

**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/17/0016

Date of decision: 29 March 2018

Appellant: Lar McKenna

Alleged Public Authority: Michael Neary, Property Arbitrator

Issue: Whether Michael Neary, Property Arbitrator, is a public authority within the meaning of article 3 of the AIE Regulations when performing his statutory function

Summary of Commissioner's Decision: The Commissioner found that Mr Neary acts in a judicial capacity when performing his statutory function and is therefore not a public authority within the meaning of article 3 of the AIE Regulations, when so acting

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

In a decision which I made on 28 November 2016 (on case CEI/15/0026, which is available on my website www.ocei.ie/decisions), I found that Michael Neary, Property Arbitrator, is a public authority within the meaning of article 3 of the AIE Regulations and I stated my expectation that he would proceed to process the AIE request in that case.

Following my decision, the appellant allowed two months for anyone affected by the decision to appeal to the High Court. No court appeal was taken. The two-month period expired on 27 January 2017 and the appellant waited for a fresh decision from Mr Neary. When none arrived, he wrote to Mr Neary on 24 March 2017, saying that he had expected a fresh decision on his AIE request within one month of the expiry of the period allowed for an appeal, and in the absence of such an appeal he had expected to be notified of a fresh decision on his request on or by 27 February 2017. As he had not received such notification, he said that a 'deemed refusal' had arisen and he requested an internal review. Mr Neary wrote back, explaining that, as he operates alone there was no-one who could conduct an internal review. The appellant appealed to my Office on 21 April 2017 and the case was given the designation CEI/17/0016.

When informed of this appeal, Mr Neary submitted to my Office that, contrary to my earlier finding in CEI/15/0026, he acts in a judicial capacity. Article 3(2) of the AIE Regulations provides that the definition of 'public authority' does not include any body when acting in a judicial capacity. He provided information which called into question the legal basis for my earlier finding.

Scope of Review

As I have already formally found that Mr Neary is a public authority and he did not appeal that decision to the High Court, in the normal course of affairs I would not revisit that issue. However, as Mr Neary has advanced an argument which effectively challenges both his status and my jurisdiction to review his decisions on AIE requests, I decided that the appropriate scope of this review would be to consider afresh whether Mr Neary is a public authority.

In conducting my review I took account of the submissions made by the appellant and Mr Neary. 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).

Mr Neary's position

Mr Neary submitted that his function:

bears all of the indicia of a judicial function, and in particular, a property arbitrator exercises a statutory function, enjoys independence in the exercise of that function, exercises a mandatory jurisdiction (in contrast to private arbitration where jurisdiction is conferred by the agreement of the parties); conducts hearings in public; hears evidence on oath; and makes reasoned awards which are final and binding, subject only to the special case stated procedure to the High Court. In addition, a determination by a property arbitrator is a determination of a civil right (within the meaning of article 6 of the European Convention on Human Rights and the European Convention on Human Rights Act 2003).

He added that while my decision on CEI/15/0026 (which found that he was not acting in a judicial capacity) relied on the Supreme Court's judgment in *Manning –v- Shackleton* [1996] 3 IR 85, that case no longer reflects the relevant law. He submitted that, contrary to my earlier finding, he is obliged to give reasons for his award decisions by virtue of the Arbitration Act 2010, which incorporates the UNCITRAL Model Law into Irish law.

He added that article 36 of the Model Law strictly limits the extent to which a court may refuse to recognise or enforce an arbitral award. He submitted that the function of arbitrator supplants that which would be performed by a court if the dispute in questions was not referable to arbitration.

The appellant's position

My investigator put Mr Neary's arguments to the appellant on 12 February 2018. On 16 February 2018 the appellant indicated that he wished to make a submission on those arguments and said he would do so early in the week commencing 26 February 2018. As of today, over a month later, no submission has been received.

Analysis

Article 3(2) of the AIE Regulations provides that, notwithstanding anything in article 3(1), the definition of “public authority” does not include any body when acting in a judicial or legislative capacity. My earlier decision found that the property arbitrator is not excluded from the definition because he is not obliged to give reasons for his decisions. I considered the argument which Mr Neary has submitted in the current case and I perused the Arbitration Act 2010. In light of these considerations, and in the absence of any counterargument put forward by the appellant, I accept Mr Neary’s position.

Decision

I am satisfied that Michael Neary, Property Arbitrator, acts in a judicial capacity when performing his statutory function and that he is not, when so acting, a public authority within the meaning of article 3 of 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
29 March 2018