THE HIGH COURT

Record No 2017/298 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—2014

Between:

FRIENDS OF THE IRISH ENVIRONMENT

Appellant

-and-

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

Respondent

-and-

THE COURTS SERVICE OF IRELAND

First Notice Party

-and-

KLAUS BALZ AND HANNA HEUBACH

Second Notice Party

-and-

AN BORD PLEANÁLA

Third Notice Party

REQUEST FOR A PRELIMINARY RULING

ARTICLE 267 TFEU

Request of the Hight Court for Preliminary Ruling Pursuant to Article 267 TFEU dated the 21st day of May, 2019

The following is the substantive text of the Request for Preliminary Ruling pursuant to Article 267 TFEU made by the High Court (O'Regan J.) on 21st May, 2019:

THE QUESTION REFERRED

1. The High Court of Ireland (Ms Justice O'Regan) hereby requests the Court of Justice of the European Union ("*the CJEU*") to consider the following question by way of preliminary ruling in accordance with Article 267 of the Treaty on the Functioning of the European Union ("*TFEU*"):

Is control of access to court records relating to proceedings in which final judgment has been delivered, the period for an appeal has expired and no appeal or further application is pending, but further applications in particular circumstances are possible, an exercise of "*judicial capacity*" within the meaning of Article 2(2) 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?

THE SUBJECT MATTER OF THE DISPUTE AND THE RELEVANT

BACKGROUND FACTS

2. The proceedings concerned a request by the Appellant for access to the records held by the First Notice Party in relation to legal proceedings entitled *Balz & Heubach v An Bord Pleanála* 2013 450 JR ([2016] IEHC 134) in which judgment had been delivered by the Irish High Court on 25 February 2016 and which has not been appealed.

3. On 9 July 2016, the Appellant wrote to the Central Office of the High Court and requested copies of the pleadings, affidavits/exhibits and written submissions as part of the proceedings before the High Court in the case, plus the perfected orders arising from the case. The request was made pursuant to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("*Aarhus Convention*"), Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information ("*the Directive*") and the European Communities (Access to Information on the Environment) Regulations 2007—2018 (the national Regulations implementing the Directive) ("*the Regulations*").

4. On 13 July 2016, the Appellant received a reply to its request from the First Notice Party. The reply stated that having reviewed the Regulations, the First Notice Party was of the view that the Regulations did not extend to cover "*court proceedings or legal documents filed in Court proceedings*" and that *"[d]ocuments filed in court proceedings are only accessible to the parties of the proceedings and their legal representatives".*

5. On 18 July 2016, the Appellant indicated to the First Notice Party that it wished to avail of its right to an internal review. The

Appellant received no reply within one month as required by the Regulations. This was a deemed refusal for the purposes of the Regulations which entitled the Appellant to appeal to the Respondent.

6. The Appellant appealed to the Respondent by notice of appeal dated 15 September 2016. This notice of appeal was acknowledged by the Respondent on 16 September 2016.

7. The Respondent subsequently wrote to the Appellant on 19 June 2017, and indicated that a decision had been made by the Respondent in a similar case (Case CEI/15/0008 *An Taisce & The Courts Service*) ("*An Taisce*"). The Respondent, while emphasising that each case would be considered on its merits, requested that the Appellant identify any reason why the Respondent should arrive at a different decision in respect of the instant case.

8. The Appellant indicated in its reply of 26 July 2017 that it wished to adopt the reasons advanced in its notice of appeal and those made by An Taisce in the earlier case.

9. The Respondent made its decision on 31 July 2017.

10. The Respondent held that the First Notice Party holds the records requested, of concluded proceedings, while acting in a judicial capacity on behalf of the judiciary. The Respondent also stated that when acting in such a capacity, the First Notice Party was not a public authority within the meaning of Regulation 3(1) of the Regulations and that: *"Accordingly, the Commissioner found that he has no jurisdiction to review the Courts Service's decision on this AIE request".*

RELEVANT PROVISIONS OF NATIONAL LAW

I. Case law

11. In *Minister for Justice v Information Commissioner* [2001] 3 IR 43, in refusing access to documents under freedom of information legislation, Finnegan J. in the High Court held that the shorthand notes and transcript were records the disclosure of which to the general public was prohibited subject to an order of the Court and that the Court enjoyed a "*discretion … where appropriate to relieve from that prohibition*" (p 49).

12. In *BPSG Limited t/a Stubbs Gazette v The Courts Service* [2017] 2 IR 343, the High Court held (paragraph 67): "*That a judge must be independent in the exercise of judicial function has as a corollary an entitlement of an individual court to control its own procedures and processes".*

13. The Court in that case added that this principle was "*reflected*" in Section 65 of the Court Officers Act 1926 ("*the 1926 Act*"), which provides in relevant part as follows:

> *"(1) Nothing in this Act shall prejudice or affect the control of any judge or justice over the conduct of the business of his court.*
>
> *…*
>
> *(3) All proofs and all other documents and papers lodged in or handed into any court in relation to or in the course of the hearing of any suit or matter shall be held by or at the order and disposal of the judge or the senior judge by or before whom such suit or matter is heard."*

14. The Court therefore concluded (paragraph 71) that a court officer could not release court records without an express order of the judge permitting such disclosure.

15. In *Minister for Health v The Information Commissioner* [2014] 2 IR 673, at issue were transcripts of interviews deposited with the Minister for Health by a retired judge arising from a non-statutory inquiry (not court proceedings) the judge had conducted into certain practices at a hospital (see paragraphs 3—4). The records had been deposited with the Minister for safekeeping, accompanied by a letter from the judge purporting to prohibiting their disclosure without the judge's consent.

16. It was observed by the High Court that the "*primary and essential characteristic of the review*" was that "*it was to be an exercise conducted in an entirely independent and impartial way"*. It was added that "*[i]ndependent in this context means independent of all those who had interest in the outcome of the review*" (paragraph 44), and that without that "*essential characteristic of independence*", it was highly probable that the review would not have been commissioned in the first place (paragraph 45). The Court also observed (paragraph 46) that it was essential that the judge had unfettered control over every aspect of the review *"including the manner in which the material assembled would be disposed of at the conclusion of the review".*

17. (1) In a judgment of the Supreme Court Appeal no. 2014/309, determined on the 27-5-19, in the matter of the Freedom of Information Acts 1997 and 2003, between the Minister for Health and The Information Commissioner, the issues before the Court related in part to the proper interpretation of the phrase "*any record held by a public body in s.6(1) of the Freedom of Information Act, 1997"* ("the 1997 Act) (para. I).

(2) S.6(1) provides:-

> *"Subject to the provisions of this Act, every person has a Right to and shall, on request therefore, be offered access to any record held by a public body and the right so conferred is referred to in this Act as the right of access."*

(3) At para.60 of the judgment it was stated:-

"Accordingly, I have concluded that for a record to be "held" within the meaning of s.6(1), the public body must not only be in lawful possession of the record in connection with or for the purpose of its business or functions but also must be entitled to access to the information in the record."

18. In *Breslin v McKenna* [2009] 1 IR 298 (paragraph 36)—where the plaintiff sought access to books of evidence previously served on the defendant when charged with offences tried by the Special Criminal Court—it was held by the Supreme Court that the approval

of the court should be sought if the books of evidence were going to be used "*for some wholly different purpose from their original intended use*" and that the power over the court file derives from "*the courts' overall responsibility to ensure the due administration of justice".*

19. When assessing whether to release court files, some of the Irish cases also assess the interests of justice in each individual case (subject to the *Tracey (No. 2)* judgment mentioned in paragraph 21 below, in which the High Court held that the public is entitled *without permission* to have access to court records opened in civil proceedings in open court). For example, in *Breslin*, the High Court held that judicial permission for access to court documents (including after final verdicts had been delivered) was necessary "*in the interest of justice*" (paragraph 37) and that transcripts could be handed over if "*necessary for the purpose of doing justice*" (paragraph 4). Similarly, in *Kelly v Ireland* [1986] ILRM 318, 323, it was observed by the High Court that an extract from the transcript of proceedings could be made available "*where it is necessary for the purpose of doing justice in a case involving litigation between contesting parties".*

20. In *Chambers v The Times Newspapers* [1999] 2 IR 424, the High Court found that witness statements and documents furnished to an accused and relied on by the prosecutor in charges tried by the Special Criminal Court and Court of Criminal Appeal were documents in the custody or power of the registrars of those courts, subject to the direction of the judges.

21. In *Allied Irish Bank Plc v Tracey (No 2)* [2013] 3 IR 398, the High Court held (at paragraph 23) that there was a constitutionally recognized principle of open access to *"documents which have already been freely opened in open court and in respect of which there are no reporting or other restrictions"*. The Court held that the public are "*entitled to have access to documents which were accordingly opened without restriction in open court"* (paragraph 23) without the Court's permission being required (paragraph 21). "*The open administration of justice is,"* held the Court, *"a vital safeguard in any free and democratic society. It ensures that the judicial branch is subjected to scrutiny and examination and helps to promote confidence in the fair and even handed administration of justice"* (paragraph 22).

22. However, notwithstanding *Tracey*, in *BPSG* (cited at paragraph 13 above), the High Court noted (paragraph 80):

> *"The fact that, as a matter of law, the release to a person not party to litigation of documents actually used in the course of the trial for a purpose other than those associated with that trial can be directed only with leave of the court seems to me to import a recognition that the legal custody and control of documents which record the happening of any proceedings can be available only with leave of the court, and cannot be said to be documents to which the public generally has access."*

These apparently conflicting decisions of the High Court have not yet been reconciled.

23. In none of the above-mentioned cases did the court consider the impact of the Directive at issue in these proceedings.

II. Legislative Framework

24. The legislative framework refers to control over access to court records as a judicial function.

25. Section 65 has already been set out. In *Minister for Justice v Information Commissioner*, Finnegan J in the High Court characterised section 65 as "*a general prohibition on the disposal of documents but from which the judge can dispense*" (p 50). In *BPSG*, the High Court observed of this provision (at paragraph 79) that *"[t]he Oireachtas intended there would be judicial control over the documents and that control over the making of orders in relation to documents is a part of the judicial function".*

26. Section 9 of the Courts Service Act 1998 provides that:

> *"No function conferred on or power vested in the Service, the Board or the Chief Executive, under this Act shall be exercised so as to interfere with the conduct of that part of the business of the courts required by law to be transacted by or before one or more judges or to impugn the independence of*
>
> *(a) a judge in the performance of his or her judicial functions, or*
>
> *(b) an officer of the Service designated for that purpose by the Board."* (Emphasis added).

27. As set out in the Eighth Schedule to the Courts (Supplemental Provisions) Act 1961, Articles 5 and 7, management of the Central Office is assigned to a court officer nominated by the First Notice Party after consultation with the President of the High Court, and subject to the directions of the President of the High Court in regard to all matters required to be transacted before a judge of the High Court.

28. Meanwhile, Section 7(2) of the National Archives Act 1986 provides that the Director of a Department of State may authorise disposal of Departmental records, subject to conditions, including that in Section 7(4)(c) that:

> *"… the Chief Justice, in the case of records of the Supreme Court, or the President of the High Court, in the case of records of the High Court, has consented to the making of the authorisation."*

29. Section 9 provides for disposal of archives, and is subject to the qualification in Section 9(3) that:

> *"… records of the High Court shall not be disposed of without the consent of the President of the High Court".*

III. Rules of Court

30. There are references in the Rules of the Superior Courts ("*RSC*") to documents requiring to be "*filed*" (Order 5, Rule 12), "*filed*" in the specific court office concerned (Order 40, Rule 2), "*filed with the proper officer*" (Order 19, Rule 10), or "*lodged in court*" (Order 40, Rules 13A and 14).

31. There are requirements for court records to be held in the custody of an officer of the Court concerned (Order 85, Rule 6 (Central Criminal Court)).

32. The RSC indicate that the form in which files or records may be kept rests with the judiciary. Order 126, Rule 5 RSC and Order 67, Rule 14 of the Circuit Court Rules ("CCR") provide that *"[a]ny court file or record may be kept in such form as may be approved*

from time to time by" the President of the High Court and President of the Circuit Court, respectively.

33. Order 117A, Rule 2(1) RSC provides for non-personal delivery of a court document, subject to approval of the Chief Justice, the President of the Court of Appeal or the President of the High Court.

34. Section 159(1)—(4) of the Data Protection Act 2018 (implementing the GDPR) expressly identify the Courts as "*controller*" within the meaning of Article 4(7) GDPR (Data Protection Act 2018 (section 159(1)) Rules 2018, Rule 2(a) (Superior Courts); Data Protection Act 2018 (section 159(2) Rules 2018, Rule 2(a) (Circuit Court); Data Protection Act (section 159(4)) Rules 2018, Rule 2(a)).

35. Furthermore:

> (1) Order 38, Rule 8 CCR creates a procedure for a person to obtain leave from a judge to copy entries in the debt attachment books;
>
> (2) Order 123 RSC creates a procedure for an application to a judge for access to a record of proceedings;
>
> (3) Order 67A CCR provides a procedure for access to a record of proceedings (see also Order 12B, Rule 5 of the District Court Rules).

36. The Data Protection Act 2018 (section 159(7): Superior Courts) Rules 2018; the Data Protection Act 2018 (section 159(7): Circuit Court) Rules 2018; and the Data Protection Act 2018 (section 159(7): District Court) Rules 2018 provide for disclosure of information in a "*court record*" to members of the media, in respect of proceedings commenced after 1 August 2018. A "*court record*" is defined as "*a record of proceedings before*" the relevant court. Disclosure is subject, inter alia, to "*any order made or direction given by the court in the proceedings concerned"* and therefore, remains subject to judicial control. Also relevant in this regard is Section 159(8) of the Data Protection Act 2018.

IV. Practice Directions

37. In Practice Direction HC86, which came into force on 29 April 2019, it is stated as follows:

> *"1. The purpose of this practice direction is to safeguard the integrity of court files maintained in the offices of the Supreme Court and the Court of Appeal and the Central Office of the High Court. This practice direction arises in the context of the judgment delivered in the High Court (Kelly P.) in Michael and Thomas Butler Ltd & ors. -v- Bosod Ltd & ors. [2018] IEHC 702.*
>
> *2. The files maintained in the aforementioned offices of the Superior Courts shall not be made available to any person attending at any of those offices. For the avoidance of doubt this includes the parties to the proceedings and the solicitors on record.*
>
> *3. Nothing in paragraph 2. of this practice direction shall preclude the provision of a copy of a document on a file to a solicitor on record or a party to the proceedings where not legally represented upon payment of the relevant fee provided for in the Fees Order."*

38. In the *Butler* case to which reference is made in the Practice Direction, the President of the High Court found that:

> (1) The High Court file did not contain the original order made by a High Court judge following a hearing, but rather two orders with two different versions of a settlement agreement (paragraphs 44—54);
>
> (2) The likelihood was that the High Court file had been interfered with to bring about this unsatisfactory situation (paragraph 67);
>
> (3) The then-applicable procedure pursuant to which High Court files could be inspected by either the solicitor on record or in the case of self-represented parties those parties themselves in an unsupervised fashion, where they were open to being interfered with, was "*completely unsatisfactory*" (paragraphs 59 and 67).

39. The President further noted (paragraph 68):

> *"Given this unsatisfactory situation I propose to discuss with the Chief Justice and the President of the High Court alterations in the system of inspection of High Court files so as to ensure that files are not interfered with and that they accurately record orders of the court. It is, in my view, essential that the integrity of High Court Central Office files be protected."*

40. Practice Direction SC15 of the 7/10/2013 provides:

> *"1. Subject to directions of the Supreme Court and the following paragraphs of this direction, a copy of written submissions lodged in or transmitted to the Supreme Court Office or handed in to the Supreme Court on or after the 7th October 2013 in relation to, or in the course of, the hearing of any appeal or matter will be made available to any person requesting same, on payment of any fee chargeable for such copy.*
>
> *2. A person making such a request will be provided with –*
>
> > *(a) A copy of such written submissions in the form in which they have been received or*
> >
> > *(b) where paragraph 3 applies, a copy of the redacted version of such written submissions lodged in accordance with that paragraph.*
>
> *3. With effect from the date aforementioned, each party to an appeal or matter shall, where the written submissions contain any information the publication of which is prohibited by, or would contravene any restriction contained in, any enactment or rule of law or order of a court, transmit to the Office of the Supreme Court a redacted version of that party's written submissions in electronic format, from whichall such information shall have been deleted.*

4. It shall be the responsibility of the parties that submissions will not contain scandalous, abusive or vexatious material.

5. Submissions will not be made available prior to the commencement of the hearing of the appeal. Any publication by the person who obtains the submissions should respect any prohibition in law or order of the court.

6. A request for a copy of written submissions shall be made to the Registrar of the Supreme Court.

7. The Registrar of the Supreme Court may -

(a) seek the direction of the Supreme Court in relation to a request made under this direction,

(b) provide a copy of written submissions in electronic form."

V. Possibility of the reopening of proceedings after the making of final orders and/or exhaustion of appeals

41. The making of final orders and expiry of the period for an appeal, or the making of final orders in any appeal taken, do not necessarily represent the definitive conclusion of the relevant proceedings before the courts.

42. Under national law, parties may make an application to the courts to re-open what are otherwise closed proceedings in a number of limited circumstances and for a number of discrete purposes. These applications are unusual. There is no such application in the case in relation to which documents are sought by the Appellant. Examples of such applications that may be taken are as follows:

(1) An application to extend the time for bringing an appeal (there is no outer limited in terms of the making of such an application) (see, e.g., *Eire Continental Trading Co Ltd v Clonmel Foods Ltd* [1955] IR 170);

(2) An application to correct an alleged error in a court order (see, e.g., *Re McInerney Homes* [2011] IEHC 25; *Nash v DPP* [2017] IESC 51);

(3) An application to set aside a court order on the ground that it was obtained by fraud, impropriety, bias or breach of constitutional rights (see, e.g., *Desmond v Moriarty* [2018] IESC 34; *Bula Ltd v Tara Mines (No 6)* [2000] 5 IR 412, *Re Greendale Developments Ltd (No 3)* [2000] 2 IR 514).

While not strictly involving an application to reopen proceedings, it is also noted that applications may be made to Court for access to court records after the making of final orders and/or exhaustion of appeals for the purpose of enforcing a settlement or determining the merits of a claim of issue estoppel or res judicata in subsequent proceedings.

REASONS FOR THE REFERENCE

I. Article 2(2) of the Directive

43. Article 2(2) of the Directive provides as follows:

"Member States may provide that [the definition of 'public authority'] shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition."

44. The term "*judicial… capacity*" is not defined in the Directive.

II. The Issue

46. It is agreed by all parties to the main proceedings that control over the court file during the pendency of proceedings involves the exercise of "*judicial capacity*".

47. The only issue in dispute therefore is as to whether court records are held by the First Notice Party in a "judicial capacity" after the making of final orders and exhaustion of any appeals in proceedings.

III. The Submissions of the Appellant

48. The Appellant submits that the Respondent erred in failing to accord "judicial capacity" an autonomous interpretation for the purposes of the Directive. The Appellant submits that the Respondent erred in relying almost entirely on the fact that section 65(3) of the 1926 Act does not identify any point at which the control by the Courts Service of the documents sought by the Appellant comes to an end. In the Respondent's view this failure to specify an end-point at which judicial control of documents ceases in the 1926 Act compelled a conclusion that the Courts Service was acting in a "*judicial capacity*" in relation to those documents in, in effect, perpetuity. The Respondent's approach, in simple terms, was confined to:

a) Identifying that in C-204/09 *Flachglas* EU:C:2012:71 the Court of Justice had looked at national law to identify the functions given to the Ministry,

b) Identifying those national law provisions which governed the jurisdiction of the First Notice Party,

c) Identifying that those national law provisions said nothing about the temporal scope of the Notice Party's control of records after the conclusion of the proceedings, and,

d) Without any further reference to the purposes of the Directive resolving that ambiguity in a manner entirely contrary to the purposes of the Directive and the express findings by the Court of Justice in *Flachglas*.

49. However, the Appellant submits, and as made clear in *Flachglas* by the Court of Justice, Article 2(2) of the Directive has to be read in a functional manner. The Court of Justice noted, in its answer to Question 1(c) in that case, that once the legislative process had come to an end the rationale for the "*legislative capacity*" exemption also came to an end and the information fell to be considered for release, subject to the exemptions in Article 4 of the Directive.

50. The Appellant contends that the Directive has to be interpreted broadly, placing particular reliance on Recitals (1), (9), (11) and (16) and Article 1 thereof.

51. The Appellant also relies on the statement of Advocate General Sharpston in *Flachglas* (paragraph 32), that in the event of ambiguity "*the Directive should be interpreted so as to favour transparency and access to information"*.

52. The Appellant contends that "*judicial capacity*" should be interpreted in a functional manner in the same way that "*legislative capacity*" was interpreted by the CJEU in *Flachglas*. In particular, it contends that, as in *Flachglas* in respect of the legislative function at issue there, Article 2(2) ceases to have effect when the proceedings have concluded. The Appellant highlights the statement of the Advocate General in Case C-204/09 *Flachglas* EU:C:2011:413 (at paragraph 55) that while it is appropriate for a bench of judges to deliberate in private, *"the reasons on the basis of which they reach their decisions must be made public, together with the evidence and argument which they have taken into consideration".* The Appellant notes that in reaching her decision regarding "legislative capacity" in *Flachglas*, the Advocate General reasoned across from "*the judicial sphere*" to the legislative sphere.

53. The Appellant submits that the decision of the Court of Justice in Case C-515/11 *Deutsche Umwelthilfe v Germany* EU:C:2013:523 supports their position. That case concerned the question of whether the term "*legislative capacity*" could extend to a body *during the legislative process* which was charged with the preparation of regulatory instruments broadly similar to statutory instruments in Ireland. The Court held that the optional derogation contained in Article 2(2) of the Directive (para 22) "*may not be interpreted in such a way as to extend its effects beyond what is necessary to safeguard the interests which it seeks to secure, and the scope of the derogations which it lays down must be determined in the light of the aims pursued by the directive*". The Court continued that the reason for the exemption was to ensure that the process for the adoption of legislation runs smoothly and that must (para 28) "*lead to the adoption of a narrow interpretation, according to which only those procedures that could result in the adoption of a law or a norm of an equivalent rank are covered by the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4."*

54. The Court concluded that the protection for bodies acting in a legislative capacity did not apply at all to a legislative body charged with the preparation of regulatory instruments because that body did not engage in a legislative process as envisaged by the Directive because (para 29):-

> *"…It is the specific nature of the legislative process and its particular characteristics that justify the special rules relating to acts adopted by bodies acting in a legislative capacity in connection with the right to information, as provided for both by the Aarhus Convention and Directive 2003/4."*

55. The Appellant places further reliance on Joined Cases C-514/07, C-528/07 and C-532/07, *Kingdom of Sweden v Association de la Press Internationale* EU:C:2010:541. In that case, access to court records was refused by the Commission in respect of ongoing and concluded proceedings pursuant to Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents ("*Regulation 1049/2001*"). Article 4(2) of Regulation 1049/2001 reads that: "*The institutions shall refuse access to a document where disclosure would undermine the protection of...court proceedings and legal advice."* In respect of the second category (where access was refused on the basis that, even though the proceedings were closed they were linked to open cases) the CJEU held (paragraph 131) that that rationale could not apply in respect of closed proceedings as "*there are no longer grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court since those activities come to an end with the closure of the proceedings*." This followed a finding in the Advocate General's Opinion in the case to the effect that (EU:C:2009:592, paragraph 31), "*Once a case is closed, however, the question becomes much easier. The answer to the basic question – whether the release of documents will undermine the integrity of the judicial process – is clearly 'No'. The Court has had the chance to examine the submissions of the parties, to deliberate and to reach its decision; the judicial process is complete and can no longer be affected by the publication of the parties' pleadings*." The decision of the Court of Justice in Case C-213/15P *Commission v Breyer* EU:C:2017:563 is an unequivocal affirmation of the principles in *API.*

56. The Appellant refers to the fact that the CJEU is itself subject to Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies ("*Regulation 1367/2006*", the "Aarhus Regulation"), and noted at the hearing of the main proceedings that, in having failed to refer to the effect of the Aarhus Regulation when discussing Regulation 1049/2001, the Respondent's and First Notice Party's written submissions did not accurately reflect the legal position regarding access to documents from the EU institutions under the EU legal order.

57. Finally, the Appellant contends in any event that section 65 of the 1926 Act is capable of an interpretation consistent with the decision of the Court of Justice in *Flachglas* as it is silent as to the temporal scope of judicial control. If it is not it must be disapplied (C-378/17 *Minister for Justice v Workplace Relations Commission*).

58. The Appellant therefore concludes that holding court records after the making of final orders and exhaustion of any appeals in proceedings cannot be characterised as an exercise of "*judicial capacity*" in Article 2(2) of the Directive.

III. The Submissions of the Respondent and First Notice Party

59. The Respondent and the First Notice Party also accept the concept of "*judicial capacity*" is an autonomous concept of EU law.

60. However, they submit that it is nonetheless necessary to have regard to the relevant "*legal and constitutional context*" established by national law, to determine whether the activity in question falls within the autonomous concept of "*judicial capacity*" under EU law (citing Case C-204/09 *Flachglas* EU:C:2011:413, Opinion, paragraph 62); Case C-279/12 *Fish Legal and Emily Shirley v Information Commissioner* EU:C:2013:853, paragraph 48).

61. The Respondent and the First Notice Party draw the Court's attention to "*The Aarhus Convention: an Implementation Guide"*, which states that the definition of a "*public authority*" does not include bodies or institutions acting in a judicial capacity. While the Guide is not binding, it may be regarded as an explanatory document (*Fish Legal*, paragraph 38).

62. The Respondent and First Notice Party also note that, under EU law, control over access to the court file after the making of final orders and exhaustion of any appeals in proceedings is recognised as the exercise of "judicial capacity". In this regard, they rely on the following:

> (1) The EU courts were not subject to the right of access to documents provided in Article 255 EC, and corresponding

Regulation 1049/2001;

(2) As was noted in *Sweden*, the CJEU is not among the institutions bound by Article 255 EC "*precisely because of the nature of the judicial responsibilities which it is called upon to discharge*" (paragraph 82);

(3) The EU courts are not subject now to the right of access other than "*when exercising their administrative tasks"* pursuant to Article 15(3) TFEU;

(4) Article 23(1)(f) of the General Data Protection Regulation (Regulation 2016/679) provides that Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights under the Regulation:

> *"when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard: [..] (f) the protection of judicial independence and judicial proceedings";*

(5) As was held in Case C-213/15P *Commission v Breyer* EU:C:2017:563 (at paragraph 45) "*neither the Statute of the Court of Justice of the European Union nor the rules of procedure of the EU Courts provide for a right of access by third parties to written submissions filed in court proceedings";*

(6) Meanwhile, Article 38(2) of the Rules of Procedure of the General Court provides that *"[n]o third party, private or public, may have access to the file in a case without the express authorisation of the President of the General Court, once the parties have been heard";*

(7) While Regulation 1367/2006 applies to the CJEU, it goes no further than Article 15(3) TFEU, insofar as the CJEU is only subject to Regulation 1367/2006 in respect of its administrative functions.

63. Reliance is also placed on the concept of judicial independence in EU law. The CJEU has referred (in Case C-216/18 *LM* EU:C:2018:586, paragraph 63) to what it describes as the "*external*" aspect of independence, which includes a requirement that the body *"functions wholly autonomously*" and:

> *"without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions".*

64. The Respondent and First Notice Party also refer to the distinction drawn by Advocate General Sharpston in *Flachglas* between functional and structural exercise of legislative or judicial capacity.

65. In this regard, in *Flachglas*, the CJEU ruled (at paragraph 49) that a "func*tional interpretation*" of the phrase "'*bodies or institutions acting in a … legislative capacity'*" was required. This meant that, notwithstanding that the ministries considered in *Flachglas* were not structurally legislative, they were nonetheless entitled to benefit from the exemption when acting in a functionally legislative capacity. Consequently, the CJEU held that ministries may be deemed to be acting in a "*legislative capacity*", "*to the extent that they participate in the legislative process"* (paragraph 51) (in other words, the exemption was limited to the actual exercise of legislative capacity).

66. By contrast, in respect of a structural legislative body, the Advocate General observed in *Flachglas* that there should be no temporal limitation on the consideration of its activities as "*legislative*". In this regard, the Advocate General observed as follows (at paragraph 73):

> *"I would contrast the situation of such bodies with that of others which, on a structural definition, form part of the legislature itself. With regard to the enactment of legislation, and with regard to the legislation enacted, bodies which form part of the legislature act exclusively in a legislative capacity. Their activity in that capacity has no beginning or end in time. There is therefore no temporal limitation on the possibility of their exclusion from the definition of 'public authority' within the meaning of the Directive."*

67. This comment of the Advocate General was not addressed by the CJEU. However, the Respondent and Notice Party submit that this comment suggests that, for a body acting in a structural "*judicial capacity*", there will be no temporal limitation on the application of Article 2(2).

68. With respect to the Appellant's arguments regarding the necessity for a broad interpretation of the Directive, the Respondent and Notice Party respond that the Directive's objective can only be pursued within the Directive's material scope, which excludes activities performed in a "*judicial capacity*".

69. They also contend that the Appellant's approach fails to consider the purpose of the exemption for "*judicial capacity*" in Article 2(2) itself, and in particular, the smooth running of court proceedings.

70. The Respondent and the Notice Party conclude that control of access to court records after the making of final orders and exhaustion of any appeals in proceedings is an exercise of "*judicial capacity*" within the meaning of Article 2(2) of the Directive and under national law.

Statement of the reasons that prompted the referring court to refer the case to the Court of Justice

71. As far as can be established the question of the extent of the judicial capacity exemption provided for in Article 2(2) of the Directive has never been considered by the Court of Justice or by the courts in any of the Member States. In Case 283/81 *CILFIT* ECLI:EU:C:1982:335 terms, the correct application of EU law in this regard is not so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. It is appropriate and necessary for the consistent interpretation of EU law, and in order to determine the main proceedings, that the input of the Court of Justice be sought in order to identify the scope of the "judicial capacity" exemption.

ANNEXES

1. Booklet of Pleadings

2. Order for reference dated as perfected by the Registrar of the High Court dated 2019