No. 1

O. 58, r. 15

SUPREME COURT

Record No: 101/2019

Application for Leave to Appeal

Part I

The information contained in this part will be published. It is the applicant's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court

1. **Date of Filing:** 28 May 2019

2. **Title of the Proceedings:**

THE MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES

APPELLANT

V

THE INFORMATION COMMISSIONER

RESPONDENT

AND

GAVIN SHERIDAN AND e-NASC EIREANN TEORANTA (TRADING AS "enet")

NOTICE PARTIES

3. **Name of Applicant:** The Information Commissioner

What was the applicant's role in the original case:
Respondent in High Court
Respondent in Court of Appeal

4. **Decision of Court of Appeal (where applicable):**

Record No: 2017/256
Date of Order: 10 April 2019 *Perfection Date:* 17 May 2019
Date of Judgment: 6 March 2019
Names of Judges: The President, Irvine, McGovern JJ.

5. Decision of the High Court:

Record No: 2015/394MCA
Date of Order: 25 April 2017 *Perfection Date:* 10 May 2017
Date of Judgment: 6 April 2017
Names of Judge(s): Noonan J

Where this application seeks leave to appeal directly from an Order of the High Court has an appeal also been filed in the Court of Appeal in respect of that Order?

Yes ☐ **No** ☐

6. Extension of Time: **Yes** ☐ **No** ☒

If an application is being made to extend time for the bringing of this application, please set out concisely the grounds upon which it is contended time should be extended.

7. Matter of general public importance:

If it is contended that an appeal should be permitted on the basis of matter(s) of general public importance please set out precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance justifying appeal to the Supreme Court.
This section should contain no more than 500 words and the word count should appear at the end of the text.

1. Per Section 22(12)(b) of the Freedom of Information Act, 2014 ("FOIA") a decision to *refuse* an FOI request is presumed unjustified *until* justified by the refuser. This presumption is a centrally important component of the FOI scheme and its applicability is a matter of general public importance. The Court of Appeal has determined that the Commissioner erred in law in applying the presumption to "exempt records" which potentially covers the majority of cases that come before the Commissioner. If the presumption cannot be applied by the Commissioner so as to require a public body to justify its determination that the record is exempt, the review process provided for under section 22 will be rendered ineffective.

2. The conclusions of the Court of Appeal are unclear in circumstances where the "exempt"

status of a record is something which requires to be determined having regard to whether the terms of relevant sections of the FOIA are met. With regard to s.36, it is unclear as to whether the judgment means that the presumption cannot be applied to a determination under s.36(1)(a)-(c) or to the consequent public interest balancing test under s.36(3) (or both).

3. Resolution of this issue is of systemic importance for the operation of the FOIA in accordance with the long recognised purposes of that Act.[1].

4. Further, the Minister did not dispute the application of s.22(12)(b) before the Commissioner. There is a long line of authority to the effect that arguments not put to the Commissioner cannot be made in the High Court.[2] The Court of Appeal did not follow this approach, and endorses a new test ("the issue featured predominantly"). This is of fundamental importance for the practice of Commissioner and litigation of these appeals.

5. The Court held certain of the Commissioner's findings under s.36(3) to be inappropriate (i.e. that disclosure would not "*totally undermine*" the business of eNet or that "*exceptional circumstances*" had not been shown). The factors the Commissioner can lawfully have regard to in the application of the public interest balancing test under s.36(3) is a matter of importance which meets the constitutional threshold.

6. The Court of Appeal expressed concerns about the High Court's citation of principles governing the standards of review applicable without suggesting how the High Court was in error. This creates doubt over the applicable principles regarding the standard of review which apply in every case.

Word count – 496.

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[1] *P (F) v Information Commissioner* [2009] IEHC 574; *Minister for Agriculture v Information Commissioner* [2000] 1 IR 309 at 319; In *Deely v The Information Commissioner* [2001] 3 IR 439, *at 442; Sheedy v Information Commissioner* [2005] 2 IR 272 at 275.

[2] *South West Area Health Board v Information Commissioner* [2005] 2 IR 547, at 553; *Minister for Education v Information Commissioner* [2009] 1 IR 588, at 591-592 *McKillen v Information Commissioner* [2016] IEHC 27 and *the Governors of the Hospital for the Relief of Poor Lying in Women v Information Commissioner* [2013] 1 IR 1 at 29

8. Interests of Justice:

If it is contended that an appeal should be permitted on the basis of the interests of justice, please set out precisely and concisely, in numbered paragraphs, the matters relied upon. This section should contain no more than 300 words and the word count should appear at the end of the text.

1. The Courts recognise the purpose of the FOIA[3] which serves the interests of justice in pursuing the objectives of transparency and accountability in public life. A core element of this is that any refusal of a request must be justified by the refuser.

2. There is a serious lack of clarity now in how the presumption in s.22(12)(b) is to apply and how the Commissioner should determine appeals under the FOIA, with a serious risk of consequent litigation. The interest of justice requires certainty in the application of the FOIA and the FOI regime and litigation arising from same. Insofar as the *obiter* comment of Macken J in *the Governors of the Hospital for the Relief of Poor Lying in Women v Information Commissioner* [2013] 1 IR 1 were relied on, it is in the interests of justice that this Court pronounce on the issue in binding form.

3. At para.15 the Court endorsed a test as to whether an issue "features prominently" in a decision in response to the point that the Minister never raised argument over s.22(12)(b). In this respect, the manner in which the Court relies on *Rotunda* is in error. Further the decision of the Court of Appeal gives support to an entirely new approach to appeals on a point of law which is inconsistent with prior jurisprudence and will allow *de novo* litigation in these cases.

4. There is similar uncertainty with respect to the standards of review applicable and, indeed, the range of factors the Commissioner may properly refer to at the s.36(3) stage. It is in the interests of justice that these uncertainties are clarified rather than plague new cases.

Word count – 282.

[3] See footnote 2 above.

9. Exceptional Circumstances: Article 34.5.4:

Where it is sought to apply for leave to appeal direct from a decision of the High Court, please set out precisely and concisely, in numbered paragraphs, the exceptional circumstances upon which it is contended that such a course is necessary.
This section should contain no more than 300 words and the word count should appear at the end of the text.

N/A

10. Grounds of Appeal

Please set out in the Appendix attached hereto the grounds of appeal that would be relied upon if leave to appeal were to be granted.

11. Priority Hearing: **Yes** [X] **No** [ ]

If the applicant seeks a priority hearing please set out concisely the grounds upon which such priority is sought.
This section should contain no more than 100 words and the word count should appear at the end of the text.

1. The decision effects the day to day operation of the FOIA and the Commissioner.

2. The operation of the presumption is fundamental to how the Commissioner approaches his functions and the lack of clarity is certain (it is submitted) to generate more litigation. There are 160 reviews currently before the Commissioner, the majority of which are impacted.

3. The lack of clarity has a bearing on existing litigation, some of which (e.g. *DPP v Information Commissioner, DCC v Information Commissioner, IPB Insurance CLG v Information Commissioner)* has been adjourned pending the outcome of this petition for leave to appeal.

Word count – 100

12. Reference to CJEU:

If it is contended that it is necessary to refer matters to the Court of Justice of the European Union please identify the matter and set out the question or questions which it is alleged it is necessary to refer.

None.

Appendix

Notice of Appeal

1. Title of the Proceedings: *[As in the Court of first instance]*

THE MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES

APPELLANT

V

THE INFORMATION COMMISSIONER

RESPONDENT

AND

GAVIN SHERIDAN AND e-NASC EIREANN TEORANTA (TRADING AS "enet")

NOTICE PARTIES

2. Grounds of Appeal:

Please set out in numbered paragraphs the Grounds of Appeal relied upon if leave to appeal were to be granted.

1. It was wrong to hold at paragraph 26 that the Commissioner made a significant error of law in stating it would apply the presumption in s.22(12)(b) and/or in applying the presumption as it did in its Decision. The presumption in s.22(12)(b) is of general application to all refusals of FOI requests.

2. It was also wrong to hold at paragraph 44 that the Commissioner approached the case on the basis that "records exempt by statute were presumed to require disclosure". Firstly, this is not how the Commissioner approached the case; s.22(12)(b) provides that a decision to refuse to grant an FOI request shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified. Secondly, the records were not "exempt by statute" unless and until a final determination is made under s.36(3) that the public interest test weighs in favour of non-disclosure.

3. Further, it is wrong in law to conclude that the FOIA in s.36 (and by extension, comparable provisions) creates a situation where the FOIA itself mandates a refusal such that it is incoherent to apply the presumption in s.22(12)(b).

4. With specific regard to the *obiter* comment of Macken J in *Rotunda* which was relied on as authoritative by the Court of Appeal, it is wrong in law to conclude that the presumption cannot apply to refusals in relation to records deemed to be exempt by Part 4 of the FOIA (or comparable records).

5. In short, the Court of Appeal was wrong in law and, by proxy, the *obiter* of Macken J which was relied on is wrong in law by excluding from consideration the fact that processes of decision and determination underpin all refusals. The purpose of the presumption is to ensure that those decisions and determinations (which apply *contra* disclosure) are justified.

6. It was wrong, in addition, to permit the Respondent to make and rely on arguments it had not made before the Commissioner. In this case, the Court of Appeal has proposed a test that once a matter "features prominently in the decision" (see para.15) it can be dealt with by the High Court absent any prior submission. It was wrong in law to apply such a test and to depart from the clear principles established in relevant case-law.[1]

7. There was no basis to criticise the High Court Judge's recitation of principles applicable to the standard of review.

8. No legal error has been made in the reference to "*exceptional circumstances.*" The question is whether the public interest requires disclosure – i.e. would the public interest be *better served* by disclosure rather than refusal. In this respect, the Commissioner is properly setting out the particular features of the public interest that arise in the context of this particular case which is, in truth, about a public body wishing to maintain details of expenditure of public money confidential.

9. It was wrong to hold that the Commissioner introduced a requirement of "totally undermining" (at paragraph 34) and that the Commissioner took the view that

[1] *South West Area Health Board v Information Commissioner* [2005] 2 IR 547, at 553; *Minister for Education v Information Commissioner* [2009] 1 IR 588, at 591-592 *McKillen v Information Commissioner* [2016] IEHC 27 and *the Governors of the Hospital for the Relief of Poor Lying in Women v Information Commissioner* [2013] 1 IR 1 at 29.

documents exempt by statute should be required to be disclosed unless doing so would undermine totally the business of the company to which they related (at paragraph 44).

10. No legal error was made in the Commissioner stating that disclosure of the information would not "totally undermine" the business of eNet. First, this is a finding the Commissioner was entitled to make in the light of the submissions made and in the context of the Minister's submission to the Commissioner that *"the disclosure of this information would undermine E-Net's business."* It was a finding of fact that was warranted on the evidence and was relevant in considering the balancing test and, indeed, was only one of the four specific matters identified from the Minister and eNet's submissions and rejected as set out above.

3. Order(s) sought

Please set out in numbered paragraphs the order(s) sought if the Appeal were to be successful.

1. An order setting aside the Orders of the Court of Appeal.
2. An order for the Commissioner's Costs in the Court of Appeal
3. An order providing for the costs of this appeal.
4. Such other Order as the Court deems fit of its own accord or on submission to it.

101/2019

COURT OF APPEAL

2017 256

Wednesday the 10th day of April 2019

BEFORE

THE PRESIDENT

MS JUSTICE IRVINE

MR JUSTICE MCGOVERN

2015 394 MCA (HC)

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 2014

BETWEEN

THE MINISTER FOR COMMUNICATIONS ENERGY AND NATURAL RESOURCES

APPELLANT

-V-

THE INFORMATION COMMISSIONER

RESPONDENT

AND

GAVIN SHERIDAN

AND

E-NASC ÉIREANN TEORANTA (TRADING AS "ENET")

NOTICE PARTIES

The Appeal on behalf of the Appellant pursuant to Notice of Appeal issued on the 2nd day of June 2017 from the Judgment and Order of the High Court (Mr. Justice Noonan) given on the 6th day of April 2017 and made on the 25th day of April 2017 (refusing the application of the Appellant to set aside pursuant to

section 24 of the Freedom of Information Act 2014 the decision of the Respondent dated the 30th day of November 2015 granting access to the First Named Notice Party records pertaining to the appointment of the Second Named Notice Party as the Management Service Entity ('MSE') of the Metropolitan Area Networks ('MANs') developed under the Regional Broadband Programme) on the grounds set forth in the said Notice of Appeal coming on for hearing on the 5th day of February 2019

Whereupon and on reading the said Notice of Appeal and the Respondent's Notice filed on the 23rd day of June 2017 and the said Judgment and Order of the High Court and the submissions lodged on behalf of the Appellant and on behalf of the Respondent and on behalf of the First Named Notice Party and the further documents contained in the Books of Appeal

And on hearing Counsel for the Appellant and Counsel for the Respondent and Counsel for the First Named Notice Party

And the Court being pleased to reserve judgment and said judgment being delivered on the 6th day of March 2019 in the presence of said respective Counsel

IT IS ORDERED that the appeal be allowed and that the said Order of the High Court be set aside and accordingly that the matter be remitted to the Respondent for further consideration

And the appeal coming on again this day in the presence of Counsel for the Appellant and Counsel for the Respondent to deal with costs

And on Counsel for the Appellant informing the Court that there is no application for the costs of the appeal

The Court doth make no order as to the costs of the appeal

And on the application of Counsel for the Respondent

IT IS ORDERED that there be a stay on this Order for a period of

21 days from the date of perfection of this Order and in the event of an application for leave to appeal to the Supreme Court being lodged within that period such stay to continue pending the determination of said application and to be further stayed pending the determination of the appeal if leave to appeal is granted

Dermot Moylan

REGISTRAR

Perfected this 17th day of May 2019

A COPY WHICH I ATTEST

FOR REGISTRAR

Chief State Solicitor for the Appellant

Philip Lee
Solicitors for the Respondent

FB Logue & Co
Solicitors for the First Named Notice Party

[2019] IECA 68

THE COURT OF APPEAL

CIVIL

[2017 No. 256]

The President

Irvine J.

McGovern J.

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 EIREANN TEORANTA (TRADING AS "enet")

NOTICE PARTIES

JUDGMENT of the President delivered on the 6th day of March 2019

Background

1. This is an appeal by the Minister for Communications, Energy and Natural Resources ('the Minister') from a decision of the High Court (Noonan J.) dated 25th April 2017 which itself dismissed an appeal by the Minister from a decision of the Information Commissioner.