Neutral Citation: [2015] IEHC 152

THE HIGH COURT

[2014 No. 146 MCA]

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 1997, AND IN THE MATTER OF AN APPEAL PURSUANT TO S. 42(2) OF THE FREEDOM OF INFORMATION ACT 1997,

BETWEEN

MICHAEL MCKEVITT

APPELLANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 6th day of March, 2015

1. This is an appeal pursuant to s. 42(2) of the Freedom of Information Act 1997, 2003 (FOI) whereby the appellant seeks to set aside the respondent's certificate issued under s. 25 of the Act on 28th February, 2014. Various other declarations are sought in the notice of motion which are not in accordance with the jurisdiction of the court under section 42. They are drafted in a form more appropriate to judicial review proceedings. The court's jurisdiction on this appeal is limited to an appeal on a point of law.

Statutory Provisions

2. When a request is made seeking records under s. 7 of the FOI, the application must be dealt with in accordance with the following relevant provisions:-

> "8(1) Subject to the provisions of this Act, a head (which under s. 2 is defined as the head of a public body to include the Minister having charge of it) shall, as soon as may be, but not later than 4 weeks, after the receipt of a request under section 7 —
>
> (a) decide whether to grant or refuse to grant the request or to grant it in part,
>
> (b) if he or she decides to grant the request, whether wholly or in part, determine the form and manner in which the right of access will be exercised, and
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> (c) cause notice, in writing or in such other form as may be determined, of the decision and determination to be given to the requester concerned.
>
> (2) A notice under subsection (1) shall specify—
>
> (a) the decision under that subsection concerned and the day on which it was made…
>
> (d) if the request aforesaid is refused, whether wholly or in part—
>
> (i) the reasons for the refusal, and
>
> (ii) unless the refusal is pursuant to section 19 (5), 22 (2), 23 (2) or 24 (3), any provision of this Act pursuant to which the request is refused and the findings on any material issues relevant to the decision and particulars of any matter relating to the public interest taken into consideration for the purposes of the decision..."

Section 8 was amended by s. 6 of the Freedom of Information (Amendment) Act 2003.

3. Section 23 provides:-

> "(1) A head may refuse to grant a request under section 7 if access to the record concerned could, in the opinion of the head, reasonably be expected to –
>
> (a) prejudice or impair -
>
> (i) the prevention, detection or investigation of offences, the apprehension or prosecution of offenders or the effectiveness of lawful methods, systems, plans or procedures employed for the purposes of the matters aforesaid,
>
> (ii) the enforcement of, compliance with or administration of any law,
>
> (iii) lawful methods, systems, plans or procedures for ensuring the safety of the public and the safety of security of persons and property,
>
> (iv) the fairness of criminal proceedings in a court or of civil proceedings in a court or other tribunal,
>
> (v) the security of a penal institution,

(vi) the security of the Central Mental Hospital,

(vii) the security of a building or other structure or a vehicle, ship, boat or aircraft,

(viii) the security of any system of communications whether internal or external of An Garda Síochána, the Defence Forces, the Revenue Commissioners or a penal institution,

(b) Reveal or lead to the revelation of the identity of a person who has given information to a public body in confidence in relation to the enforcement of administration of the civil law or any other source of such information given in confidence, or

(c) facilitate the commission of an offence.

(2) Where a request under section 7 relates to a record to which subsection (1) applies, or would, if the record existed, apply, and the head concerned is satisfied that the disclosure of the existence or non-existence of the record would have an effect specified in paragraph (a), (b) or (c) of that subsection, he or she shall refuse to grant the request and shall not disclose to the requester concerned whether or not the record exists."

Section 23(3) provides that subs (1) does not apply to a record if the conditions set out at subpara (a) are complied with and under subs (b) in the opinion of the head concerned, the public interest would on balance be better served by granting than by refusing the request concerned.

4. Section 23 of the principal Act was amended by s. 18 of the Freedom of Information (Amendment) Act 2003, authorising a head to refuse a request under s. 7 if access to the record concerned could "in the opinion of the head reasonably be expected to" –

"(aa) endanger the life or safety of any person."

5. Section 24, as amended by s. 19 of the Freedom of Information (Amendment) Act 2003, provides:-

"(1) A head may refuse to grant a request under section 7 in relation to a record if, in the opinion of the head, access to it could reasonably be expected to affect adversely –

(a) the security of the state,

(b) the defence of the state,

(c) the international relations of the state, or

(d) matters relating to Northern Ireland.

(2) A head shall refuse to grant a request under section 7 if the record concerned –

(a) contains information –

(i) that was obtained or prepared for the purpose of intelligence in respect of security or defence of the state, or

(ii) that relates to –

(I) the tactics, strategy or operations of the defence forces in or outside the state, or

(II) the detection, prevention or suppression of activities calculated or tending to undermine the public order or the authority of the state (which expression has the same meaning as in section 2 of the Offences Against the State Act, 1939),…"

6. The relevant provisions concerning declaring records to be exempt and issuing a certificate to that effect are contained in s. 25 of the Freedom of Information Act 1997, as amended, as follows:-

"(1) (a) Subject to paragraph (b), where—

(i) a Minister of the Government or the head of a public body (other than a Department of State or the Office of the Tánaiste) in relation to which functions stand conferred on that Minister of the Government—

(I) pursuant to section 8, refuses to grant a request to him or her under section 7 , or

(II) pursuant to section 14 , upholds a decision, or decides, to refuse to grant a request under section 7, because he or she is satisfied that, by virtue of section 23 or 24 , the record concerned is an exempt record, and

(ii) the Minister of the Government is satisfied, that the record is of sufficient sensitivity or seriousness to justify his or her doing so,

the Minister of the Government may declare, in a certificate issued by him or her ("a certificate"), that the record is, by virtue of section 23 or 24 , an exempt record.

(b) A Minister of the Government shall not issue a certificate in respect of a record the subject of a decision referred to in clause (I) or (II) of paragraph (a) (i) by the head of a public body (other than a Department of State or the Office of the Tánaiste) unless he or she has been requested by the head, in writing or such other form as may be determined, to do so."

The 1997 Act was replaced by the Freedom of Information 2014, which entered into force on 14th October, 2014. Though the 1997

Act was repealed, this is subject to s. 55 of the 2014 Act which provides that any action commenced under the 1997 Act, but not completed before the commencement of the new Act "shall continue to performed and completed after the commencement of the Act as if the 1997 Act had not been repealed. A notice of motion was issued on 16th April, 2014, and consequently the proceedings are to be determined under the 1997 legislation.

Background

7. The appellant was convicted by the Special Criminal Court on 6th August, 2003, of the offence of "directing the activities of an organisation in respect of which a suppression order has been made under s. 19 of the Offences Against the State Act 1999, contrary to s. 6 of the Offences Against the State (Amendment) Act 1998".

8. The appellant made a s. 7 FOI application to the respondent by letter dated 20th January, 2014, following the issuing of a final report by his Honour Judge Smithwick, of the "Tribunal of Inquiry into suggestions that members of An Garda Síochána or other employees of the State colluded in the fatal shooting of RUC Superintendent Harry Breen and RUC Superintendent Robert Buchanan on 20th March, 1989". The application was said to be in connection with evidence given to the Tribunal and referred to at paras. 11.4 – 11.10 (inclusive) of the report. The contents of this extract of the Tribunal's report demonstrates that the appellant was the subject of garda telephone surveillance in or about 1990. The Tribunal considered evidence as to whether there had been a leak of information from An Garda Síochána to Mr. McKevitt in respect of a proposed search of his home under a search warrant. The Tribunal obtained access to a Garda Síochána file on the appellant which contained transcripts of a number of intercepted telephone conversations between him and another or others. The Tribunal focused upon those transcripts and records relevant to its terms of reference and, in particular, to a period in or about January, 1990. The transcripts referred to did not represent an exhaustive list of all phone conversations intercepted by An Garda Síochána, but only those which were retained and considered to be relevant from the perspective of Crime and Security (the intelligence gathering arm) in An Garda Síochána.

9. The records and transcripts relating to the telephone surveillance carried out on the appellant were made available to the Tribunal pursuant to a process and/or protocol, details of which were not made known to the court. The appellant relies upon the proceedings and findings of the Tribunal as evidence that he was subject to telephone surveillance, that records existed in relation to that surveillance, including transcripts, and that An Garda Síochána gave access to His Honour Judge Smithwick, to those records and transcripts in the course of the Tribunal's work.

10. He claims that as a result of the evidence given by serving and retired members of An Garda Síochána to the Smithwick Tribunal, a significant amount of information was now in the public domain in respect of interception of his home telephone.

11. In the letter of 20th January, 2014, the appellant sought various records relating to the interception by An Garda Síochána of his home telephone. An application made on his behalf by his solicitors states:-

> "It is clear that Michael McKevitt was subject to officially conducted telephone interceptions, which resulted in transcripts of conversations being prepared. Neither Mr. McKevitt nor any other member of his household consented to the interception of these telephone calls. We require, as a matter of urgency, to establish in the first instance the basis upon which this interception took place and the extent of it. The period of time of greatest immediate concern is from August, 1999 to April, 2001.
>
> Accordingly, we are writing to you seeking all records including but not limited to any authorisations under the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993, and all transcripts or audio recordings and all logs of calls or related intelligence reports concerning Michael McKevitt or his household.
>
> This request is made pursuant to the provisions of the Freedom of Information Acts and the Data Protection Act. Our client's authority in that regard is attached.
>
> We draw your attention to the observations in the report at paragraph 11.4.2. It follows that if the State effectively led this evidence in public without objection we do not see how any refusal can be grounded upon maintenance of a State secret that the State of (*sic*) voluntarily waived secrecy and privilege over."

12. On 25th February, 2014, the Minister for Justice and Equality issued a ministerial certificate under s. 25 of the Freedom of Acts 1997 – 2003, in the following terms:-

> "I, Alan Shatter, T.D., Minister for Justice and Equality, hereby declare pursuant to section 25 of the Freedom of Information Acts 1997 and 2003, that the record(s) referred to at paragraph A below are exempt by virtue of the provisions set out at paragraph B below.
>
> A. Details of Section 7 Request
>
> "All records including but not limited to any authorisations under the Interception of Postal Packets and Telecommunications (Regulation) Act 1993, and all transcript or audio recordings and all logs of calls or related intelligence reports concerning Michael McKevitt or his household."
>
> B. Provisions of the Act by Reference to which the Records Requested are Exempt Records
>
> "Section 23(1)(a)(i)-(iii)
>
> *The prevention, detection or investigation of offences, the apprehensions or prosecution of offenders or the effectiveness or lawful methods, systems, plans or procedures employed for the purpose of the matters aforesaid the enforcement of, or compliance with or administration of any law, lawful methods, systems, plans or procedures for ensuring the safety of the public and the safety or security of persons and property.*
>
> *Section 24(1)(a)(b)(c)(d)*
>
> *The security of the State*
>
> *The defence of the State*

The international relations of the State

Matters relating to Northern Ireland

C. Date of Signature of Certificate and Expiration Date of Certificate

Date Certificate signed 28th February, 2014

Expiration Date of Certificate 28th February, 2016

D. Name of Requester MacGuill & Company Solicitors on behalf of Mr. Michael McKevitt

Alan Shatter T.D., Minister for Justice and Equality 25th February, 2014."

The certificate was furnished under cover of letter dated 7th March, 2014, addressed to the appellant's solicitors which stated:-

"Dear Sirs,

I refer to your Freedom of Information request in respect of you client, Mr. Michael McKevitt, for the following:

"All records including but not limited to any authorisations under the Interception of Postal Packets and Telecommunications (Regulation) Act 1993, and all transcripts or audio recordings and all logs of calls or related intelligence reports concerning Michael McKevitt or his household."

Decision
I wish to inform you that the Minister, as provided for under the provisions of section 25 of the Freedom of Information Act, as amended, has decided to declare, in a certificate issued by him that the records requested are exempt by virtue of sections 23 and 24 of the Act. A copy of the ministerial certificate is enclosed for your information.

Rights of Appeal
Under the provisions of section 42 of the Freedom of Information Act, as amended, (copy enclosed) there is provision for an appeal to the High Court on a point of law against the issue of a certificate under section 25 of the Act."

The Appeal
13. The appellant seeks an order setting aside the ministerial certificate issued on 28th February, 2014. In the notice of motion grounding the application no point of law is cited as the basis for the appeal. Rather, a number of declarations are sought which, as matters emerged in argument, formed the basis of a number of legal points advanced. The court derives the following points of law from the application:-

(A) That the decision taken by the respondent is overly vague and uncertain in its meaning and fails to set out whether and in what way disclosure of each of the categories of materials sought would breach each or all of the public interest considerations referred to in the certificate.

(B) Providing the applicant with each of the categories of materials sought could not reasonably be expected to adversely affect each or all of the public interest considerations referred to in the certificate.

(C) The respondent failed to have sufficient regard to the fact that the materials sought by the applicant are historical in nature and the State has previously waived its rights to claim confidentiality in respect thereof by allowing extensive reference to be made in public proceedings to their existence and content.

The Nature and Scope of the Appeal
14. The scope of this appeal is determined by s. 42 of the Freedom of Information Act 1997, which provides that a requester may appeal to the High Court "on a point of law" against:-

"(a) the issue of a certificate under section 25,

(b) a decision pursuant to section 8, to refuse to grant a request under section 7 in relation to a record the subject of such a certificate,…"

15. This appeal is not an appeal on the merits and its nature and scope is described in *Deely v. The Information Commissioner* [2001] 3 I.R. 349, as approved by the Supreme Court in *Sheedy v. The Information Commissioner* [2005] I.R. 272 at pp. 276 – 7. The following principles apply:-

"(a) The court may not set aside findings of primary fact unless there is no evidence to support such findings;

(b) The court ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw:

(c) The court may reverse such inferences, if some were based on the interpretation of documents and should do so if incorrect;

(d) If the conclusion reached by the body is shown to be based on an erroneous view of the law, the decision may be set

aside;

(e) The onus of proving that the decision of the respondent was erroneous in law rests upon the appellant."

The Campbell Case

16. In *Campbell v. The Minister for Justice, Equality and Law Reform and The Information Commissioner* [2010] IEHC 197, an appeal was brought under s. 42(2) seeking to set aside a s. 25 certificate. The arguments made by the applicants in *Campbell* closely resemble those now relied upon by the applicant in these proceedings. It was claimed that the manner in which the reasons for refusal had been certified by simply restating in the certificate the statutory provisions relied upon by the Minister constituted an insufficient discharge by him of the obligation to provide a reason or reasons for refusal. It was submitted that by failing to explain in a more expansive way why he was certifying the records as exempt, the Minister made it impossible for the decision to be appealed in any meaningful way. It was also claimed that any confidentiality which may have attached to the records had already been waived by the Minister because they had been provided to a third party, the prosecuting authorities in Lithuania, and could not now be relied upon as a reason for exemption.

17. Peart J. held that s. 25(5)(b) of the Act did not require the Minister to explain in a certificate which refuses access to documents the reasons why it is considered that the records in question come within the provisions of ss. 23 or 24. He stated:-

> "This is not a case in which no reasons have been provided for the decision to refuse access to records. The Act has provided for a number of reasons which will justify refusal, and has provided also that where access has been refused a certificate will be issued by the Minister and it is further specifically provided as to what such a certificate shall contain. The Minister has certified his reasons and has complied precisely with what the legislation provides that he must do. Section 25(5)(b) FOI mandates, as set forth above, that "the provisions of the s. 23 or 24, as may be appropriate, by reference to which the record to which it relates is an exempt record" shall be specified. The Minister has done this. The section does not go further and require that the Minister explain in his certificate the reasons why he considers that the records in question come within these provisions. The Minister clearly has a discretion in this regard. While that discretion is not an unfettered one and is one which must be exercised judicially so that his decision is not based on a mere whim, the court is entitled to presume that the Minister has acted constitutionally. The Oireachtas when providing for what a s. 25 Certificate shall contain could have chosen to require that the Minister explain in the Certificate why the records in question come within these particular provisions. It has not done so. In my view, by asking this Court to look behind these reasons, and in order to do so, to seek production of the records in question and form its own view upon them, the applicants are asking this Court to reach a conclusion on the merits, as opposed to a point of law."

18. Peart J. also rejected the submission that the right to appeal on a point of law was frustrated by the absence of clearly stated and specific reasons for the issuing of the certificate beyond the reliance upon the reasons provided for in sections 23 and 24. He noted that any more specific statement of the reasons might defeat the very reason for the exemption of the records.

The Decisions in Mallak and Murphy

19. The appellant submits that since judgment was delivered in the *Campbell* case, the decisions in *Mallak v. Minister for Justice* [2012] 3 I.R. 297 and *Murphy v. Ireland* [2014] 1 I.L.R.M. 457 resulted in a change in the law and that the Minister is now required to give specific reasons for the exemption and for invoking the provisions of ss. 23 and 24 when issuing a certificate. In particular, the appellant relies upon the judgment of Fennelly J. in *Mallak* at paras. 66 and 67:-

> "In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.
>
> Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them."

20. In *Mallak* the applicant applied for a certificate of naturalisation which was refused and was not provided with any reasons for the decision. The respondent Minister submitted that he was not obliged to explain his decision. The High Court (Cooke J.) rejected the applicant's contention that the respondent was required to accompany his decision with a statement of reasons, finding that the refusal of the certificate was within the respondent's absolute discretion and that the applicant was not entitled to a certificate as a matter of legal right but only as a benefit or a privilege. The Supreme Court allowed an appeal to quash the Minister's decision holding that the rule of law required all decision makers to act fairly and rationally, meaning that they must not make decisions without reasons. It was held that it was not possible for the applicant without knowing the respondent's reason for refusal to ascertain whether he had a ground for applying for judicial review and by extension, for the courts effectively to exercise their power of judicial review. The court also addressed the possibility that a Minister might refuse to disclose his reasons following the quashing of his decision for good reason. Fennelly J. stated:-

> "Following the making of the order, it will be a matter for the Minister to consider the application afresh. It will be a matter for him to decide what procedures to adopt in order to comply with the requirements of fairness. It is not a matter for the court to prescribe whether he will give notice of his concerns to the applicant or disclose information on which they may be based or whether he will continue to refuse to disclose his reasons but to provide justification for doing so. Any question of the adequacy of reasons he may actually decide to provide or any justification provided for declining to disclose them can be considered only when they have been given. At this stage, I would propose that the court make only the limited decision to quash the Minister's decision."

21. In *Murphy v. Ireland* the Supreme Court considered a challenge to the constitutionality of s. 46(2) of the Offences Against the State Act 1939, pursuant to which the Director of Public Prosecutions could issue a certificate certifying that the ordinary courts were, in his opinion, inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of a plaintiff for a non-scheduled indictable offence. The court held that a decision of the Director was reviewable if it could be demonstrated that it was reached *mala fides* or was influenced by improper motive or improper policy or other exceptional circumstances. O'Donnell J. when considering the scope of the application of the *Mallak* decision stated:-

"40. However, the decision in *Mallak* was rather more nuanced than a simple citation of these paragraphs (68 and 69) would suggest. The judgment points to s. 18(2) of the Freedom of Information Act 1997, which introduced into Irish law a statutory entitlement to reasons. However, the Director of Public Prosecutions is not subject to that Act in respect of prosecutorial decisions. *Mallak* undoubtedly brings the common law on the duty to give reasons into line with the obligations of statute, but it does not address the question whether the common law requires decision makers to go further than the statutory requirement. Put another way, the considerations which underpin the limitation and the scope of the statutory right to reasons may also be effective at common law. The decision in *Mallak* refers, without disapproval, to the decision in *Eviston v. The Director of Public Prosecutions* and also to The State (Lynch) v. Cooney where there was limited right of review and no reasons were provided until the High Court hearing. Perhaps most notably, the decision in *Mallak* contemplated the possibility at pp. 325/99 that a decision maker could comply with the requirements of the law not by disclosing reasons but rather by "providing justification" for refusing to do so.

41. The obligation to give reasons is, as has been observed, dependent upon and a reflection of, the reviewability of the decision and the scope of that review. The decision made here is at the end of the spectrum where review is most limited and attenuated. This is because of the subject matter of the decision, the sensitivity of the matters routinely considered, and the fact that the end result of a decision to prosecute will be a trial in open court pursuant to the dictates of Article 38.1. The category of reasons which apply in the context of the Offences Against the State Act are reasonably well known. They are in part contained in the decision of the government to bring Part V into operation on the grounds that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order, and also in the Director of Public Prosecution's certificate that those conditions mean that the administration of justice and preservation of peace and order cannot be secured in the individual case…

42. It also follows from the decision of the government and the certificate of the Director of Public Prosecutions that it is highly likely that the reason why the Director of Public Prosecutions considered that the ordinary courts are not adequate to secure the administration of justice in the particular case must relate to the connections of the individual with organisations which are prepared to interfere with the administration of justice. Nevertheless, trial by jury is a constitutional requirement in those cases to which it applies. A decision which has the effect of removing a case which would otherwise be tried by a jury to be tried by a judge or judges alone is a decision which must comply with the dictates of the Constitution. Accordingly, the Court considers that it is necessary in such a case that the Director of Public Prosecutions, if requested, should either give such reason, or, as contemplated in *Mallak*, justify a refusal to do so. While this, in most cases, may be an entirely predictable step, it is nevertheless an important one in an area where there is a significant limit on the jurisdiction of the courts and it is desirable that such an obligation should be required where that duty to give reasons can be complied with without damage to the other public interests involved."

22. The Supreme Court accepted that the Director of Public Prosecutions was under a duty to provide reasons for considering that the ordinary courts were not sufficient to secure the administration of justice in a particular case. In addition, in an appropriate case it may be sufficient to state that "no reason can be given without impairing national security". However, it did not follow that the entitlement to reasons carried with it a further obligation to furnish "the gist of information grounding such a decision or to have a hearing or to make submissions before a decision is made". A review of the Director's decision should be the exception and never the routine and only when an accused is in a position to put forward a substantial case that the decision making process had miscarried. The Minister, in this case, relies upon the specific provisions of s. 23(1)(a)(i) – (iii) and s. 24(1)(a), (b), (c) and (d) as the basis for the granting of the certificate without further explanation.

23. The Oireachtas has addressed in very specific terms the extent of the information to be given in all cases but draws a distinction between those covered by ss. 23 and 24 and others. Under s. 8(2)(d) a notice refusing an application for records must specify the reasons for the refusal and unless the refusal is made pursuant to, *inter alia*, ss. 23(2) or 24(3), the notice must specify the provision of the Act pursuant to which the request is refused and the findings on any material issues relevant to the decision and particulars of any matter relating to the public interest taken into consideration for that purpose. Thus, the Oireachtas has considered the extent of the information which the Minister is obliged to give. It is clear that the justification for the limited reasons that may be given for exempting records under s. 25, with reference to ss. 23 and 24, relates to the sensitivity and seriousness surrounding the furnishing of such information or elaborating upon the reasons for the exemption. The court is satisfied that the Minister is not statutorily obliged to provide any further information than the fact that the reasons permitted under the relevant sections are relied upon.

24. Under s. 25, the Minister may grant a certificate that a record is exempt by virtue of s. 23 or 24 if "satisfied that the record is of sufficient sensitivity or seriousness to justify his or her doing so". The decision as to the sensitivity or seriousness of the records in issue is a matter entirely for the Minister. Any elaboration upon the materials or considerations leading to that determination may defeat the purpose of the certification process. This is not a case of a refusal to give reasons under s. 8(2) or to give any reasons at all for the certification under s. 25, nor is it a case of a failure to give reasons justifying a refusal to give such reasons. The justification for the granting of the certificate arises from the nature of the documents which qualify for exemption under ss. 23 and 24 and the necessary statutory determination that they are of such sufficient and serious sensitivity to require certification by the Minister. This involves the exercise of an executive discretion concerning issues of public policy, the protection of citizens and matters of state. The Minister is obliged to act in accordance with constitutional fairness in the exercise of this discretion which is circumscribed by the provisions of s. 25 and the other provisions of the Act. There is a rebuttable presumption that the Minister has acted in a constitutional manner. Moreover, the certificate expires after a period of two years.

25. Furthermore, I am not satisfied that the common law or the Constitution imposed a duty to give any further explanation or elaboration of the statutory reasons advanced in this case. As noted by O'Donnell J. in *Murphy*, the obligation to give reasons is "dependent upon and a reflection of the reviewability of the decision and the scope of that review": so also is any suggested obligation to expand on such reasons. In that case the decision was held to be "at the end of the spectrum where review is most limited and attenuated". In this case also, the subject matter of the certification necessarily involved the consideration of sensitive matters as evidenced by the invocation of ss. 23 and 24. This is unsurprising having regard to the wide ranging nature and extent of the sources and investigative tools which must be relied upon when combating terrorism and protecting citizens and the institutions of the state.

26. The court is, therefore, satisfied that in the circumstances of this case, the certificate issued under s. 25 by the respondent was in accordance with law. The declaration contained in the certificate that by virtue of ss. 23 or 24, the documents sought are exempt records, was made for reasons which are clear and transparent and follow a consideration that the records were of sufficient sensitivity or seriousness to justify certification. There is no allegation of *mala fides* on the part of the respondent and no evidence indicating unreasonableness, irrationality or lack of proportionality by the respondent in the making of the decision. The acknowledged background and circumstances of the case indicate the contrary, though the merits of the decision are not a matter for this Court. The extent and detail of the reasons given for certification are clearly and properly informed by the terms of s. 25, and the

seriousness and sensitivity of the records sought when considered in the context of the applicant's known history and circumstances. Anything further that might relate to the "gist of the information" relied upon in making the decision was not required. The justification for the lack of elaboration is in no way opaque and derives directly from the consideration by the Minister of the seriousness and sensitivity of the applicant's phone records. I do not consider that there is any conflict of principle between the judgment of Peart J. in *Campbell* and the subsequent decisions of the Supreme Court in *Mallak* and *Murphy* in respect of these matters.

Waiver or Estoppel

27. It is clear from the extracts of the Smithwick Tribunal relied upon that the appellant's phone was the subject of interceptions in or about 1990, and that access was granted to the Tribunal on what appears to be a limited basis to the records of some transcripts of those calls. Evidence in respect of these matters was heard in private session by the Tribunal. The appellant gave evidence said to be relevant to those calls concerning an alleged leak of information to him about a proposed search of his home. He contends that the Commissioner of An Garda Síochána and/or the Minister have waived any claim that any other similar historical records are exempted from disclosure on grounds of confidentiality or public policy because of the limited access granted to the Tribunal.

28. I am not satisfied that this submission is correct. Reliance is placed on the judgment of Hardiman J. in *Hannigan v. Director of Public Prosecutions* [2001] 1 I.R. 378. It is submitted that the situation is analogous to a claim of privilege where part of a privileged document has been referred to in court proceedings by a person asserting privilege over it, but in a manner which is unfair to the opposing party. The general rule that where privilege material is deployed in court in an interlocutory application, the privilege in that and any associated material is waived has no application in the present case. In this case, the disclosure to the Tribunal was of a very limited nature and took place in very restricted circumstances consistent with the seriousness and sensitivity with which the records were regarded by the Tribunal and the authorities. Evidence was given in private session upon the application of the Garda Commissioner. The references to the transcripts are limited to telephone conversations from An Garda Síochána's file in or about January 1990. There is no evidence of any waiver by or on behalf of the Minister in respect of the power vested in him under section 25. Furthermore, the appellant seeks records which came into existence subsequent to the events the subject matter of the Tribunal's report. There is no evidence to suggest that confidentiality in respect of any of those records was at any stage undermined or waived by the Minister and the disclosure to the Tribunal does not amount to a forbearance or waiver of the right of the Minister to exercise his power under s. 25 at any stage in relation to them (see Campbell at p. 33 and *OBG Limited v. Allan* [2008] 1 A.C. 1 paras. 302 and 329). I am not satisfied that the Minister waived or undermined the protection from disclosure which he was entitled to consider and confer on the telephone records under section 25.

Conclusion

29. I am, therefore, satisfied for all of the above reasons that this appeal must be refused.