THE HIGH COURT

[2021] IEHC 353

[2020 No. 34 MCA]

IN THE MATTER OF ORDER 84C OF THE RULES OF THE SUPERIOR COURTS AND REGULATION 13 OF THE EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007-2018.

BETWEEN

RIGHT TO KNOW CLG ("RTK")

APPELLANT

– AND –

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

RESPONDENT

– AND –

RAIDIO TEILIFÍS ÉIREANN ("RTÉ")

NOTICE PARTY

JUDGMENT of Mr Justice Max Barrett delivered on 20th April, 2021.

A. Summary

1. Right to Know has been refused certain documents by RTÉ and is not taking 'no' for an answer. It contends that the Commissioner erred in the manner in which he decided the review of RTÉ's refusal of the documents. The court agrees.

B. Facts

2. The facts of the case are most clearly dealt with by way of summary chronology:

24.11.2018. RTK emails RTÉ requesting copies of any records held relating to (a) how RTÉ reports on climate change issues and (b) RTÉ's creation of policies/guidelines on climate change reporting. The request was made under the European Communities (Access to Information on the Environment) Regulations 2007 to 2018.

20.12.2018. RTÉ indicates that: there are no records relating to category (b); while it does possess documentation relating to category (a), this – apparently; the court has not seen the documentation – was in the form of public correspondence/feedback by way of email. RTÉ took the view that these emails could not be considered to be environmental information. It is not entirely clear what is contained in the substance of the emails. Mr Dowling, who swore an affidavit on 9th October last for RTÉ refers to them as "*records…in the form of email correspondence and feedback from members of the public" (para.9) and also as "constituting communications from members of the public in relation to RTÉ's coverage of environmental/climate change issues*" (para.14). Though comprised within email correspondence it is not clear precisely what the word "*feedback*" is intended to connote. However, it seems to be that the email correspondence refers to the quantity and quality of RTÉ's climate change broadcasting/reporting.

21.12.2018. RTK seeks an internal review of RTÉ's decision.

25.01.2019. The internal review proves unsuccessful from RTK's persepctive.

02.02.2019. RTK seeks a review of the unsuccessful review by the Commissioner.

06.12.2019. The Commissioner concludes that *"[T]he information concerned is not environmental information within the meaning of the definition in article 3(1)(e) of the AIE Regulations" (Decision, p.1) and hence that "RTÉ was not obliged to process the appellant's request for access to the information and that he had no further jurisdiction in relation to the matter*" (Decision, p.1).

C. Reliefs

3. The notice of motion seeks various reliefs. The principal remaining relief sought, apart from certain declaratory reliefs, is *"[a]n Order pursuant to Article 13 of the [Regulations]…and Order 84 RSC setting aside the decision of the Commissioner for Environmental Information made on 6th December 2019"*, as well as the standard application for costs.

D. Principles

4. The court gratefully adopts the below-quoted text, which appears in the written submissions of counsel for the respondent, as correctly stating various of the norms informing how the court should treat with a statutory appeal of the type here presenting:

"a. This is not a full de novo appeal. Rather it is limited to points of law.1

1 [See, e.g., *the summation of principle in* Electricity Supply Board v. Commissioner for Environmental Information *[2020] IEHC 190* at [*10]-[13*], Minister for Communications, Energy and Natural Resources v. The Information Commissioner *[2020] IESC 57* at [112]. See also Deely v. Information Commissioner [*2001*] *3 I.R. 439*, Killilea v. Information Commissioner *[2003] 2 I.R. 402*, Sheedy v. Information Commissioner [2005] 2 I.R. 272, Westwood Club v. Information Commissioner [*2014] IEHC 375*, and McKillen v. Information Commissioner [*2016] IEHC 27*; FP v. Information Commissioner *[2019] IECA 19* at *[26];* Coyle v. The Labour Court *[2020] IEHC 111*.]

b. Whereas findings of fact are largely for the [decisionmaker]…a finding of fact cannot survive where there is no evidence at all for a factual conclusion.2 The same standard, of course, does not apply to purely legal issues of statutory interpretation, but it does apply to conclusions of mixed law and fact insofar as the facts conclusions are impugned.3

2, 3 [Deely v. Information Commissioner [2001] 3 I.R. 439, Electricity Supply Board v. Commissioner for Environmental Information *[2020] IEHC 190 at [10]-[13];* Minister for Communications, Energy and Natural Resources v. The Information Commissioner [*2020] IESC 57 at [112]-[114]].*

c. An appeal cannot be successful simply because, as Peart J. said in FP v. Information Commissioner *[2019] IECA 19 at [74] "…the court hearing an appeal might itself have reached a different decision. There must be a clear error of law established."*

d. *A party cannot put new evidence before the High Court [that was] not before the Commissioner4 and cannot make arguments not made to the Commissioner. This does not preclude arguments that only arise from the Commissioner's decision on which a party could not be expected to have made submission.5*

4 [Minister for Education v. Information Commissioner [*2009] 1 I.R. 588, at 591-92 and* South West Area Health Board v. Information Commissioner *[2005] 2 I.R. 547, at 553 where (in the latter case) Smyth J. held: 'It would be wholly unsatisfactory that a decision on appeal should be made without the matter having first been raised before the Commissioner.' See also* The Governors of the Hospital for the Relief of Poor Lying-In Women v. Information Commissioner [2013] 1 I.R. 1 *at 29 per Fennelly J, 'I think it is an integral part of any appeal process, other than possibly an appeal by complete re-hearing, that any point of law advanced on appeal shall have been advanced, argued and determined at first instance.' This principle has been rigorously applied recently in* McKillen v. Information Commissioner *[2016] IEHC 27. Similarly, as Hyland J. held in* Jackson Way Properties v. Information Commissioner [*2020] IEHC 73 at para.48: "There are obvious reasons why a party cannot introduce an argument for the first time at the oral hearing."*

5 Minister for Communications, Energy and Natural Resources v. The Information Commissioner [*2020] IESC 57*]

e. *The well-known standard in* Orange v. The Director of Telecommunications Regulations & Anor *[2000] 4 I.R. 159 as applied in many cases such as* Nowak v. Data Protection Commissioner [*2016] 2 I.R. 585 is relevant. The appellant must show that as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. The notion that the error must be serious and significant is clearly important…[S]ignificance, in particular, requires to be gauged in the context of the decision as a whole.*

f. *In this case, the Regulations must be interpreted having regard to the Directive and Aarhus Convention.6*

6 [Minch v. Commissioner for Environmental Information [2017] IECA 223; NAMA v. Commissioner for Environmental Information [2015] 4 I.R. 626.]"

E. Directive

5. Of note when it comes to the present application are recitals (1), (2) and (10) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (O.J. L 41, 14.2.2003, p. 26) (the 'AIE Directive'). They state as follows:

"(1) Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.

(2) Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment initiated a process of change in the manner in which public authorities approach the issue of openness and transparency, establishing measures for the exercise of the right of public access to environmental information which should be developed and continued. This Directive expands the existing access granted under Directive 90/313/EEC….

(10) The definition of environmental information should be clarified so as to encompass information in any form on the state of the environment, on factors, measures or activities affecting or likely to affect the environment or designed to protect it, on cost-benefit and economic analyses used within the framework of such measures or activities and also information on the state of human health and safety, including the contamination of the food chain, conditions of human life, cultural sites and built structures in as much as they are, or may be, affected by any of those matters."

6. As regards recital (1), this case falls within that recital, both under the public access but also the information dissemination aspects of same. On the information dissemination point, the crux of what is at play in this regard is well caught in an email that was sent by RTK to the Commissioner's staff as part of the 'to-ing and fro-ing' by way of correspondence that was a feature of the review process:

> *"…Broadcasting, particularly by a public service broadcaster shapes public opinion by informing the public about the subject matter. The degree of awareness around climate change is almost certain to affect the way people adapt to and accept climate change issues. The Commissioner doesn't have to be satisfied that RTÉ's reporting of climate change issues and public knowledge and acceptance of climate change issues should be readily understood given the role of media in our society as a way for the public to receive information and to make informed decisions about how they live their lives. The final point to make is that access to this category of information is entirely in line with the objectives of the Aarhus Convention and the AIE Directive since RTÉ, as a public authority, has a role to play in disseminating environmental information to the fullest extent possible and this includes state-owned media organisations and their reporting on environmental issues including climate change."*

7. As regards recital (2), of note is the sentence which states that "*This Directive expands the existing access granted under Directive 90/313/EEC*." That is a point to be borne in mind when approaching case-law, for example of the European Court of Justice, which is concerned with Directive 90/313/EEC, i.e. Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (O.J. L 158, 23.6.1990, p.

56). That case-law is concerned with a regime that is more restrictive in terms of contemplated access than the regime established under the AIE Directive, i.e. Directive 2003/4. Also of note is the reference in recital (2) to the 1990 Directive as having "*initiated a process of change*". So what had been in play over the course of the lifetime of that directive and its more recent successor is an evolutionary process. As a consequence one must approach the current directive as being not just expansive but increasingly so.

8. As regards recital (10), when one reads the text of same it is difficult to conceive of how the Community legislature could have taken a more expansive approach to the scope of the concept of "*environmental information*".

F. "*Environmental Information*"

9. So far as relevant to this application, reg.3(1) of the Regulations defines "*environmental information"* as meaning:

> *"any information in written, visual, aural, electronic or any other material form on—*
>
> *(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements,*
>
> *(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment,*
>
> *(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements…"*

G. Regulation 3(1)(c)

i. 'Measure' or 'Activity'?

10. Regulation 3(1) of the Regulations defines "*environmental information*" as:

> *"any information in written, visual, aural, electronic or any other material form on…(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements…".*

11. A question that arises is whether/how broadcasting and reporting by a national public service broadcaster on climate change slot into the foregoing. The answer is that it can either be a 'measure' or an 'activity'. Being an 'activity' – and the broadcasting or reporting on climate change by a broadcaster as a matter of plain logic is an 'activity' – it does not need to be conditioned in any sense, for example as an administrative activity.

There is no qualification contained in reg.3(1)(c) in this regard. It refers to ", *and activities"* plain and simple. There is no mention or suggestion in reg.3(1)(c) that these must be 'administrative activities'.

12. Broadcasting and reporting on climate change is also a measure. It is not, nor does it need to be an 'administrative measure'. This is because reg.3(1)(c) refers to "*measures (including* [but not limited to*] administrative measures, such as*…". Hence there is no need for the measure to be an administrative measure. The examples given in the definition in reg.3(1)(c) are illustrative, i.e. they are neither stated nor intended to be an exhaustive list.

13. In the Commissioner's written submissions, he observes, amongst other matters, as follows:

> *"25. [Regulation] 3(1)(c) embraces a measure with the requisite environmental affect. RTK say the Commissioner wrongly said climate change reporting was not a measure and said that the term "measure" "had to be interpreted as a plan or a programme capable of having an environmental effect". No such conclusion was reached. Indeed the ratio of the Commissioner's decision is concerned with affect* ***on the assumption that a measure is, in fact, being considered****" (Emphasis added).*

14. The court does not see in the impugned decision that the Commissioner is proceeding on the assumption that a measure is being considered. Thus, if one goes to the impugned decision, the Commissioner states as follows (at p.10):

> *"The appellant also suggests [and the Commissioner is entirely correct that this is what the appellant suggested] that RTÉ's broadcasting or reporting may itself be a measure or activity within the meaning of [reg.] 3(1)(c) and that the emails may therefore qualify as 'information on' the measure or activity. However, in describing 'activities or measures' as those terms are used in the Aarhus Convention, the Aarhus Guide refers to 'decisions on specific activities, such as permits, licences, permissions that have or may have an effect on the environment'. It explains that the activities or measures do not need to be part of some category of decision-making labelled 'environmental'; rather, '[t]he test is whether the activities or measures may have an effect on the environment.' Broadcasting or reporting is not a plan, policy or programme with proposed actions that are likely to affect the environment…nor is it an activity akin to the submission of a statement of views by a public authority in planning permission proceedings".*

15. Read simply, the just-quoted text indicates that broadcasting or reporting is *not* viewed by the Commissioner as a 'measure or activity'. The court does not see how an alternative conclusion could be taken from this text. And lest there be any doubt in this regard, in the very next line, the Commissioner puts his views beyond doubt, observing that "*Rather*, *it* [broadcasting or reporting] *is a function carried out by RTÉ in the exercise of press freedom*…". And the next paragraph after that in which the last-quoted line appears

features the words "*In any event, as I have explained above, a mere connection or link to an environmental factor is not sufficient to bring information within the scope of the AIE regime…".*

16. There has been an attempt by the Commissioner to suggest that the words "*In any event*…" point to him as not having yet made up his mind on the measure/activity issue. However, this construction of the text just does not sit or fit with, say, the Commissioner's observation that *"Broadcasting or reporting is not a plan, policy or programme with proposed actions that are likely to affect the environment…nor is it an activity akin to the submission of a statement of views by a public authority in planning permission proceedings. Rather, it* [broadcasting or reporting*] is a function carried out by RTÉ in the exercise of press freedom*…"

17. This is perhaps a useful point at which to recall the Opinion and Judgment in *Mecklenburg v. Kreis Pinneberg* (*Case C-321/96*), a case concerned with the predecessor to the AIE Directive, where the information in question came from a countryside protection association and concerned the proposed construction of a road in Germany. There the late AG La Pergola in his Opinion ([ECLI:EU:C:1998:9]) observes, amongst other matters, as follows, at para.15:

> *"The term 'measure' employed by the Community legislature reflects the need to include within the acts governed by the Directive even the most diverse forms in which administrative activity is carried on. However, this does not mean that, as the defendant erroneously maintains, a 'measure' in the sense intended by the Community legislature corresponds solely to acts which may have an impact upon particular legal situations by regulating their effects. On close inspection, it can be seen that the Directive is not solely concerned with administrative measures in a technical sense, against which it is possible to bring a legal action or raise other forms of claim in accordance with the procedures prescribed by law. On the contrary, the 'measure' to which the Directive refers must here be given its true meaning, that is, the result of administrative action lacking in specified characteristics."*

18. In its judgment, the European Court of Justice adopted the same position, holding (see [ECLI:EU:C:1998:300]), amongst other matters, at paras. 19-20, that:

> *"19. It must be noted in the first place that Article 2(a) of the directive includes under 'information relating to the environment' any information on the state of the various aspects of the environment mentioned therein as well as on activities or measures which may adversely affect or protect those aspects, 'including administrative measures and environmental management programmes'. The wording of the provision makes it clear that the Community legislature intended to make that concept a broad one, embracing both information and activities relating to the state of those aspects.*

20. Secondly, the use in Article 2(a) of the directive of the term 'including' indicates that 'administrative measures' is merely an example of the 'activities' or 'measures' covered by the directive. As the Advocate General pointed out in paragraph 15 of his Opinion, the Community legislature purposely avoided giving any definition of 'information relating to the environment' which could lead to the exclusion of any of the activities engaged in by the public authorities, the term 'measures' serving merely to make it clear that the acts governed by the directive included all forms of administrative activity."

19. In truth, the European Court of Justice could not have taken a more expansive view of what comprises an administrative measure for the purposes of the 1990 directive. The judgment of the Court did not have to speak to what is meant by "*activities*" and, interestingly – one would have thought the point would have come up in some member state at some stage – counsel for RTK have been unable to find a case at the European level or otherwise in which the purport of the term "*activities*" has been considered. However, it is more than reasonable to assume that a similarly expansive approach would be taken by the European Court of Justice to the interpretation of what constitutes a 'measure' as that which the European Court has previously taken as regards what constitutes an 'activity' – and it is nigh on impossible to envision that the European Court of Justice would conclude that broadcasting/reporting done by a state broadcaster in a European Union member state would not constitute an activity. Even if one goes back to basics and considers the meaning of the noun "activity", as defined in the *Oxford English Dictionary Online*, it defines "*activity*", with just a *soupçon* of tautology, to mean "*1.a. The state of being actively occupied".* How could the act of broadcasting/reporting not be construed as placing a state broadcasting entity in a "*state of being actively occupied*"?

20. Assuming the court is right so far in reasoning as it has, why is the Commissioner's decision wrong in law in the context under consideration? The Commissioner erred in law in treating what is mentioned in reg.3(1)(c) as but illustrative examples when in fact he needed to look at the 'full picture' and take into account the issues that fell properly to be considered. The Commissioner also fell into error in concluding, and he did conclude, that broadcasting or reporting is *not* a 'measure or activity'. The Commissioner's decision is predicated on the notion that if the information is not within the Aarhus Guide, the decision of the Court of Appeal in *Minch v. Commissioner for Environmental Information* [2017] IECA 223 (considered below) or the judgment of the European Court of Justice in *Mecklenburg*, then one is outside the scope of reg.3(1)(c). The Commissioner did not say, for example 'This is what I know from Aarhus, *Minch* and *Mecklenburg'* and then go back to reg.3(1)(c) and consider how he should approach matters when presented with a situation (the situation here presenting) that is not caught by the Aarhus Guide, *Minch* or *Mecklenburg*. Instead the Commissioner resorted to an irrelevant consideration, namely a reference to journalistic freedom (an aspect of his decision considered in fuller detail below). In passing, as to reliance on the Aarhus Guide, it is important to remember that it is but a Guide, it is not legally binding and it is not determinative. So just because a measure/activity does not come within what the Guide mentions does not inexorably mean that it is without what reg.3(1)(c) contemplates. Likewise, when it comes to *Minch*

and *Mecklenburg*, to decide that what is under consideration does not come within reg.3(1)(c) because a measure/activity is not within the scope of the Guide or *Minch* or *Mecklenburg* is too restrictive.

21. It is useful at this point briefly to consider the decision of the Court of Appeal in *Minch*. That was an appeal against a High Court decision that had set aside a decision of the Commissioner insofar as he had refused to direct the disclosure of a report prepared by a Government minister on potential state intervention in the roll-out of next-generation broadband. The judgment of the Court of Appeal in that case looks at the report there sought in the context of it being a policy, plan or programme for the purposes of reg.3(1)(c). Notably, the Court of Appeal did not look at what could constitute a measure beyond a policy, plan or programme. The key issue for the Court was whether or not what was sought had "*graduated from simply being an academic thought experiment into something more definite such as a plan, policy or programme – however tentative, aspirational or conditional such a plan or policy might be – which, either intermediately or mediately, is likely to affect the environment"* (*Minch*, para.39). When it comes to the case at hand, it is undoubtedly the case, and it is not denied, that RTÉ does broadcast on the occurrence/effect of climate change in various contexts – unsurprisingly so, given that climate change is an existential issue for humanity – so one is certainly not in the realm, when it comes to such broadcasts, of "*an academic thought experiment*". In fact, one is far beyond that stage. There are continuing occasional "*temporal manifestations*", to borrow the phrase used by counsel for RTK in his oral submissions, in the form of reports on RTÉ television and radio that are tangible by sight and/or sound and which relate directly or indirectly to climate change. Additionally, on a separate note, when it comes to the case now before this Court, the court notes that RTK has never said that the sole live category of documentation now sought is a plan, policy, or programme. So when it comes to reliance on *Minch*, the Commissioner, to borrow from the language of metaphor, is using a Court of Appeal excursus on 'apples' to determine his treatment of RTK's 'oranges'. Yes, to continue with this imagery, both are fruit and so there are some learnings from what the Court of Appeal had to say. However, there is also a clear point of difference between apples and oranges and it is in his failure to recognise and act upon this difference that the Commissioner has, with respect, got himself into difficulty.

22. In their arguments at hearing, both the Commissioner and RTÉ contended that there was no *ab initio* ruling by the Commissioner that what was in issue between RTK and RTÉ involved either a measure or an activity for the purposes of reg.3(1)(c). However, it seems to the court that this is to misunderstand what has been contended by RTK. RTK has not contended that the Commissioner got matters wrong when he turned to the Aarhus Guide and to *Minch* and to *Mecklenburg*. Rather what RTK contends and has rightly/successfully contended is that there was no engagement by the Commissioner with the issue of what a 'measure' or 'activity' is beyond the scope of the Guide and that case-law (and that is to leave aside for the moment the Commissioner's considerations/ratio as to press freedom which is a separate and additional flaw in the Commissioner's approach to matters). That is the complaint made, i.e. that reg.3(1)(c) is illustrative (it contains examples and states itself to contain but examples) and has no

qualification as to what is or is not an activity. Indeed, the point might be made that prior to the European Court of Justice giving its decision in *Mecklenburg* and before the Court of Appeal gave its judgment in *Minch*, there was no such case-law: would that have meant that the Commissioner could properly have stated, 'There is no authority in this area. Hence I am not obliged to consider whether the material falls within reg.3(1)(c)'? No it would not. It is perfectly open to the Commissioner to conclude that what is before him in any one case does not come within what is countenanced by the Aarhus Guide, *Minch* and *Mecklenburg*; however, even having reached that conclusion he must ask himself the question 'Is what is before me a measure or activity captured by reg.3(1)(c) over and beyond what is said in that Guide and case-law?' This the Commissioner should have done and, regrettably, did not do – and again that is to leave aside for the moment the considerations (*ratio*) as to press freedom which offers a separate and additional flaw presenting in the Commissioner's approach to matters, and to which the court next turns.

ii. Press Freedom/Journalistic Privilege

23. When it comes to the issue of press freedom/journalistic privilege, the parties will recall the following observations of the Commissioner at pp.10-11 of the impugned decision:

> *"Broadcasting or reporting is not a plan, policy or programme with proposed actions that are likely to affect the environment, as in Minch, nor is it an activity akin to the submission of a statement of views by a public authority in planning permission proceedings, as in Mecklenburg.* ***Rather****, it is a function carried out by RTÉ in the exercise of press freedom, which is regarded as an important right guaranteed under the Irish Constitution and the European Convention on Human Rights….The 'freedom and pluralism of the media' is also expressly protected under Article 11 of the Charter of Fundamental Rights of the European Union. I recognise, of course, that the press plays a crucial role in informing the public matters of public interest such as climate change. Indeed, it is through its broadcasts and reports on climate change issue that RTÉ disseminates environmental information and raises awareness of such issues. However, the central role played by the press in relation to the free flow of information is the reason why the courts have generally accorded very strong protection to journalistic material….Thus, I consider it very doubtful that the international, European or national legislature intended for information on a State broadcaster's journalistic functions to be captured by the environmental information definition." [Emphasis added].*

24. It goes without saying that no right-minded person could or would deny the critical importance of a free press in and to a free society. One cannot have a free society without a free press.

25. By way of initial substantive observation on the above-quoted text, the court notes the use of the formulation "*Rather*…". This it seems to the court is a crucial formulation in the Commissioner's quoted observations. For what the Commissioner is stating in effect is 'This is neither a measure nor an activity but rather it is a function carried out by RTÉ in the exercise of press freedom…'. The normal use of the word '*rather'* is that if an author

posits a proposition and then follows that proposition with text that begins 'rather…', that indicates that the author has now stated that proposition and is moving on to say something else.

26. What the Commissioner does in the above-quoted text is to introduce a form of public interest test in relation to press freedom/journalistic privilege. There is no provision for any such test in relation to reg.3(1)(c). It is beyond the scope of reg.3 to introduce what, to use judicial review terminology (albeit that this is a statutory appeal) is an irrelevant consideration, an *ultra vires* action, and something that is not expressly countenanced by the Regulations either expressly or impliedly. The independence and interests of RTÉ, as touched upon by the Commissioner, have nothing to do with the undertaking by Commissioner of his review role. And while, under reg.3(2), there can be an exclusion in respect of certain '*public authorities'* from the scope of the definition of "public authority", no such exclusion arises in respect of a broadcaster required to be independent pursuant to statute. That is not to dispute the requirement on RTÉ to be independent or the importance of that requirement; however, that requirement has no import as regards the process that was required to be carried out by the Commissioner.

27. An issue arising in respect of the above-quoted text is whether it was relied upon in the decision, i.e. was it a part of what, if the Commissioner's decision were a judgment, would be the *ratio decidendi* of same? Any fair-minded reading of the decision could only arrive at the conclusion that the Commissioner accords the press freedom/journalistic privilege issue significant importance in his decision. And it was not something that arose 'out of the blue'. The Commissioner was invited by RTÉ to consider and decide this issue as he did. In his pre-decision dealings with the parties he accorded the issue such importance that he wrote to RTK and invited comment on the point being raised by RTÉ. Hence the Commissioner cannot convincingly contend, as he has sought to contend, that RTK has misunderstood what the Commissioner was about in this part of his decision. So, for example, at para.25 of his written submissions, the Commissioner contends as follows:

> "[Regulation] 3(1)(c*) embraces a measure with the requisite environmental affect*. RTK *say* [that] *the Commissioner wrongly said [that] climate change reporting was not a measure and said that the term 'measure' 'had to be interpreted as a plan or a programme capable of having an environmental effect'. No such conclusion was reached. Indeed, the ration of the Commissioner's decision is concerned with effect on the assumption that a measure is, in fact being considered:-*
>
> > 'In any event *as I have explained above, a mere connection or link to an environmental factor is not sufficient to bring information within the scope of the AIE regime. In this case, I consider that the environmental effects from the reporting on climate change issues are too indirect and too uncertain for the reporting to qualify as a measure or activity for the purposes of article 3(1)(c) of the AIE Regulations". [Emphasis added]*

28. As touched upon previously above, emphasis has been placed by the Commissioner on the emphasised phrase "*In any event*…" (it appears at p.11 of the impugned decision) as pointing to a distancing from the Commissioner's previous observations that, for example, *"Broadcasting or reporting is not a plan, policy or programme with proposed actions that are likely to affect the environment….Rather, it is a function carried out by RTÉ in the exercise of press freedom, which is regarded as an important right…".* However, the short but respectful answer to that proposition is that the phrase "*In any event*…" is just not so deployed and cannot fairly be read as having been so deployed. The Commissioner said what he said in the last-quoted sentences and also in the paragraph in which they appear, he said it clearly, he meant what he said, and there is just no getting around what he said.

29. Counsel for RTÉ suggested in effect that everything stated in the two paragraphs before the words "*In any event*…" is by way of commentary that the court ought to disregard. However, that, with respect, is a surprising submission to be made by a notice party. It is simply an approach that that notice party takes and would have the court take, i.e. it is an approach that is not urged on the court by the actual author of the impugned decision. RTK, which is also not the author of the decision, takes a different approach. It has contended, more convincingly and ultimately successfully, that the said preceding paragraphs clearly form part of the *ratio*, the Commissioner offering considered reasoning as to why there is no 'measure' or 'activity' at play. That in itself is a serious and significant error of law sufficient in and of itself and by itself to vitiate the decision of the Commissioner: he began from the wrong premise.

30. Another problem with the impugned decision is that the phraseology used by the Commissioner when dealing with the press freedom/journalistic privilege point tallies with the terminology that appears in recital 1 of the AIE Directive, which, it will be recalled, states that "[i]*ncreased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment*." This recital mirrors what the Commissioner has to say at pp.10-11 of the impugned decision, where he states that "*I recognise, of course, that the press plays a crucial role in informing the public on matters of public interest such as climate change. Indeed, it is through its broadcasts and reports on climate change issues that RTÉ disseminates environmental information and raises awareness of such issues.*" Given this mirroring of recital (1), it is hard to understand how any finding could be made that broadcasting/reporting on climate change is not a 'measure' or 'activity' within the meaning of reg.3(1)(c) when the Commissioner himself clearly says that the press plays a crucial role, disseminates environmental information, and raises awareness of environmental issues. How could the Commissioner be of the view that the press plays a crucial role in informing the public on matters of public interest such as climate change, disseminates environmental information and raises awareness of environmental issues, yet simultaneously hold the view that because of, amongst other matters, press freedom, such broadcasting and reporting falls outside reg.3(1)(c)?

31. It is only fair to note that, at para.43 of the Commissioner's written submissions, which deal fairly tersely with the press freedom/journalistic privilege issue, the Commissioner states that "*Whereas the Commissioner referred to the general protection given to journalist freedom, the Commissioner has not 'read into' the Regulations a 'public interest' test.* This again is not a fair reading of a Decision of the Commissioner which clearly sets out and applies the correct legal tests." Counsel for RTK described this as a "Move along now"-type submission, by which the court understands him to mean (and, with respect, he is right in this) that the Commissioner is essentially contending in this regard 'Don't look at what I wrote here, look at what I wrote there'. In this regard, the Commissioner, with respect, neither engages with the point made by RTK in this regard, nor does he satisfactorily answer the point. Dealing (and dealing correctly) with the *Minch* and *Mecklenburg* decisions does not get to, never mind over, the contention made by RTK that reg.3(1)(c) is much broader in scope than a reading of the Aarhus Guide or *Minch* or *Mecklenburg* would lead one to conclude. Moreover, for the reasons touched upon above, the reference to press freedom/journalistic privilege is not a relevant point that should have been taken into account by the Commissioner in reaching his decision – and it clearly formed a crucial part of the Commissioner's resolution of the matter the subject of the impugned decision.

iii. "[A]*ffecting or likely to affect"*

32. It will be recalled by the parties that the Commissioner decides that "*Broadcasting or reporting is not a plan, policy or programme with proposed actions that are likely to affect the environment, as in* Minch…". So, broadcasting or reporting is first of all ruled out on the basis that they are not "*a plan, policy or programme with proposed actions that are likely to affect the environment".* The reference to *Minch* in this regard is correct so far as it goes, except that in the present case one is talking about the dissemination of information through the broadcasting/reporting of climate change issues and it follows, *ipso facto*, that this must be capable of having an environmental impact and capable of being likely to affect the environment. How could it be otherwise when the Commissioner himself points to the importance of the state broadcaster in this regard, stating (at pp.10-11) that "*RTÉ disseminates environmental information and raises awareness of such* [environmental] *issues*"?

33. The net effect of the foregoing is that the Commissioner reaches an inconsistent finding in this regard. On the one hand he points to the press/RTÉ playing a crucial role, yet on the other hand the dissemination of information and raising of awareness is not likely to affect the environment.

34. The Commissioner has pointed in this regard to the decision of the European Court of Justice in *Glawischnig (Case C-316/01)* [ECLI:EU:C:2002:728], a case that was concerned with access to information on control measures in the Austrian food industry. Factually, that case is entirely different from this case. Context-wise it is also entirely different, being concerned with control measures in a food industry. It is hard to equate that with broadcasting/reporting on climate change issues by the state broadcaster in

Ireland. Counsel for RTK pointed in this regard to the questions raised for the European Court of Justice in *Glawischnig* (see para. 13 of that judgment) to show just how far apart is the factual/legal/administrative context of each of the two cases (that one and this one). However, even if one looks to the substantive part of the judgment, specifically paras. 24-25 and 27, they provide as follows:

> *"24 The Community legislature's intention was to make the concept of 'information relating to the environment' defined in Article 2(a) of Directive 90/313 a broad one, and it avoided giving that concept a definition which could have had the effect of excluding from the scope of that directive any of the activities engaged in by the public authorities (see Mecklenburg, paragraphs 19 and 20).*
>
> *25 Directive 90/313 is not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision….*
>
> *27 As to the second category, information on measures of control does not generally fall within that category, even if those controls concern activities or measures which for their part affect or are likely to affect one or more of the environmental factors."*

35. There is, with respect, just nothing in this that assists the Commissioner with regard to the phrase "*affecting or likely to affect*".

36. The Commissioner made some play in his written submissions of the German language version of the decision of the European Court of Justice in *Glawischnig*. However, this point was essentially abandoned by the Commissioner as recent (surprising) Supreme Court authority meant it could no longer be made.

37. The Commissioner also suggests, as follows, at paras. 35-36 of his written submissions:

> *"35. RTK argued that the Commissioner erred in concluding that climate change reporting did not affect or was not likely to effect the environmental factors in Article 3(1)(a)-(b).* In Redmond*, Collins J stated that:-*
>
> > "[I]t appears to me that, for the purposes of paragraph (c), a measure or activity is "likely to affect" the environment if there is a real and substantial possibility that it will affect the environment, whether directly or indirectly. Something more than a remote or theoretical possibility is required (because that would sweep too widely and could result in the 'general and unlimited right of access' that *Glawischnig* indicates the AIE directive was not intended to provide) but it is not necessary to establish the probability have a relevant environmental impact bracket (because that would, in my opinion, sweep too narrowly and risk undermining the fundamental objectives on the AIE Directive).

36. There is no reasonable point to be made that the Commissioner erred in applying the legal test here. Indeed, the determination is all about the facts – i.e. that on the facts, the Commissioner determined that climate change reporting itself cannot have the required effect on the environmental factors in Article 3(1)(a) and (b)."

38. A decision on the scope *ratione materiae* of legislation is a legal test and not a finding of fact. If the opposite were true, and it is not, there would be a swathe of cases decided by the Commissioner that could never be appealed to the High Court. Moreover, if one looks, for example, to the decision in *Mecklenburg*, the proposition advanced by the Commissioner in this regard, if accepted (and it respectfully is not accepted) would mean that in Mecklenburg the European Court of Justice would have had no role in referring at para.27 of its judgment to whether or not control measures would affect or be likely to affect the environment. The Commissioner's proposition, if accepted, would also stymie appeals and the quality of appeals because there is a clear right to an effective remedy in Art.6 of the AIE Directive, which provides, under the heading, "*Access to Justice*", that:

"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.

[This provision covers the two-stage process within RTÉ and also the Commissioner stage of the process].

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.

[This adds an additional layer of effective remedy. The argument now made by the Commissioner would in effect thwart the review procedure in Art.6(2), claiming that in effect it 'stops with him' as regards determining questions of eligibility, access, ambit, etc.].

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."

39. In passing, the court notes that the regulations provide for an appeal on a point of law only and while this is an issue to be decided on some future occasion it may be that there is a deviation between Art.6 of the Directive – which seeks to provide the greatest entitlement to appeal to persons dissatisfied following a request for environmental information – and the provision in reg.13(1) of the Regulations that "*A party to an appeal under article 12 or any other person affected by the decision of the Commissioner may appeal to the High Court on a point of law from the decision*". One will search in vain for a reference to a 'point of law' process in Article 6.

iv. Capability

40. At paras.39-40 of his judgment in *Minch*, Hogan J. observes as follows:

> *"39. It is, however, perhaps significant that Article 3(1)(c) of the 2007 Regulations refers to 'plans' or 'policies' 'affecting or likely to affect the environment...' The wording here suggests that the document in question must have graduated from simply being an academic thought experiment into something more definite such as a plan, policy or programme – however tentative, aspirational or conditional such a plan or policy might be – which, either intermediately or mediately, is likely to affect the environment.*
>
> *40. This does not mean, however, that the Commissioner is required to make a judgment as to whether the plan or policy is ever likely to be put into effect and in that sense is or is not likely to affect the environment. If, for example, the Minister had prepared a plan to build four new motorways, it would matter not that by the time the matter came to the Commissioner the economy had weakened and the funding for this project was no longer to hand. The Commissioner would not be entitled in those circumstances to conclude, for example, that these plans were not likely to affect the environment because the roads in question were now unlikely to be constructed. In that sense, as the French text of Article 3(1)(c) of the 2003 Directive makes clear,* ***the reference to 'likely to affect' the environment should really be understood in the sense of being 'capable' of affecting the environment*** *('...les mesures ....et les activités ayant ou susceptibles d'avoir des incidences sur les éléments et les facteurs visés aux points a) et b), ainsi que les mesures ou activités destinées à protéger ces éléments...'.)" [Emphasis added].*

41. In his judgment in *Redmond v. Commissioner for Environmental Information* [2020] IECA 83, Collins J., at para. 63, observes as follows:

> *"63. …[I]t appears to me that, for the purposes of paragraph (c), a measure or activity is 'likely to affect' the environment if there is a* real and substantial possibility *that it will affect the environment, whether directly or indirectly. Something more than a remote or theoretical possibility is required (because that would sweep too widely and could result in the "general and unlimited right of access" that* Glawischnig *indicates the AIE Directive was not intended to provide) but it is not necessary to establish the probability of a relevant environmental impact (because that would,*

in my opinion, sweep too narrowly and risk undermining the fundamental objectives of the AIE Directive)" [Emphasis added].

42. Notable in Collin J.'s helpful analysis is the reference to "possibility", as opposed to 'probability'. Of note too in this regard are the following submissions from the written submissions of counsel for RTK:

*"40. In Redmond, having conducted a review of the authorities, Mr Justice Collins concluded his analysis by summarising the position as follows [*the text of para.63, quoted above, then follows*]….*

41. The test is therefore whether the measure is capable of affecting environmental elements or factors. The Commissioner concluded that broadcasting by the State broadcaster on the issue of climate change was essentially incapable of having such an effect. The Commissioner held:

> 'In this case I consider that the environmental effects from the reporting on climate change issues are too indirect and too uncertain for the reporting to qualify as a measure or activity for the purposes of article 3(1)(c) of the AIE Regulations. In my view, the connection between RTÉ's reporting on climate change issues and any effect on factors relevant to climate change such as emissions and the elements of the environment is at best minimal or remote, if not purely hypothetical.'

42. As a matter of…common sense this is clearly incorrect and is, in any event, contradicted by the Commissioner's own findings. Immediately prior to this conclusion the Commissioner had held:

> 'I recognise of course, that the press plays a crucial role in informing the public on matters of public interest such as climate change. Indeed, it is through its broadcasts and reports on climate change issues that RTÉ disseminates environmental information and raises awareness of such issues.'

43. If the broadcasting disseminates information and raises awareness ipso facto it must be capable of having an effect on the environment. Indeed, the Commissioner accepted that it had such an effect – if nothing else the broadcasting 'raises awareness'. In light of that finding, the Commissioner was precluded from reaching a conclusion that the broadcasting did not engage the terms of the Regulations, when assessed against the test identified in Minch and Redmond.

44. In light of the Commissioner's own conclusion, it is perhaps unnecessary to go further."

43. It is as a matter of law unnecessary to go further because it is entirely inconsistent to say that, on the one hand, broadcasting disseminates information and raises awareness, yet to say, on the other hand, that it cannot be capable of having an environmental impact.

44. In passing, when it comes to the issue of whether broadcasting on climate change is a measure or activity that may have an effect on the environment, the court notes the following averments in the affidavit sworn by Mr Foxe for RTK on 4th February 2020:

> *"13. I say that the Respondent has simply dismissed the link between climate change reporting by the Notice Party and likely environmental effects brought about by the influence this reporting has on public opinion and individual behaviour. The Respondent appears not to have conducted any investigation into whether this was true or not. However, this link…was specifically drawn to the Respondent's attention and it is well understood….*
>
> *27 ….[I]t is further the Appellant's case that had the Respondent asked itself the correct question it could only have concluded that broadcasting on climate change by the national broadcaster is clearly and obviously a measure or activity that may have an effect on the environment. Although a matter to be developed in written submissions, for the sake of argument, if RTÉ devoted insufficient resources or broadcast erroneous information on climate change, that could clearly affect the environment by discouraging people from taking steps to reduce their emissions. Because of RTÉ's authoritative position, it could lead to further dissemination of that erroneous information. It could influence people to vote or not to vote for a particular political party based on that flawed or incomplete understanding of the immediacy of the climate change crises. Or, in the alternative it is the Appellant's case that accurate reporting on the gravity and immediacy of the climate change issue is clearly capable of encouraging people to take immediate personal, political or social action (as pointed out by the EPA) to reduce the pace of climate change. On either approach, I say that it is the Appellant's case, that broadcasting and reporting on the question of climate change is capable of having an effect on the environment. It is now well known that various media can be and actually are being manipulated using so-called 'false news' to strongly influence public opinion and behaviour including in relation to climate change. In this context it is impossible to understand how the Respondent can conclude that information on RTÉ's reporting of climate change issues is not environmental information."*

45. An oddity, and a fatal deficiency, in the impugned decision, and a point not addressed by the Commissioner or by RTÉ, is that the Commissioner fails to engage with the case made in this regard by RTK which, in essence, is that there is a link between climate change reporting and its likely environmental effects, the effect being the remarkable ability of the national public service broadcaster to influence public opinion and hence individual behaviour. The Commissioner states merely that "*I consider that the environmental effects from…reporting on climate change issues are too indirect and too uncertain for the reporting to qualify as a measure or activity for the purposes of article 3(1)(c) of the AIE Regulations"* (Decision, p.11). In this, the Commissioner does not actually engage with the submission that has been made by RTK, *viz*. that human behaviour can change as a result of climate change broadcasting/reporting by a national public service broadcaster. In truth, the Commissioner, most regrettably, misses the point entirely. The effect of the

foregoing is that one can spend hours on the niceties and nuances of *Glawischnig, Henney, Redmond, etc*., teasing out, for example, the meanings of 'capable' and the French word '*susceptible'*, but in doing that one is dancing around the proverbial 'elephant in the room' that presents in this regard, viz. that the Commissioner flatly and simply fails in the impugned decision to engage with the actual case made by RTK as to the fact that human behaviour can change as a result of climate change broadcasting/reporting by a national public service broadcaster.

46. Some reliance was placed by counsel for RTÉ on the statutory obligation on RTÉ, under s.98 of the Broadcasting Act 2009, to be "*independent in the pursuance of its objects*". Two points might be made in this regard. First, and the court understands counsel for RTÉ to agree with this, the independence of RTÉ is not a matter on which the Commissioner bases the operative part of the impugned decision. Hence it is not a matter which needs to detain the court. Second, the point seems to be introduced (erroneously) to go to what it is that constitutes a "*public authority*" for the purposes of the Regulations. What constitutes a "*public authority*" for the purposes of the Regulations is the subject of separate definition in reg.3(1) of the Regulations and no reading of the submissions made by RTÉ to the Commissioner can be construed to have sought to suggest that RTÉ is excluded ab initio from the scope of the Regulations on the ground that it is not a "*public authorit*y" within the meaning of reg.3(1). RTÉ's case rests on the definition of "*environmental information*" in reg.3(1). (Notwithstanding the foregoing, the court cannot help but note in passing that transparency and independence are not in any event mutually exclusionary terms; indeed transparency could reasonably be contended to buttress and/or better ensure independence).

47. Finally, the decision as to reg.3(1)(c) falls into error by applying the environmental impact test to the emails themselves, as opposed to the measure/activity referred to in reg.3(1)(c). This is what was described at hearing as the '*Redmond point'*. In his decision, the Commissioner observes, amongst other matters, that *"In my view, the connection between RTÉ's reporting on climate change issues and any effect on factors relevant to climate change such as emissions and the elements of the environment is at best minimal or remote, if not purely hypothetical. The connection between the emails themselves and any environmental impact is even more tenuous*." The foregoing addresses a question that did not arise to be addressed by the Commissioner in the context of his considerations. Regulation 3 does not require, and in fact since *Redmond* has been stated to preclude, a consideration of this environmental impact test in the context of the information that is sought. This is a matter looked at in the context of the measure/activity but not in the context of (here) the emails. Returning to Redmond, in his judgment in that case Collins J. observes as follows at paras. 57-59:

> *"57. The essential question, therefore, is not whether the sale of the Coillte Lands was or was capable of being a 'measure' but rather whether it was a 'measure affecting or likely to affect' the environment. If it was, then 'any information...on' the sale is prima facie required to be provided under the Regulations. That is how this part of the definition of 'environmental information' operates. In my opinion, it is not*

correct to look at the information sought to see whether, in itself, it is information that can be described as 'affecting or likely to affect' the elements and factors set out in Article 3(1), paragraphs (a) and/or (b). It is the 'measure', not the information 'on' that measure, that is subject to that threshold test.

58. In this context, I agree with the view of Beatson LJ in Department for Business, Energy and Industrial Strategy v. Information Commissioner [2017] EWCA (Civ) 844 that the definition in Article 2.1(c) (Regulation 2(1)(c) of the UK Regulations) 'does not mean that the information itself must be intrinsically environmental' (at para 45).

59. Again, this was not in controversy before this Court. However, it does appear that the High Court Judge may have taken the view that it was a requirement that the information sought by Mr Redmond be shown, in itself, to be information 'affecting or likely to affect' the environment: see paragraph 53 of the judgment. To the extent that she did, she was, in my respectful opinion, in error. Equally, insofar as the Commissioner adopted the same approach in his decision (as to which see the final paragraph of his discussion of question 1), he was also mistaken in my view."

48. The Commissioner is faced now with an insurmountable difficulty when it comes to the just-quoted observations of Collins J. It is impossible to see that the Commissioner's consideration in his decision of "[t]*he connection between the emails themselves and any environmental impact*" can be lawful, following on the just-quoted observations of Collins J.

49. How has the Commissioner treated with the just-considered issue? In a second 'Move along now' argument (at para. 34 of his written submissions) he contends that the court should essentially disregard the Commissioner's consideration in his decision of "[t]*he connection between the emails themselves and any environmental impact*" (on the basis that it does not upset the analysis which comes before it, that previous analysis being a part of the '*ratio'* of the Commissioner's decision). With respect, it is not open to the Commissioner to write a decision and then come into court and say in effect (and this is what the Commissioner is saying in effect) 'I am not very happy with aspects of this decision. Due to unfolding case-law in the area, I am not happy with the ratio. You should look to another part of my decision as the *ratio'*. It is clear that the Commissioner was minded to consider "[t]*he connection between the emails themselves and any environmental impact*", did consider that connection, and reached the conclusion that he reached concerning that connection. That whole exercise was wrong and that it was done as it was done (and the conclusion reached that was reached) is, with all respect, patently and insurmountably flawed when one has regard to the judgment of Collins J. in *Redmond*. What took place, regrettably, involved an *ultra vires* consideration, an error of law, and the consideration of an irrelevant consideration.

H. Regulation 3(1)(b)

50. In the impugned decision (at p.10) the Commissioner observes as follows:

"…I find no basis for concluding that the emails at issue in this case qualify as environmental information for the purposes of the AIE Regulations. The emails are not about climate change or any other environmental papers per se; they are about the quality and quantity of RTÉ's reporting on climate change issues. The contents of the emails do not contain or provide information on or about the state of the elements of the environment such as on the quality or quantity of air or atmosphere or the interaction between the elements. Neither are the contents of the emails on or about the factors such as climate change or greenhouse gases or other emissions or releases into the environment which are affecting or likely to affect the state of the elements of the environment or the interaction between them. Accordingly, I do not agree with the appellant's suggestion that the information requested is environmental information within the meaning of article 3(1)(b) of the AIE Regulations."

51. The Commissioner unfortunately falls into error in the above when one has regard to the judgment of Collins J. in *Redmond v. Commissioner for Environmental Information* [2020] IECA 83, paras.57-59 (quoted previously above). How does Redmond-type error arise when it comes to the Commissioner's reasoning concerning reg.3(1)(b)? It arises in the following way. The Commissioner approaches the emails as being the critical issue in the context of reg.3(1)(b). What was required here in the first instance was a consideration of the term "*factors*" in reg.3(1)(b). This is because reg.3(1) defines *"environmental information"* as "*any information…on…(b) factors, such as…*". (RTÉ accepts that limb (b) would extend to climate change). The Commissioner erred, however, by looking at the contents of the emails when approaching his decision-making in this regard. So, for example, the Commissioner states that "*The contents of the emails do not contain or provide information on or about the state of the elements of the environment such as…", and also "Neither are the contents of the emails on or about the factors such as climate change…".* To discharge his responsibilities correctly, the Commissioner ought first of all to have looked at the issue of 'What is the factor here?' The factor is climate change. And the issue of focus is broadcasting/reporting in relation to this factor. So it is the factor (climate change) and the broadcasting/reporting in relation to same in which the Commissioner should have brought his focus when it came to assessing the issue of *"affecting or likely to affect*" the state of the factor. But that is not what happened. Instead, the Commissioner focused in, at the beginning, on the issue of environmental impact from the perspective of the emails themselves, as opposed to environmental impact as regards the factor.

52. As mentioned above, reg.3(1) defines "*environmental information*" as "*any information…on…(b) factors, such as…*" [Emphasis added]. The preposition "on" in this context means 'about' or 'relates to' or 'concerns' the measure in question and the approach taken by the Commissioner in this regard is too restrictive. Just to take this point a little further, it is worth looking to *Department for Business, Energy and Industrial Strategy v. Information Commissioner* [2017] EWCA (Civ) 844, a decision of the Court of Appeal of England and Wales. There, the applicant made an FOI request to the Department seeking information concerning a project assessment review of the

communications and data component of the Government's smart meter programme. The Department provided the applicant with a heavily redacted copy of the report which was the culmination of the review. The applicant complained to the Information Commissioner, contending that his request should have been dealt with under the United Kingdom's Environmental Information Regulations 2004 since it was environmental information within reg.2(1) of the 2004 Regulations, which, by reg.2(1)(c), included *"any information…on…measures…affecting or likely to affect*" the state of the elements of the environment or factors affecting those elements. The Upper Tribunal indicated that when determining whether information was on a relevant measure for the purposes of reg.2(1)(c) it was permissible to look beyond the precise issue with which the information was concerned and have regard to the bigger picture. On the 'on' question, Lord Justice Beatson observed, amongst other matters, as follows, in terms that are respectfully adopted by this Court, *mutatis mutandis*, in the context of the present application:

> "37 ….*It is…first necessary to identify the relevant measure*. [Court Note: It is the same under reg.3(1)(b). It is first necessary to identify the relevant factor]. *Information is 'on' a measure if it is about, relates to or concerns the measure in question* [Court Note: In this case, one does not get a like approach by the Commissioner. He does not look first to see what is the relevant factor and then proceed to consider information 'on' the factor, having regard to the wide meaning of 'on' in this context.]….
>
> *47 In my judgment, the way the line will be drawn [i.e. in determining whether one is dealing with 'information on…'] is by reference to the general principle that the Regulations, the Directive, and the Aarhus Convention are to be construed purposively. Determining on which side of the line information falls will be fact and context-specific. But it is possible to provide some general guidance as to the circumstances in which information relating to a project will not be information on [emphasis added] the project for the purposes of section 2(1)(c) because it is not consistent with or does not advance the purpose of those instruments.*
>
> *48 My starting point is the recitals to the Aarhus Convention and the Directive, in particular those set out at para 15 above. They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as on [emphasis added] a given measure.*

53. In the present case, it will be recalled, RTK was looking for information on RTÉ's broadcasting/reporting on climate change issues but the Commissioner moves on in his decision to factors such as climate change, greenhouse gases, etc. So the approach is just wrong. He correctly acknowledges that a purposive reading is required. However, the

extent of the analysis under reg.3(1)(b) simply does not engage with the purposive approach, i.e. it does not engage with the requirements identified in case-law as to what needs to be considered.

54. By way of complementary observation to the foregoing, the court notes: (i) that the Aarhus Convention specifically recognises the importance of the media in advancing its purposes, the recitals to same refer, amongst other matters, to the desire *"to promote environmental education to further the understanding of the environment and sustainable development and to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development", the next recital "[n]oting, in this context, the importance of making use of the media and of electronic or other, future forms of communication"; (ii) recital 1 of the AIE Directive provides that "Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."* The Commissioner was obliged to look at the wider context and failed to read reg.3(1)(b) in the light of the purpose of the AIE Directive and, in particular, the just-quoted first recital. (In passing, the court notes that the AIE Directive in recital 1 and across the substance of the AIE Directive does not require, so to speak, that each and every issue touched upon in recital 1 needs 'to have its box ticked' or that if there is one issue that is not 'ticked' then one has strayed beyond the scope of the AIE Directive. Increased public access to environmental information and more effective participation by the public in environmental decision-making are related, yet stand-alone and equal objectives of the AIE Directive).

55. Finally under this heading, when the Commissioner undertakes his reg.3(1)(c) analysis, he identifies the importance of broadcasting in relation to environmental matters in his observation that he recognises "*that the press plays a crucial role in informing the public matters of public interest such as climate change. Indeed, it is through its broadcasts and reports on climate change issue that RTÉ disseminates environmental information and raises awareness of such issues.*" Three points might be made in this regard:

- first, it seems to the court that in this regard the Commissioner himself points to how the information sought by RTK satisfies the requirement touched upon by Collins J. in his judgment in *Redmond*, at para.100, that "*while the information sought* [does]…not need to be environmental in character*, it [has]…to have more than a* 'minimal connection' *with the relevant* 'measure'".

- second, what the Commissioner states in effect is what the Aarhus Convention points to, viz. the potential for climate change broadcasting to affect the environment or elements of the environment.

- third, an incidental point but one perhaps worth making nonetheless is that it is clear from the text of the impugned decision that the Commissioner has undertaken research into an issue (press freedom) that is not within his statutory remit. Not

being within his statutory remit, it follows that no deference is owed to the Commissioner's views on press freedom.

56. The correct position of RTK in this case is that it is not open to the Commissioner to come to court and ask the court to disregard one or more elements of the operative part of his decision, to disregard in relation to the content of the emails what was done by the Commissioner both in his consideration of reg.3(1)(b) and reg.3(1)(c) versus what was stated by Collins J. in Redmond after the impugned decision was made, and to take as being the ratio of the impugned decision what the Commissioner now identifies are the parts of that decision to be treated as the *ratio*.

57. A further difficulty that presents for the Commissioner is that while he recognises in the context of reg.3(1)(c) "*that the press plays a crucial role in informing the public matters of public interest such as climate change*…", he fails to bring this recognition to bear in his reg.3(1)(b) analysis. Instead his decision is confined to a consideration of whether the information before him was directly on environmental factors.

I. Conclusion

58. Having regard to the errors identified in the preceding pages, the court will make an order setting aside the decision of the Commissioner for Environmental Information of 6th December 2019 and remit this matter to him for fresh consideration.

59. Given the substance of the court's judgment and the outcome of the within application, it would seem to the court that, on the face of matters, the appellant has an unanswerable case to be awarded its costs. The parties might let the court know within 14 days of the date of delivery of this judgment (via the registrar or the court's judicial assistant) whether any of them take a different view (if so a brief supplementary hearing can be scheduled) or whether they are satisfied for the court to make the suggested order as to costs.

SUMMARY

Pursuant to the European Communities (Access to Information on the Environment) Regulations 2007 to 2018, Right to Know (RTK) has sought of RTÉ any records held by RTÉ relating to how RTÉ should report on climate change issues. A question arises whether a bundle of emails in the possession of RTÉ is "*environmental information*" for the purposes of the Regulations. If so, the emails will fall to be released by RTÉ to RTK. RTÉ considers that the emails are not "*environmental information*". In a decision of 6th December 2019 the Commissioner for Environmental Information agreed. RTK has brought this statutory appeal against the Commissioner's decision. The appeal has succeeded for a variety of reasons identified in detail above. Briefly put, these include the fact that the Commissioner: concluded, contrary to regulation 3(1)(c) and the decisions of the European Court of Justice in *Mecklenburg v. Kreis Pinneberg* (Case C-321/96) and of the Court of Appeal in *Minch v. Commissioner for Environmental Information* [2017] IECA 223 that broadcasting on climate change is not a measure affecting or likely to affect the environment; erroneously subjected the emails to an environmental impact threshold test contrary to an express finding in *Redmond v. Commissioner for Environmental*

Information [2020] IECA 83; erroneously concluded that broadcasting on climate change by the national broadcaster is not capable of affecting the environment through its impact on public behaviour; took account of an irrelevant consideration in relation to the definition of "*environmental information*"; and erred in the application of reg.3(1)(b). This summary forms part of the court's judgment.