

## THE HIGH COURT

[2015 No. 351 P]

BETWEEN

GRAHAM DWYER

PLAINTIFF

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA, MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES, IRELAND  
AND ATTORNEY GENERAL

DEFENDANTS

**EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered on the 11th day of January, 2019**

**Introduction**

1. At para. 5.23 of the principal judgment delivered in these proceedings on 6th December, 2018, [2018] IEHC 685, (*"principal judgment"*), the Court referred to its circulation of draft declarations to the parties and asked for submissions. Written outline submissions were exchanged earlier this week and the Court was furnished with a book of authorities before hearing oral submissions this morning. That process was useful, not least because Counsel for the parties agreed that the concerns of their respective clients could be accommodated by an agreed form of declaration with a stay on the effect of the declaration pending the determination of the proposed appeal by the Defendants.

2. It was indicated that the Defendants will apply pursuant to Article 34.5 of the Constitution for what is colloquially called a "leap frog appeal" to the Supreme Court soon. Counsel correctly clarified that the terms of the final order was indeed a matter for the Court.

3. In view of the question posed in the principal judgment about the practical purpose of making a declaration pursuant to s. 5 of the European Convention on Human Rights Act and the focus at all times by the Plaintiff on his outstanding appeal to the Court of Appeal from his conviction, it is convenient for the Court to make a few further observations given the limits to the agreed declaration now sought.

**Declaratory Relief**

4. A declaration can be a private and a public law remedy. Section 155 of the Chancery (Ireland) Act 1867 (repealed by the Statute Law Revision (No. 2) Act 1893) (*"1893 Act"*) granted jurisdiction to the courts to make declarations without granting consequential relief. Section 1 of the 1893 Act provides inter alia:-

*"... nor shall this Act affect any principle or rule of law or equity, or established jurisdiction, form or course of pleading, pleading, practice, or procedure, of the general or public nature of any statute, or any existing usage, franchise, liberty, custom, privilege, restriction, exemption, office, appointment, payment, allowance, emolument, or benefit, or any prospective right, notwithstanding that the same respectively may have been in any manner affirmed, recognised, or derived by, in, or from any enactment hereby repealed;"*

Order 19, rule 29 of the Rules of the Superior Courts identifies the right to seek declaratory relief only.

5. A declaration is a flexible remedy and is often tailored to the particular circumstances of the claimant or the parties. The Court is alert to situations which may be covered by a declaration and for which there is no proper contradictor.

6. Paragraphs 1.18, 1.19 and 4.4 of the principal judgment identified topics with which the Court did not engage. It was submitted at all times by Counsel for the Plaintiff that the purpose of these proceedings was to advance specific arguments in his appeal from his conviction. He is not pursuing a larger public interest case as the Plaintiff company did in *Digital Rights Ireland Ltd v. Minister for Communications* [2010] 3 IR 251 (*"Digital Rights Ireland Ltd"*).

7. The Defendants referred to difficulties arising and measures taken as a result of the principal judgment for other investigations and prosecutions. They specifically mentioned the desire to ensure that service providers do not perceive the principal judgment as a basis to destroy or to cease retaining "mobile telephony data". They have also identified methods adopted to respect the findings of this Court in respect of accessing what may be described as general and indiscriminate retained telephony data for the investigation and prosecution of serious crime while confirming their intention to appeal the findings of this Court.

8. The recent judgments listed at para. 4.26 of the principal judgment indicate an evolving jurisprudence for remedies in respect of constitutional issues which could be extended to declarations of inconsistency with European Union law. Tailoring is not a novel proposition when defining the terms of a declaratory order.

9. While a contradictor is not always needed to do justice, see *G. McG. v. D.W. (No. 2)* [2000] 4 I.R. 1, the desirability of having a party with a specific interest in, for example the security of the State, was and is a significant factor for this Court in exercising restraint both in the terms of the principal judgment and in the making of the final orders.

10. In light of the above, and the agreed stance of the parties, I make "a declaration that s. 6(1)(a) of the Communications Retention of Data Act 2011, (*"the Act"*), insofar as it relates to telephony data, as defined in Part 1 of Schedule 2 of the Act, and which is retained on a general and indiscriminate basis as provided for in s. 3 of the Act, is inconsistent with Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, read in light of Article 7, 8 and 52(1) of the Charter of Fundamental Rights of the European Union." (*"the Declaration"*).

11. There is now no practical purpose in making separate declarations:-

(i) concerning s. 3 of the Act as the effect of the principal judgment required by the Plaintiff for his appeal from his conviction, is incorporated into the above declaration; and

(ii) pursuant to s. 5(2) of the European Convention on Human Rights Act 2003 as put forward in para. 5.23 of the principal judgment for submission in case that this Court overlooked any argument which could be made if an opportunity had been given.

## Stay

12. Applications for a stay on a declaratory order are unusual. However, the principles for granting stays on other types of orders pending the determination of an appeal are well established. The judgment of McCarthy J. in *Redmond v. Ireland* [1992] 2 I.R. 362, described matters to be taken into account in an application for a stay of execution upon the award for damages in a claim for personal injury. Many of those factors should be considered in applications for stays in other claims. The principal factor is that: "*the overall consideration is to maintain a balance so that justice will not be denied to either party*" (at p. 366).

13. Suspending declarations is discussed at para. 4.29 to 4.36 of the principal judgment. One might well ask what is the difference between a stay and a suspension of a declaration of inconsistency with EU law?

14. If it were not for the pragmatic approach of Counsel for all sides to agreeing that a stay should be granted, the Court would find itself having to grapple with the subtle differences which could be advanced. Therefore, there is little precedential value in the decision of this Court now to grant the stay. The only other precedent cited to the Court for granting a stay on declaratory relief was *National Association of Regional Game Councils v. Minister for Justice & Ors* (an *ex tempore* judgment of Barrington J. for the Supreme Court on 7th August, 1998). In that case, the High Court had clarified an earlier declaration to which the appellant defendant Minister objected on the grounds that:-

(i) the High Court Judge was *functus officio* when making the revised declaratory order;

(ii) the amendment imposed a new obligation on the defendant Minister which he did not want to undertake.

15. Somewhat hesitantly, but in recognition of the circumstances outlined by the Defendants in relation to the effects of the Declaration, the desire of both parties to expedite an application for a leapfrog appeal to the Supreme Court, and the focus of the Plaintiff in these proceedings on his appeal for his conviction, this Court orders that the effect of the Declaration be stayed from the date of perfection of the order for such period as is provided for in Order 58 or Order 86A of the Rules of the Superior Courts (as the case may be) for the lodging of an appeal herein, and in the event of such an appeal being lodged within that period, that the effect of the Declaration be further stayed until the first hearing for directions before the Court of Appeal or the Supreme Court, (as the case may be), and that any further application in relation to a further stay be made to the Court of Appeal or the Supreme Court.

16. The reason for not granting a stay until the determination of the appeal is to give an opportunity to the Court of Appeal or the Supreme Court to consider the principal judgment and particularly paras. 4.20 to 4.36, relating to the application for a suspended declaration in the context of the stay. Furthermore, "*... it must be borne in mind that there is an overriding obligation on the national court to uphold European law, and national procedural rules should not operate in such a way as to undermine a claimant's rights to effective judicial protection.*" (para. 28 of *Digital Rights Ireland Ltd v. Minister for Communications* [2010] 3 IR 251).

17. Lastly, the Court was advised at the beginning of the plenary hearing of these proceedings that an application would be made at this stage for a recommendation that the legal costs of the Plaintiff would be paid by the State. The Court recommends as now sought with liberty to the Plaintiff to apply further in this regard if necessary.