

ANNEX 1: EXTRACT FROM O’SULLIVAN JUDGMENT, APRIL 2003

In the High Court case between Aer Rianta cpt and the Commission for Aviation Regulation concerning the Determination on airport charges made in August 2001¹, O’ Sullivan J. in his Judgment of the 3rd April 2003 considered the nature of a Ministerial direction addressed to the Commission. The actual direction in question related to the Commission’s then duty under the Aviation Regulation Act, 2001 to have regard to the contribution of the airport to the region in which it is located. The Commission was directed to ensure that the Determination reflected the important emphasis the Government placed on balanced regional development. Having heard submissions, the Judge came to the following conclusion:

“Turning to the generality of the submission it does seem to me that there is a clear distinction between the character of the obligation cast upon the [Commissioner]² in s. 33(d) whereunder he is obliged to have *due regard* to the contribution of the airport to the region in which it is located, on the one hand, and on the other the obligation cast upon him under s.10 which requires him to *comply* with the direction. In this context, I do not agree with the submission of the [Commission], that the cases in relation to “*due regard*” obligations are of relevance to my consideration of the [Commissioner’s]’s obligation under Section 10. On the contrary, I think a clear distinction should be made between them. I agree with [Aer Rianta’s] submission that under Section 10 the [Commission] must comply with the direction and whilst there may be a choice and a variety of ways in which he can achieve this, I do not think that the true test as to whether he did so (assuming it is established, as it has been, that he considered the direction and the relevant documents referred to) is whether his decision can be faulted on the grounds of irrationality alone. I think the test is simply whether he has complied with the direction which is a ministerial direction, that he makes every reasonable effort to ensure that his final Determination reflects the important emphasis, which the government has placed on balanced regional development. If I conclude that he has made every reasonable effort to achieve this then he has complied. If I conclude that he has not, then he

¹ JR No 707 of 2001. Judgment of O’Sullivan J. of the 3rd April 2003.

² The names of Aer Rianta and the Commissioner and have been substituted for the terms ‘Applicant’ and ‘Respondent’ respectively

has not, no matter how rational his own thought process and procedures may have been.

Having said this, it is also clear that the Ministerial direction itself is cast in the language of generality. The obligation cast upon [the Commission] is to make every reasonable effort: it is not an obligation to achieve a particular result or to aim for a policy objective in a particular way. Indeed given the wide language of Section 10 itself, which refers to making a general policy direction, a specific direction might well be open to question.

I also think it is true to say that a Court, when considering whether or not there has been compliance with such a generally worded direction in respect of which both sides agree there is no black and white answer, must accord to the [Commission] a measure of deference or a margin of appreciation if only for the fact that the [Commissioner] has available to him a level of economic and other relevant advice which is not available to the Court. By this I mean that if I, myself, were to conclude, having read the relevant documents, that if I were regulator I would comply with it in a way other than the regulator has done I must not proceed to say that therefore the regulator has not complied. Both parties agree there may be different ways in which compliance can be achieved and it is not for me, I think, to gainsay this or conclude that a particular way chosen by the [Commissioner] does not amount to compliance unless I am clearly satisfied on this point. This does not mean, however, that I cannot be satisfied unless I am also satisfied that the Determination itself is rational.”