APPROVED

AN ARD-CHÚIRT
THE HIGH COURT

[2024] IEHC 726

Record No. 2021/500JR

BETWEEN/

BARTH O'NEILL

APPLICANT

-AND-

THE REVENUE COMMISSIONERS

RESPONDENT

(NO.2)

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 22nd day of October 2024

INTRODUCTION

Preliminary

1. This application arises from my judgment in *O'Neill v Revenue Commissioners* [2024] IEHC 337, where I refused the Applicant's interlocutory application seeking either: (a) an order that his substantive judicial review proceedings be heard otherwise than in public (*i.e.*, in camera); or (b) an order directing the anonymisation of that challenge.

2. The substantive proceedings concern the Applicant's challenge to the Respondent's refusal to erase data in relation to his 2007 tax return, pursuant to the right to erasure ("the right to be forgotten") contained in Article 17 of the General Data Protection Regulation ("GDPR").

3. As indicated at the end of the judgment in *O'Neill v Revenue Commissioners* [2024] IEHC 337, at paragraph 66, it was agreed by both parties during the hearing of that application in April 2024 that any *intended* application for a preliminary reference to the Court of Justice of the European Union ("CJEU") pursuant to Article 267 of the Treaty on the Functioning of the European Union ("TFEU") would be left over until judgment was delivered on the Applicant's *in camera*/anonymisation application.

4. The Applicant then confirmed that he wished to make an Article 267 reference and the parties filed submissions in that regard with the matter being heard before me on Tuesday 17th September 2024.

5. This second judgment now addresses that application.

CONTEXT

6. No application for a preliminary reference was sought by the Applicant in any of the following documentation: the Applicant's Statement of Grounds; the Notices of Motion dated 3rd June 2021 and 25th October 2022; the Applicant's written submissions on the interlocutory application seeking either that the substantive judicial review proceedings be heard *in camera* or directing their anonymisation.

7. The first occasion on which the Applicant indicated a possible intention to seek a preliminary reference was at the conclusion of his oral submissions on the first day of the hearing. Overnight, between the first and second day of the hearing, the Applicant furnished the following draft, setting out:

   > "*That in light of Article 6(3) of the TEU, 16 of the TFEU, Art 7, 8,52(3) of the Charter of the Fundamental rights and in particular Article 17 of Regulation (EU) 2016/679 that any person seeking to invoke the provisions of the said article before any Court or Tribunal has, in order to have an effective remedy as per Art 47 of the TFEU, Art 13 of the ECHR, and Art 79 Regulation (EU) 2016/679 a right to have the proceedings anonymised before any Court or Tribunal.*"

8. As stated earlier, it was in fact agreed by both parties during the hearing of the initial application on 11th and 12th April 2024 that any *intended* application for an Article 267 reference would be left over until judgment was delivered on the Applicant's *in camera*/anonymisation interlocutory application. As referred to by the Applicant in his written submissions, and as mentioned previously, that was reflected in paragraph 66 of my judgment in *O'Neill v Revenue Commissioners* [2024] IEHC 337.

9. When the matter came before me on 12th June 2024, after judgment had been delivered on 31st May 2024, the Applicant initially sought to move his preliminary reference application at that point. However, it was agreed that written submissions would first be filed and the matter would be adjourned for hearing to Tuesday 17th September 2024.

DISCUSSION & DECISION

10. In summary, Article 267 TFEU provides that if a court considers that a decision on a question or questions asked is necessary to enable that court to give judgment, it can request the CJEU to give a ruling on that question(s).

11. The fact that judgment has been delivered in *O'Neill v Revenue Commissioners* [2024] IEHC 337 on the Applicant's interlocutory application which sought that his substantive judicial review proceedings be heard *in camera* or that they be anonymised, poses an insurmountable difficulty in seeking a preliminary reference on *that application*.

12. In order to circumvent that difficulty, the Applicant is effectively forced to argue either: (a) that I should revisit the judgment delivered on 31st May 2024 in which I refused his interlocutory application, and in the course of that reconsideration, I should make a reference on the questions now sought to be referred; or (b) in the period between the judgment and the final orders I should make a reference on the questions which he has now posed.

13. In his written submissions, the Applicant submitted that his proposed questions raised the issue of the right in EU Law to have his proceedings anonymised in the context of a right to be forgotten case.

14. The Applicant contended (in particular at paragraph 4 of his written submissions and sub-paragraphs thereunder) that due to the complexity of the legal issues, it was not possible to fully ventilate every issue of law and fact within the time allocated to the application in April and then he repeats (and seeks to add to) the arguments previously made during the April hearing ("*less certain matters* [having] *been decided per incuriam*") and states that because he was representing himself, the following matters ought to be considered afresh.

15. The Applicant, for example, repeated his previous submission that his proceedings raised data protection rather than tax issues; he stated that the timeline appended to his written submissions set out, in a chronological manner, how he alleged the Revenue Commissioners accessed and used his data to delete and deny him refunds, which in fact led to these judicial review proceedings; in light of both the principle of direct effect and the supremacy of EU law he contends that section 117 of the Data Protection Act 2018 should be interpreted to include judicial review applications and not limit data protection actions to actions founded on tort; he submitted that Article 79 of the GDPR had not been successfully transposed into Irish law; he referred to the matters addressed in *O'Neill v Revenue Commissioners* [2024] IEHC 337 at paragraphs 58 to 60; he repeated that his application for judicial review was an effective judicial remedy (making reference *inter alia* to *Schrems v Data Protection Commissioner* [2014] IEHC 310) and stated that the EU law provisions referred to were not limited to a remedy in tort and that, therefore, Ireland had not properly transposed EU law; he submitted that the central premise of the

motion and the Article 267 reference was that the logical corollary of a "*right to be forgotten*" under Data Protection law was to ensure that the right can be given full expression through the legal process; he referred to an extract of a lecture from the President of the CJEU Judge Koen Lenaerts on the supremacy of EU Law over national law; he referred to the judgment of the Supreme Court (Clarke J., as he then was) in *Minister of Justice, Equality and Law Reform & Ors v The Workplace Relations Commission & Ors* [2017] IESC 43 making a preliminary reference to the CJEU.

16. The Applicant introduced the five questions (which reflect the aforementioned summary of his submission) that he wished to have referred to the CJEU by way of a preliminary reference, as follows: "*Lest I be incorrect in the law that I have put before the Court in this submission and to avoid any a situation where final orders may be decided per incuriam such additional questions may include any of the following (The Court of Justice suggest that questions are limited to three) … :*

    (a) Is section 117 of the Data Protection Act 2018, which appears to limit data protection law, to the law of tort, compatible with EU Law?

    (b) In a case where the Respondent is a tax authority and there is no tax at issue between the parties, can domestic tax law be used to defeat the Applicant's data protection rights under EU Law and the right to have these proceedings anonymised?

    (c) In the case where the Respondent is a tax authority, can the provision of section 17.3b of the GDPR regulations be pleaded in aid of a tax authority, outside the domestic tax collection limitation periods.

(d) *Is it correct, that in light of the Supremacy of EU law, and the judgment in Van Gend en Loos that all historic domestic case law in the area of the right to have proceeding anonymised, must give way to, article 17 of the GDPR.*

(e) *A provision exists* [under section 156 of the Data Protection Act 2018] *in Irish Law to have the proceedings held otherwise than in public at the Court's discretion. Must the Court exercise its discretion in such proceedings in light of EU Law and if not, must it give reasons as to why, in light of the provision of EU law and the Supremacy of same, that it will not exercise its discretion?*"

17. Whilst it is accepted that a court can revise or alter a decision prior to the perfection of the Court Order for the purpose of correcting an error, making a clarification or amplifying the reasoning, such circumstances do not arise in this case and, in addition, for the following reasons, I am refusing the Applicant's applications: (i) to revisit the decision and judgment in *O'Neill v Revenue Commissioners* [2024] IEHC 337; and (ii) for a preliminary reference to the CJEU pursuant to Article 267 TFEU.

18. First, the Applicant has not established "*strong reasons*" to revisit my refusal of his interlocutory application in *O'Neill v Revenue Commissioners* [2024] IEHC 337 to have his substantive judicial review proceedings either heard *in camera* or anonymised: see the judgments of the High Court and Supreme Court in *Re McInerney Homes Ltd* [2011] IEHC 25, [2011] IESC 31, and as mentioned, there is no requirement to correct an error, make a clarification or amplify the reasoning set out in *O'Neill v Revenue Commissioners* [2024] IEHC 337.

19. Rather, the substance of the Applicant's approach, for example, in his written submissions (as summarised above), is to seek to revisit and amplify the arguments which were previously made at the hearing in April 2024.

20. The Applicant, both in his written submissions and in the timeline document attached to those submissions, also attempts to make *new* arguments in support of his previous argument that his substantive judicial review proceedings be heard *in camera* or that they be anonymised.

21. Second, the Applicant has not established that a manifest error was made in the judgment which was so fundamental as to have an effect on the decision so as to amount to a denial of justice and nor has he referred to new facts which would have a significant consequence on the findings made in *O'Neill v Revenue Commissioners* [2024] IEHC 337: see *Bank of Ireland Mortgage Bank v Hade* [2022] IEHC 728, per Barr J.

22. Third, the five questions proposed by the Applicant arise in the context of an *interlocutory application*.

23. In brief, in the judgment in *O'Neill v Revenue Commissioners* [2024] IEHC 337, I refused the Applicant's interlocutory application for either an *in camera* hearing of the substantive judicial review application or to have it anonymised and no basis has been established for me to revisit that judgment. A decision of the CJEU on the questions posed now is simply not necessary.

24. Further, in Case 338/85 *Fratelli Pardini SpA v Ministero del Commercio con l'Estero and Banca Toscana*, ECLI:EU:C:1988:194 the (then) ECJ observed at paragraph 11, in the context of a reference which occurred in respect of *interim* measures, that a national court was "*not empowered to bring a matter before the Court by way of a reference for a preliminary ruling unless a dispute is pending before it in the context of which it is called upon to give a decision capable of taking into account the preliminary ruling. Conversely, the Court of Justice has no jurisdiction to hear a reference for a preliminary ruling when at the time it is made the procedure before the Court making it has already been terminated.*"

25. In *Dowling v Minister for Finance* [2013] IESC 37; [2013] 4 I.R. 576 after referring to Case 338/85, the Supreme Court (Clarke J., as he then was) observed as follows at paragraph 14.5:

> "*It, therefore, follows that the Court was not obliged to refer a question concerning the interpretation of European Union law to the ECJ pursuant to Article 267 of the Treaty on the Functioning of the European Union as the questions are raised in interlocutory proceedings and would be overtaken by events in any case. Insofar as the Court has a discretion whether or not to refer any such question, the Court was of the view that any question concerning the interpretation of European Union law may be the subject of a reference to the ECJ, if considered necessary, when all or any one of the related proceedings are being tried on their merits or on appeal*".

26. In Collins & O'Reilly, *Civil Proceedings and The State* (Third Edition, 2019, Thomson Reuters (Professional) Ireland Limited) at page 378, paragraph 11-70, the learned authors, after referencing these authorities, observe that "*a reference need not be made where the issue is raised in interlocutory proceedings, the decision taken at that stage is not binding on the court which will deal with the substance of the case and the questions decided at the interlocutory stage can be examined and the subject of a reference at a later stage in the proceedings*".

27. Fourth, judgment has already been delivered in *O'Neill v Revenue Commissioners* [2024] IEHC 337 on the Applicant's interlocutory application seeking either that his substantive judicial review proceedings be heard *in camera* or that they be anonymised. Notwithstanding that, the Applicant has described the proposed questions, upon which he seeks a referral pursuant to Article 267 TFEU, as raising the issue of the right in EU Law to have his proceedings anonymised in the context of a right to be forgotten case. However, the Applicant has not set out any basis to persuade me to revisit my determination.

28. Further, in this regard the Applicant *inter alia* explains the speculative rationale for this Article 267 reference at paragraph 2.8 of his written submissions as follows: "*there is nothing prohibiting this Court from examining the question raised and seeing is there enough of a basis to ask the Court of Justice to carry out the role that it exclusively reserved for them, namely the interpretation of EU Law. It is submitted the balance of justice favours making the referral, on the basis that the right may be there only awaiting to be discovered. It would appear there is enough to ground a root title and find a right, to have right to be forgotten proceedings anonymised, particularly so when there is a*

national provision that is close to giving a similar relief, albeit a discretionary one. A referral would allow the Court of Justice an opportunity to discharge its primary role and consider, is this a right that should be available to all the 450 million citizens of the EU?" I do not consider, however, that a decision or ruling from the CJEU on the Applicant's questions is necessary.

CONCLUSION

29. The High Court is not a court of final remedy pursuant to the TFEU. The Applicant has a right of appeal to the Court of Appeal from my judgment determining the interlocutory application and, therefore, the issue of the court of last resort (as per Article 267 TFEU) does not arise.

30. For the reasons set out in this judgment and having regard to the provisions of Article 267 TFEU, I do not consider that a decision or ruling from the CJEU on the Applicant's questions is/was necessary to have enabled me to give judgment on the Applicant's application to have his substantive judicial review proceedings either held *in camera* or anonymised.

31. In the circumstances, therefore, I refuse the Applicant's application to revisit the matters determined in *O'Neill v Revenue Commissioners* [2024] IEHC 337, and accordingly, I do not consider that questions have been raised before me which require a decision and ruling of the CJEU on those questions to be necessary to have enabled me to give judgment. The Applicant's applications are, therefore, refused.

PROPOSED ORDER

32. I shall make an order: (i) refusing the applications requesting the revisitation of matters determined in *O'Neill v Revenue Commissioners* [2024] IEHC 337; and (ii) refusing the Applicant's request for a reference to the CJEU pursuant to Article 267 TFEU.

33. I shall put the matter in before me on Tuesday 17th December 2024 at 10:30 to deal with the question of costs.

CONLETH BRADLEY

22nd OCTOBER 2024