Report considers in particular two options available to achieve the objectives of the National Broadband Plan (hereinafter, "N.B.P."), namely whether broadband would be made available by a wireless or wired mode. The N.B.P. itself is freely available.

The legislative framework

5. The European Communities (Access to Information on the Environment) Regulations 2007, S.I. 133 of 2007, transposes Directive 2003/4/EC3 on public access to environmental information and repealing council directive 90/313/EEC. The Directive was implemented following the signing by the European Community of the UN/ECE Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters, the Aarhus Convention (1998).

6. Article 6 of the Regulation of 2007, as amended, provides for the making of a request for environmental information to be made in the first place to the relevant public authority, and provision is made under Article 12 for an appeal to the Commissioner for Environmental Information.

7. Article 13(1) provides an appeal to the High Court on a point of law of any decision of the Commissioner:-

> "A party to an appeal under article 12 or any other person affected by the decision of the Commissioner may appeal to the High Court on a point of law from the decision."

8. The Regulations provide a definition of environmental information at clause 3(1) as follows:-

> "In these Regulations—
>
> "environmental information" means any information in written, visual, aural, electronic or any other material form on—

a. the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements,

b. factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment,

c. measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements,

d. reports on the implementation of environmental legislation,

e. cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c), and

f. the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment referred to in paragraph (a) or, through

> those elements, by any of the matters referred to in paragraphs (b) and (c)."

Subparagraphs (b), (c) and (e) are engaged in this appeal. For convenience I will refer to "emissions" when discussing the environmental factors listed in (b), as it is in regard to information on emissions into the environment that the applicant primarily argues.

The appeal as pleaded: preliminary objection

9. The originating notice of motion is broadly drafted and seeks without specificity a declaration that the Report is "environmental information" within the Regulations, and relates to information on emissions into the environment within the provisions of Article 10(1) of the Regulations. The motion also seeks an order that the Court should substitute its decision for the decision made by the Commissioner to refuse access to the Report.

10. The application is grounded on an affidavit of the applicant sworn on the 16th February, 2015 and it is fair to say that the affidavit does not disclose details of how it is asserted the Commissioner fell into error, nor the basis on which it is argued that the information is environmental information for the purposes of the disclosure requirements in the Regulations. Paragraph 2 of the motion has, at best, identified the claim as coming within Article 3 (b) *viz.* that the information relates to emissions into the environment.

11. In his second affidavit sworn on the 25th May, 2015 the applicant seeks to rely on the definition contained in Article 3(1)(c) and Article 3(1)(e) of the Regulation. The written legal submissions and the argument of counsel for the applicant during

the hearing rely entirely on sub. (c) and (e), and counsel did not seek to argue that the information fell within category (b).

12. The notice of motion does not "state concisely the point of law on which the appeal is made" as is required by Order 84C, the respondent and the Department argue that the applicant ought not be permitted to rely on subs. (c) and (e) as these are not pleaded, nor were these arguments before the Commissioner.

13. The jurisdiction of the High Court is one conferred by statute and is expressly one where the Court engages a point of law "from the decision". The applicant may not seek now to argue matters in the High Court which were not considered by the Commissioner. The matter is one of jurisdiction. However, I reject the submission that the applicant did not argue before the Commissioner that the Report came to be considered as information contemplated by Article 3(1)(c) and (e), and each of these subcategories are expressly mentioned in the final determination of the Commissioner.

14. Accordingly I consider that while the motion does not comply with the mandatory statutory requirement, and does not state concisely and with specificity the nature of the alleged defect in the determination of the Commissioner, the matters in issue are clear from the submissions and from the supplemental affidavit of the applicant, and therefore there is no element of surprise that might cause prejudice to the Commissioner or to the notice party in the appeal.

The role of the High Court

15. The applicant contends that the High Court engages its original and full jurisdiction on the appeal, which, it is argued, is close to a *de novo* appeal. The

respondent and the notice party assert that the appeal on a point of law must be informed by the approach of the courts to judicial review, as is found in case law dealing with the appeals provisions in the Freedom of Information Act, considered by White J. in *O'Grady v. Information Commissioner* [2007] IEHC 152 (Unreported, High Court, 30th March, 2007) and in *Deely v. The Information Commissioner* [2001] 3 I.R. 439. The jurisdiction, thus, understood confines the court to considering whether inferences from fact were ones "which no reasonable decision making body could draw", to quote from the judgment of McKechnie J. in *Deely v. The Information Commissioner.*

16. In *Sheedy v. Information Commissioner* [2005] 2 I.R. 272 Kearns J. said that:-

> "... but it would be obviously incorrect to apply exclusively judicial review principles to matters of statutory interpretation in the way that might be appropriate to issues of fact. A legal interpretation of a statute is either correct or incorrect and the essence of this case is to determine whether the interpretation giving first by the respondent and later by the High Court ... was correct or otherwise."

17. That approach was approved by MacEochaidh J. in *NAMA v. Commissioner for Environmental Information* [2013] IEHC 86 (Unreported, High Court, 27th February, 2013) but note he also considered it proper for him to engage with questions of statutory interpretation.

18. I consider that the correct approach was identified by O'Neill J. in *An Taoiseach v. Commissioner of Environmental Information* [2013] 2 I.R. 510 . O'Neill J. was considering the requirement that the State in transposing the Directive was

required to afford a hearing on appeal, subject to the procedural autonomy that the member state enjoys within the requirements of equivalence and effectiveness. O'Neill J. at para. 7.11 described the appeal as a "full rehearing on all legal issues which arose in the case".

19. At 7.5 O'Neill J. said the following:-

> "...although the appeal is limited to an appeal on a point of law, as all of the issues which have arisen and are in issue between the parties are questions of law, the appeal procedure contains ample jurisdiction so as to fulfil the requirement in Art 6[2] of providing a review procedure in this case. I would construe the term 'review' in a wide general sense rather than the more familiar judicial review concept in Irish law or the review type appeal such as the appeal from the High Court to the Supreme Court. I would treat this appeal as full rehearing of the appeal or review before the respondent on all legal issues arising, including the jurisdictional issue now under discussion and all issues of interpretation of the Directive and the Regulations. To that extent, the jurisdiction of this Court on this appeal may be greater than that of the respondent on the review now under appeal, that seems to me to be necessary to ensure that the full original jurisdiction of this Court, is made available to determine the issues that necessarily arise in the consideration of the notice party's rights under the Directive and Regulations, thereby achieving full compliance with Art 6 of the Directive."

20. I consider that the approach identified by O'Neill J. is correct having regard to the principles that informed his decision, namely the principle of effectiveness under European law. Furthermore his approach is consistent with the approach identified by McKechnie J. in *Deeley v. Information Commissioner*, and the quote at p. 452 which has been much followed:-

> "There is no doubt but that when a Court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-
>
> a. it cannot set aside findings of primary fact unless there is no evidence to support such findings,
>
> b. it ought not set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw,
>
> c. it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect, and finally,
>
> d. if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision."

21. In my view the approach that I take in the appeal is that identified by O'Neill J., namely I may consider whether the conclusion reached by the Commissioner was based on a correct or erroneous view of the law, as noted by Mc Eochaidh J. in *NAMA v. Commissioner for Environmental Information*. I may engage "all legal

issues arising", and I may consider the issues of the interpretation of the underlying Directive and of the Regulation. The appeal does engage the full jurisdiction of the court, but not as argued by the appellant, in that I cannot substitute findings of fact, and I cannot reverse the inferences drawn by the Commissioner with regard to the nature of the Report.

22. Counsel for the respondent and the notice party both assert that the decision of the Commissioner was a decision based on his analysis of the facts, *i.e.* an analysis of the contents of the Report, how it was to be viewed, and how it, and the N.B.P. were to be characterised. It is argued that my approach is confined to the question of whether the Commissioner, on the facts that he found, made a legal error in concluding from those facts that the report was not environmental information. I consider that my approach must be more nuanced than that proposed, in that I must look to the conclusion drawn by the Commissioner as to the characterisation of the N.B.P. and thereafter of the Report, and the test of remoteness he applied.

The Commissioner characterises the Report

23. The Commissioner delivered a five page reasoned decision in which he refers to the purpose of the Regulations, and the requirement for public access to environmental information laid down in Directive 2003/4. He accepted the Department's description of the Report and it is useful to repeat that description here:-

> "This Report is a financial and technical analysis of options for potential State intervention in the roll out of next generation broadband and was commissioned by the Department in the context of the National

Broadband Plan for Ireland. The purpose of the Report was to develop a financial model to calculate the likely capital expenditure associated with deploying next generation broadband under a number of different scenarios.

The department's description contained the following assertion:-

It contains no environmental content."

24. The Commissioner went on to characterise the purpose and contents of the Report:-

> "I agree that its purpose was to examine the cost of deploying 'next generation' broadband (NGB) infrastructure to areas that the private sector is not expected to serve based on a range of options or scenarios of a technical nature, i.e. to develop a financial model to calculate the likely capital expenditure associated with deploying NGB infrastructure for each of the scenarios identified by the Department in order to provide the Department with an understanding of the scale of investment required for each case. In other words, put simply, the report is about the cost implications for the state of deploying various types of NGB infrastructure to areas underserved by the private sector."

25. The Report did not address spectrum availability or planning issues, presumably questions, such as whether masts or under ground cables might be necessary or appropriate for the deployment of the relevant technologies, and did not contain any discussion of the various technologies in respect of their potential impact

on the environment but rather in terms of their performance, characteristics and related cost implications. He goes on to say that:-

> "The report notes that actual deployment may differ from the illustrative scenarios discussed as a result of such matters."

26. Thus it seems that the Report deals with the performance, characteristics and relative cost implications of the various options identified in the N.B.P.

Information on factors likely to affect the environment

27. The Commissioner separately examined the request in the context of the definition in the Regulations, and his decision involved him in first deciding whether the Report itself contained environmental information, primarily with regard to sub s.(c), *i.e.* did it contain information relevant to emissions *etc.* likely to affect elements of the environment. He concluded as follows:-

> "In the circumstances, I do not accept that the report provides information on factors such as energy, radiation, or emissions affecting or likely to affect the elements of the environment. Thus, I find that the report does not qualify as environmental information under Article 3 (1) (b) of the definition. I also do not accept that the report provides information on a measure or activity affecting or likely to affect the elements and factors referred to in paras. (a) and (b) of the environmental information definition. It follows that I find no basis for concluding that the report, in and of itself, qualifies as environmental information within the meaning of Article 3 (1) (c) of the regulations."

The interplay between the National Broadband Plan and the Report

28. The Commissioner then considered the request under sub.(e), *i.e.*, whether the Report might be a cost benefit analysis within the framework of a measure to which sub . (c) relates.

29. To consider this question he had to first determine whether the N.B.P. itself might be "a measure affecting or likely to affect the environmental elements" and within 3(1)(c). He concluded that as it contains a number of different policy objectives to achieve the targets for high speed broadband availability throughout the country, a review of the national spectrum policy, publication of a national digital strategy, infrastructure barrier removal, and a proposed state intervention, the N.B.P. was "merely a high level strategy, and the many variables which might effect the environment or the level of discharge emissions or other releases into the environment, are not apparent from a policy document".

30. He determined that the N.B.P. itself is not environmental information as "[t]he link between the plan and any effect on the environment is simply too remote, unlike the measures and activities that may be adopted to implement the plan."

31. In light of that conclusion the Commissioner considered that the Report did not qualify as environmental information by virtue of Article 3(1)(e), as the characterisation of the Report depended on whether it was a report, economic analysis or cost benefit analysis regarding a policy or plan or measure which itself is environmental information.

32. To understand the approach of the Commissioner it is therefore necessary to understand his approach to the N.B.P. He considered that the link between the

N.B.P. and emissions into the environment is "too remote" to have any effect on the environment, as it was a high level strategy and at that level of generality could not have on emissions into the environment.

33. He then concluded that if the N.B.P. is not on measure affecting or likely to affect emissions, cost benefit or other economic analysis and assumptions that might either underlie or be used within the "framework" of the measures, could also not be environmental information.

34. It seems to me that a question of law is engaged namely whether he was correct in the following conclusions:-

a. Whether the link between the N.B.P. and an effect on the environment was "simply too remote" to enable the N.B.P. to be characterised as environmental information and

b. Whether the Report could not therefore be environmental information.

The arguments

35. The applicant argued that the N.B.P. was a measure within the meaning of Regulation 13(1)(c), primarily because radio wave emissions from wireless transmitters were emissions into the environment. He quoted decisions of the U.K. Information Tribunal as authority for that proposition. He also argued that any technology that might be used for the roll out of broadband would have attendant power requirements, and the choice between technologies would have consequence for the volume of emissions, including CO^2 from the burning of fossils fuels, or radio wave radiation. He identified different power consumption that might be required for wireless or fixed line technologies. He argued that any decision with regard to the

recommendation of one technology over the other could have consequences for emissions, and the choice is not environmentally neutral.

36. The Department argues that the Report and the N.B.P. were general or high level documents containing no concrete choices or proposals. The proposition advanced is set out in summary form at para. 24 above.

Authorities on the definition of environmental information

37. The applicant relies on a decision of the European Court of Justice in Case C-321/1996 *Mecklenburg v. Kreis Pinneberg*, 17th June, 1998, concerning the wording of Article 2(a) of the old Directive, broadly similar to the Directive of 2003. The Court said that the definition covered any statement which was "capable of adversely affecting or protecting the state of one of the sectors of the environment covered by the Directive."

38. The applicant relies also on the Aarhus Convention Implementation Guide itself also suggested that the meaning of "activities or measures in Article 3(b)" is broad:-

> "And most importantly the activities or measures do not need to be part of some category of decision making labelled 'environmental'. The test is whether the activities or measures may have an affected on the environment."

39. In relation to economic analysis the Guide states the following:-

> "As economic analyses may have a great impact on whether or not a particular project will go ahead, it is important to be able to examine the thinking that went into them. The quantification of environmental values

and the 'internalization' of environmental costs are among the most difficult questions for economists."

40. Counsel for the applicant accepts that the Guide does not have binding force of law, but that it may be taken into consideration as explained by the European Court of Justice in Case C-182/10 *Marie-Noëlle Solvay & Ors v. Région Wallonne,* 30th March, 2010.

A matter of law?

41. What constitutes environmental information is a matter of law, and all parties agree with that general proposition. The respondent argues that for information to be environmental information, it must be information *on* the various matters set out in Regulation 13(1), and rejects the suggestion that the Regulations permit a more broad approach in requiring there to be made available information which *relates to* information on emissions.

42. The affidavit of David Hanley, sworn on behalf of the notice party on 6th March, 2015, describes the Report as follows:-

> "...a financial and technical analysis was options for potential State intervention in the roll out of next generation broadband. The purpose of the report was to develop a financial model to calculate the likely capital expenditure associated with deploying next generation broadband under a number of different scenarios. The report contains no environmental information."

43. This description is consistent with how the Commissioner characterises the Report as being "about the costs implications" of the deployment of various types of broadband infrastructure.

44. The respondent argues in reliance on the opinion of Advocate General Kokott in Case C-524/09 *Ville de Lyon,* 22nd December, 2010, that the Directive does not *"...give a general and unlimited right of access to all information held by public authorities which has a connection, however, minimal, with an environmental factor."*

45. He also relies on the Court of Justice judgment in Case C-316/01 *Eva Glawischnig,* 12th June, 2013, where the request for information regarding measures applied to monitor products with genetically modified food stuffs and ensure compliance with labelling requirements. The Court, answering a question referred for a preliminary ruling, took the view that the name of the manufacturer and the product description and the administrative penalties imposed for controlling compliance with the labelling requirements "do not constitute information relating to the environment."

46. The Commissioner's conclusion was one based primarily on a view that as the N.B.P. was not a measure or policy to which the Regulation applied, that a cost benefit analysis that might inform the implementation of that plan is equally not environmental information.

47. The characterisation of the N.B.P. was clearly and concisely dealt with by him. I conclude that I must approach the decision of the Commissioner by first considering his characterisation of the N.B.P., and whether the Commissioner was correct in applying a test of remoteness.

The approach of the Commissioner to the N.B.P.

48. I reject the argument of the respondent that the applicant is incorrect to argue that first matter for determination is whether the N.B.P. contains environmental information. Regulation 13(1)(e) identifies as environmental information a cost benefit analysis of a measure or policy to which Regulation 13(1)(c) applied. That is a starting point for 13(1)(e) and the Commissioner was correct that any analysis of the applicability of Regulation 13(1)(e) had to involve first a consideration of the status of the N.B.P. Regulation 13(1)(e) does not relate to stand alone information, but rather cost-benefit or economic analyses in framework of other documentation and information.

The interpretative approach

49. The European Court of Justice, in its judgment in *Mecklenburg v. Pinneberg* made clear its view that:-

> "the Community legislature intended to make that concept a broad one, embracing both information and activities relating to the state of those aspects."

50. At para. 21 of its judgment the Court said the following:-

> "In order to constitute 'information relating to the environment for the purposes of the directive', it is sufficient for the statement of views put forward by an authority, such as the statement concerned in the main proceedings, to be an act capable of adversely affecting or protecting the state of one of the sectors of the environment covered by the directive. That is the case, as the referring court mentioned, where the statement of views is

capable of influencing the outcome of the development consent proceedings as regards interests pertaining to the protection of the environment."

51. This approach is supported by the recent judgement of the Supreme Court in *NAMA v. Commissioners for Environmental Information* [2015] IESC 51 (Unreported, Supreme Court, 23rd June, 2015) where, at para. 10, O'Donnell J. giving the judgement of the court expressed the view, specifically with regard to the implementation of the Aarhus Convention, that the specific obligation taken by Ireland as a Member State of the E.U.:-

> "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."

52. Having regard to the approach identified by O'Donnell J. I consider that the Environmental Commissioner in applying the Regulations must have regard to their purpose, and *ipso facto* to the Aarhus Convention itself. The Aarhus Convention recognises that public participation relating to the environment is to be achieved, *inter alia*, by making available to members of the public the information necessary to fully so participate.

53. In the preamble to Aarhus there was recited *inter alia* that the parties thereto recognise:-

> " ... that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns

and enable public authorities to take due account of such concerns…"

54. The Convention's stated aim is:-

"to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment."

55. The Convention also expressed a desire to encourage "widespread public awareness of, and participation in, decisions affecting the environment and sustainable development." I regard it as important that the Convention acknowledged that the public authorities "hold environmental information in the public interest", and this suggests a broad approach to the question of interpretation is correct.

56. I consider that a purposive interpretation of the provisions of the Regulation 13(1)(e) suggests that what was intended to be captured thereby were economic analysis or models which informed or were capable of informing either a programme or plan or administrative measure, not merely information which did as a matter of fact actually inform the decision maker. To consider otherwise would fail to have regard to the fact that the Minister is not bound by any of the policies or strategies proposed in the N.B.P, and the Regulation intends to capture any documentation or reports or information even that which was rejected by the policy maker in coming to its decision, and of all of the matters be considered by him or her.

57. I consider also that the word "use" in Regulation 13(1)(e) does not import a narrow approach such that only those documents which were available at the time a particular report was written are covered by the Regulation, and as the terminology of Regulation 13(1)(c) includes plans and programmes "likely to affect" the environmental elements, reports, information, models or other data which are capable

of informing the thinking in a plan, programme or policy are capable of being environmental information.

58. Thus I consider that the Environmental Commissioner took an overly narrow approach in a number of respects. His approach to the N.B.P. itself, that it was a high level or a policy document, is overly narrow. I do not consider that the question of remoteness was a correct approach in that he failed to take into account the fact that Regulation 13(1)(c) included in the definition of environmental information not merely measures, programmes, policies *etc.*, which affected the elements of the environment, but those which were likely to effect those elements. Therefore, I consider that the test of remoteness as identified by the Commissioner does not correctly identify the range of information that might affect the elements of the environment, *i.e.* where the consequential effect is not direct or not yet apparent.

59. Therefore, I conclude that the test applied by the Commissioner in assessing the N.B.P. was overly narrow, and in his view that only documentation which would show how the policy was to be worked out or implemented could come within the Regulation, the Commissioner fell into error.

60. As a result, I consider the approach of the Commissioner to be incorrect with regard to the Report the subject matter of the data application before him. He directly, and in my view incorrectly, linked the production of the Report to his characterisation of the N.B.P. itself. The Report, as an economic model, could inform the choice that policy makers will make. It is, to use the language of Aarhus, part of the "thinking" that might go into such policy choices, and could impact on them.

61. The cost benefit analysis is part of the framework of information that Government will have before it when considering the various options described in the N.B.P., and because the matter will include the element of cost, the full framework of the information available to the Government is likely to have an impact on emissions into the environment.

62. In conclusion, I consider that any information that might have informed or be capable of informing the thinking of the Government in making decisions with regard to the N.B.P., including economic models or cost-benefit analyses, is capable of being environmental information, and is so capable, notwithstanding that such models do not contain information on emissions or impact on the environment as such.

63. I consider in the circumstances that the Commissioner's approach was too narrow, he failed to adopt the teleological approach that is required to the interpretation and implementation of the Regulations, and imposed an overly narrow test of remoteness in seeking to characterise both the N.B.P. and any report or information within the framework that might inform the Government on the implementation of that plan.

Direct production of the report now?

64. The applicant argues that if true and effective access to Court is to be available, the applicant ought not have to return to the Environmental Commissioner following a successful appeal on a point of law, and that the cost and delay involved would be a serious obstacle to the rights recognised in the Aarhus Convention as incorporated into European law.

65. The question of whether I could substitute my decision was considered by MacEochaidh J. in *NAMA v. Commissioner for Environmental Information* where he held that his jurisdiction was to remit the matter to the respondent and not substitute his decision, although for the reasons he explained he did not consider it necessary or appropriate to remit in that case.

66. Apart from the practical reality that the Report is not before me, the Regulations clearly envisage the limit of the court's powers being to determine a point of law arising from the decision. There is no procedural or legal basis on which I could hear evidence with regard to the Report and the approach urged by the applicant would involve my engaging in an exercise. Accordingly I do not consider that I may direct production of the Report.

Conclusion

67. I propose to make an order setting aside the determination of the Commissioner, made on the 18th December, 2104, and remitting the matter to him for further determination. I refuse to make a declaration that the Report contains information on the environment. My conclusion on this appeal is that the Commissioner fell into error in his approach, but whether the Report is to be disclosed is a matter for determination in the light of a consideration of its contents, is outside my jurisdiction.

Approved
No redaction needed
[signature]
22/2/2016