An Taoiseach, Appellant v. **The Commissioner for Environmental Information**, Respondent and **Gary Fitzgerald**, Notice Party [2010] IEHC 241, [2008 No. 183 MCA]

High Court 4th June, 2010

European Union – Public access to environmental information – Jurisdiction of Commissioner for Environmental Information – Whether jurisdiction to consider whether Regulations inconsistent with Directive – Whether entitlement to disapply national law – National procedural autonomy – Correct procedure for securing supremacy of Community law over domestic law – Appropriate forum for considering compliance with Directive – Regulations – Whether Directive correctly transposed – Whether Regulations in compliance with Directive – European Communities (Access to Information on the Environment) Regulations 2007 (S.I. No. 133), articles 7, 8, 9, 10 and 13 – Council Directive 2003/4/EC.

Constitution – Environmental information – Meetings of Government – Cabinet confidentiality – Public access to environmental information – Exceptions to rights of access – Information on emissions into environment – Whether meetings of Government internal communication of public authorities – Whether meetings of Government proceedings of public authorities – Whether discussions at Government meetings governed separately – European Communities (Access to Information on the Environment) Regulations 2007 (S.I. No. 133), articles 7, 8, 9, 10 and 13 – Constitution of Ireland 1937, Article 28.

Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information ("the Directive") provides that, subject to certain exceptions set out in art. 4, information relating to the environment held by, or for, a public authority must be made available on request to members of the public. Article 4(1)(e) of the Directive provides that member states may provide for a request for environmental information to be refused if the request concerns internal communications, taking into account the public interest served by disclosure. Article 4(2)(a) of the Directive provides that member states may provide for a request for environmental information to be refused if disclosure of the information would adversely affect the confidentiality of proceedings of public authorities, where such confidentiality is provided for by law.

The European Communities (Access to Information on the Environment) Regulations 2007 ("the Regulations of 2007") were introduced to give effect to the Directive and, *inter alia*, make provision for rights of access by the public to information on the environment held by, or for, public authorities. Article 7(1) of the Regulations of 2007 sets out the general obligation on public authorities to give access to environmental information. Article 8 of the Regulations of 2007 sets out mandatory exceptions, subject to exceptions set out in art. 10, to the provision of environmental information. It provides:-

"A public authority shall not make available environmental information in accordance with article 7 where disclosure of the information –

(a) would adversely affect –

…

(iv) without prejudice to paragraph (b), the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts);

or

(b) to the extent that it would involve the disclosure of discussions at one or more meetings of the Government, is prohibited by Article 28 of the Constitution."

Article 10 of the Regulations of 2007 creates an exception to the mandatory restrictions on access in art. 8 by providing for information to be released when it relates to information on emissions into the environment. Article 10 preserves however the confidentiality of Government discussions. It provides:-

"(1) Notwithstanding articles 8 and 9(1)(c), a request for environmental information shall not be refused where the request relates to information on emissions into the environment.

(2) The reference in sub-article (1) to information on emissions into the environment does not include a reference to any discussions on the matter of such emissions at any meeting of the Government."

The notice party sought access to documents relating to cabinet decisions or reports of cabinet discussions on Ireland's greenhouse gas emissions from the Department of An Taoiseach. The Department refused to release a number of documents within the scope of the notice party's request on the basis that they were records of the Government and specifically excluded from public disclosure by, *inter alia*, art. 8 of the Regulations of 2007. The notice party appealed this decision to the respondent.

The respondent took the view that only one of the documents sought could be regarded as constituting a report of discussion on Ireland's greenhouse gas emissions and therefore confined the appeal to the notice party's right of access to this document alone. She found that this document related to information on emissions into the environment and therefore fell within the ambit of art. 10(1) of the Regulations of 2007, which limits the operation of the exceptions permitting restrictions on access that are set out in article 8. However, the respondent took the view that art. 10(2) of the Regulations of 2007, which qualifies art. 10(1) by providing that it does not include a reference to any discussions on the matter of emissions at any meeting of the Government, was not in conformity with the Directive. She found that the Directive was incorrectly transposed into Irish law and that, as the Directive was directly effective, she was bound to proceed on the basis that the requirements of the Directive could not properly be set aside by art. 10(2) of the Regulations of 2007. The respondent therefore directed the appellant to disclose the record of discussions at a meeting of the Government to the notice party.

The appellant appealed the decision of the respondent to the High Court. The appellant submitted that the respondent did not have jurisdiction to analyse whether the provisions of the Regulations, allowing for exceptions to disclosure, were in conformity with those in the Directive and, accordingly, that her decision that the Regulations were not to be applied was *ultra vires*. The respondent contended that she was under an obligation to disapply art. 10(2) of the Regulations of 2007 and give direct effect to the

Directive, which does not contain a similar express exclusion in respect of cabinet confidentiality. The notice party supported the position of the respondent.

Held by the High Court (Ó Néill J.), in allowing the appeal, 1, that the respondent did not have jurisdiction to consider whether art. 10(2) of the Regulations of 2007 was inconsistent with the Directive. That jurisdiction was unquestionably reserved under the Constitution to a court of law and the jurisdiction given to the respondent under the laws of the State was confined to the application of the Regulations of 2007.

2. That the primacy of European Union law was secured by a general rule to that effect and it was then left to member states within the architecture of their own legal systems to determine procedures for the enforcement of European Union law subject to the principles of equivalence and effectiveness. In transposing the Directive in the Regulations of 2007, the State was entitled to, and did, establish a procedure for dealing with claims for disclosure and for the refusal of environmental information.

Van Schijndel and van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten (Cases C-430 & 431/93) [1995] E.C.R. I-4705 considered.

3. That the Regulations of 2007 expressly and unequivocally made provision for discussions at meetings of the Government in arts. 8(b) and 10(2), and therefore, from an application of the primary canon of construction, namely ascertaining the true meaning of the words used, it must be taken that the only provisions of the Regulations of 2007 that governed or affected cabinet confidentiality were arts. 8(b) and 10(2) and not arts. 8(1)(iv) or 9(2)(d).

4. That, as a record of discussions of a meeting of the Government fell within the ambit of art. 8(b) of the Regulations of 2007, subject to art. 10, the Regulations of 2007 unequivocally provided for the exclusion from disclosure of the document in issue.

5. That meetings of Government, which were the constitutionally mandated form of communication between its members for the purpose of discharging their collective responsibility, were to be regarded as the internal communications of a public authority within the meaning of art. 4(1)(e) the Directive.

6. That as art. 4(1)(e) of the Directive applied to meetings of the Government and member states were therefore permitted to provide for a request for environmental information to be refused if the request concerned records of cabinet discussion, there was no conflict between art. 8(b) and art. 10(2) of the Regulations of 2007.

Cases mentioned in this report:-

Amministrazione delle Finanze dello Stato v. Simmenthal SpA (Case 106/77) [1978] E.C.R. 629; [1978] 3 C.M.L.R. 263.

Becker v. Finanzamt Münster-Innenstadt (Case 8/81) [1982] E.C.R. 53; [1982] 1 C.M.L.R. 499.

Bozzetti v. Invernizzi SpA (Case 179/84) [1985] E.C.R. 2301.

Comet v. Produktschap (Case 45/76) [1976] E.C.R. 2043.

Commission v. Italy (Case 48/71) [1972] E.C.R. 527; [1972] C.M.L.R. 699.

Consorzio Industrie Fiammiferi v. Autorità Garante della Concorrenza e del Mercato (Case C-198/01) [2003] E.C.R. I-8055.

Cooperativa Agricola Zootecnica S. Antonio v. Amministrazione delle finanze dello Stato (Cases C-246/94 to 249/94) [1996] E.C.R. I-4373.

Costa v. E.N.E.L. (Case 6/64) [1964] E.C.R. 585; [1964] C.M.L.R. 425.

Courage Ltd v. Crehan (Case C-453/99) [2001] E.C.R. 6297.

Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH (Case C-54/96) [1997] E.C.R. I-4961.

Fratelli Costanzo SpA v. Comune di Milano (Case 103/88) [1989] E.C.R. 1839; [1990] 3 C.M.L.R. 239.

Henkel KgaA v. Deutsches Patent-und Markenamt (Case C-218/201) [2004] E.C.R. I-1725.

Impact v. Minister for Agriculture and Food (Case C-268/06) [2008] E.C.R. I-2483.

Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Case 11/70) [1970] ECR 1125; [1972] C.M.L.R. 255.

Irish Press Publications Ltd. v. Minister for Enterprise [2002] 4 I.R. 110.

Larsy v. Institut National d'Assurances Sociales pour Travailleurs Indépendants (INASTI) (Case C-118/00) [2001] E.C.R. I-5063.

Marleasing SA v. La Comercial Internacional de Alimentación (Case C-106/89) [1990] E.C.R. I-4135; [1992] 7 C.M.L.R. 305.

Marshall v. Southampton and South-West Hampshire Area Health Authority (Case 152/84) [1986] E.C.R. 723.

Minister for Justice v. Director of Equality Tribunal [2009] IEHC 72 [2010] 2 I.R. 455; [2009] 20 E.L.R. 116.

Ministero delle Finanze v. IN.CO.GE.'90 Srl (Cases C-10/97 to 22/97) [1998] E.C.R. I-6307.

Murphy v. Bord Telecom Éireann [1989] I.L.R.M. 53.

Peterbroeck v. Belgian State (Case C-312/93) [1995] E.C.R. 4599.

R. v. Secretary of State for Transport, ex parte: Factortame Ltd. (Case C-213/89) [1990] E.C.R. 02433; [1990] 3 C.M.L.R. 375.

Rewe-Handelsgesellschaft Nord gmbH v. Hauptzollamt Kiel (Case C-158/80) [1981] E.C.R. 1805.

Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland (Case 33/76) [1976] E.C.R. 1989; [1977] 1 C.M.L.R. 533.

Safalero Srl v. Prefetto di Genova (Case C-13/01) [2003] E.C.R. 8679.

SEIM v. Subdirector-Geral das Alfândegas (Case C-446/93) [1996] E.C.R. I-73.

Tate v. Minister for Social Welfare [1995] 1 I.R. 418; [1995] 1 I.L.R.M. 507.

Unibet (London) Ltd. v. Justitiekanslern (Case C-432/05) [2007] E.C.R. I-2271.
Van Duyn v. Home Office (Case 41/74) [1974] E.C.R. 1337; [1975] 1 C.M.L.R. 1.
Van Schijndel and van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten (Cases C-430 & 431/93) [1995] E.C.R. I-4705.
Von Colson and Kamann v. Land Nordrhein-Westfalen (Case 14/83) [1984] E.C.R. 1891; [1986] 2 C .M.L.R. 430.

Motion on notice

The facts have been summarised in the headnote and are more fully set out in the judgment of Ó Néill J., *infra*.

By originating notice of motion dated the 8th December, 2008, the appellant, pursuant to art. 13 of European Communities (Access to Information on the Environment) Regulations 2007, appealed the decision of the respondent directing the appellant to disclose the record of discussions at a meeting of the Government to the notice party.

The motion was heard by the High Court (Ó Néill J.) on the 29th, 30th and 31st, July, 2009.

Maurice Collins S.C. and *Anthony M. Collins S.C.* (with them *Peggy O'Rourke*) for the appellant.

Nuala Butler S.C. (with her *Emily Egan*) for the respondent.

Garrett Simons S.C. (with him *Colm Mac Eochaidh*) for the notice party.

Cur. adv. vult.

Ó Néill J. 4th June, 2010

Background

[1] These proceedings come before this court by way of statutory appeal under art. 13 of the European Communities (Access to Information on the Environment) Regulations 2007 ("the Regulations of 2007") against a decision of the respondent made on the 10th October, 2008, wherein she directed the appellant to disclose to the notice party a record, in the form of

a handwritten note, of discussions and the outcome of those discussions at a meeting of the Government on the 24th June, 2003.

[2] The appellant seeks an order setting aside the impugned decision. He also seeks a declaration that the record is exempt from disclosure pursuant to the provisions of the Regulations of 2007 and, in particular, art. 8(a)(iv) and/or art. 8(b). He seeks a further order remitting the notice party's request for access to the record to the respondent for further consideration or determination by her, should this court consider it necessary or appropriate.

Legislative background

[3] Directive 2003/4/EC of the European Parliament and of the Council of the 28th January, 2003, on Public Access to Environmental Information ("the Directive") was adopted to guarantee a right of access by the public to environmental information held by, or for, public authorities and to set out "the basic terms and conditions of, and practical arrangements for", the exercise of this right, as stated in article 1. In addition, it is designed to ensure that "as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information". Article 3 imposes an obligation on member states to ensure that public authorities provide environmental information held by or for member states once a request is made. It states:-

> "Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest."

[4] This obligation is subject to art. 4 of the Directive, which sets out discretionary exceptions to it. However, when a request for environmental information relates to information on emissions into the environment a member state may not rely on certain of the exceptions set out to refuse access to such information. Article 4 states:-

"1. Member states may provide for a request for environmental information to be refused if:

…

(e) the request concerns internal communications, taking into account the public interest served by disclosure.

2. Member states may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:

(a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law;

…

The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member states may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment."

[5] Article 6 of the Directive provides for "access to justice" as follows:-

"1. Member states shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.

2. In addition to the review procedure referred to in paragraph 1, Member states shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member states may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse.

3. Final decisions under paragraph 2 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 Article."

[6] The Regulations of 2007 transposed the above Directive into Irish law on the 28th March, 2007. Article 7(1) purports to replicate art. 3, in that, it sets out the general obligation under the Regulations, on public authorities to make available to applicants access to environmental information. It states:-

"A public authority shall, notwithstanding any other statutory provision and subject only to these Regulations, make available to the ap-

plicant any environmental information, the subject of the request, held by, or for, the public authority."

[7] Mandatory exceptions to the provision of environmental information, which are subject to the provisions of art. 10, are set out in art. 8 which provides:-

"A public authority shall not make available environmental information in accordance with article 7 where disclosure of the information –

(a) would adversely affect –

…

(iv) without prejudice to paragraph (b), the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts);

or

(b) to the extent that it would involve the disclosure of discussions at one or more meetings of the Government, is prohibited by Article 28 of the Constitution."

[8] Article 9 of the Regulations of 2007 outlines discretionary grounds for refusal as follows:-

"…

(2) A public authority may refuse to make environmental information available where the request –

…

(d) concerns internal communications of public authorities, taking into account the public interest served by the disclosure."

[9] Article 10 has the effect of creating an exception to the exceptions, in that, it provides for information to be released when it relates to information on emissions into the environment. However in its second paragraph, it preserves the confidentiality of Government discussions, even where the information sought relates to emissions into the environment. It states:-

"(1) Notwithstanding articles 8 and 9 (1) (c), a request for environmental information shall not be refused where the request relates to information on emissions into the environment.

(2) The reference in sub-article (1) to information on emissions into the environment does not include a reference to any discussions on the matter of such emissions at any meeting of the Government.

(3) The public authority shall consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal.

(4) The grounds for refusal of a request for environmental information shall be interpreted on a restrictive basis having regard to the public interest served by disclosure.
(5) Nothing in article 8 or 9 shall authorise a public authority not to make available environmental information which, although held with information to which articles 8 or 9 relates, may be separated from such information.
…"

[10] Article 13 of the Regulations of 2007 provides for an appeal "on a point of law" to this court from a decision of the respondent. The respondent is empowered under art. 12(9) to refer "any question of law" arising in an appeal before her to this court for determination. That did not happen in this case.

[11] As this case concerns a record of Government discussions, the guarantee of confidentiality under Article 28.4.3° of the Constitution is relevant. That provision states as follows:-

"The confidentiality of discussions at meetings of the Government shall be respected in all circumstances save only where the High Court determines that disclosure should be made in respect of a particular matter –

i in the interests of the administration of justice by a Court, or
ii by virtue of an overriding public interest, pursuant to an application in that behalf by a tribunal appointed by the Government or a Minister of the Government on the authority of the Houses of the Oireachtas to inquire into a matter stated by them to be of public importance."

The facts

[12] The Department of An Taoiseach ("the Department") received a series of requests from the notice party in letter[s] dated the 30th March, 2007, seeking access to (i) any documents showing cabinet decisions or conclusions on Ireland's greenhouse gas emissions for the years 2002 to 2007 and (ii) any documents, including, but not limited to, minutes of meetings, that reported any cabinet discussions on Ireland's greenhouse gas emissions for the years 2002 to 2007. The notice party indicated in his letters to the Department that he was making the request pursuant to the provisions of the Directive. Having not received a reply to his requests, the notice party wrote a further letter to the Department advising it that, due to its failure to respond, he assumed that his requests were refused and that, accordingly, he wished to appeal that refusal under art. 11 of the Regulations of 2007, which had come into force since he first made his request.

[13] On the 17th May, 2007, the matter was referred for internal review in the Department. By letter dated the 13th June, 2007, the Department informed him that no records were held by it within the scope of the first request and that 26 records were held within the scope of the second. It further stated that eight of the records were being released to him and were enclosed but that the remaining 18 records, descriptions of which were set out, were not being released on the basis that the documents were records of the Government and were specifically excluded from public disclosure, as mandated by art. 8 of the Regulations of 2007 and s. 19 of the Freedom of Information Act 1997 ("the Act of 1997"). The letter then went on to outline the notice party's right to appeal the decision to the respondent.

[14] The notice party wrote to the respondent, by letter dated the 10th July, 2007, informing her of his intention to appeal. An official of the respondent wrote back to the notice party expressing concern in respect of the respondent's jurisdiction to accept the appeal, since the original requests had been made prior to the coming into force of the Regulations of 2007. The Regulations expressly provide that requests which can be appealed must be made pursuant to the Regulations. On the 2nd October, 2007, the notice party submitted his fee, payable under the Regulations of 2007 for an appeal, on a "without prejudice" basis and indicated that, whilst the requests were made before the Regulations came into being, the Directive was directly effective and he urged the respondent to accept the appeal as valid. Some days later the notice party sent an email to the respondent pointing out that the letter he received from the Department dated the 13th June, 2007, made no reference to any jurisdictional issue. Another official of the respondent, by email dated the 16th October, 2007, confirmed to the notice party that the respondent had decided to accept the appeal, notwithstanding jurisdictional concerns.

[15] A copy of the appeal was forwarded to the Department the following day and submissions were sought by the respondent from it. The Department on the 14th November, 2007, furnished the 18 unreleased documents to the respondent together with its submissions. It submitted that the confidentiality of the withheld records was protected by s. 19(1)(a) of the Act of 1997, that the records were specifically excluded from public disclosure in accordance with "art. 8(a)(iv)" of the Regulations of 2007 and that "to the extent that such records may 'contain the whole or part of a statement made at a meeting of the Government or information that reveals, or from which may be inferred, the substance of the whole or part of such a statement'", Article 28.4.3º of the Constitution and s. 19(a) of the Act of 1997 protected their confidentiality. The case of *Irish Press Publications Ltd. v. Minister for Enterprise* [2002] 4 I.R. 110 was cited in support of the contention that the doctrine of cabinet confidentiality

protects not only discussions at cabinet but also documents upon which discussions were based or from which such discussions could be inferred.

[16] In an email of the following day an official of the respondent set out the central submissions made by the notice party and invited the Department's comments. The notice party's arguments were summarised in that email as follows:-

> "Even though art. 8(b) of S.I. No. 133 of 2007 makes reference to Article 28 of the Constitution in relation to cabinet confidentiality, it is a fundamental principle of European Union law that the European Union measure is supreme and cannot be overridden by domestic legal provisions even where this is a constitutional provision [see *Costa v. E.N.E.L. (Case 6/64)* [1964] E.C.R. 585; *Internationale Handelgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel (Case 11/70)* [1970] E.C.R. 1125].
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> The relevant sections (articles 3(1) and 4(2) of the Directive are sufficiently clear to have direct effect [*Van Duyn v. Home Office (Case 41/74)* [1974] E.C.R. 1337].
>
> Cabinet confidentiality cannot be considered if it conflicts with rights under the Directive – given that information on emissions is being sought, the Directive states that there are no grounds for refusal.
>
> Article 8 (b) and art. 10(2) of S.I. No. 133 of 2007 contradict the provisions of the Directive and must be disapplied.
>
> The doctrine of supremacy requires that the Commissioner exercise powers that she would not normally have under domestic law."

[17] On the 29th January, 2008, the Department replied to the respondent indicating that it had consulted with the Attorney General's Office and the Department of the Environment, Heritage and Local Government (the Department that introduced the Regulations of 2007). Their advice was to the effect that the Regulations were fully compatible with the Directive and that there was no conflict between them. The Directive, it was pointed out, gave member states discretion as to whether to exempt disclosure of certain information and those exemptions were set out in art. 10 of the Regulations.

[18] In her decision, the respondent took the view that only one of the 18 documents could be regarded as constituting a "report" of discussion at cabinet on Ireland's greenhouse gas emissions, thereby confining the appeal to the notice party's right of access to this document alone. The notice party does not take issue with this. The respondent, in her decision, then set out the Department's decision and the respective positions of the notice party and of the Department. She identified the relevant parts of the legal provisions at issue, that is, the Directive, the Regulations of 2007 and Article 28.4.3° of the Constitution. She observed that the Act of 1997

applied only to decisions made under that Act and did not enshrine a legal protection for confidentiality generally.

[19] The respondent acknowledged that the document at issue, as a record of discussions of a meeting of the Government, enjoyed protection under Article 28.4.3° of the Constitution and, as such, fell within the ambit of art. 8(b) of the Regulations of 2007, subject to art. 10 of the Regulations. She found that it was of little consequence whether the record also came within art. 8(a)(iv) as, if the notice party was correct in his argument, neither of the two art. 8 grounds for refusal would apply and if he was wrong, then either of the two grounds relied on by the Department would suffice to protect the document from release. On its face, she noted that the document at issue contained a small amount of factual information.

[20] The respondent then considered whether the notice party's requests related to information on emissions into the environment. If they did, she noted that the grounds for the refusal of a request, as contained in art. 8 were subject to article 10. She stated that the Department did not take any issue with her office proceeding on the basis that the request related to emissions into the environment. The wording of the notice party's request indicated that it was a request relating to emissions into the environment. She found the nature of the document in issue was such that part of it disclosed factual information on emissions into the environment and the remaining portion related to, in a general sense, information on emissions into the environment. She concluded that "the record portion which discloses factual information on emissions into the environment also relates to emissions into the environment".

[21] The respondent then went on to consider whether the Regulations of 2007 were in conflict with the Directive. She noted the provisions of art. 3 and art. 4 of the Directive. In respect of art. 4 she stated:-

> "While all the grounds for refusal are subject to a public interest test, art. 4 of the Directive provides that, 'where the request relates to information on emissions into the environment', five of the eight 'harm based' grounds for refusal may *not* be invoked. The five 'harm based' grounds for refusal are those at paras. 2(a), (d) (f), (g) and (h) of article 4. Of particular relevance here is para. 2(a) which provides the potential to refuse environmental information where disclosure would adversely affect 'the confidentiality of proceedings of public authorities, where such confidentiality is protected by law'."

[22] To the extent that art. 10(1) of the Regulations of 2007 restricts the operation of the exception provisions of art. 8 of the Regulations of 2007 in the case of requests that relate to information on emissions into the environment, she found that it did conflict with art. 4 of the Directive. As

to whether art. 10(2) of the Regulations of 2007 accorded with the Directive she stated as follows:-

> "Article 10(2) of the Regulations qualifies article 10(1) by providing that the latter 'does not include a reference to any discussions on the matter of such emissions at any meeting of the Government'. The effect of article 10(2) is to disapply article 10(1) in the case of a record which refers to discussions, at any meeting of the Government, on emissions into the environment. The Department argues that, taken in conjunction with article 10(5) of the Regulations, this approach is perfectly compatible with the Directive. It says that the application of article 10(2) simply serves to confine release of environmental information which pertains to emissions to 'factual information'. I do not accept that the Department is correct in this. I cannot find anything explicit or implicit in the Directive or in its objectives to support the making of exceptions for certain classes of information within the category described in paragraph 2(a) of Article 4 of the Directive. Neither can I find anything in the Directive which would allow a member state to confine the exception to factual information as argued by the Department. While elements of para. 2 of art. 4 of the Directive as transposed by article 9(1) of the Regulations (international relations, public security, national defence, the course of justice, intellectual property rights) do not attract the prohibition on refusal, I consider that the exception in para. 2(a) – the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law – is definitely subject to it.
>
> The Department has not brought to my attention any provision in the Directive or any case law which would support its approach to the application of para. 2(a) and the transposing of the provision so as to provide for the omission of certain categories of information from its prohibition. It appears to be suggesting that it is open to me to confine my consideration to the wording of the provisions of the Regulations. My view is that the option of applying the Regulations in isolation from the Directive is not one which is open to me."

[23] The respondent stated that she was adopting the teleological approach in her analysis of the transposition of the Directive. She did not think that there was any alternative remedy open to the notice party in order to seek the information he was seeking. The purpose of the existence of exceptions or grounds for refusal was, in her view, because some information, if disclosed, would adversely affect the confidential proceedings of public bodies. She noted that member states are expressly prohibited from invoking art. 4(2)(a), (d), (f), (g) and (h) in order to refuse a request where the request relates to information on emissions into the

environment, but that where a request for information related to information on emissions into the environment it could be refused under art. 4(2)(b), (c) and (e) (*i.e.* international relations, public security, national defence, the course of justice and intellectual property rights). The blanket prohibition in art. 4(2)(b), (c) and (e) did not apply, she found, in respect of confidentiality which was provided for in article 4(2)(a). She stated:-

> "Clearly, the Directive was framed to specifically exclude the refusal of a request on confidentiality – based grounds where the request relates to information on emissions to the environment. It seems to me that this is indicative of a conscious decision that confidentiality – even confidentiality provided for by law – was not sufficient to displace the presumption that environmental information relating to emissions will be released. Thus, environmental information in cabinet discussions relating to such matters as security, defence or the course of justice may be withheld even where such information relates to emissions whereas a blanket prohibition on matters 'confidential' is not envisaged by the Directive."

[24] For the above reasons she concluded that art. 10(2) of the Regulations of 2007 was not in conformity with art. 4(2) of the Directive. She found that the Directive was directly effective but that it was incorrectly transposed into Irish law. She relied on a line of jurisprudence from the European Court of Justice to the effect that a public body must disapply national procedural rules in order to protect individual rights derived from directly effective law of the European Communities, in finding that the requirements of art. 4(2) of the Directive could not properly be set aside by art. 10(2) of the Regulations; (*Larsy v. Institut National d'Assurances Socials pour Travailleurs Indépendants* (INASTI) *(Case C-118/00)* [2001] E.C.R. I-5063; *Von Colson and Kamann v. Land Nordrhein-Westfalen (Case 14/83)* [1984] E.C.R. 1891 and *Henkel KGaA v. Deutches Patent- und Markenamt (Case C-218/201)* [2004] E.C.R. I-1725). She also referred to the decision of this court (Keane J.) in *Murphy v. Bord Telecom Éireann* [1989] I.L.R.M. 53.

[25] As to her jurisdiction to determine the above matters, the following passage from her decision is significant:-

> "I am conscious of the fact that while my office is a creature of the Regulations, its creation arose from the 'access to justice' provisions set out at art. 6 of the Directive. Specifically art. 6(2) of the Directive provides that 'Member states shall ensure that an applicant has access to a review procedure before a court of law or other independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decision may become final'. Having considered the matter, including the objec-

tives of the Directive, I find that where a provision of the Directive is as clear and precise as the provision at issue here, I must exercise my functions in carrying out a review and proceed on the basis that the requirements of para. 2 of art. 4 of the Directive cannot properly be set aside by art.10(2) of the Regulations."

[26] The appellant instituted judicial review proceedings around the time of this appeal in order to challenge the *vires* of the respondent to reach such a decision. The parties agreed that this issue could be dealt with within the confines of this appeal.

[27] It is also to be noted that no specific reliance was placed by the appellant in the proceedings before the respondent on art. 9(2)(d) of the Regulations and that it was invoked by him for the first time in these proceedings.

[28] During the hearing of these proceedings the respondent applied for a reference by this court to the European Court of Justice under Article 234 of the Treaty of the European Union. The appellant opposed this and the notice party took a neutral position.

Jurisdiction

[29] The first matter that must be examined is the jurisdiction of the respondent. The parameters of that jurisdiction must be identified to assess whether she was entitled to look to the Directive to interpret the true meaning of the Regulations of 2007 and whether her jurisdiction properly encompasses the disapplication of national law.

The appellant's submissions

[30] Counsel for the appellant submitted that the respondent did not have jurisdiction to embark upon an analysis of whether the provisions of the Regulations, allowing for exceptions to disclosure, were in conformity with those in the Directive. Counsel for the appellant argued that the respondent's conclusion that the Regulations were to be disapplied by virtue of their incompatibility with Community law was *ultra vires*. Her powers, he submitted, emanated from the Regulations themselves and did not include analysing whether the Regulations conformed with Community law. A recent decision of this court (Charleton J.) in *Minister for Justice v. Director of Equality Tribunal* [2009] IEHC 72, [2010] 2 I.R. 455 was relied upon in this regard. This jurisdictional point, it was submitted, was sufficient to conclude the matter and it was neither necessary nor appropriate for this court to engage in any consideration of further issues.

[31] Allegations of a failure to properly transpose a Directive into domestic law could only be lawfully agitated in this court, it was argued, and not elsewhere and this position did not breach the principles of equivalence and effectiveness. It was submitted that Community law provided for member states to retain national procedural autonomy, subject only to the requirements of the principles of equivalence and effectiveness, as held in *Amministrazione delle Finanze dello Stato v. Simmenthal* SpA *(Case 106/77)* [1978] E.C.R. 629. It was argued that *Fratelli Costanzo SpA v. Commune di Milano (Case 103/88)* [1990] 3 C.M.L.R. 239 and *Larsy v. Institut National d'Assurances Socials pour Travailleurs Indépendants* (INASTI) *(Case C-118/00)* [2001] E.C.R. I-5063, upon which the respondent and the notice party relied, did not extend this principle. Although it was acknowledged the respondent had an obligation to interpret the Regulations of 2007 in conformity with Community law (the *Marleasing* principle; see *Marleasing SA v. La Comercial Internacional de Alimentación (Case C-106/89)* [1990] E.C.R. I-4135), it was submitted that she must take national law as she finds it and it is not for her to assume a jurisdiction that she does not have, to set aside or to disapply a provision of national law. The cases of *Unibet (London) Ltd. v. Justitiekanslern (Case C-432/05)* [2007] E.C.R. I-2271, *Impact v. Minister for Agriculture and Food & Others (Case C-268/06)* [2008] E.C.R. I-2483, *Van Schijndel v. Stichting Pensioenfonds voor Fysiotherapeuten (Cases (C-430 & 431/93)* [1995] E.C.R. I-4705 and *Ministero delle Finanze v. IN.CO.GE '90 Srl (Case C-10-22/97)* [1998] E.C.R. I-6307 were cited in support of this contention.

[32] The practical effect of the respondent's decision, if correct, it was submitted, would be that every public authority would be conferred with an extraordinary jurisdiction, to become "courts" and to determine far reaching measures of European law. A member state, in the appellant's contention, was entitled to say that those issues must be addressed in a particular forum, that is, in this court, and that this jurisdiction, it was argued, was a fundamental part of the judicial architecture of the State.

[33] Counsel for the appellant submitted that the Directive at issue in this case was not directly effective. He highlighted arts. 4 and 6 of the Directive, in particular, which he submitted were incapable of having direct effect as there was a choice of procedure open to the member state. The appropriate proceedings to bring in respect of a failure to transpose a Directive correctly, he submitted, was an action against the State. He pointed to *Tate v. Minister for Social Welfare* [1995] 1 I.R. 418 as an example of where such an action was brought.

The respondent's submissions

[34] Counsel for the respondent submitted that her client had not acted in excess of jurisdiction in considering whether the Regulations of 2007 were in conformity with the Directive. The respondent was, she submitted, an emanation of the State and under an obligation to comply with any directly effective provision of the Directive and by implication she was required to consider whether the Regulations were in conformity with the Directive. In addition, as the body reviewing compliance with the Directive, she argued that the respondent was obliged not to apply any provision of national law which was incompatible with European Union law and this required her to inquire into whether the Regulations were in conformity with the Directive.

[35] Counsel for the appellant submitted that art. 4 of the Directive was directly effective, notwithstanding the discretion set out in it; as a result, the respondent, in reviewing the decision of the appellant, was bound to apply it where the application of the Regulations did not give to it full effect. She further submitted that national procedural and jurisdictional rules cannot impede the effectiveness of Community rights. She contended that the obligation to apply European Union law even where a national court or tribunal does not have jurisdiction under national law to declare national legislation void was recognised by the European Court of Justice in *Amministrazione delle Finanze dello Stato v. Simmenthal SpA (Case 106/77)* [1978] E.C.R. 629. This principle, she stated, was further extended by the European Court of Justice in *Fratelli Costanzo SpA v. Commune di Milano (Case C-103/88)* [1989] E.C.R. 1839, *Larsy v. Institut National d'Assurances Socials pour Travailleurs Indépendants* (INASTI) *(Case C-118/00)* [2001] E.C.R. I-5063, and in *Cooperativa Agricola Zootecnia S. Antonio v. Amminstrazione delle Finanze dello Stato (Cases C-246-249/94)* [1996] E.C.R. I-4373.

[36] A national administrative authority could not, in the respondent's submission, disapply provisions of national law which are inconsistent with a Directive if it does not firstly enter into a consideration of the national measure's consistency with the Directive. In this regard she submitted that the existence of the respondent's jurisdiction in this regard was a necessary precondition to the administrative authority being able to comply with the obligations of a directly effective Directive. She added that the effect of "disapplication" was not the same as a declaration of invalidity or striking a provision down. It was, in her submission, a discrete decision within the respondent's jurisdiction based on a correct application of the law including the Directive upon which the Regulations of 2007 are based.

[37] The decision of this court (Charleton J.), she submitted, in *Minister for Justice v. Director of Equality Tribunal* [2009] IEHC 72, [2010] 2 I.R. 455 was *per incuriam*, in that the learned judge only made reference to *Impact v. Minister for Agriculture and Food (Case C-268/06)* [2008] E.C.R. I-2483. She stated that it did not appear that the *Fratelli Constanza* line of authority was opened to that court. In addition it was submitted that the decision was not consistent with that of Keane J. in *Murphy v. Bord Telecom Éireann* [1989] I.L.R.M. 53 where a case was remitted to the Labour Court, which was, it was observed, as much bound to apply Community law as this court is.

[38] Counsel for the respondent contended that the principle of the supremacy of Community law dictated that if there is a conflict between a provision of European Union law and a provision of national law, including Article 28.4.3° of the Constitution, Community law must take precedence. In the instant case she submitted that art. 4 of the Directive must take precedence over both art. 10(2) of the Regulations and Article 28.4.3° of the Constitution.

The notice party's submissions

[39] Counsel for the notice party adopted the submissions of the respondent. He submitted that the appellant's jurisdictional argument was an artificial one and was inconsistent with the conduct of the Government in establishing the office of the respondent for the purposes of the Directive. He further submitted that the argument that a competent national authority and/or an emanation of the State cannot disapply provisions of national law which conflict with European Union law is contrary to the principle of supremacy and, in particular, the judgment of the European Court of Justice in *Fratelli Constanzo SpA v. Commune di Milano (Case 103/88)* [1989] E.C.R. 1839 and *Consorzio Industrie Fiammiferi v. Autorita Garante della Concorrenza e del Mercato (Case C-198/01)* [2003] E.C.R. I-8055. The *Fratelli* judgment, he also noted, was not cited to the court in *Minister for Justice v. Director of Equality Tribunal* [2009] IEHC 72, [2010] 2 I.R. 455 and for this reason that decision was *per incuriam*.

[40] Counsel for the notice party noted that, whilst this court has full original jurisdiction and can therefore deal with the issue of consistency between the Directive and the Regulations of 2007, if the notice party were required to initiate declaratory proceedings in this court, a significant obstacle would have been put in the path of his client, inconsistent with the "access to justice" provisions of the Directive (article 6). The legal issue of whether cabinet confidentiality comes within the exceptions to disclosure under art. 4 of the Directive was now properly before this court, he

submitted, irrespective of any issue as to the jurisdiction or competence of the respondent.

[41] Counsel for the notice party argued that the reliance on the part of the appellant on the jurisprudence of the European Court of Justice concerning procedural autonomy of member states was misplaced as what was at issue in the instant case was a conflict between the provisions of the Directive and a substantive provision of national law, that is Article 28.4.3° of the Constitution. Those cases concerned, in his submission, procedural rules such as time limits, *locus standi* and *res judicata*.

A review of the jurisprudence of the European Court of Justice on the disapplication of provisions of domestic law by administrative authorities which conflict with directly effective provisions of European Union law

[42] In *Fratelli Costanzo SpA v. Commune di Milano (Case 103/88)* [1989] E.C.R. 1839, in the course of a preliminary reference, the European Court of Justice found that administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of art. 29(5) of Council Directive 71/305/EEC (which was found to have direct effect) and to refrain from applying provisions of national law which are inconsistent with them. In that case an unsuccessful tenderer challenged a national law which allowed for the exclusion of tenders that were so low so as to be unrealistic. In contrast, the European Union law did not have the same automatic exclusion. The court held as follows at paras. 28 to 33:-

> "28 In the fourth question the national court asks whether administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305 and to refrain from applying provisions of national law which conflict with them.
>
> 29 In its judgments of the 19th January, 1982, in *Becker v. Finanzamt Münster-Innenstadt* (Case 8/81) [1982] E.C.R. 53, at p. 71 and the 26th February, 1986, in *Marshall v. Southampton and South-West Hampshire Area Health Authority (Case 152/84)* [1986] E.C.R. 723, at p. 748) the court held that wherever the provisions of a Directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State has failed to implement the Directive in national law by the end of the period prescribed or where it has failed to implement the Directive correctly.

30 It is important to note that the reason for which an individual may, in the circumstances described above, rely on the provisions of a directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member states.

31 It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a directive which fulfill the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them . It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions.

32 With specific regard to Article 29(5) of Directive 71/305, it is apparent from the discussion of the first question that it is unconditional and sufficiently precise to be relied upon by an individual against the State . An individual may therefore plead that provision before the national courts and, as is clear from the foregoing, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply it.

33 The answer to the fourth question must therefore be that administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305/EEC and to refrain from applying provisions of national law which conflict with them."

[43] In *Consorzio Industrie Fiammiferi v. Autorità Garante della Concorrenza e del Mercato (Case C-198/01)* [2002] E.C.R. I-8055 an Italian consortium of match manufacturers challenged a decision of the Italian national competition authority which declared legislation establishing and governing that consortium contrary to Articles 10 and 81 of the European Community Treaty and that the members of it had infringed Article 81 of the European Community Treaty by the allocation of production quotas. It ordered them to terminate the infringements found. Following the line of authority in *Fratelli Constanzo SpA v Comune di Milano (Case 103/88)* [1989] E.C.R. 1839 the European Court of Justice held at paras. 48 to 50 that the national competition authority was entitled to apply provisions of the Treaty:-

"48. It is appropriate to bear in mind, second, that in accordance with settled case-law the primacy of Community law requires any pro-

vision of national law which contravenes a Community rule to be disapplied, regardless of whether it was adopted before or after that rule.

49. The duty to disapply national legislation which contravenes Community law applies not only to national courts but also to all organs of the State, including administrative authorities (see, to that effect, *Fratelli Costanzo SpA v. Commune di Milano* (Case 103/88) [1989] E.C.R. 1839, para. 31), which entails, if the circumstances so require, the obligation to take all appropriate measures to enable Community law to be fully applied (see *Commission v Italy (Case 48/71)* [1972] E.C.R .527, paragraph 7).
50. Since a national competition authority such as the Authority is responsible for ensuring, *inter alia* , that Article 81 EC is observed and that provision, in conjunction with Article 10 EC, imposes a duty on Member states to refrain from introducing measures contrary to the Community competition rules, those rules would be rendered less effective if, in the course of an investigation under Article 81 EC into the conduct of undertakings, the authority were not able to declare a national measure contrary to the combined provisions of Articles 10 EC and 81 EC and if, consequently, it failed to disapply it."

[44] In *Larsy v. Institut National d'Assurances Socials pour Travailleurs Indépendants (INASTI) (Case C-118/00)* [2001] E.C.R. I-5063 the European Court of Justice determined that a national social insurance agency should disapply conflicting laws in order to give effect to the supremacy of Community law. The court noted as follows at para. 51:-

> "… any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law (*Amministrazione delle Finanze dello Stato v. Simmenthal SpA (Case 106/77)* [1978] E.C.R. 629, para. 22, and *R. v. Secretary of State for Transport, ex parte: Factorame Ltd. (Case C-213/89)* [1990] E.C.R. I-2433, paragraph 20)."

The court held that the relevant administrative agency had breached community law and it found that it should have disapplied national provisions of law to the extent that the national procedural rules precluded the effective protection of Mr. Larsy's rights under the direct effect of Community law.

A review of the jurisprudence of the European Court of Justice on national procedural autonomy

[45] The case of *Unibet (London) Ltd. v. Justitiekanslern (Case C-432/05)* [2007] E.C.R. I-2271 involved a claim against the Swedish State by two United Kingdom companies which purchased advertising space in a number of Swedish media outlets with a view to promoting their online gaming services although it was illegal to promote participating in a lottery or games of chance in that country. Criminal proceedings had been instituted against the companies in Sweden and injunctions had been obtained against the media who agreed to supply the claimants with advertising space. The claimants, in the Swedish courts, sought a declaration that they had a right under Article 49 of the European Community Treaty to promote their gaming and betting services in Sweden and were not prevented from doing so by the prohibition under national law. They also sought compensation for the damage suffered arising from that prohibition and a declaration that the prohibition and measures and sanctions for breach of it did not apply to them. Swedish law does not provide for declaratory relief.

[46] In a preliminary ruling under Article 234 of the European Community Treaty the European Court of Justice considered the question of whether "the principle of effective judicial protection of an individual's rights under Community law must be interpreted as requiring it to be possible in the legal order of a member state to bring a free-standing action for an examination as to whether national provisions were compatible with Article 49 of the European Community Treaty if other legal remedies permitted the question of compatibility to be determined as a preliminary issue". The European Court of Justice noted that the principle of effective judicial protection is a general principle of Community law that emanates from the constitutional traditions of the member states, which are encapsulated in articles 6 to 13 of the European Convention on Human Rights and Fundamental Freedoms, as was recognised in a series of cases before the European Court of Justice and has been reaffirmed by article 47 of the Charter of Fundamental Rights of the European Union, proclaimed on the 7th December, 2000, in Nice. The judgment stated at paras. 39 to 41:-

> "39. It is also to be noted that, in the absence of Community rules governing the matter, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law (see, *inter alia, Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland (Case 33/76)* [1976] E.C.R. 2043 (para. 13), *Pe-*

terbroeck v. Belgian State (Case C-312/93) [1995] E.C.R. 4599 (para. 12), *Courage Ltd v. Crehan (Case C-453/99)* [2001] E.C.R. 6297 (para. 29) and *Safalero Srl v. Prefetto di Genova (Case C-13/01)* [2003] E.C.R. 8679 (para. 49)).

40. Although the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community court, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law (see *Rewe-Handelsgesellschaft Nord gmbH v Hauptzollamt Kiel (Case C-158/80)* [1981] E.C.R. 1805 (para. 44)).
41. It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law (see, to that effect, the *Rewe-Zentralfinanz* case (para. 5), the *Comet* case (para 16) and *R. v. Secretary of State for Transport, ex parte: Factorame Ltd. (Case C-213/89)* [1990] E.C.R. I-2433 (paras. 19 to 23))."

[47] The court concluded that the above question should be answered in the negative, provided other effective legal remedies, which were no less favourable than those governing similar domestic actions, made it possible for such a question of compatibility to be determined as a preliminary issue, which was a task that fell to the national court. It held that it was a matter for the member state to ensure judicial protection of an individual's rights under Community law and to establish a system of legal remedies and procedures which ensured respect for the right to effective judicial protection. The fact that an alternative remedy was available in the Swedish court for challenging the compatibility of Swedish law with Community law influenced the court in reaching its decision on this point.

[48] In the subsequent case of *Impact v. Minister for Agriculture and Food (Case C-268/06)* [2008] E.C.R. I-2483 a question arose in the context of a preliminary ruling under Article 234 of the European Community Treaty as to whether national courts are required to apply directly effective provisions of Community law even if they have not been given express jurisdiction to do so under domestic law? There had been a delay in transposing the directive at issue in those proceedings. The domestic implementing measure did not give any express jurisdiction to the Rights Commissioner to determine a claim based on a directly effective provision of Community law. In essence, it was sought to establish whether the Labour Court or a Rights Commissioner, when called on to decide a case concerning an infringement of the legislation transposing that directive, is required by Community law to hold that it also has jurisdiction to hear and

determine claims based directly on that directive itself in circumstances where such claims related to a period after the deadline for transposing the directive concerned but before the date of the entry into force of the transposing legislation conferring jurisdiction on it to hear and to determine claims based on that legislation. The court noted that, in the absence of Community rules governing the matter, it is for the domestic legal system of each member state to lay down detailed procedural rules governing actions for safeguarding the rights of individuals under Community law, subject to the principles of equivalence and effectiveness. Those principles were described by the European Court of Justice. at para. 46 of its judgment as follows:-

> "46. … the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)."

[49] The court went on to find as follows at paras. 48 to 55:-

> "48. A failure to comply with those requirements at Community level is – just like a failure to comply with them as regards the definition of detailed procedural rules – liable to undermine the principle of effective judicial protection.
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> 49. It is in the light of those considerations that the referring court's first question must be answered.
>
> …
>
> 51. In those circumstances, where the national legislature has chosen to confer on specialised courts jurisdiction to hear and determine actions based on the legislation transposing Directive 1999/70, the obligation which would be placed on individuals in the situation of the complainants – who sought to bring a claim based on an infringement of that legislation before such a specialised court – to bring at the same time a separate action before an ordinary court to assert the rights which they can derive directly from that directive in respect of the period between the deadline for transposing it and the date on which the transposing legislation entered into force, would be contrary to the principle of effectiveness if – which is for the referring court to ascertain – it would result in procedural disadvantages for those individuals, in terms, *inter alia*, of cost, duration and the rules of representation, such as to render excessively difficult the exercise of rights deriving from that directive.
>
> …

54. If the referring court were to find such an infringement of the principle of effectiveness, it would be for that court to interpret the domestic jurisdictional rules in such a way that, wherever possible, they contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under Community law (see, to that effect, the *Unibet* case (para. 44)).
55. Having regard to the foregoing considerations, the answer to the first question must be that Community law, in particular the principle of effectiveness, requires that a specialised court which is called upon, under the, albeit optional, jurisdiction conferred on it by the legislation transposing Directive 1999/70, to hear and determine a claim based on an infringement of that legislation, must also have jurisdiction to hear and determine an applicant's claims arising directly from the directive itself in respect of the period between the deadline for transposing the directive and the date on which the transposing legislation entered into force, if it is established that the obligation on that applicant to bring, at the same time, a separate claim based directly on the directive before an ordinary court would involve procedural disadvantages liable to render excessively difficult the exercise of the rights conferred on him by Community law. It is for the national court to undertake the necessary checks in that regard."

[50] In the joined cases of *Van Schijndel v. Stichting Pensionenfonds voor Fysiotherapeuten (Cases C-430 & 431/93)* [1995] E.C.R. I-4705 the European Court of Justice considered whether Community law imposes an obligation on a court to raise issues of Community law of its own motion not raised by the parties. The court again recognised the national procedural autonomy of member states to designate the courts and tribunals having jurisdiction and to lay down procedural rules in respect of actions for the safeguarding of rights emanating from directly effective Community law, in the absence of Community rules, subject to the principles of effectiveness and equivalence. It held as follows at paras. 20 and 21:-

"20 In the present case, the domestic law principle that in civil proceedings a court must or may raise points of its own motion is limited by its obligation to keep to the subject-matter of the dispute and to base its decision on the facts put before it.
21 That limitation is justified by the principle that, in a civil suit, it is for the parties to take the initiative, the court being able to act of its own motion only in exceptional cases where the public interest requires its intervention. That principle reflects conceptions prevailing in most of the Member states as to the relations between the State and the individual; it safeguards the rights of the defence;

and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas."

[51] In his opinion in the above case Advocate General Jacobs explored the issue of national procedural autonomy in detail. In his view the primacy of Community law did not require that national procedural rules should be overridden in all circumstances so as to permit Community law to enter the arena at any stage in the proceedings. The court's case law, he concluded, required only that individuals are given, by the national procedural rules, an effective opportunity to enforce their rights. He stated as follows at paras. 29 to 31:-

"24. In my view, it does not follow from the primacy of Community law that a national court must in all circumstances set aside procedural rules which prevent a question of Community law from being raised at a particular stage in the proceedings. What the primacy of Community law requires in the first place is a general rule that, when a national court is confronted with a conflict between a substantive provision of national law and a substantive provision of Community law, the Community provision shall prevail. It is easy to see that, in the absence of such a general rule, Community law would be a dead letter.

25. But as regards procedural rules, the primacy of Community law does not require that they should be overridden in all circumstances so as to allow Community law to enter the arena at any stage in the proceedings. As the court's case law has shown, it is sufficient that individuals are given, by the national procedural rules, an effective opportunity of enforcing their rights.

26. It is true that the public interest in the proper application of Community law must be taken into account, as well as the interests of the parties. However, the approach consistently taken over the years by the court suggests that what is sufficient to satisfy the public interest in this respect corresponds precisely to the well established principles already referred to, namely the principles that national courts must ensure the enforcement of Community rights where there are invoked in national proceedings in accordance with national procedural rules; and the national rules need only be set aside where they make it impossible or unduly difficult for those rights to be enforced …

27. Moreover, if the view were taken that national procedural rules must always yield to Community law, that would, as will appear below, unduly subvert established principles underlying the legal systems of the member states. It would go further than is necessary

> for effective judicial protection. It could be regarded as infringing the principle of proportionality and, in a broad sense, the principle of subsidiarity, which reflects precisely the balance which the court has sought to attain in this area for many years. It would also give rise to widespread anomalies, since the effect would be to afford greater protection to rights which are not, by virtue of being Community rights, inherently of greater importance than rights recognised by national law. It can, for example, scarcely be argued that Mr. van Schijndel's and Mr. van Veens putative right under Community law to choose their own insurance scheme is more important than and merits greater protection than, for example, the right of a plaintiff to recover damages for personal injury. …
>
> 31. This brings me to the second argument put forward by the Spanish Government based on the need to ensure the effectiveness of Community law. It should be noted first that a proper application of the law does not necessarily mean that there cannot be any limits on its application. The interest in full application may need to be balanced against other considerations such as legal certainty, sound administration and the orderly and proper conduct of proceedings…"

[52] The European Court of Justice made the following similar statement of principle with regard to national procedural rules in *Ministero delle Finanze v. IN.CO.GE '90 Srl (Case C-10-22/97)* [1998] E.C.R. I-6307 at para. 14:-

> "It should be noted … that, according to a consistent line of cases decided by the court, it is for each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law. However, it is the Member states' responsibility to ensure that those rights are effectively protected in each case. Subject to that reservation, it is not for the court to involve itself in the resolution of questions of jurisdiction to which the classification of particular situations based on Community law may give rise in the national judicial system (*Bozzetti v. Invernizzi SpA (Case 179/84)* [1985] E.C.R. 2301, para. 17; *SEIM v. Subdirector-Geral das Alfândegas (Case C-446/93)* [1996] E.C.R. I-73, para. 32; and *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH (Case C-54/96)* [1997] E.C.R. I-4961, para. 40)."

Decision

[53] The problem in this case is not securing supremacy or primacy of Community law over domestic law, but discerning the correct procedural

means for doing this. The notice party has rights under art. 3 of the Directive and art. 7 of the Regulations of 2007 to the disclosure to him of the material in issue in this case which it is accepted concerns emissions into the environment unless that material can be withheld on the grounds of cabinet confidentiality. As it is clear that the Regulations of 2007 (art. 10(2)) do unequivocally provide for the exclusion from disclosure of this material, because the documents sought record cabinet discussion, the core issue is whether the respondent is entitled to disapply that provision in the Regulations and Article 28.4.3° of the Constitution and to give direct effect to the Directive, which does not contain a similar express exclusion in respect of cabinet confidentiality.

[54] Disapplication, it was submitted by counsel for the respondent, in this sense does not mean that the regulation in question is deemed to be or becomes invalid, merely that in the discrete circumstances of this case it is not applied. This outcome could be seen as the worst of all worlds, in that a law or rule which is said to be inconsistent with a superior European Union law is not declared invalid by a court of competent jurisdiction but remains in force where its validity and enforceability is in doubt, there being circumstances in which it cannot apply and perhaps others where it can. It is to be envisaged that over time and with the expanding role of the European Union in so many areas of life and commerce, the national legal landscape would become littered with the moribund remains of hitherto valid national laws. Such a state of affairs would greatly undermine the clarity and certainty that are necessary and fundamental to the integrity of legal systems in societies and communities based on the rule of law. In effect the vast array of administrative bodies across the entire spectrum of public administration could claim, or have imposed on them, a jurisdiction to hear and determine all questions of law and fact relating to the application or enforcement of European Union rights, in preference to national laws, once European Union rights were asserted by a party to a dispute.

[55] Manifestly under our domestic law this could not occur as disputes of this nature are reserved exclusively to the courts and issues such as arose in this case, *i.e.* the consistency of the Regulations of 2007 with the Directive, could only be litigated in the High Court at first instance. The problem with all this, apart from the violence done to the judicial architecture of the State, is that the party who may wish to rely on domestic law, either as a protection of his rights or as establishing a binding duty, will be denied a hearing of his case in a forum, *i.e.* the courts, established by law for that purpose and which, by virtue of such, over time have acquired the professional expertise, experience and competence to deal with these matters with the constitutional guarantee of independence and impartiality. As the focus of the concern of many of these public bodies, many of whom

are purely administrative in character, would be the enforcement of the European Union rights relying on the supremacy of European Union law, attaining that supremacy might too easily be achieved by the suppression of rights and duties based on national laws, without adequate or appropriate consideration of correct constitutional and legal tests and balances.

[56] The approach advocated in the respondent's submission puts to the hazard a variety of European Union legal principles some of which are also well established in our domestic constitutional law. The principle of legal certainty and clarity of laws in force would be undermined if national laws could not be enforced because of conflict with European Union laws but were not lawfully repealed or declared invalid by a court of competent jurisdiction. The principle of judicial protection would manifestly be breached if the rights and duties of parties to disputes concerning the application of European Union laws could not be considered and determined by courts established by law with competence to deal with these matters. The principle of proportionality would be at risk where the procedural route chosen to enforce European Union law inflicted disproportionate damage on the national system of law and the rights and duties of the parties affected. The principle of subsidiarity would be ignored as the forum chosen might bear no resemblance to the appropriate forum for consideration and determination of the issue involved. The principle of equivalence would in effect be stood on its head. This principle requires that European Union rights can be applied and enforced in national courts on no less favourable terms and conditions than similar actions arising under national law. The respondent's submission would result in European Union rights enjoying a degree of procedural supremacy that, not only far exceeds that available to similar actions based on national law, but virtually eliminates national procedural safeguards for rights and duties based on national law.

[57] It was argued by the respondent and the notice party that, if the notice party were required to litigate his right to the disclosure sought in the High Court, this would breach the principle of effectiveness, in that the cost and delay involved in taking his case to the High Court would amount to a very serious obstacle, if not an actual impediment, to the exercise of his rights under the Directive. This submission seems to overlook the access to justice provision in art. 6(2) of the Directive. As quoted above, this provides for a review procedure to a court of law or an independent impartial body established by law. Article 13 of the Regulations of 2007 transposes this aspect of the Directive and creates the right of appeal to this court which is the proceeding now before me. Although the appeal is limited to an appeal on a point of law, as all of the issues that 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 the Directive 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 of 2007. 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 of 2007, thereby achieving full compliance with art. 6 of the Directive.

[58] In my view, it cannot be said that recourse to the High Court by the notice party would breach the principle of effectiveness when the Directive itself provides for a review before a court of law. That review is there for the benefit of all parties to a disputed application for disclosure and is not merely an instrument to enforce the notice party's rights under the Directive and Regulations of 2007.

[59] Whilst there can be no doubt but that where there is a conflict between a European Union law and a national law the European Union law must prevail, the question must be asked whether it is necessary to ensure the supremacy of European Union law to undermine national systems of law, which would be the inevitable outcome if the respondent's submission is correct, or do the relevant judgments of the European Court of Justice demand such a response from national legal systems.

[60] As set out above, there is a clear line of authority from the European Court of Justice to the effect that member states enjoy procedural autonomy subject to the principle of equivalence and effectiveness. It is submitted on behalf of the respondent and the notice party that the line of authority stemming from *Fratelli Constanzo SpA v. Comune di Milano (Case 103/88)* [1989] E.C.R. 1839 to the effect that where a national law conflicts with a European Union law the doctrine of supremacy requires that the national law be disapplied in favour of the European Union law and that it was the function and duty of all public bodies confronted with such conflict in the discharge of their functions to disapply the national law at that point. On the face of it, there would appear to be a conflict between these two lines of authority emanating from the European Court of Justice. That of course would be very surprising if it were the case. I am not at all satisfied that it is. Whilst there are statements in these cases apparently

requiring national law to be disapplied, which taken in isolation seem to require, as was submitted by the respondent and notice party, that conflicting national laws be disapplied at the point of application by whatever public body is dealing with them, these statements taken in the overall context of the cases in which they arise but more particularly in the context of the general jurisprudence of the European Court of Justice and the well established principles of European Union law as mentioned above, would not seem to have the kind of meaning contended for by the respondent and the notice party, as this would create a very clear conflict in the jurisprudence of the European Court of Justice with the well established line of authority on national procedural autonomy and the variety of European Union legal principles mentioned above, which could be either ignored or breached in the process.

[61] The opinion of Advocate General Jacobs in *Van Schijndel and van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten (Cases C-430 & 431/93)* [1995] E.C.R. I-4705, quoted above, in my opinion, correctly elucidates the problem, namely, that the primacy of European Union law is secured by a general rule to that effect, which of course must be universally applied across all the member states. It is then left to the member states within the architecture of their own legal systems to determine procedures for the enforcement of European Union law subject to the principles of equivalence and effectiveness.

[62] I am satisfied therefore that, in transposing the Directive in the Regulations of 2007, this State was entitled to, and did, establish a procedure for dealing with claims for disclosure of environmental material and for refusals of same, when such might occur, as in this case. Clearly those Regulations did not purport to confer on the respondent the kind of jurisdiction she asserted in her ruling, namely to consider the validity of the Regulations of 2007 in light of the Directive, a jurisdiction unquestionably reserved under the Constitution to a court of law. Thus, notwithstanding the patient and full hearing she afforded the parties and the careful consideration she gave to the difficult issues in the case, I must conclude that she exceeded her jurisdiction and was not entitled to embark on a consideration of whether the Regulations of 2007 correctly transposed the Directive and she had no jurisdiction to disapply the Regulations of 2007 and in particular art. 10(2) or Article 28.4.3° of the Constitution. The jurisdiction given to her under the laws of this State was confined to the Regulations of 2007 and no more. In this respect, it should be noted that art. 12(9)(a) of the Regulations of 2007 permits the respondent to refer any question of law to the High Court for determination and she can postpone her decision until after such determination. This procedure is there, *inter alia,* to assist the

respondent when confronted with the kind of problems that arose in this case.

[63] As mentioned earlier, this appeal is a full rehearing on all legal issues which arose in the case. Thus, notwithstanding the foregoing conclusion, it remains necessary for this court to consider the findings of the respondent on other aspects of the case that could affect the ultimate determination of the issue of whether the notice party is entitled to the disclosure of the document in issue. Although the respondent did not have jurisdiction to consider whether the Regulations of 2007 incorrectly transposed the Directive, this court does.

Other issues arising in the appeal

[64] Apart from the jurisdictional issue a further issue arises in this appeal and that is whether a meeting of the Government was to be considered as "internal communication of public authorities" and governed by art. 9(2)(d) of the Regulations of 2007 and art. 4(1)(3) of the Directive or whether meetings of the Government are to be treated as the "proceedings of public authorities" and governed by art. 8(a)(iv) or whether meetings of the government dealt with in the Regulations of 2007 on a stand alone basis, being governed explicitly and solely by article 8(b). Each of these alternatives leads to different outcomes when considered in the context of the Directive.

[65] If the Government meetings are "internal communications of public authorities" the consequence is that the exemption from disclosure is not lost, by virtue of art. 10(1) of the Regulations of 2007 and art. 4(2) of the Directive, if the information relates to emissions into the environment. On the other hand if Government meetings are considered to be "the proceedings of public authorities" the exemption from disclosure given under art. 8(a)(iv) of the Regulations of 2007 and art. 4(2)(a) of the Directive is lost under art. 10(1) of the Regulations of 2007 and art. 4(2) of the Directive. If Government meetings are only affected by art. 8(b) of the Regulations of 2007, the exemption from disclosure is not lost under art. 10(1) of the Regulations of 2007 because of the operation of art. 10(2), which excludes discussions at a meeting of the government of emissions into the environment from the loss of exemption. If discussions at a meeting of the government are governed exclusively by art. 8(b) an issue arise as to whether art. 10(2) of the Regulations of 2007 is inconsistent with the Directive and therefore invalid.

Submissions

[66] Counsel for the appellant described the appeal as being one in respect of a decision made by the Commissioner directing the Taoiseach to disclose a single document which, it was accepted, recorded discussion at cabinet. He submitted that, if the matter fell to be determined by Irish law alone, it would amount to a breach of Article 28.4.3° of the Constitution. He further submitted that the Regulations of 2007 enshrine an exception, in express terms, to the disclosure of meetings of Government to the extent that that is prohibited by Article 28.4.3°. As such, he submitted that the document is one which, under the Constitution and the Regulations, the Taoiseach could not be properly directed to disclose, save where the balance of the public interest required it. He contended that there was a perfectly lawful accommodation of the confidentiality of cabinet discussion in the Regulations of 2007.

[67] Counsel for the appellant submitted that it was the appellant's case that discussions in cabinet constitute internal communications of a public authority. He noted that art. 9(2)(d) of the Regulations reflected the exception set out in art. 4(1)(e) of the Directive. The Government, he contended, was a public authority. He submitted that the exception that relates to internal communications in art. 4(1)(e) of the Directive is not subject to the same qualification as art. 4(2)(a), *i.e.* the exception applies irrespective of whether the information relates to environmental emissions. If the court agreed with him and found that the request concerned internal communications then, he submitted, this would dispose of the case and the issue of whether the document concerned emissions into the environment would not arise.

[68] Counsel for the appellant denied that he was raising a new ground. The argument rested on the proposition, he stated, that the record at issue was protected from disclosure by virtue of its nature and that it fell under art. 9(2)(d) of the Regulations of 2007. Therefore, it was not a different characterisation of the document, he submitted. Also, he argued that the respondent had not been prejudiced as the argument he was making featured in the legal submissions. If the court was of the view that art. 9(2)(d) of the Regulations applied, it would obviate a conflict between European Union law and the Constitution, he stated. In his submission the matter was too important to take the view that that argument should not be made or allowed in because it was not made earlier.

[69] Counsel for the appellant submitted that the respondent acted in disregard of *inter alia* art. 9(2)(d) of the Regulations of 2007. He contended that the refusal of the record was clearly justified on the basis of *inter*

alia art. 9(2)(d) of the Regulations of 2007 and that this provision is wholly compatible with the provisions of the Directive.

[70] It was submitted that the definition of "public authority" in art. 3 of the Regulations of 2007 is similar to the definition contained in art. 2(2) of the Directive. The discussions of the Government at cabinet, it is further submitted, clearly constitute "internal communications" of the Government for the purposes of art. 9(2)(d) of the Regulations of 2007 and art. 4(1)(e) of the Directive. Reference was then made to an express finding on the part of the respondent in her decision of the 10th October, 2008, that the record is not an internal communication between officials as contemplated by art. 9(2)(d) of the Regulations of 2007, as interpreted in accordance with art. 4(1)(e) of the Directive, by reason of the fact that "the contributors of the discussion recorded on the record are members of cabinet and are not the staff of a public authority". It was submitted that it was not a requirement of the Regulations of 2007 or the Directive that a communication, to be considered internal, should be between officials of a public authority nor was it relevant that members of Government were not staff of a public authority. To suggest that the Regulations of 2007 were to be construed as permitting disclosure to be refused in respect of communications between officials of a public authority but not in respect of the members of that authority was untenable, it was submitted.

[71] Counsel for the respondent acknowledged that the provisions of the Constitution were being relied on by the Taoiseach. She submitted, however, that European law was supreme, even in respect of the Constitution and that this was clear from Article 29 of the Constitution. Counsel for the respondent pointed out that these proceedings involved an appeal on a point of law and that it was not a *de novo* appeal. The issue concerning art. 9(2)(d) of the Regulations of 2007 should not properly be raised at this point, she contended. Counsel for the notice party adopted a neutral position in this regard. The respondent submitted that the appellant did not raise the issue of art. 4(1)(e) of the Directive before the respondent. It was submitted that he is estopped from raising it now.

[72] It was not accepted by the respondent that the record concerned internal communications. A distinction should be drawn, it was submitted, between the proceedings of such authorities, as expressly referred to in art. 4(2)(a) of the Directive and internal administrative communications within such a body or between the administrators and the body itself. As the record at issue in this case was a note of actual comments made at the meeting of the Government of the 24th June, 2003, it was contended that it involved "proceedings", as understood by art. 4(2)(a) of the Directive.

[73] Reference was made to *The Aarhus Convention: An Implementation Guide* (2000), which states at p. 59 that, although there was no

definition of "proceedings" in the Convention, "one interpretation is that these may be proceedings concerning the internal operations of a public authority and not substantive proceedings conducted by the public authority in its area of competence".

[74] It was highlighted that it was a requirement under art. 4(2) of the Directive to give a restrictive interpretation to the grounds for refusal in both art. 4(1) and (2). This indicated, it was submitted, that, where disclosure was mandatory in relation to emissions into the environment in the context of a particular type of proceedings, the decision maker should not strain to characterise that type of proceeding so as to fall within another ground of exemption which would not be subject to the mandatory disclosure requirement.

[75] Counsel for the respondent rejected any suggestion that the discussions of cabinet could be classified as internal communications. She submitted that there was no dispute, however, that such discussions were confidential, as provided for under art. 4(2)(a) of the Directive.

[76] Counsel for the respondent further submitted that the proceedings of a public authority classically involved meetings and that internal communications were distinct. Proceedings at cabinet must fall under art. 4(2)(a) of the Directive, in her submission. She noted that that article did not distinguish between cabinet level and lower levels. She argued that cabinet communications could not be shoehorned into art. 4(1)(e) of the Directive. The distinction seemed, in her view, to be based on s. 19 of the Act of 2007, which had no application in the present case.

[77] Counsel for the notice party adopted the submissions of the respondent. He submitted that the appellant had said that cabinet confidentiality fell within art. 4(2)(a) of the Directive at first instance and was now attempting to shoehorn it into article 4(1)(e). He argued that cabinet confidentiality could not be relied upon in a case relating to emissions into the environment.

[78] Counsel for the appellant, in reply, noted that if the interpretation of the respondent and notice party was correct, if a member of the cabinet passed a note to another that would be an internal communication but that if he or she said it orally it would not be "proceedings of a public authority".

Decision

[79] In her decision the respondent acknowledged that the document at issue, as a record of discussions of a meeting of the Government, enjoyed protection under Article 28.4.3° of the Constitution and, as such, fell within the ambit of art. 8(b) of the Regulations of 2007, subject to art. 10 of the

Regulations. Therefore, the Regulations of 2007, properly construed, preclude the disclosure of the document in issue on the basis of Article 28.4.3° of the Constitution.

[80] As is apparent from the summary of the submissions above, much of the debate in the case concerned whether a meeting of the Government should be categorised as "the proceedings of a public authority", or as "internal communications" of a public authority. The first issue to be confronted is whether the appellant is entitled to raise in this appeal the issue of whether art. 9(2)(d) of the Regulations of 2007 and art. 4(1)(e) of the Directive apply, given that these were not relied on in the appeal or review before the respondent. I have already held that this appeal is a rehearing and therefore new material can be introduced. I am satisfied that the respondent and notice party had ample notice of the appellant's reliance on art. 9(2)(d) of the Regulations and art. 4(1)(e) of the Directive in advance of the hearing of this appeal. Therefore, having regard to the importance of the issue, I permitted the appellant to rely on it.

[81] It is clear that the Regulations of 2007 expressly and unequivocally make provision for discussions at meetings of the Government in art. 8(b) and article 10(2). Hence, applying the primary canon of construction, namely ascertaining the true meaning of the words used and applying same unless absurdity is produced, I am of the opinion that, for the purpose of the Regulations of 2007, it must be taken that the only provisions of the Regulations of 2007 that govern or affect cabinet confidentiality are arts. 8(b) and art. 10(2) and not art. 8(a)(iv) or art. 9(2)(d). The opening phrase in art 8(a)(iv), namely "without prejudice to paragraph (b)", tends to reinforce this conclusion. Article 10(2) has the effect of protecting from disclosure a record of discussion at a meeting of the Government of emissions into the environment.

[82] As it is apparent that the provisions in the Regulations of 2007 that expressly deal with meetings of the Government are not replicated in the Directive, the court must consider whether art. 8(b) and art. 10(2) are inconsistent with the Directive and hence invalid. It is in this context that the issue as to the correct categorisation of meetings of the Government arises and whether art 4(1)(e) or art. 4(2)(a) of the Directive applies.

[83] Meetings of the Government are but one aspect of its constitutional role and its many and varied functions as described briefly in the Constitution and set out in great detail in a vast array of legislation. To describe meetings of the Government as "the proceedings" of the Government as the public authority in question seems to me somewhat artificial and strained. Applying the natural and ordinary meaning of these terms as used in art. 4(2)(a) in the Directive, would in my opinion result in a conclusion that art. 4(2)(a) did not, and was not intended to, apply to

meetings of the Government such as and in so far as these are provided for in our Constitution and laws.

[84] On the other hand, meetings of the Government are the occasions when, as provided for in Article 28.4.2° of the Constitution, the members of the Government come together to act as a collective authority, collectively responsible for all departments of State. Meetings of the Government are the constitutionally mandated means or system of communication between its members for the purpose of discharging their collective responsibility. These meetings and their records are required by the Constitution to be private and confidential unless otherwise directed by the High Court under Article 28.3 of the Constitution. Whereas many aspects of the functions of the Government are essentially public and external in nature, meetings of the Government are quintessentially private and internal to the overall functions of the Government. Thus, in my judgment, this constitutionally mandated form of communication between members of the Government can only be regarded as the internal communications of a public authority. Any other conclusion would lead to absurd results, as pointed out by counsel for the appellant, in that communications between members of the Government in any other context apart from formal meetings of the Government would have to be regarded as internal communications and protected from disclosure but the same communications at a Government meeting would, as "the proceedings of a public authority", attract disclosure. Manifestly such a state of affairs, apart from its obvious absurdity, would seriously undermine the discharge of collective responsibility by the Government, as required by Article 28.4.2° of the Constitution. In this regard, I should further add that I am quite satisfied that the distinction sought to be drawn between communications between the members of a public authority and between officials of that authority or between officials of the authority and the members of the authority is devoid of any rational merit and has no discernible basis either in the express provisions or, by way of necessary implication, in the Directive or the Regulations of 2007.

[85] Hence in my view art. 4(1)(3) of the Directive clearly applies to meetings of the Government and thus there is no conflict between arts. 8(b) and 10(2) of the Regulations of 2007 and the Directive.

Application for a reference to the European Court of Justice under Article 234 of the European Community Treaty

[86] As this court is not a court of last resort in this jurisdiction with competence to deal with the issues of European Union law that have arisen

in the case, I have decided to exercise my discretion to refuse the respondent's application for such a reference.

Conclusion

[87] For the reasons set out above, I must allow the appeal, set aside the determination of the respondent and grant declarations to the following effect:-

[a] that the respondent did not have the requisite legal power to consider whether art. 10(2) of the Regulations of 2007 was inconsistent with art. 4(2) of the Directive and to disapply Article 28.4.3° of the Constitution and art. 10(2) of the Regulations;

[b] article 8(b) alone and not art. 8(a)(iv) or art. 9(2)(d) of the Regulations of 2007 apply to discussions at meetings of the Government;

[c] for the purposes of the Directive, discussions at meetings of the Government are "internal communications" within the meaning of art. 4(1)(e) of the Directive.

[*Reporter's note*: The respondent appealed by notice of appeal dated the 24th August, 2010, but withdrew her appeal on the 12th January, 2012. The notice party appealed by notice of appeal dated the 17th August, 2010, but withdrew his appeal on the 20th August, 2014.]

Solicitor for the appellant: *The Chief State Solicitor.*

Solicitors for the respondent: *Mason, Hayes + Curran.*

Solicitors for the notice party: *Michael Campion & Co.*

Aoife McCarthy, Barrister