



**THE SUPREME COURT  
DETERMINATION  
IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 2014  
BETWEEN  
THE MINISTER FOR COMMUNICATIONS ENERGY AND NATURAL RESOURCES  
APPELLANT  
AND  
THE INFORMATION COMMISSIONER  
RESPONDENT  
AND  
GAVIN SHERIDAN  
AND  
E-NASC ÉIREANN TEORANTA (TRADING AS "ENET")  
NOTICE PARTIES**

**Neutral Citation:** [2019] IESCDET 179

**Supreme Court record no:** S:AP:IE:2019:000101

**Court of Appeal record no:** A:AP:IE:2017:000256

**High Court record no:** 2015 No. 394 MCA

**Date of Determination:** Wednesday, 31st July, 2019

**Composition of Court:** Clarke C.J., MacMenamin J., O'Malley J.

**Status:** Approved

**APPLICATION FOR LEAVE TO APPEAL TO WHICH ARTICLE 34.5.3° OF THE  
CONSTITUTION APPLIES**

**RESULT:** The Court grants leave to the Respondent to appeal to this Court from the  
Court of Appeal

**REASONS GIVEN:**

**ORDER SOUGHT TO BE APPEALED**

COURT: Court of Appeal
DATE OF JUDGMENT OR RULING: 6th March, 2019
DATE OF ORDER: 10th April, 2019
DATE OF PERFECTION OF ORDER: 17th May, 2019

THE APPLICATION FOR LEAVE TO APPEAL WAS MADE ON 28th May, 2019  
AND WAS IN TIME.

### **General Considerations**

1. The jurisdiction of the Supreme Court to hear appeals is set out in the Constitution. As is clear from the terms of Article 34.5.3° thereof and the many determinations made by this Court since the enactment of the Thirty-third Amendment, it is necessary, in order for this Court to grant leave to appeal from a decision of the Court of Appeal, that it be established by the applicant that the decision sought to be appealed involves a matter of general public importance, or that it is otherwise necessary in the interests of justice that there be an appeal to this Court.
2. The general principles applied by this Court in determining whether to grant or refuse leave to appeal having regard to the criteria incorporated into the Constitution as a result of the 33rd Amendment have now been considered in a large number of determinations and are fully addressed in both a determination issued by a panel consisting of all of the members of this Court in *B.S. v Director of Public Prosecutions* [2017] IESCDET 134 and in a unanimous judgment of a full Court delivered by O'Donnell J. in *Price Waterhouse Coopers (A Firm) v Quinn Insurance Ltd. (Under Administration)* [2017] IESC 73. The additional criteria required to be met in order that a so-called 'leapfrog appeal' direct from the High Court to this Court can be permitted were addressed by a full panel of the Court in *Wansboro v Director of Public Prosecutions* [2017] IESCDET 115. Accordingly it is unnecessary to revisit the new constitutional architecture for the purpose of this determination.
3. It should be noted that any ruling in a determination is a decision particular to that application and is final and conclusive only as far as the parties are concerned. The issue calling for the Court's consideration is whether the facts and legal issues meet the constitutional criteria as above identified. It will not, save in the rarest of circumstances, be appropriate to rely on a refusal of leave as having a precedential value relative to the substantive issues, if and when such issues should further arise in a different case. Where leave is granted on any issue, that matter will be disposed of in due course in the substantive decision of the Court.
4. The application for leave filed, and the respondent's notice thereto, are published along with this determination (subject only to any redaction required by law) and it is therefore unnecessary to set out the position of the parties in detail.

## **Background**

5. The origin of this dispute lies in a Freedom of Information request from the first named notice party, Mr. Sheridan, for certain records pertaining to contracts between the respondent Minister and the second named notice party, known as enet, in respect of the provision of broadband services. The request was declined on grounds of confidentiality and, in particular, commercial sensitivity (provided for respectively in ss. 35(1)(b) and 36(1)(b) of the Freedom of Information Act 2014). Mr. Sheridan appealed the refusal to the Commissioner, who ruled against the Minister. In so doing the Commissioner found that the s.36(1)(b) commercial sensitivity exemption did arise, in that enet's competitive position would be prejudiced. However, it would not be "totally undermined". He concluded that s.36(3) applied, in that the public interest would be better served by granting rather than refusing the request. The Commissioner had regard to s.22(12)(b) (which requires the Commissioner to apply a presumption that a refusal of an FOI request is unjustified unless it is shown to his satisfaction to be justified), and found that the Minister had not discharged the burden imposed thereby.
6. The High Court agreed with the Commissioner (see [2017] IEHC 222), but was reversed on appeal (see [2019] IECA 68). The Court of Appeal found that the Commissioner had erred in his understanding of the applicability of the presumption, and had wrongly introduced a requirement of "total undermining" in respect of the commercial sensitivity exemption.
7. In an expressly *obiter* passage the Court, with some hesitation, largely upheld the finding of the Commissioner that the confidentiality exemption in s.35 did not apply to a confidentiality clause in a contract between the Minister and a service provider.

## **The application for leave**

8. The Commissioner submits that the interpretation of s.22(12)(b) by the Court of Appeal is unclear and has the potential to render ineffective the review process provided for by s.22 of the Act. Leave is also sought on the grounds that the Minister had not disputed the applicability of the presumption when the matter was before the Commissioner (despite having been made aware of the Commissioner's view at the start of the process) and should not have been permitted to do so in the litigation thereafter; that the Court of Appeal ruled that some of the Commissioner's findings were inappropriate and thus raised a question as to the factors that the Commissioner can lawfully have regard to; and that the judgment creates doubt as to the standards of review applicable in the High Court.

9. Mr. Sheridan supports the application.
10. The Minister does not oppose the grant of leave as regards the operation of the presumption, but contends that the other issues raised do not meet the constitutional threshold. In a cross application for leave, the Minister takes issue with the interpretation by the Court of Appeal of s.35(1) and (2) of the Act (which concern requests where the information in question had been received in confidence). The Minister says that there is a need for a definitive interpretation, in view of the importance of the issue to contracts for the provision of services between private entities and public bodies.

**Decision**

11. The Court agrees with the parties that the issue raised in respect of s.22(12)(b) is a matter of general public importance. Further, the Court considers that the other issues raised by both the Commissioner and the Minister may be of systemic importance to the operation of the Freedom of Information legislation, and in any event may need to be determined in order to reach an appropriate conclusion in the appeal. Leave to appeal will therefore be granted on each of the points in the application and cross-application, subject to any necessary refinement in case management. It is to be noted in this regard that the Court is also granting leave to appeal in the case of *University College Cork v The Information Commissioner*, which raises similar but not entirely identical issues. The two cases will be heard together, and directions will be given in case management with a view to avoiding duplication of argument.

**And it is hereby so ordered accordingly.**