No. 2

O. 58, r. 18(1)

THE SUPREME COURT

Supreme Court No. 2015/017

Court of Appeal No. 2012/196

Between:-

PETER NOWAK

Appellant

- and -

THE DATA PROTECTION COMMISSIONER

Respondent

RESPONDENT'S NOTICE

Date of Filing:	12 May 2015
Name of Respondent:	The Data Protection Commissioner
Respondent's Solicitors:	Philip Lee, 7 – 8 Wilton Terrace, Dublin 2
Name of Appellant:	Peter Nowak, 1F Rathborne Close, Ashtown, Dublin 15
Appellant's Solicitors:	The Appellant is not legally represented.

1. Respondent Details

1.1. Respondent's Full Name: The Data Protection Commissioner

1.2. The Respondent was served with the Application for Leave to Appeal and Notice of Appeal on 30 April 2015.

1.3. The Respondent intends (a) to oppose the Application for Leave to Appeal and (b) to ask the Supreme Court to dismiss the Appeal if leave to appeal is granted.

1.4. Details of the Respondent's representation as set out in the Notice of Appeal are correct. Contact details are set out below.

1.5. The Respondent would prefer the Court to communicate by electronic mail.

1.6. Contact details for the Respondent's Solicitors are as follows:

Damien Young,
Philip Lee Solicitors,
7–8 Wilton Terrace,
Dublin 2
(e): dyoung@philiplee.ie (t): (01) 237 3700

1.7. Counsel for the Respondent and his contact details are as follows:

Paul Anthony McDermott BL
Law Library,
Four Courts
Dublin 7
(e): paulanthonymcdermott@eircom.net

2. Respondent's reasons for opposing extension of time

Not applicable

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

Procedural background to the Order under Appeal

3.1. The Appellant is seeking leave to appeal an Order of the Court of Appeal, made on **24 April 2015**. No written judgment was delivered by the Court.

3.2. By its Order, the Court of Appeal affirmed an Order of the High Court (Mr Justice Birmingham) made on **14 March 2012.** (A written judgment was delivered by Mr Justice Birmingham on **7 March 2012**).

3.3. The High Court Order in turn affirmed an Order of the Circuit Court (Her Honour Judge Linnane) made on **16 November 2010**, rejecting the Appellant's appeal against a refusal of the Data Protection Commissioner to investigate a complaint submitted to her Office by the Appellant under cover of letters dated 17 June 2010 and 14 July 2010.

Factual background

3.4. In the summer of 2009, the Appellant sat the "CA Proficiency 2" examinations set by the Institute of Chartered Accountants in Ireland ("**CAI**"), being an examination that candidates for the CAI's Chartered Accountancy professional qualification are required to sit and to pass. Having been unsuccessful in the summer sittings of that examination, the Appellant re-took the examination in the autumn of 2009. On being informed that he had also been unsuccessful in the latter sittings, the Appellant exercised a right of appeal to the CAI's Appeal Panel. However, he elected not to avail of a mechanism available under the relevant scheme of appeal whereby a candidate may apply to inspect his or her examination script under controlled conditions.

3.5. In the event the Appellant's appeal to the CAI's Appeal Panel was not successful.

3.6. On 10 March 2010, the Appellant's then solicitors wrote to the CAI to notify it that the Appellant intended to judicially review the Appeal Panel's rejection of his appeal. The letter requested that the CAI take steps to ensure that the Appellant's examination script and related documents would be preserved intact so that they could later be independently examined. The CAI replied by letter dated 15 March 2010 confirming that the answer booklet, original marking plan and all related marking plans had been preserved, as requested.

3.7. On or about 12 May 2010, the Appellant submitted a "subject access request" to the CAI under Section 4 of the Data Protection Acts 1988 & 2003 (the "DP Acts"). That request sought access to all personal data held by the CAI relating to the Appellant. The request went on to identify a number of particular items of personal data to which access was sought, including the above referred examination scripts.

3.8. On 1 June 2010, the CAI released copies of certain material to the Appellant in response to his subject access request. However, it declined to release the Appellant's examination scripts on the grounds that they did not constitute "personal data" of the Appellant, within the meaning of that term as defined at Section 1 of the DP Acts.

3.9. On or about 17 June 2010, the Appellant submitted a complaint to the Commissioner's Office in relation to the CAI's refusal to provide him with a copy of his examination scripts. The Appellant submitted some additional material under cover of letter dated 14 July 2010. Amongst other things, the letter of 14 July 2010 explained that the examination in issue was an open book accountancy exam in which the Appellant had transcribed model or sample answers from a text book. Having obtained the marking scheme from the CAI, the letter asserted that the Appellant was in a position to determine the marks he says he ought properly to have been awarded.

3.10. By letter dated 21 July 2010, the Commissioner informed the Appellant that, having examined the materials submitted by the Appellant, he had been unable to identify any substantive breach of the DP Acts. In particular, the Commissioner noted that the material to which the Appellant sought access was not "personal data" for the purposes of the DP Acts. It necessarily followed that the access right asserted by the Appellant by reference to Section 4 of the DP Acts did not arise in this case. On the basis of his opinion that the complaint was therefore "frivolous or vexatious" within the meaning of Section 10(1)(b)(i) of the DP Acts, the Commissioner's letter concluded by informing the Appellant that his complaint would not be the subject of an investigation.

3.11. The Appellant appealed the Commissioner's refusal to investigate his complaint to the Circuit Court, pursuant to Section 26 of the DP Acts. On 16 November 2010, Judge Linnane dismissed the appeal. Whilst a written judgment was not delivered, the Respondent's Solicitor's note of the Court's *ex tempore* judgment records the following points:

a. The reference to an "appeal" in Section 10(1)(b)(ii) of the DP Acts means an appeal to the Circuit Court, made under Section 26 of the DP Acts, in any case where the Commissioner has investigated a complaint and made a decision on the merits of that complaint. The Circuit Court does not have jurisdiction to hear an appeal under Section 26 in any case where the Commissioner has refused to investigate a complaint on the basis of his opinion that the complaint is frivolous or vexatious.

b. It was open to the Appellant to judicially review the Commissioner's refusal to investigate the Appellant's complaint.

c. Even if it was wrong on the jurisdiction point, and the Circuit Court did have jurisdiction to hear the appeal:

i. the opinion formed by the Data Protection Commissioner to the effect that the complaint was "frivolous or vexatious" was reasonable and was not erroneous. As such, it should not be set aside; and,

ii. on the facts of this particular case, the Appellant's exam scripts did not constitute "personal data" within the meaning of Section 1 of the DP Acts. Accordingly, there was no breach of the DP Acts and the Appellant was not entitled to demand a right of access to (or copies of) his exam scripts.

3.12. On appeal on a point of law to the High Court, Judge Birmingham reached the same conclusions, expressed by him in the following terms at paragraph 9 of his written judgment, delivered on 7 March 2012:

> "I find myself in respectful agreement with Judge Linnane that the jurisdiction of the Circuit Court is to hear an appeal against a decision that has been arrived at after there has been an investigation. I share her view that absent investigation of the complaint and a decision in relation to the investigation, that the Circuit Court has no jurisdiction. The entitlement of an aggrieved party in the first place to submit an appeal and then of the Court to hear and determine an appeal arises only where there has been a decision of the Commissioner in relation to a complaint under section 10(1)(a). However, the Commissioner reaches a decision in relation to a complaint only if, not having decided that the matter is frivolous and vexatious, he proceeds to investigate the complaint and reaches a decision in relation thereto."

3.13. At paragraph 19 of his judgment, Mr Justice Birmingham also found that the Appellant's examination scripts did not constitute "personal data" within the meaning of Section 1 of the DP Acts in any event.

3.14. On 14 May 2012, the Appellant appealed the Judgment and Order of the High Court to this Honourable Court. By letter dated 12 November 2014, the parties were notified that a determination had been made transferring the appeal to the Court of Appeal.

3.15. The appeal was duly heard and determined by the Court of Appeal on 25 April 2015. Having heard submissions from both parties, the Court ordered that the appeal be dismissed and ordered that the Appellant pay the Respondent's costs.

4. Respondent's reasons for opposing leave to appeal

4.1. Leave to appeal is opposed by the Respondent. It is respectfully submitted that the Judgment and Order in respect of which leave to appeal is sought does not involve any matter of general public importance; nor is it necessary, in the interests of justice, that there be an appeal to the Supreme Court.

The decision does not involve any matter of general public importance

4.2. It is respectfully submitted that the proceedings do not involve any issue of general public importance. Nor do they raise any novel legal issue for

determination, or any claim under the Constitution or the European Convention on Human right.

4.3. The Appellant contends that, because the Appeal "relates to the right of appeal to the Courts", it follows that it involves a matter of public importance. The Respondent disagrees with this analysis, particularly as it now well-established that, even though a statutory appeal does not lie against the Commissioner's refusal to investigate the Appellant's complaint, the Appellant is not without a remedy: it is open to him to challenge the actions of the Commissioner by way of judicial review. See for example the Judgment of Hogan J in Schrems v Data Protection Commissioner [2014] IEHC 310. Accordingly, and bearing in mind the fact that the issues in dispute have been fully ventilated in three separate hearings, it is respectfully submitted that no "access to justice" point arises that could sensibly be presented as involving a matter of public importance.

It is not necessary, in the interests of justice, that there be an appeal

4.4. As noted above, the issues raised by the Appellant have already been the subject of three hearings, before each of the Circuit Court, the High Court and the Court of Appeal. On each occasion, the findings made by the Court below have been upheld and the Appellant's appeal dismissed. It is submitted that the interests of justice do not require a further hearing of issues that have already been fully and properly examined on three separate occasions. Equally, it is submitted that, having regard to the number of hearings to date, and the findings made, the Appellant's contention that the Orders of the High Court and Court of Appeal were "unsustainable in law" and "against the terms of common sense" is without merit.

4.5. Whilst he prosecuted his appeal before the Court of Appeal without legal representation, the Appellant had the benefit of legal representation (both Solicitor and Counsel) when the proceedings came before the Circuit Court and the High Court.

4.6. The Appellant contends that the Court of Appeal did not provide any justification for its decision to uphold the decision made by the High Court.

Whilst the proceedings were not the subject of a written judgment, Ryan P expressly noted when delivering the Court's decision that the Court agreed with the Judgment of Mr Justice Birmingham and with the reasoning set out in his judgment.

4.7. The Appellant also contends that the Court of Appeal judges "seemed to be biased and prejudiced". The basis on which this contention is made has not been articulated by the Appellant. The Respondent also notes that the contention is one that is being raised for the first time in the context of the within Application for Leave to Appeal, no complaint of bias or prejudice having been raised during the hearing before the Court of Appeal. Accordingly, the Respondent respectfully submits that the complaint is without any merit whatsoever.

5. Respondent's reasons for opposing appeal if leave to appeal is granted

5.1. The Appellant's Notice of Appeal identifies two grounds of appeal:

(1) Firstly, he contends that the Court of Appeal erred in law in holding that the Appellant did not have a right of appeal to the Circuit Court from the Commissioner's refusal to investigate his complaint; and,

(2) Secondly, he contends that the Court of Appeal erred in finding that the Appellant's examination script was not personal data within the meaning of the DP Acts.

The first ground of appeal

5.2. Section 10(1) of the DP Acts provides:

> " (a) The Commissioner may investigate, or cause to be investigated, whether any of the provisions of this Act have been, are being or are likely to be contravened in relation to an individual either where the individual complains to him of a contravention of any of those provisions or he is otherwise of opinion that there may be such a contravention.
>
> (b) Where a complaint is made to the Commissioner under paragraph (a) of this subsection, the Commissioner shall-

(i) investigate the complaint or cause it to be investigated, unless he is of opinion that it is frivolous or vexatious, and,

(ii) if he or she is unable to arrange, within a reasonable time, for the amicable resolution by the parties concerned of the matter the subject of the complaint, as soon as may be, notify in writing the individual who made the complaint of his or her decision in relation to it concerned in writing of his decision in relation to the complaint and that the individual may, if aggrieved by his decision, appeal against it to the Court under section 26 of this Act within 21 days from the receipt by him or her of the notification.

5.3. The appeal from the decision of the DPC is to the Circuit Court.

5.4. Section 26(3)(b) of the DP Acts provides that where the Circuit Court has determined an appeal from a decision made by the DPC:

> "An appeal may be brought to the High Court on a point of law against such a decision; and references in this Act to the determination of an appeal shall be construed as including references to the determination of any such appeal to the High Court and of any appeal from the decision of that Court (emphasis added)."

5.5. It is submitted that each of the Circuit Court, High Court and Court of Appeal correctly concluded that the Circuit Court did not have jurisdiction under Section 26 of the DP Acts to hear the Appellant's appeal.

5.6. Section 26(1) of the DP Acts provides as follows (the text relevant to this case is underlined):

> "An appeal may be made to and heard and determined by the Court against-
>
> (a) a requirement specified in an enforcement notice or an information notice,
>
> (b) a prohibition specified in a prohibition notice,
>
> (c) a refusal by the Commissioner under section 17 of this Act, notified by him under that section, and
>
> (d) a decision of the Commissioner in relation to a complaint under section 10(1) (a) of this Act,

and such an appeal shall be brought within 21 days from the service on the person concerned of the relevant notice or, as the case may be, the receipt by such person of the notification of the relevant refusal or decision."

5.7. Thus it is only a "decision" that can be appealed to the Circuit Court. When one considers the plain meaning of the text of Section 10(1) it is clear that the word "decision" in the Act relates to a decision made after an investigation has been conducted by the Commissioner.

5.8. The text of Section 10(1) envisages a sequence of steps as follows:

(1) If the Commissioner forms the opinion that a complaint is frivolous or vexatious then that is the end of the matter.

(2) If the complaint is not deemed frivolous or vexatious then the Commissioner shall investigate the complaint.

(3) The Commissioner will endeavour to arrange, within a reasonable time, the amicable resolution by the parties concerned of the matter the subject of the complaint.

(4) If an amicable resolution cannot be arranged then the Commissioner shall notify in writing the individual who made the complaint of his or her decision in relation to it.

(5) The complainant may, if aggrieved by the decision, appeal against it to the Court under s. 26 of the Act within 21 days from the receipt by him or her of the notification of the said decision.

5.9. Once one understands this sequence of steps, it becomes clear that the word "decision" has a particular meaning in the section and refers to the decision that is made after a full investigation has occurred.

5.10. This sequence of steps was endorsed and applied by Mr Justice Peart in Fox v. Data Protection Commissioner [2013] IEHC 49, (unreported, High Court, February 5, 2013).

5.11. The fact that a statutory appeal does not lie does not mean that the Appellant is left without a remedy since any step taken by a public body is *prima facie* susceptible to judicial review (this is not, of course, to say that on the facts of any particular case such a judicial review would necessarily have the slightest merit). The availability of judicial review in respect of a refusal by the Commissioner to investigate a complaint on grounds that it was "frivolous and vexatious" was confirmed in the recent case of Schrems v Data Protection Commissioner [2014] IEHC 310, (unreported, High Court, June 18, 2014, Hogan J).

5.12. In summary, it is respectfully submitted that it is clear from the provisions of Section 10(1)(b)(ii) and Section 26 of the DP Acts that it is only where the Commissioner has proceeded to the investigation stage that an appeal will lie from that decision to the Circuit Court. Accordingly, it is the Respondent's position that where the Commissioner forms an opinion that a complaint is not admissible and does not require investigation, on the grounds that it is "frivolous or vexatious" no appeal will lie in relation to the finding. In such circumstances, the only remaining remedy that is open to an individual is that of judicial review. It is further submitted that the right of appeal afforded in Section 26 of DP Acts, as interpreted by the Circuit Court, High Court and upheld by the Court of Appeal in this case, faithfully transposes the requirement in Directive 95/46/EC that there appeals through the courts from decisions of supervisory authorities giving rise to complaints.

The second ground of appeal

5.13. Not every piece of data can be viewed as personal data, even where some link can be drawn between the data and an individual. There has to be a reasonable distinction drawn between personal data and non-personal data. Precisely where that line should be drawn will always be a matter for debate and the law on the topic may expand or contract. With her expertise and experience in this area, it is submitted that the Respondent Commissioner is in a good position to identify on which side of the line a particular item of data falls.

5.14. Applying the approach of the Article 29 Working Party[1] and the European Court of Justice[2] to the facts and circumstances of the Appellant's case, it is submitted that the contents of an anonymous examination script, comprising model answers transcribed by the Appellant during an open book accountancy exam, cannot be said to constitute personal data within the meaning of that term as set out in the DP Directive and the DP Acts. Answers to professional exam questions are not data relating to a living individual any more than a completed cross-word puzzle would be. This must be particularly so in the context of an open-book accountancy exam. The purpose of such an exam is not to learn anything about the personality of the candidate (unlike, for example, a psychometric exam) but is simply to ascertain in a mechanical manner whether they can answer the questions posed correctly or incorrectly, analysing and/or manipulating predominantly numeric information and organizing and/or applying that information in a particular way. The irrelevance of the identity or character of the candidate is illustrated by the fact that the scripts are marked anonymously.

5.15. In the circumstances, it is unclear how the answers provided by the Appellant in his examination script (as distinct from the results of the examination or the examination number used to link the script to the Appellant) could be said to be personal or "relating to" the Appellant as this has been interpreted by the European Court of Justice or the Article 29 Working Party. Nor, in such circumstances, could it be said that it was irrational for the Commissioner to have formed the view that the script was not personal data.

Paul Anthony McDermott BL

[1] The Article 29 Working Party is an independent, advisory body established under Directive 95/46/EC (on the protection of individuals with regard to the processing of personal data), comprising data protection authorities from the member states of the EU. It published an Opinion on the Concept of Personal Data (WP Opinion 4/2007) on 26 June 2007.

[2] See for example the judgment of the European Court of Justice in YS, M and S v. Minister voor Immigratie, Intergratie en Asiel, Joined Cases C-141/12 and C-372/12, 17 July 2014)

6. **Additional grounds on which decision should be affirmed**

None. (For the avoidance of doubt, however, the Respondents oppose each and every relief sought by the Appellants by way of appeal).

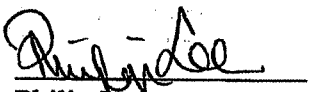
7. **Requests for the Supreme Court**

7.1. The Respondent is not asking the Supreme Court to depart from one of its own decisions.

7.2. The Respondent is not asking the Supreme Court to make a reference to the Court of Justice of the European Union.

7.3. If leave is granted, the Respondent will not be requesting a priority hearing.

7.4. For completeness, the Respondent notes that, prior to the transfer of the appeal from the Supreme Court to the Court of Appeal, the Appellant brought an application for priority in the Supreme Court list. That application was refused by the Chief Justice on 26 June 2014.

Signed: 

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