

Appendix FF

Order 58, rule 15

No. 1

SUPREME COURT

Application for Leave and Notice of Appeal



For Office use

Supreme Court record number of this appeal	
Subject matter for indexing	

Leave is sought to appeal from	
<input type="checkbox"/> The Court of Appeal	<input checked="" type="checkbox"/> The High Court

[Title and record number as per the High Court proceedings]

NOWAK	V	THE DATA PROTECTION COMMISSIONER & THE INSTITUTE OF CHARTERED ACCOUNTANTS IN IRELAND (NOTICE PARTY)
High Court Record Nr	2014 No 118 CA	Court of Appeal Record Nr
Date of filing	9 th April 2018	
Name(s) of Applicant(s)/Appellant(s)	PETER NOWAK	
Solicitors for Applicant(s)/Appellant(s)	N/A	
Name of Respondent(s)	THE DATA PROTECTION COMMISSIONER	
Respondent's solicitors	Philip Lee Solicitors	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
<input type="checkbox"/> Yes	<input checked="" type="checkbox"/>	<input type="checkbox"/> No
If yes, give [Supreme Court] record number(s)		

Are you applying for an extension of time to apply for leave to appeal?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/>	<input type="checkbox"/> No
If Yes, please explain why			

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Mr. Justice Coffey
Date of order/ Judgment	13 March 2018 (perfected on 29 March 2018) / 26 February 2018

2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	PETER NOWAK
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Original status	<input type="checkbox"/>	Plaintiff	<input type="checkbox"/>	Defendant
	<input checked="" type="checkbox"/>	Applicant	<input type="checkbox"/>	Respondent
	<input type="checkbox"/>	Prosecutor	<input type="checkbox"/>	Notice Party
	<input type="checkbox"/>	Petitioner		

If the Applicant / Appellant is not legally represented please complete the following

Current postal address	Church Road, East Wall, Dublin 3
e-mail address	petenowak@hotmail.com
Telephone no.	

How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input checked="" type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	THE DATA PROTECTION COMMISSIONER
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Original status	<input type="checkbox"/>	Plaintiff	<input checked="" type="checkbox"/>	Defendant	Is this party being served with this Notice of Application for leave?
	<input type="checkbox"/>	Applicant	<input type="checkbox"/>	Respondent	
	<input type="checkbox"/>	Prosecutor	<input type="checkbox"/>	Notice Party	
	<input type="checkbox"/>	Petitioner			
	Yes	<input checked="" type="checkbox"/>	No		

Solicitor			
Name of firm	Philip Lee Solicitors,		
Email	info@philiplee.ie		
Address	7/8 Wilton Terrace, Dublin 2	Telephone no.	
		Document Exchange no.	
		Ref.	DAT001-0092
Postcode			

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Paul Anthony McDermott S.C		
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Notice Party's full name	THE INSTITUTE OF CHARTERED ACCOUNTANTS IN IRELAND
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Original status	<input type="checkbox"/>	Plaintiff	<input type="checkbox"/>	Defendant	Is this party being served with this Notice of Application for leave?
	<input type="checkbox"/>	Applicant	<input type="checkbox"/>	Respondent	
	<input type="checkbox"/>	Prosecutor	<input checked="" type="checkbox"/>	Notice Party	
	<input type="checkbox"/>	Petitioner	<input type="checkbox"/>		
					Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>

Solicitor			
Name of firm	Gore & Grimes Solicitors		
Email	solrs@goregrimes.ie		
Address	Cavendish House, Dublin 7 Ireland	Telephone no.	
		Document Exchange no.	
		Ref.	LC/SM/C7357.175
Postcode			

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input checked="" type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input checked="" type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	N/A		
Email			
Address	Telephone no.		
	Document		
	Exchange no.		
Postcode			

4. Information about the decision that it is sought to appeal

Please set out below:

Whether it is sought to appeal from the entire decision or (b) a part or parts of the decision and if (b) the specific part or parts of the decision concerned:

The Appeal is brought against the decision to the effect that the obligation on a data controller to provide a data subject with personal data, whether arising from section 4(9) or section 4(1)(a)(iii) of the Acts, does not extend to an obligation to provide the data in its original material form or, in the case of a document, to provide the original of that document.

A concise statement of the facts found by the trial court (in chronological sequence) relevant to the issue(s) identified in Section 5 below and on which you rely (include where relevant if certain facts are contested):

1. The learned High Court judge in his judgment failed to incorporate the facts leading to the decision of the Data Protection Commissioner dated 27 January 2014.
2. I was registered with the Institute of Chartered Accountants in Ireland operating under the title 'Chartered Accountants Ireland' ('CAI') as a student to qualify as a chartered accountant between 1 November 2006 and 21 August 2009. The Institute operates under bye-laws which must be approved pursuant to section 6 of the Institute of Chartered Accountants in Ireland (Charter Amendment) Act 1966 (as amended).
3. On 10 March 2010 my solicitors wrote a letter to the ICAI to preserve intact original examination scripts and other documentation relating to 2009 examinations and appeal.
4. On 15 March 2010 the ICAI confirmed that it would preserve the answer booklet and other documents relating to the examinations and appeal intact.
5. On 12 May 2010 I made a data access request to the ICAI. On 2 June 2010 the ICAI responded sending a copy of the personal data material (withholding copies of the examination scripts). Being unsatisfied with the response by the ICAI I made the first

complaint to the Data Protection Commissioner regarding data access request by letters dated 1 July and 14 July 2010. On 21 July 2010 the Commissioner made a decision in relation that request which was appealed to the Circuit Court. Eventually the appeal proceeded through the High Court, Court of Appeals to the Supreme Court. The Supreme Court (*Nowak v. Data Protection Commissioner [2016] IESC 18*) referred questions of law to the European Court of Justice for a preliminary ruling. The CJEU delivered its judgment on 20 December 2017(Second Chamber C-434/16).

6. By letter dated 13 November 2013, awaiting the appeal of the High Court's decision (relating to the appeal of the first Commissioner's decision dated 21 July 2010), I sought the re-confirmation from the ICAI whether it kept intact the original examination scripts and other documentation (as confirmed in the letter dated 15 March 2010).
7. By letter dated 19 November 2013 the ICAI replied to the effect that it "retained a copy of [the] exam script and related documentation".
8. Arising out of the foregoing I made a further complaint to the Data Protection Commissioner on 13 January 2014 to which the Data Protection Commissioner's Office responded inter alia "*the right of access under section 4 of the Data Protection Acts is a right to request a **copy** of personal data held by a data controller. This right of access does not require the supply of originals of information held. The data Protection Acts do not provide a right to an individual to require an organization to preserve originals of personal data*".
9. The Commissioner's decision made on 27 January 2014 was appealed to the Circuit Court on 17 February 2014. The Circuit Court judge decided to dismiss the appeal on 3 June 2014. That decision was appealed to the High Court on a point of law.
10. The High Court heard the appeal on 1st and 2nd of February 2018 and delivered the judgment on 26 February 2018.

The relevant orders and findings made in the High Court:

1. The High Court ruled that "*the obligation on a data controller to provide a data subject with personal data, whether arising from section 4(9) or section 4(1)(a)(iii) of the Act, does not extend to an obligation to provide the data in its original material form or, in the case of a document, to provide the original of that document*".
2. An Order refusing a Declaration that a data subject is entitled to access his or her personal data in its original form or format pursuant to section 4 of the Data Protection Act 1988 -2003
3. A consequential Order upholding the decision of the Data Protection Commissioner made on 27 January 2014 insofar it held that a right of access under section 4 of the Data Protection Acts does not require the supply of the personal data held in its original form or format.

5. Reasons why the Supreme Court should grant leave to appeal

In the case of an application for leave to appeal to which Article 34.5.4° of the Constitution applies (i.e. where it is sought to appeal to the Supreme Court from the High Court)—

why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court:-

- a) It is a matter of general public importance as the decision raises significant issue regarding the interpretation and application of section 4(9) of the Data Protection Acts 1988 & 2003. The decision reached by the Supreme Court, being the court of final appeal, would give a clear direction how that provision of the Act must be interpreted and understood by the Commissioner and data protection law practitioners. This decision would affect a great number of future members of general public wishing to make a data access request under section 4 of the Acts.
- b) The learned High Court judge failed to state the factual background (circumstances) leading to the decision of the Respondent and incorporate into the judgment submissions made in writing and orally and therefore it is assumed that it failed take them into consideration in making the decision on the appeal. It seems as if the Court interpreted the provisions of the law in isolation from the decision made by the Commissioner, facts of the case and submissions made to the Court.

and why there are exceptional circumstances warranting a direct appeal to the Supreme Court:-

- c) It is highly likely that this case will eventually be appealed to the Supreme Court. Bypassing the Court of Appeal will shorten the waiting time of the delivery of a final interpretation of the section of the Act concerned.
- d) In the past the Court of Appeal erred in law in holding that the examination script was not personal data and wrongly interpreting the application of sections 10 and 26 of the Data Protection Acts in relation to the ill-founded (so-called frivolous and vexatious) complaints. The Supreme Court, after seven years, ultimately had to correct the errors of law made by the Circuit Court and upheld by the High Court and the Court of Appeal. There is a risk that the Court of Appeal will make an incorrect decision again.
- e) Clark C.J held that he wished to reserve a final decision on the question of whether the test identified in *Orange Communications Limited v. The Director of Telecommunications Regulation & anor* [2000] 4 I.R 136 is the appropriate test to be applied in this case and said it may be appropriate to look again at the precise parameters of the Orange test. It can be a perfect opportunity to so do in this appeal.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

Please list (as 1, 2, 3, etc) concisely:

- a) the specific ground(s) of appeal and the error(s) of law related to each numbered ground:

The Court erred in law in holding that the obligation on a data controller to provide a data subject with personal data, whether arising from section 4(9) or section 4(1)(a)(iii) of the Act[s], does not extend to an obligation to provide the data in its original material form or, in the case of a document, to provide the original of that document.

- b) the specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely:

Section 4(9) of the Data Protection Acts 1988 & 2003.

Name of solicitor or (if counsel retained) counsel or applicant/Appellant in person:

PETER NOWAK

7. Other relevant information

Neutral citation of the judgment appealed against *e.g.* Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

High Court [2018] IEHC 118

References to Law Report in which any relevant judgment is reported: N/A

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

1. Order varying the Order of the High Court dated 12 March 2018
2. Order remitting the matter back to the Respondent for further investigation in light of the judgment of this Court.
3. An Order for costs and/or expenses.

What order are you seeking if successful?

Order being appealed: set aside vary/substitute

Original order: set aside restore vary/substitute

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

N/A

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention

N/A

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?

Yes

No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?

Yes

No

If Yes, please give details below:

Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

The matter at issue is of great public importance. The sooner the appealed will be determined the sooner the Commissioner, law practitioners and potential data subjects would have a final interpretation of section 4(9) of the Acts which could be then applied by the Commissioner in the handling of future complaints.

SIGNED: _____

NOWAK

APPELLANT IN PERSON

Please submit your completed form to:

The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.