Judgment

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Judgment by:	O'Donnell Donal J.
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Judgments by	Link to Judgment	Concurring
O'Donnell Donal J.	Link	McKechnie J., Clarke J., MacMenamin J., Laffoy J., Dunne J., Charleton J.
Clarke J.	Link	O'Donnell Donal J., McKechnie J., MacMenamin J., Laffoy J., Dunne J., Charleton J.

The Supreme Court

2015/017

IN THE MATTER OF THE DATA PROTECTION ACTS 1998 AND 2003

AND IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 26 OF THE DATA PROTECTION ACTS 1988 AND 2003

O'Donnell J
McKechnie J
Clarke J
MacMenamin J
Laffoy J
Dunne J
Charleton J

Between/

Peter Nowak

Appellant

and

The Data Protection Commissioner

Respondent

Judgment of O'Donnell J delivered on 28th day of April 2016

1 Mr Peter Nowak's difficulties with the examination in Strategic Finance and Management Accounting ("SFMA"), set by the Institute of Chartered Accountants in Ireland ("CAI"), has led him on a legal journey, perhaps unique, through four different levels of the courts system in Ireland.

2 Mr Nowak was a trainee accountant who had sat and passed the first level accountancy exams set by the CAI, and three of the four required subjects at second level. However, he failed the SFMA examination in the summer and autumn sessions of 2008, and again in summer of 2009. When he failed once more in autumn 2009, he took steps to challenge the result. On the 12th of May, 2010, however, he changed tack and submitted a data access request under s.4 of the Data Protection Acts 1988 and 2003 ("the Acts") seeking all "personal data" held by the CAI. That body promptly released 17 items to Mr Nowak by letter of the 1st of June, 2010, but declined to release his examination script on the basis that the CAI had been advised that the script was not personal data within the meaning of the Acts. This was the essential issue which was to occupy the attention of the Data Protection Commissioner ("the Commissioner") and four separate courts. Because the CAI took the position it did, the script itself was not disclosed, and accordingly neither the Commissioner nor the courts which have reviewed the Commissioner's decision have seen it. It is said, however, that the examination was an open book exam, and Mr Nowak contends that the script was in his handwriting and it may have contained markings and/or comments by the examiner.

3 Mr Nowak sent an initial email to the Office of the Data Protection Commissioner seeking its assistance and disputing the contention that his script was not personal data. He also raised a number of other concerns about the information which had been disclosed. These matters, however, are not relevant to the legal issue which has arisen, and I mention them only as background. By an email of the 28th of June, 2010, the Office of the Data Protection Commissioner offered some observations, and advised Mr Nowak that "exam scripts do not generally fall to be considered … because this material would not generally constitute personal data".

4 There was further correspondence relating to the information that had been disclosed, and on the 1st of July, 2010, Mr Nowak submitted a formal complaint form enclosing some of the material supplied to him. There was further correspondence, but on the 21st of July, 2010, the Office of the Data Protection Commissioner wrote to him informing him that having reviewed the information, the Commissioner had identified no substantive contravention of the Acts. That letter, in its material respects, stated the following:

> "In relation to your complaint of 1 July 2010, I must inform you that the Commissioner has examined all papers on this matter and has not identified any substantive breach of the Data Protection Acts. In accordance with Section 10(1)(b)(i) of the Data Protection Acts, we are not obliged to investigate a complaint where no substantive breach of the Acts remains to be investigated...
>
> … We have now examined fully the material that you have supplied and cannot agree that the material to which you are seeking access can be considered to be your personal data within the meaning of the Data Protection Acts as transposed from the EU Directive on data protection. …
>
> .... In relation to your complaint of 14 July 2010, I must inform you that the Commissioner has examined all papers on this matter and has not identified any matter arising for investigation under the Data Protection Acts. The material over which you are seeking to exercise a right of correction is not

> personal data to which Section 6 of the Data Protection Acts applies. In accordance with Section 10(1)(b)(i) of the Data Protection Acts, we are not obliged to investigate a complaint where no breach of the Acts can be identified."

5 It should be explained that s.10(1)(b)(i) of the Acts requires the Commissioner to investigate a complaint "unless he is of opinion that it is frivolous or vexatious". For reasons which it will be necessary to address in greater detail, the Office of the Data Protection Commissioner took the view that if a complaint was not sustainable on legal grounds then it was, in a technical sense, both frivolous and vexatious, and that the office was not obliged to further investigate it. That indeed is what occurred here, and that process has given rise to the legal issues which this Court must address.

6 In response to this communication, Mr Nowak commenced an appeal to the Circuit Court under s.26 of the Acts, which provides:

> "(1) An appeal may be made to and heard and determined by the Court against—
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> (a) a requirement specified in an enforcement notice or an information notice,
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> (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
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> (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."

The Court, for the purposes of the Acts, is the Circuit Court, and the relevant provision here is s.26(1)(d). Mr Nowak sought to appeal to the Circuit Court against a decision of the Commissioner. It was accepted on behalf of the Commissioner that Mr Nowak had made a complaint under s.10(1)(a), and that the communication of the 21st of July, 2010, was made "in relation to the complaint" (as indeed the letter expressly stated) and, furthermore, that in ordinary language, the letter could readily be described as a decision or as a notification of a decision. However, in accordance with the position taken by it for some time, the Office of the Data Protection Commissioner argued, and the Circuit Court judge (her Honour Judge Linnane) accepted, that a special and more limited interpretation was required to be given to the word "decision" as contained in s.26 because of the terms, and indeed structure, of s.10 of the Act as amended. This meant, it was said, that no appeal lay from a determination (to use a neutral word) by the Commissioner that a complaint was frivolous or vexatious. It was also argued that there was, however, no injustice in adopting this interpretation because a determination of the Commissioner which could not be appealed under s.26 could be the subject of judicial review.

7 The Circuit Court judge accepted this argument, but went on, very helpfully, to consider the position on the basis that, contrary to her conclusion, an appeal did lie. She first held that an appeal under s.26 did not constitute a full rehearing. Instead, the Court should apply the test first outlined by Keane C.J. in *Orange Communications Ltd v. The Director of Telecommunications Regulation and anor (No. 2)* [2000] 4 I.R. 159, and adopted and approved thereafter in cases such as *Ulster Bank Investment Funds Ltd v. Financial Services Ombudsman* [2006] I.E.H.C. 323. (Unreported, High Court, Finnegan P., 1st November, 2006) *Orange* was an appeal under s.111(2)(b)(i) of the Postal and Telecommunications Services Act 1983 (as amended) from a decision of the Director of Telecommunications Regulation awarding a licence for mobile telephony. The section merely provided for appeal to the High Court. It was necessary, therefore, to consider what test the court should apply on such an appeal. In the Supreme Court, Keane C.J. (with whom the other members of the Court agreed) considered that such an appeal could not amount to a full rehearing of an application for a licence, nor could it be restricted

merely to judicial review grounds. While he considered that all matters which might be raised on judicial review could also be raised on a statutory appeal to the High Court, the Court was also required to address the merits of the decision to some degree. The test is set out at p.184-185 of the report as follows:

> "In short, the appeal provided for under this legislation was not intended to take the form of a re-examination from the beginning of the merits of the decision appealed from culminating, it may be, in the substitution by the High Court of its adjudication for that of the first defendant. It is accepted that, at the other end of the spectrum, the High Court is not solely confined to the issues which might arise if the decision of the first defendant was being challenged by way of judicial review. In the case of this legislation at least, an applicant will succeed in having the decision appealed from set aside where it establishes to the High Court as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In arriving at a conclusion on that issue, the High Court will necessarily have regard to the degree of expertise and specialised knowledge available to the first defendant."

8 The reference in the last sentence of the passage quoted to the "High Court having regard to the degree of expertise and specialised knowledge" of the decision maker is a reference to a decision of the Canadian Supreme Court in *Canada (Director of Investigation and Research) v. Southam Inc* (1997) 1 S.C.R. 748. This approach is sometimes described, perhaps misleadingly, as "curial deference". The portion of the decision of the Canadian Supreme Court approved in *Orange* is as follows:

> "…an appeal from a decision of an expert tribunal is not exactly like an appeal from a decision of a trial court. Presumably if parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, it is because the tribunal enjoys some advantage the judges do not. For that reason alone, review of the decision of a tribunal should often be of a standard more deferential than correctness...
>
> I conclude that the... standard should be whether the decision of the tribunal is unreasonable. This is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it..."

9 As already observed, the *Orange* test and approach have been adopted in a number of decisions such as *Ulster Bank Investment Funds Ltd v. Financial Services Ombudsman* [2006] I.E.H.C. 323. (Unreported, High Court, Finnegan P., 1st November, 2006) and *Carrigdale Hotel Ltd v. Controller of Patents, Designs and Trade Marks* [2004] 3 I.R. 410. Applying this test, the learned Circuit Court judge upheld the determination or opinion of the Commissioner that the examination script in this case was not personal data within the meaning of the Acts. Mr Nowak sought to challenge the Circuit Court's decision.

Appeal to High Court and Court of Appeal

10 Under s.26(3) of the Acts, the decision of the Circuit Court may be appealed in turn to the High Court on a point of law. Although the Acts do not expressly say so, it follows from the fact that there is an appeal to the High Court that, prior to 2015, it was possible to appeal the High Court decision to the Supreme Court, and now to the Court of Appeal. Again, although obviously not adverted to in the Acts, it now follows from the establishment of the new Supreme Court jurisdiction that an appeal is possible from the decision of the Court of Appeal if leave is granted by this Court in accordance with Article 34.5.3 of the Constitution on the grounds that the issue is one of general public importance or that an appeal is in the interests of justice. Whether it is wise or desirable to have such an elongated appeal process is something which might be reviewed as a matter of policy. The undoubted benefit of having an appeal to a court, and the desirability

of having the possibility of an appeal to a level in the system which can resolve conflicting decisions, might be achieved by a more streamlined process.

11 In due course, Mr Nowak appealed the decision of the Circuit Court. The High Court (Birmingham J.) upheld the decision of the Circuit Court judge on all points. The High Court judge agreed that a determination that a complaint was frivolous or vexatious could not be the subject matter of an appeal under s.26, but went on to consider the case on the basis that such an appeal lay, and also upheld the decision of the Commissioner. This carefully reasoned decision has itself been followed in *Fox v. The Data Protection Commissioner* [2013] I.E.H.C. 49, (Unreported, High Court, Peart J., 5th February, 2013). Meanwhile, the decision of the High Court in this case was appealed by Mr Nowak, and the Court of Appeal (Ryan P., Kelly and Irvine J.J.) delivered a short *ex tempore* judgment on the 24th April, 2015, in which that Court upheld the decision of the High Court on all points.

12 By a determination of this Court issued on the 22nd October, 2015, leave to appeal was granted on two grounds which were certified to be of general public importance. In the determination, the grounds of appeal were reformulated as follows:

> "(1) The Court of Appeal erred in law in holding the appellant was not entitled to appeal to the Circuit Court from the determination of the Data Protection Commissioner under s.26 of the Data Projection Acts 1988–2003;
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> (2) The Court of Appeal erred in law in holding that the Data Protection Commissioner was entitled to conclude that the examination script, the subject matter of the complaint, was not personal data within the meaning of the Acts."

These two grounds of appeal may be analysed as containing three issues:

> (i) Whether an appeal lies under s.26 from a determination of the Data Protection Commissioner that a complaint is frivolous or vexatious;
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> (ii) If so, what test should the Circuit Court have applied on an appeal under s.26;
>
> (iii) If an appeal lies, then applying the appropriate test, was the decision of the Data Protection Commissioner that the exam script was not personal data within the meaning of the Acts justified?

Does an appeal lie under s.26 of the Acts from a decision of the Data Protection Commissioner that a complaint under s.10(1)(a) was frivolous or vexatious?

13 The underlying issue here, whether an examination script is ever capable of being personal data within the meaning of the Acts, and if so, whether this script is such personal data, is one of some difficulty and complexity that requires the analysis of a number of different texts and provisions. It might appear rather incongruous, therefore, that the Commissioner, while clearly respectful of Mr Nowak's complaints, determined them to be frivolous and vexatious, and now maintains that this decision can only be reviewed through the mechanism of judicial review. This incongruity is highlighted by the fact that perhaps the most important data protection case to emanate from this jurisdiction, and which has resulted in a landmark decision of the Court of Justice of the European Union, *Schrems v. The Data Protection Commissioner* (Case C-362/14), judgment of the Grand Chamber, 6th October 2015, to which Digital Rights Ireland was added as a party, concerned an issue which was determined by the Commissioner to be frivolous and vexatious under s.10(1)(b)(i).

14 The reasoning process leading to the conclusion that a complaint considered to be ill founded in law can, or must, be dismissed as frivolous or vexatious is instructive and casts some light on the approach taken to the interpretation of section 26. It is said that the term "frivolous and vexatious" is a term of art, and that assistance can be obtained

from circumstances in which that term has been encountered in the field of litigation. Reference is made in particular to the provisions of Order 19 Rule 28 of the Rules of the Superior Courts, which permits pleadings to be struck out if they are determined to be frivolous or vexatious. This is a jurisdiction which is exercised solely by reference to the pleadings, but it has been held that there is a parallel inherent jurisdiction in which the court can have regard to evidence. Most, if not all, court applications rely on both O.19 r.28 and the inherent jurisdiction. This can be a very useful jurisdiction which allows the court to terminate proceedings at the very outset if it is apparent that they should not be permitted to proceed. In the landmark case of *Barry v Buckley* [1981] I.R. 306, Costello J. held that the inherent jurisdiction could be exercised to stay a plaintiff's proceedings where such proceedings "must fail". In that case, the claim was one for specific performance of a contract for the sale of a house. However, it was possible to show to the Court, by producing the alleged contract, that no binding contract had been created, in that case because the terms set out were all declared to be "subject to contract". When used appropriately, the power to dismiss proceedings *in limine* saves court time, avoids delay, and, just as importantly, prevents the court process and the inevitable delays involved therein from being used merely to bring pressure to bear on the other party, and thus become a bargaining counter in negotiations. Of course, such a determination is a decision which can be appealed.

15 While Costello J. in *Barry v Buckley* was careful to distinguish between cases which were bound to fail and those which were otherwise "frivolous and vexatious", that distinction, and the distinction between the jurisdiction provided by O.19 r.28 and the inherent jurisdiction have become blurred. Thus, it has come to be said that a case which cannot succeed in law is one which is frivolous and vexatious. The position was put perhaps most elegantly in the *ex tempore* judgment of the Supreme Court in *Farley v. Ireland* (Unreported, Supreme Court, 1st May, 1997) delivered by Barron J. and quoted by Mr Nowak in para. 19 of his submissions:

> "So far as the legality of the matter is concerned, frivolous and vexatious are legal terms, they are not pejorative in any sense or possibly in the sense that Mr Farley may think they are. It is merely a question of saying that so far as the plaintiff is concerned, if he has no reasonable chance of succeeding then the law says that it is frivolous to bring the case. Similarly, it is a hardship on the defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious."

The same point was made by Birmingham J. in the High Court in this matter, referring to s.10(1)(b)(i):

> "That section refers to complaints that are frivolous or vexatious. However, I do not understand these terms to be necessarily pejorative. Frivolous, in this context does not mean only foolish or silly, but rather that a complaint that was futile, or misconceived or hopeless in the sense that it was incapable of achieving the desired outcome, *see R v Mildenhall Magistrates' Courts Ex P Forest Heath* D.C. -16/05/1997 Times Law Reports. Having regard to the view the Commissioner had formed that examination scripts did not constitute personal data, he was entitled to conclude that the complaint was futile, misconceived or hopeless in the sense that I have described, indeed such a conclusion was inevitable."

16 To some extent, this question of whether a claim which is considered to be wrong in law is properly frivolous or vexatious is closely connected to the central question on this appeal, namely the scope of an appeal under s.26, and the true interpretation of s.10. Any public decision maker must have the capacity to screen claims and exclude at an early stage those which are plainly misconceived. If this form of decision-making triage cannot be carried out, and all complaints must proceed through to a formal determination, then the system becomes overloaded, and will grind to a halt. This is wasteful of time and resources, and a real injustice to those with substantial complaints. This is as true of administrative decision makers as of the courts: indeed, perhaps more so. If, as the Commissioner appears to have considered, the only way to avoid a full investigation and the futility of attempted amicable settlement is if complaints are determined to be

frivolous or vexatious, then, inevitably, there is an incentive to adopt a broad interpretation of the term. But I am not convinced that is the case. Without in any way reducing the scope of an important jurisdiction both for courts and other decision makers, I nevertheless consider that it may be desirable to distinguish between cases which are bound to fail and those which are truly frivolous and vexatious. Furthermore, while some guidance may be obtained from the use of familiar legal terms, nevertheless I would be slow to slavishly read across the judicial elaborations of terms contained in rules of court into the provisions of a statute meant to be of general application, and moreover creating an important public right, and accordingly intended to be understood and applied by non-lawyers. There may be something to be said in this context, therefore, for limiting the term "frivolous and vexatious" to those types of cases which all parties in this Court agreed came squarely within that term. Some examples given by counsel for the respondent were cases where the complaint was plainly misdirected and was perhaps a complaint more properly addressed to raising issues of freedom of information, or garda oversight, or circumstances where the complaint was a repetition of a matter which had been considered on perhaps more than one occasion by the Commissioner and the fresh complaint was either a simple restatement of an issue already determined, or an attempt to circumvent the ruling or decision already made. As the many cases on the "frivolous and vexatious" formula as used both in statute and in the Rules of the Superior Courts unfortunately demonstrate, there are many other examples of cases which are readily recognisable as fitting the test and meriting summary disposal. It may be desirable to apply the term, and more importantly, the power to summarily dismiss the complaint to such cases. It may often add insult to injury if an important legal point is raised and carefully considered (as in this case, and indeed in *Schrems*) but is then characterised as frivolous or vexatious. There should be nothing to stop the Commissioner from proceeding in a structured way and considering, for example, if a preliminary issue of law should be determined. On this approach, therefore, the determination in this case (that the exam script was not personal data) would be appealed to the Circuit Court, even if the Commissioner was correct that it is not possible to appeal decisions that a complaint is frivolous and vexatious in the narrower understanding of that term. It is, however, not necessary to decide this point definitively in light of the view I take of the larger issue of the scope of appeal under section 26. In approaching that issue, it is, however, useful to keep in mind the fact that the interpretation advanced by the Commissioner, and hitherto accepted, would apply not just to cases such as this which raise a point of law, (and which could without much difficulty be formulated in terms of judicial review) but would also apply to cases considered to be frivolous and vexatious on the facts.

Sections 26 and 10 considered

17 The Commissioner, while acknowledging that in ordinary language the letter of the 21st of July contains a decision, nevertheless argues that the reference to a decision in s.26 (which can be appealed) must be given a "particular interpretation". This argument is not derived from the language of s.26 itself, but is instead entirely dependent on the construction of section 10. That latter provision was included in the 1988 Act, and then subsequently amended by the insertion of a new s.10(1)(b)(i) in the 2003 Amendment Act. The terms of the amendment are important. As originally set out in the 1988 Act, s.10 provided as follows:

> "(1) (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 by a data controller or a data processor 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—
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> (i) investigate the complaint or cause it to be investigated, unless he is of opinion that it is frivolous or vexatious, and
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> (ii) as soon as may be, notify the individual 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 of the notification."

I think it is clear that this section, as introduced in 1988 and governing matters until 2003, does not itself suggest any limitation on the nature of an appeal, and of course s.26 was (and remains) also in general terms, with no suggestion of restriction on its scope. The "decision" of the Commissioner could be that the complaint was frivolous and vexatious, or that it was justified or not, but there is no suggestion that only decisions as to substance are to be notified and may be appealed.

18 In 2003, the Act was amended. Section 11 of the 2003 Act amended s.10 of the 1988 Act, in essence, by introducing the possibility of the Commissioner arranging an amicable resolution of the complaint. Accordingly, s.10(1)(b) now reads:

> "(b) Where a complaint is made to the Commissioner under paragraph (a) of this subsection, the Commissioner shall –
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> (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**, notify in writing the individual who made the complaint of his or her decision in relation to it and that the individual may, if aggrieved by the 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 …"

While s.11 of the 2003 Act substituted a new s.10(1)(b)(ii), the portion highlighted in bold above identifies that portion in respect of which the new s.10(1)(b)(ii) differs from the 1988 version.

19 The Commissioner argues that the section contemplates a sequential approach to decision making under the Acts. This was put very clearly at paras. 5.7 – 5.9 of the respondent's notice resisting the application for leave to appeal to this Court:

> "5.7 Thus it is only a 'decision' that can 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.
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> 5.8 The text of Section 10(1) envisages a sequence of steps as follows:
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> (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 matter 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 we understand the 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."

This sequence was endorsed and accepted by the decision of the High Court in *Fox v. Data Protection Commissioner* [2013] I.E.H.C. 49 (Unreported, High Court, Peart J., 5th February, 2015). A similar approach has been taken in relation to decisions by the Information Commissioner. However, the precise terms of the legislation in that case are different, and as that issue is the subject of a separate appeal pending in this Court, and this issue depends upon an interpretation of the statutory language used in each case, I do not propose to comment on the extent to which there are similarities or distinctions between the respective codes.

20 While I understand the reasoning leading to this conclusion, I cannot accept that this interpretation is correct. First, the focus on s.10 (as amended) distracts attention from the fact that the relevant section of the Acts which governs appeals is section 26. That provision is, in my view, unambiguous. It provides in clear and general terms for an appeal to the Circuit Court from the decision of the Commissioner. In ordinary language, the conclusion that a complaint is frivolous or vexatious is a decision. The statement, for example, in the letter of the 21st of July, 2010, that "the material over which you are seeking to exercise a right of correction is not personal data to which Section 6 of the DPA applies" is, in ordinary language, a decision, and moreover, a decision on an issue of law. Indeed, it is perhaps easier and more natural to describe this as a "decision" than it is to describe as "frivolous and vexatious" the contention that an examination script might constitute personal data. Indeed, even if it were correct that only a decision following investigation could be the subject of an appeal, it is difficult to say that there was not some form of investigation here. The conclusion by the Commissioner followed a full examination of all of the papers. It is true that the Commissioner did not seek information from the CAI, but the issue required some investigation and consideration before a conclusion could be reached.

21 I think it is clear that the interpretation favoured by the Commissioner is dependent upon the structure which is considered to be implied by s.10 after the amendment introduced in 2003. However, I think it is legitimate to look first at the provisions of s.10 as enacted in 1988. I think it is clear under that Act that a decision that a complaint was frivolous or vexatious was appealable under section 26. Section 10(1)(b) required the Commissioner to investigate a complaint unless he was "of opinion that it is frivolous or vexatious". Subsection (ii) then required the Commissioner to notify the individual concerned in writing "of his decision in relation to the complaint". This readily comprehends both a substantive decision after investigation and a decision that a complaint is frivolous or vexatious. It does not, I think, matter that in s.10(1)(b) there is reference to the Commissioner being "of opinion" that a complaint is frivolous or vexatious, since in consequence of that opinion, he or she must do something to determine the complaint. This, in conclusion, is, I think, reinforced by the similar use of the term "opinion" in subsections 2 and 3 of section10.

22 The structure of the Act and the relationship between s.10 and s.26 was established by the 1988 Act. If a decision that a complaint was frivolous or vexatious could have been appealed under s.26 under the 1988 Act, it would, I think, be highly unlikely that the scope of appeal would be narrowed in 2003, and furthermore that such a limitation of appeal would be affected indirectly by an amendment of section 10. It is also clear that limiting the scope of appeal was not the intended object of the change of s.10, which was to introduce into the process the possibility of amicable resolution. If indeed it had been intended that the appeal would, as a consequence, become more restrictive, it might be expected that this would have been clearly stated, and not left to be deduced from an amendment of another provision directed to a different issue. It is true that the introduction of the step of amicable resolution facilitates an approach to the legislation which sees the Commissioner proceeding in a series of structured steps. But once it is recognised that a "decision" under s.10(1)(b) of the 1988 Act included a decision that a complaint was frivolous or vexatious, then it is not difficult to give the same words the same meaning in the amended provision. The introduction of the concept of amicable settlement is no doubt itself sensible, even if the suggestion that it must precede notification of a decision in every case is somewhat clumsy. But that, in itself, is no reason to read down the concept of "decision" to mean only a decision following a full investigation. The fact that notification may have to follow a consideration of amicable

settlement is no reason to require it also to follow investigation. It may be that if a decision is made that a complaint is not sustainable in law, either under the rubric of being frivolous or vexatious, or simply after determination of a preliminary issue, that such a complaint cannot be the subject of amicable resolution, and the Commissioner is then, in the statutory language, unable to arrange an amicable settlement and can therefore proceed to inform them of his or her decision. But even if a contrary view is taken and it is considered that the true interpretation of the Acts now means that the Commissioner is obliged to attempt amicable settlement even of complaints she has determined to be without legal foundation, then the conclusion might more appropriately be that an unnecessary and cumbersome procedure has been established by s.10 rather than limiting the scope of appeal provided for in s.26, which itself was not amended.

23 Furthermore, it appears to follow that if the right of appeal under s.26 is limited to cases which have not been determined to be frivolous or vexatious, then it must follow that there is no statutory obligation on the Commissioner to notify the parties of the decision and of his or her opinion that the information is not personal data, since this obligation is contained in the same provision of s.10(1)(b) and must, on the interpretation of the Commissioner, only apply to decisions made after a full investigation and attempted amicable settlement. This is such an unlikely meaning to be attributed to a piece of legislation which gives important rights to members of the public that it is, in itself, a powerful reason against adopting the interpretation proposed on behalf of the Commissioner. A further consideration is that if the Acts are to be interpreted as providing two separate, mutually exclusive routes to court review, one of which is not mentioned in the statute, but is known only to those familiar with general principles of administrative law, then there would be a real possibility of the provisions becoming a costly trap for the unwary citizen. If an individual wrongly appeals a determination that a complaint is frivolous and vexatious (which is what Mr Nowak was held to have done) then the fact that the wrong route had been taken might not become apparent until a period long after the expiry of the time limit for judicial review, and perhaps after an adverse order for costs (which indeed also occurred in Mr Nowak's case). Again, it seems unlikely that this course could have been intended by the Oireachtas when it amended section 10.

24 There is a further dimension to this. The 1988 Act was introduced to give effect in Irish law to the provisions of the 1981 Strasbourg Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. By the time of the 2003 Act, however, Directive 95/46/EC had been introduced, and accordingly, the legislation as amended now gives effect to that Directive. Furthermore, the Charter of Rights of the European Union provides, under Article 8.1, for a right of protection of personal data, and by Article 47 requires an effective remedy to be provided for everyone whose rights and freedoms guaranteed by the law of the Union are violated. Mr Nowak says that Article 28(3) of the Directive provides in apparently general terms that "[d]ecisions by the supervisory authority which give rise to complaints may be appealed against through the courts". It is, of course, pointed out by the Commissioner (and indeed in the High Court judgment herein) that it might be thought that Article 28(4) of the Directive is more specifically appropriate to the case here. That Article provides:

> "Each supervisory authority shall hear claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data. The person concerned shall be informed of the outcome of the claim."

It might also be said that any requirement of the Directive for appeal through the courts may be satisfied by a form of judicial review. Nevertheless, as Mr Nowak points out, Article 28.3 is in general terms, and an interpretation of the Directive which leads to the conclusion that a member of the public who made a complaint was only entitled to be informed of the outcome, and not to challenge it by appeal, would be inconsistent with the general thrust of the Directive. Both Mr Nowak and counsel for the Commissioner have also properly drawn attention to para. 64 of the recent decision of the Grand Chamber in *Schrems v. Data Protection Commissioner* (Case C-362/14), 6th October 2015, which was in the following terms:

> "In a situation where the national supervisory authority comes to the

> conclusion that the arguments put forward in support of such a claim are unfounded and therefore rejects it, the person who lodged the claim must, as is apparent from the second subparagraph of Article 28(3) of Directive 95/46, read in the light of Article 47 of the Charter, have access to judicial remedies enabling him to challenge such a decision adversely affecting him before the national courts."

This certainly seems to suggest that Article 28(3) is applicable in a case such as this, since *Schrems* was itself a decision in respect of a challenge by way of judicial review to a decision of the Data Protection Commissioner that a complaint was ill founded in law, and therefore frivolous and vexatious. Understandably, however, the decision of the Grand Chamber does not make any observation on the nature of the judicial remedy required under Article 28(3). That did not arise in *Schrems*, since where the issue is a pure issue of law, it is arguable that review by judicial review is as extensive as even a full appeal. Nevertheless, para. 64 of *Schrems* provides some further support for Mr Nowak's argument.

25 It is not, however, necessary to resolve these issues as a matter of European law. It is, I think, sufficient that an interpretation of the Acts by the application of traditional techniques of interpretation leads to a conclusion that a decision that information is not personal data (and even if it is considered thereby, that the complaint is frivolous or vexatious) is a decision which is capable of appeal under s.26 of the Acts, and such a conclusion is, at a minimum, not inconsistent with the requirements of European law.

26 Finally, it is worth asking why the Oireachtas would intend to provide for a full appeal to the Circuit Court (and the prospect, as it happens, of two, and now three, further layers of appeal) but only in respect of decisions arrived at after a full investigation on the facts? The decision here, while characterised as frivolous or vexatious, is in fact a significant decision on the law relating to data protection, which it might be thought is precisely the sort of issue which should be capable of appeal to a court of law. The Act, on its face, gives no hint that it does not itself provide for any appeal or review of a decision that a complaint is unfounded as a matter of law, while permitting a full appeal to the Circuit Court on factual issues, or indeed such issues of mixed fact and law. The Commissioner seeks to counter this obvious problem by suggesting that decisions on law could be the subject of judicial review since they are made by an administrative decision maker. But apart from the fact that no hint is given of this by the legislation itself, that interpretation only raises a host of further questions. Why should there be two different methods of review or appeal of a decision on a matter of law? If there should be any distinction, why should a decision that a complaint is not well founded in law, or is frivolous or vexatious in fact, be subject only to judicial review? It may be that judicial review is seen as a general power to review for irrationality and other illegality, and in a particular case it may be apparent that the structure of the legislation makes it clear that this is what was intended, but it is difficult to draw this conclusion from the amendment of the statute in this case.

27 Rights of appeal on review exist because of the possibility that a decision may be wrong, and require correction. A decision that a complaint is misconceived as a matter of law, or is otherwise is frivolous or vexatious, is just as likely to be wrong and in need of correction as any other decision made by the Commissioner on matters of fact or law or both. In summary: it is difficult to understand why legislation should seek to distinguish between appeal or review; surprising if this was achieved by the route of amendment of legislation which, on its face, sought merely to introduce the possibility of amicable resolution; and surely doubtful that a trap for the unwary would be set in this indirect fashion in legislation designed to provide for an important and, indeed, fundamental right for members of the public. I consider that a court should approach legislation on the assumption that it was intended to make sense and achieve some purpose that is to be discerned from the words of the Act, its structure, and the background against which it was enacted. Such an approach leads, in my view, to the simple conclusion that a decision was made by the Commissioner in relation to a complaint under s.10(1)(a) and that, accordingly, an appeal lay to the Circuit Court under section 26.

Nature of Appeal

28 It is remarkable feature of legislative drafting that Acts creating independent decision makers often provide for appeal to some court in the legal system as if that was an end in itself, and without specifying the nature of that appeal. There is a wide range of possible appeals, and the decision as to what form of appeal is appropriate in any case can have a very significant impact on the length, and therefore cost, of the proceedings in court. Failure to specify what is meant by an appeal to a court can also lead to preliminary issues and the possibility of appeals. It is, in theory, possible that the legislation which provides for an appeal to court may require any of the following: a full appeal on the merits to a court; a rehearing (normally restricted to the information that was before the decision maker); an appeal by reference to the test applied by this Court or the Court of Appeal in relation to appeals set out in the well known case of *Hay v. O'Grady* [1992] 1 I.R. 210; an appeal limited to a point of law; an appeal where the court is empowered to annul a decision, but not to substitute its own decision; an appeal by way of case stated; an appeal where a decision may be set aside if it was vitiated by a serious error or a series of errors; or, finally, a statutory appeal which is indistinguishable from the standard applied on judicial review. It appears that little attention is paid at the legislative level to these different types of appeals and their consequences, and courts are often left to deduce the nature of the appeal from the limited information that can be gleaned from the language used, the structure of the Act, and, sometimes, the subject matter of the decision.

29 Mr Nowak contends, unsurprisingly, that there should be a full rehearing of his appeal. He relies in this regard on *Dunne v. Minister for Fisheries* [1984] I.R. 230, although, in that case, the Court held that while there was an appeal on the merits, the Court would normally be limited to the information before the decision maker. Accordingly, even this option is something less than a full rehearing as occurs, for example, in the High Court on a Circuit Court appeal. On the other hand, the Commissioner did not contend for a standard akin to that in judicial review, but rather for the standard articulated in *Orange*: *i.e.* that a decision will be set aside on appeal if it is wrong in law or if it is vitiated by a serious error or series of errors. Both of these cases have their place. *Dunne* is perhaps an example of an older style of appeal from a decision maker, in that case the Minister for Fisheries, who might have no greater knowledge or expertise than the High Court judge. Since the decision was one to be made by a minister who, as distinct from his or her department, might have no particular expertise in the area, it was not, perhaps, implausible that a High Court judge would be empowered to make a decision on the merits on the material presented to the Minister. The important feature supplied by appeal to a court is the prospect of review by a third party with guaranteed independence. *Orange* is an example of the more modern trend where a significant number of decisions on areas of some complexity are now made by statutorily independent decision makers who, moreover, may be selected for appointment because of, and in any event may have developed, very considerable technical expertise. The purpose of court review in such a case may be different.

30 In my view, in addition to considering the terms of the statute, it is useful to ask why the Oireachtas might have created a right of appeal to a court rather than to a further expert appellate body as occurs, for example, when planning appeals are brought to An Bord Pleanála, or indeed as occurred in the telecommunications field when, briefly, an expert appeal panel was established. First, it may, no doubt, be that the Oireachtas wished, by designating the court as the appropriate appellate body, to provide a guarantee of independence. It is, of course, possible to establish a body which is, by statute, independent, but by providing for appeal to the court, the legislation invokes, and to some extent, benefits from the constitutional guarantee of independence of the judiciary, and moreover the long history of independence in decision making. Thus, provision for appeal to a court can be seen as an assurance that extraneous considerations, whether national or local, or industry requirements or expectations, or perhaps public controversy, will not affect the decision. In so much as any appeal raises a point of law, then it is natural to expect that a court would determine such issues. Furthermore, however, courts, while perhaps having no expertise in the underlying area, do have considerable experience both in decision making and in review of decision making and reasoning processes. On the other hand, even the greatest admirer of courts might think it unlikely that individual courts could, in the course of a single case, develop the type of technical expertise

acquired by, and available to, specialist bodies in a complex area, and in any event, might reasonably doubt that adversarial litigation is the most effective or cost efficient way of educating a judge on technical issues to the point where he or she could, with confidence, substitute his or her decision on a technical issue for that of the original decision maker. This functional analysis perhaps supports the test identified in *Orange*: a court can be expected to detect errors of law, and may identify serious errors in reasoning or approach. It can be said that if an error is sufficiently clear and serious to be detectable by a non-expert court after scrutiny, then that is justification for overturning the decision, even though the court may lack more specific expertise. In my view, the *Orange* standard is the appropriate standard to apply here. As it happens, I do not believe this issue has much, if any, impact on the substance of Mr Nowak's appeal, since the issue he raises is essentially an issue of law: it involves the application of a legal test to facts which are not significantly in dispute. However, since the matter is of general importance, I would hold that the Circuit Court is not required to allow a full appeal on the merits, or the narrower appeal permitted in *Dunne*. Instead, the Court should apply the Orange test as outlined above. I would, however, emphasise that the argument here proceeded on the basis that the only options were a Dunne type appeal, or the more limited form of review contemplated in *Orange*. No argument was addressed to the formulation of the test in Orange, which may yet arise in an appropriate case.

Was the Examination Paper "Personal Data" within the meaning of the Acts and/or the Directive?

31 This was the issue of substance determined by the Commissioner. If Mr Nowak is able to persuade the Court that his examination paper was personal data within the meaning of the Acts, then it is unquestionable that this would be an error which would lead to the quashing of the decision of the Commissioner. "Personal data" is defined within the Acts as follows:

> "[D]ata relating to a living individual who is or can be identified either from the data or from the data in conjunction with other information that is in, or is likely to come into, the possession of the data controller."

In Directive 95/46/EC, "personal data" is defined as:

> "'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity."

The Commissioner points out that this was an open book exam which contained answers to accountancy questions which would not be expected to contain any personal information relating to Mr Nowak or any other exam candidate. Furthermore, insomuch as the Acts are designed to give a right of correction to an individual, it is hard to see how such a concept can be applied to an examination script, particularly in its unmarked form. Furthermore, the data subject, in this case the exam candidate, is fully aware of the contents of the examination script, since he or she generated it, and accordingly there could be no question of making the data subject aware of what is contained in that document.

32 In particular, the Commissioner relies on the analysis of Advocate General Sharpston in her Opinion of 12th December, 2013, in *YS v. Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v M and S* (Joint cases C-141/12 and C-372/12). In those cases, third country nationals, who had applied for residency rights in the Netherlands and had been refused, sought access to a report setting out the legal basis upon which the Dutch Immigration and Naturalisation Services had determined their respective residency applications. Previously, such reports had been made available, but the authorities adopted a new practice which was challenged by the applicants. The refusal to disclose the legal analysis was upheld by the Dutch Data Protection Authority. Advocate General Sharpston distinguished between the factual information upon which the analysis was carried out (which was data), and the legal analysis (which was not). She noted, at para. 56:

> "In my opinion, only information relating to facts about an individual can be personal data. Except for the fact that it exists, a legal analysis is not such a fact. Thus, for example, a person's address is personal data but an analysis of his domicile for legal purposes is not."

33. Furthermore, the Commissioner points out that it has recently been commented, in Kelleher, *Privacy and Data Protection Law in Ireland*, 2nd Ed., (Dublin, 2015) at para. 8.51, that "[t]he decision of Birmingham J in *Nowak v. Data Protection Commissioner* is itself consistent with that of the CJEU in YS". Finally, the Commissioner stated that there is no precedent for any other data protection body in Europe concluding that an examination script is personal data, although, in this regard, it must be said that the opposite is also true, at least as far as the submissions to this Court go: it has not been shown that there is any precedent deciding that such scripts are not personal data.

34 Mr Nowak argues, in reply, that the examination paper is personal data. He argues, for example, that it contains biometric data in that it is handwritten, and that this can constitute personal data. I am not persuaded that there is substance in this argument since the marking of an exam, even handwritten, does not constitute an analysis of handwriting, or indeed any assessment or analysis of personality. Instead, it is limited to an assessment of knowledge held, or at least demonstrated, as of a single point in time. However, Mr Nowak also points out that the examinations are dealt with in the grounding legislation. In the first place, s.4(6) of the 1988 Act provides that:

> "A request by an individual under subsection (1) of this section in relation to the results of an examination at which he was a candidate shall be deemed, for the purposes of this section, to be made on—
>
> (i) the date of the first publication of the results of the examination, or
>
> (ii) the date of the request,
>
> whichever is the later; and paragraph (a) of the said subsection (1) shall be construed and have effect in relation to such a request as if for '40 days' there were substituted '60 days'."

Examination is defined by s4(6)(b) as:

> "…any process for determining the knowledge, intelligence, skill or ability of a person by reference to his performance in any test, work or other activity."

The purpose of this section appears to be to prevent the data protection legislation from being used to circumvent arrangements for the publication of examination results. Nevertheless, Mr Nowak argues that it implicitly recognises that an examination result is personal data. Accordingly, he argues that if the result of an examination can be personal data, then the raw material from which that result is derived, *i.e.* the script, and possibly the marks or comments of an examiner on it, must also be personal data. He also relies on the equivalent United Kingdom provisions. In particular, the United Kingdom Data Protection Act 1998 contains a similar exemption in respect of examination marks. It also contains, at Article 9 of Schedule 7, a reference to examination scripts and provides:

> "Personal data consisting of information recorded by candidates during an academic professional or other examination are exempt from section 7."

Again, Mr Nowak argues that this is statutory recognition, if only indirect and inferential, that an examination script is capable of being personal data, since otherwise it would not have required statutory exemption. In this regard, he also relies on recent academic analysis, Rosemary Jay, *Data Protection Law and Practice*, 3rd Ed., (2007). At para. 19.25, the author makes the following comment on the exemption in respect of examination scripts:

> "There is no test of prejudice and it appears to be an absolute exemption to subject access. It is difficult to ascertain how this can be justified under the

> Directive or indeed in commonsense terms, given that the personal data would have been provided by the subject directly in the examination. The Commissioner in the Legal Guidance suggests that the exemption does not extend to 'comments recorded by the examiner in the margins of the script' which it advises should be given 'even though they may not appear to the data controller to be of much value without the script itself'. This assumes that the scripts are covered by the Act, however if they fall outside the definition of a 'relevant filing system' they may not be covered."

35 This last comment relates to a different issue, which is that data is defined under the Directive, and therefore under the 2003 Act, by reference not merely to what it contains, but also to how it is held. However, that issue does not arise in this case because the Commissioner has made a preliminary determination that the subject matter of the request is not personal data. It is easy to sympathise with any argument that an examination script, particularly in a field such as accountancy, reveals nothing about a student other than his or her state of knowledge on a particular issue, moreover at a very particular time. Nevertheless, if the result of an examination is capable of being personal data, then it might be argued that the raw material by which that result is arrived at, either itself, or in conjunction with the examiner's comments, is also personal data. It is, moreover, not inconceivable that there might be circumstances in which a data subject might wish to control the processing of such information outside of the examination process. In any event, this is ultimately a matter of European law. Accordingly, this Court, as a final court of appeal, must apply the test set out in case 238/81 *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] E.C.R. 3415. In that case, the CJEU held, at para. 16:

> "…the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it."

36 I am not satisfied that the issue here can be said to be *acte clair*. Accordingly, I would propose that the Court refer questions to the ECJ. Accordingly, Mr Nowak's legal journey continues. Questions proposed by the Court will be circulated today, and the parties given the opportunity of commenting on them prior to their submission to the ECJ.

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