Supreme Court of Ireland Decisions

Judgment

Title:	Data Protection Commissioner & anor -v- Facebook Ireland Limited & anor
Neutral Citation:	[2018] IESC 38
Supreme Court Record Number:	68/18
High Court Record Number:	2016 4809 P and 2016 No. 74 COM
Date of Delivery:	31/07/2018
Court:	Supreme Court
Composition of Court:	Clarke C.J., O'Donnell Donal J., Dunne J., Charleton J., Finlay Geoghegan J.
Judgmentby:	Clarke C.J.
Status:	Approved
Result:	Other

THE SUPREME COURT

Record No: 2018/68

Clarke C.J.
O'Donnell J.
Dunne J.
Charleton J.
Finlay Geoghegan J.

Between/

The Data Protection Commissioner & Anor

Plaintiff/First Named Respondent

And

Facebook Ireland Ltd

Defendant/Appellant

And

Maximillian Schrems

Defendant/Second Named Respondent

Judgment of Mr. Justice Clarke, Chief Justice delivered the 31st July 2018

1. Introduction

1.1 This judgment relates to an application for leave to appeal to this Court directly from the High Court. The issues which generally arise in these proceedings can be seen from the judgment of the High Court (Costello J.) delivered on the 3rd October 2017 (*The Data Protection Commissioner v. Facebook Ireland Limited & anor*. [2017] IEHC 545)

1.2 The basis on which the defendant/appellant ("Facebook") suggests that an appeal to this Court meets the constitutional threshold for leave to bring a direct or leapfrog appeal to this Court from that decision of the High Court is fully set out in the notice of appeal filed which, in accordance with the Court's normal practice, is published along with this judgment. The reasons why the plaintiff/first named respondent ("The Data Protection Commissioner") and the defendant/second named respondent ("Mr. Schrems") opposed the grant of leave are set out in the respective respondents' notices filed which are also published along with this judgment.

1.3 It follows that it is unnecessary to set out in detail either the issues which arise in these proceedings and potentially on appeal or the arguments put forward by both sides on whether or not leave should be granted. However, unusually, the Court decided that it was necessary to conduct an oral hearing so as to explore some of the difficult issues both of national constitutional law and of European Union law which potentially arise and which impact on the significant question of whether any appeal is available in the particular circumstances of a case such as this.

1.4 In simple terms, it is argued both by the Data Protection Commissioner and by Mr. Schrems that, as a mixed question of European Union law and Irish constitutional law, no appeal lies in circumstances where the High Court has decided to make a reference to the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union ("TFEU") which provides as follows:-

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> > (a) the interpretation of the Treaties;
> >
> > (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
>
> If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

1.5 Before going on to consider the questions which arise on this application for leave, it is appropriate to identify the general principles by reference to which this Court ordinarily approaches the question of whether it is appropriate, having regard to the provisions of the 33rd Amendment, to grant leave.

2. General Principles

2.1 As this Court has noted in its recent determinations, the general principles applied by the Court in determining whether to grant or refuse leave to appeal having regard to the criteria incorporated into the Constitution as a result of the 33rd Amendment have now been considered in a large number of determinations and are fully addressed in both a determination issued by a panel consisting of all of the members of this Court in*B.S. v Director of Public Prosecutions*[2017] IESCDET 134 and in a unanimous judgment of a full Court delivered by O'Donnell J. in*Price Waterhouse Coopers (A Firm) v Quinn Insurance Ltd. (Under Administration*) [2017] IESC 73. The additional criteria required to be met in order that a so-called 'leapfrog appeal' direct from the High Court to this Court can be permitted were addressed by a full panel of the Court in*Wansboro v Director of Public Prosecutions*[2017] IESCDET 115. It follows that it is unnecessary to revisit the new constitutional architecture for the purposes of this determination.

2.2 However, there clearly are additional questions which arise in the context of this case having regard to the significant issue between the parties as to whether it is possible to pursue an appeal at all. I therefore turn to that question.

3. Does an Appeal Lie?

3.1 The starting point has to be to identify the national jurisprudence in this regard. The leading case is clearly*Campus Oil Limited and ors v. Minister for Industry and Energy and*ors [1983] 1 I.R. 82.

3.2 It is unnecessary to set out the background to*Campus Oil*in detail, except to note that it concerned an appeal to the Supreme Court seeking to discharge or set aside an order of Murphy J. in the High Court making a preliminary reference to the Court of Justice regarding the proper interpretation of certain Treaty articles. Walsh J. delivered the judgment of this Court (O'Higgins C.J. and Hederman J. concurring), concluding that the Court had no jurisdiction to hear such an appeal.

3.3 It is worth quoting at length from the reasoning of Walsh J. in reaching this conclusion. Walsh J. stated:-

> "A request by a national judge to the Court of Justice for an interpretation of articles of the Treaty is not, in any sense, an appeal to a higher court. It is an exercise of a right (which, by its nature, is non-contentious) to request an interpretation of the Treaty from the Court of Justice which itself is the only one having jurisdiction to give such binding interpretations. The national judge, by virtue of this power conferred upon him by the Treaty, exercises a function under Irish law in making such a request. The power is conferred upon him by the Treaty without any qualification, express or implied, to the effect that it is capable of being

> overruled by any other national court. It is not within the power of the Oireachtas, or of any rule-making authority, to give any national court the power to modify or to control the unqualified jurisdiction conferred upon the national judge by article 177 of the Treaty. The national judge has an untrammelled discretion as to whether he will or will not refer questions for a preliminary ruling under article 177. In doing so, he is not in any way subject to the parties or to any other judicial authority."

3.4 Later, Walsh J. stated:-

> "It is as a matter of Irish law that article 177 of the Treaty confers upon an Irish national judge an unfettered discretion to make a preliminary reference to the Court of Justice for an interpretation of the Treaty, or upon the validity or the interpretation of acts of the institutions of the Community, or upon the interpretation of statutes of bodies established by an act of the Council, where the statutes so provide. The very purpose of that provision of article 177 of the Treaty is to enable the national judge to have direct and unimpeded access to the only court which has jurisdiction to furnish him with such interpretation. To fetter that right, by making it subject to review on appeal, would be contrary to both the spirit and the letter of article 177 of the Treaty."

3.5 Walsh J. also made the following observation in the course of his judgment:-

> "In so far as any reliance is sought to be placed upon Article 34 of the Constitution (which gives a right of appeal to this Court from all decisions of the High Court, subject to such exceptions as are permitted by law), in my view the reference made by Mr Justice Murphy in this case is not a decision within the meaning of Article 34. He made no order having any legal effect upon the parties to the litigation.If and when he comes to apply the Treaty provisions to the case before him, then he will have made a decision which can be appealed to this Court. This Court would then have to decide whether or not the Treaty provisions in question were applicable to the case. However, even if the reference of questions to the Court of Justice were a decision within the meaning of Article 34 of the Constitution, I would hold that, by virtue of the provisions3 of Article 29, s. 4, sub-s. 3, of the Constitution, the right of appeal to this Court from such a decision must yield to the primacy of article 177 of the Treaty. That article, as a part of Irish law, qualifies Article 34 of the Constitution in the matter in question."

(Emphasis added)

3.6 In substance, Facebook argues either that*Campus Oil*was wrongly decided or that this case can be distinguished from*Campus Oil*, not least because of the unusual nature of these proceedings. While it will be necessary to refer briefly to the nature of these proceedings in due course, it does need to be recorded that a particularly unusual feature of this case is that it would appear that, in substance, the Court of Justice of the European Union ("CJEU") will be asked to make a final decision on the validity of the measures of the European institutions which are under scrutiny such that the matter will not come back to the Irish courts to deal with any subsequent matter of substance.

3.7 In those circumstances, it appears to be accepted by all parties, and seems clear to the Court, that there would be no possibility for any subsequent appeal within the Irish legal system, for the CJEU would have made a final and definitive decision on the validity or otherwise of the measures under challenge and there would be no jurisdiction for either the Court of Appeal or for this Court to depart from that ruling. Thus, unlike most cases where there may be a preliminary reference under Article 267, the final finding of substance would appear to be one which would be made by the Court of Justice rather than by the national court. In those circumstances, Facebook argues that, at a minimum, it is possible to distinguish a case of this type from that which was under consideration by this Court in*Campus Oil*.

3.8 The second set of issues which arise in this context concerns the limitations which European Union law imposes on national legal systems concerning what might be termed interference with the role of a referring court which avails of its entitlement to invoke Article 267.

3.9 In Case C-210/06*Cartesio*[2008] ECR I-9641, the CJEU stated as follows at paragraph 93:-

> "As is clear from the case-law cited in paragraphs 88 and 89 above, concerning a national court or tribunal against whose decisions there is a judicial remedy under national law, [Article 267 TFEU] does not preclude a decision of such a court, making a reference to the Court, from remaining subject to the remedies normally available under national law. Nevertheless, the outcome of such an appeal cannot limit the jurisdiction conferred by [Article 267 TFEU] on that court to make a reference to the Court if it considers that a case pending before it raises questions on the interpretation of provisions of Community law necessitating a ruling by the Court."

3.10 The CJEU further stated at paras. 95 and 96 of*Cartesio*:-

> "Where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the autonomous jurisdiction which [Article 267 TFEU] confers on the referring court to make a reference to the Court would be called into question, if – by varying the order for reference, by setting it aside and by ordering the referring court to resume the proceedings – the appellate court could prevent the referring court from exercising the right, conferred on it by the EC Treaty, to make a reference to the Court.
>
> In accordance with [Article 267 TFEU], the assessment of the relevance and necessity of the question referred for a preliminary ruling is, in principle, the responsibility of the referring court alone, subject to the limited verification made by the Court in accordance with the case-law cited in paragraph 67 above. Thus, it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it."

3.11 The CJEU concluded as follows at paragraph 98:-

> "In the light of the foregoing … where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of [Article 267 TFEU] is to be interpreted as meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings."

3.12 In Case C-470/12*Pohotovost*[2014] the CJEU followed its decision in*Cartesio*, stating as follows at paragraphs 31 and 32:-

> "As regards the fact that an appeal was brought against the order for reference, it must be noted that, in accordance with Article 267 TFEU, the

assessment of the relevance and necessity of the question referred for a preliminary ruling is, in principle, the responsibility of the referring court alone, subject to the limited verification made by the Court in accordance with the case-law cited in paragraph 27 above. Thus, it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it (Case C–210/06 Cartesio [2008] ECR I–9641, paragraph 96).

> It follows that, in a situation such as that in the main proceedings, the Court must – also in the interests of clarity and legal certainty – abide by the decision to make a reference for a preliminary ruling, which must have its full effect so long as it has not been revoked or amended by the referring court, such revocation or amendment being matters on which that court alone is able to take a decision*(Cartesio*, paragraph 97)."

3.13 At this stage, it is perhaps worth also highlighting the comments of Judge Lenaerts, now President of the CJEU, writing extra-judicially on this issue (see Lenaerts, "National Remedies for Private Parties in the light of the EU Law Principles of Equivalence and Effectiveness" (2011) 46 JUR 13). He observed as follows:-

> "...the success of art.267 TFEU is built on the very absence of hierarchy. 'Dialogue' is the raison d'Ãªtre of the preliminary reference procedure and the interest of promoting dialogue is best served by making the opportunity to engage in dialogue available not only to higher national courts but also to lower ones. Moreover, it will often be apparent from the very outset that a case before a national court of first instance will require a preliminary ruling from the ECJ and it would therefore be both inefficient and counterproductive to apply any form of filter curtailing or inhibiting the lower national court's freedom to make a reference."

3.14 There can be no doubt but that what I will describe as the*Cartesio*jurisprudence imposes significant limits on the ability of a national appellate court to interfere with the important freedom, which every national court enjoys, to make a reference to the CJEU under Article 267. There may, however, be questions as to the precise extent of that limit.

3.15 It is important to note that both the Data Protection Commissioner and Mr. Schrems argue that the combined effect of the constitutional appellate structure which applies in this jurisdiction and the jurisprudence of the CJEU as set out in*Cartesio*mean that there cannot be any appeal in a case such as this. While acknowledging that, as a matter of Union law, the*Cartesio*jurisprudence permits, with significant limitations, an appeal process in a member state notwithstanding the fact that a reference from a lower court is pending before the CJEU, it is argued that the only form of appeal which the*Cartesio*jurisprudence would permit is an appeal which is not recognised, and therefore is not possible, in the Irish appellate structure. The argument is to the effect that the only form of appeal which is recognised in the Irish appellate structure is one where the appeal court has the power to reverse or overturn any decision of the lower court which is the subject of a successful appeal. It is said that the limitations imposed by*Cartesio*do not permit such an appeal.

3.16 It is on that basis that both the Data Protection Commissioner and Mr. Schrems argue that leave to appeal should not be given because, it is said, no appeal lies in the circumstances of this case. However, it is also necessary to consider the full extent of the issues which Facebook seeks to raise on this potential appeal.

4. The Issues Facebook Seeks to Raise

4.1 In its application for leave to appeal, Facebook sets out 10 grounds on which an

appeal would be pursued if leave to appeal were granted. It seems to me that it is possible to summarise and categorise those grounds in the following manner.

4.2 Three of the proposed grounds (Grounds 1, 2 and 10) relate to either the validity, or necessity, of the making of the reference by the High Court, or the content of the reference itself. Ground 1 relates to the High Court's finding in respect of the Privacy Shield Decision (Commission Decision 2016/1250). Broadly speaking, the argument raised under this ground is that the High Court erred in making a reference to the CJEU where, Facebook argues, the High Court was bound by the decision/finding on US law contained in the Privacy Shield Decision in respect of the adequacy of protections in the context of governmental surveillance.

4.3 Ground 2 concerns the alleged failure of the High Court to consider the imminent repeal of Directive 95/46/EC. The broad argument here is that as a result of the repeal of this Directive, and the introduction of the General Data Protection Regulation ("GDPR"), the difference between the legal context which formed the background to the making of the reference and that which will adhere when the CJEU comes to answer the questions referred is such that Facebook considers that the making of the reference is rendered inappropriate.

4.4 Ground 10 relates to the wording of one of the questions referred by the High Court. Facebook states that, notwithstanding its other grounds of appeal, it objects to the inclusion in Question 1 of the phrase "Law enforcement and the conduct of foreign affairs of the third country". Facebook contends that should this Court decide that the reference made by the High Court is necessary, it should nonetheless amend that question to remove this phrase.

4.5 Grounds 3 to 6 as set out in the application for leave relate to alleged errors on the part of the High Court in its assessment of US law. Facebook argues that these are matters which are central to any reference to the CJEU as they form the backdrop to that Court's legal analysis of the questions before it. Essentially, Facebook would urge this Court to "correct" the findings of the High Court in this regard. The alleged errors relate to the High Court's finding in respect of "mass indiscriminate processing" (Ground 3), the High Court's finding that surveillance is legal unless forbidden (Ground 4), the High Court's finding on the doctrine of standing in US Law (Ground 5) and the High Court's findings with respect to remedies and its consideration of other issues such as safeguards (Grounds 6). Of course, as these findings relate to the law of another jurisdiction, the High Court's findings in this context are treated as findings of fact and not of law. The implications of this distinction are explored below.

4.6 Grounds 7 and 8 are closely related to Grounds 3 to 6. In particular, they relate to Article 47 of the Charter of Fundamental Rights of the EU, which recognises the right to an effective remedy. Facebook argue that the High Court erred in relation to its finding that the laws and practices of the US did not respect the essence of the right protected by Article 47 of the Charter, and also object to the High Court's findings regarding the proportionality of any interference with the right protected by Article 47.

4.7 Finally, Ground 9 concerns the High Court's alleged failure to consider what is said to be "a significant volume of uncontradicted evidence" in relation to a range of matters. Facebook contends that this evidence was essential to the Court's assessment of the practices which protect data, the vital security interests involved, and the range of important Charter rights engaged in connection with the transfer of data.

4.8 It follows that it is also necessary to say something about the substantive issues of fact which Facebook wishes to address on this appeal.

5. The Substantive Issues
5.1 From that analysis it follows that there are questions as to whether an appeal lies at all in the circumstances of this case, both as a matter of Irish and European law. Furthermore, there are questions as to the nature of any appeal which may be found to exist by particular reference to the type of order which this Court could make in the event that an appeal was entertained and was ultimately successful.

5.2 However, it is also important to note the substantive issues which Facebook wishes to raise in the event that this Court is persuaded both that an appeal is or may be possible as a matter of law and considers that the case may meet the constitutional threshold for leave to appeal. It is necessary, therefore, to say something about the substantive issues which might arise.

5.3 Facebook wishes to invite this Court to review certain important findings of fact made by the High Court in its judgment and which informed the decision of the High Court to refer certain questions to the CJEU. In substance, Facebook seeks to invite this Court to overturn (whether in a "hard" or in a "soft" way) certain findings of fact made by the trial judge. In reality, the arguments of principle which arise concerning the extent to which it is possible to distinguish*Campus Oil*(or even to say that it is wrong) or concerning the scope of any appeal which might be permissible, are only a means to the end of arguing that this Court should embark on a consideration of the facts. In that latter context, it should, of course, be noted that Facebook accepts, as it must, that there are significant limitations on the extent to which facts can be re-visited in the Irish appellate process having regard to the principles identified in*Hay v. O'Grady*[1992] 1 I.R. 210 and subsequent jurisprudence. I do not understand Facebook to seek to invite this Court to depart from that established jurisprudence, so that any references in this judgment to an appeal against the findings of fact of the trial judge should be taken to refer to an appeal within the significant limitations in that regard which the Irish jurisprudence imposes.

5.4 Before going on to consider whether it is appropriate to grant leave to appeal in this case and, if so, on what basis, it may also be appropriate briefly to touch on the question of the relevance, so far as the reference to the CJEU is concerned, of the findings of fact of the High Court.

6. The Relevance of the Findings of Fact
6.1 There are a number of unusual features to this type of case. Ordinarily it might be said that a question concerning the validity of a measure or instrument of the European Union might be most likely to arise as an incidental question to other types of litigation which might arise before national courts. For example, the rights or obligations of the State or its agencies in relation to private individuals might be governed by a measure or instrument of Union law such that those rights and obligations might be different in the event that the measure or instrument concerned is found to be invalid. Likewise, it is possible that a measure, such as a regulation, which impacts on the rights of individuals as and between themselves might have its validity questioned in private litigation such that the result of that litigation might be different depending on whether the Union regulation withstood challenge.

6.2 However, here the form of action is one which would not ordinarily be known in Irish law but which derives from the decision of the CJEU in Case C-362/14 S*chrems ("Schrems (No.1)")*

6.3 In its judgment in that case the CJEU said the following at paragraph 65:-

> "In the converse situation, where the national supervisory authority considers that the objections advanced by the person who has lodged with it a claim concerning the protection of his rights and freedoms in regard to

> the processing of his personal data are well founded, that authority must, in accordance with the third indent of the first subparagraph of Article 28(3) of Directive 95/46, read in the light in particular of Article 8(3) of the Charter, be able to engage in legal proceedings. It is incumbent upon the national legislature to provide for legal remedies enabling the national supervisory authority concerned to put forward the objections which it considers well founded before the national courts in order for them, if they share its doubts as to the validity of the Commission decision, to make a reference for a preliminary ruling for the purpose of examination of the decision's validity."

6.4 It follows that these proceedings might well be described as being *sui generis* so far as the Irish legal system is concerned, but they are clearly mandated by the decision of the CJEU in *Schrems (No. 1*) and no question, therefore, arose as to whether these proceedings could be maintained in the form in which they were.

6.5 The precise status of the findings of fact of the High Court so far as the issue which the CJEU will need to consider on the reference is not absolutely clear. The questions referred by the High Court were the following:-

> 1. In circumstances in which personal data is transferred by a private company from a European Union (EU) member state to a private company in a third country for a commercial purpose pursuant to Decision 2010/87/EU as amended by Commission Decision 2016/2297 ('the SCC Decision') and may be further processed in the third country by its authorities for purposes of national security but also for purposes of law enforcement and the conduct of the foreign affairs of the third country, does EU law (including the Charter of Fundamental Rights of the European Union ('the Charter')) apply to the transfer of the data notwithstanding the provisions of Article 4(2) of TEU in relation to national security and the provisions of the first indent of Article 3(2) of Directive 95/46/EC ('the Directive') in relation to public security, defence and State security?
>
> 2. (1) In determining whether there is a violation of the rights of an individual through the transfer of data from the EU to a third country under the SCC Decision where it may be further processed for national security purposes, is the relevant comparator for the purposes of the Directive:
>
> > a) The Charter, TEU, TFEU, the Directive, ECHR (or any other provision of EU law); or
> >
> > b) The national laws of one or more member states?
>
> (2) If the relevant comparator is b), are the practices in the context of national security in one or more member states also to be included in the comparator?
>
> 3. When assessing whether a third country ensures the level of protection required by EU law to personal data transferred to that country for the purposes of Article 26 of the Directive, ought the level of protection in the third country be assessed by reference to:
>
> > a) The applicable rules in the third country resulting from its domestic law or international commitments, and the practice designed to ensure compliance with

those rules, to include the professional rules and security measures which are complied with in the third country;

or

b) The rules referred to in a) together with such administrative, regulatory and compliance practices and policy safeguards, procedures, protocols, oversight mechanisms and non judicial remedies as are in place in the third country?

4. Given the facts found by the High Court in relation to US law, if personal data is transferred from the EU to the US under the SCC Decision does this violate the rights of individuals under Articles 7 and/or 8 of the Charter?

5. Given the facts found by the High Court in relation to US law, if personal data is transferred from the EU to the US under the SCC Decision:

a) Does the level of protection afforded by the US respect the essence of an individual's right to a judicial remedy for breach of his or her data privacy rights guaranteed by Article 47 of the Charter?

If the answer to a) is yes,

b) Are the limitations imposed by US law on an individual's right to a judicial remedy in the context of US national security proportionate within the meaning of Article 52 of the Charter and do not exceed what is necessary in a democratic society for national security purposes?

6. (1) What is the level of protection required to be afforded to personal data transferred to a third country pursuant to standard contractual clauses adopted in accordance with a decision of the Commission under Article 26(4) in light of the provisions of the Directive and in particular Articles 25 and 26 read in the light of the Charter?

(2) What are the matters to be taken into account in assessing whether the level of protection afforded to data transferred to a third country under the SCC Decision satisfies the requirements of the Directive and the Charter?

7. Does the fact that the standard contractual clauses apply as between the data exporter and the data importer and do not bind the national authorities of a third country who may require the data importer to make available to its security services for further processing the personal data transferred pursuant to the clauses provided for in the SCC Decision preclude the clauses from adducing adequate safeguards as envisaged by Article 26(2) of the Directive?

> 8. If a third country data importer is subject to surveillance laws that in the view of a data protection authority conflict with the clauses of the Annex to the SCC Decision or Article 25 and 26 of the Directive and/or the Charter, is a data protection authority required to use its enforcement powers under Article 28(3) of the Directive to suspend data flows or is the exercise of those powers limited to exceptional cases only, in light of Recital 11 of the Directive, or can a data protection authority use its discretion not to suspend data flows?
>
> 9. (1) For the purposes of Article 25(6) of the Directive, does Decision (EU) 2016/1250 (4) ('the Privacy Shield Decision') constitute a finding of general application binding on data protection authorities and the courts of the member states to the effect that the US ensures an adequate level of protection within the meaning of Article 25(2) of the Directive by reason of its domestic law or of the international commitments it has entered into?
>
> (2) If it does not, what relevance, if any, does the Privacy Shield Decision have in the assessment conducted into the adequacy of the safeguards provided to data transferred to the United States which is transferred pursuant to the SCC Decision?
>
> 10. Given the findings of the High Court in relation to US law, does the provision of the Privacy Shield ombudsperson under Annex A to Annex III of the Privacy Shield Decision when taken in conjunction with the existing regime in the United States ensure that the US provides a remedy to data subjects whose personal data is transferred to the US under the SCC Decision that is compatible with Article 47 of the Charter?
>
> 11. Does the SCC Decision violate Articles 7, 8 and/or 47 of the Charter?

6.6 Each of those questions is, in substance, concerned with the ultimate issue of whether the relevant instruments are valid. The question of the validity of those instruments is not, of course, a matter of pure law but rather is dependent at least in part on the facts concerning the way in which data transmitted to the United States can be processed or accessed in that jurisdiction. The finding of invalidity in*Schrems (No. 1)*was itself dependent on an assessment by the CJEU of the facts and the application of legal principles to the facts as determined. It would appear that the CJEU may have had regard to some materials or facts which did not derive directly from the reference document or the findings of the Irish High Court in that case. There is, therefore, a certain lack of clarity about the precise extent to which the findings of fact of the Irish High Court in this case may impact on the assessment of validity which the CJEU may have to conduct as a result of the reference.

6.7 Indeed, in that context, it is worth noting that counsel for Facebook indicated that one of the matters that it is intended to canvass before the CJEU is the extent to which the CJEU should itself consider any relevant evidence or materials for the purposes of reaching its own conclusion on any facts relevant to its assessment of validity.

6.8 That being said, it would be difficult to consider that the CJEU would not at least have regard (and potentially significant regard) to the findings of fact of a referring court.

6.9 Indeed, it must be observed that this analysis gives rise to an additional unusual

feature of this type of case. Ordinarily the CJEU has no role in determining the facts, which remain the preserve of national courts and in particular the referring court. The facts as found by a referring court and included in the reference document may be necessary to put the legal issues which arise into context and to demonstrate the admissibility of the reference having regard to the principle that the CJEU does not offer advisory opinions. However, ordinarily, it will remain a matter for the referring court to determine the ultimate result of the case in the light of the facts which it has found and applying the law as determined by the CJEU to those facts.

6.10 The extent to which it may be either necessary or appropriate for the CJEU to go beyond the facts found by a referring court in what might be described as a "pure" validity case such as this is a matter which is by no means clear. However, as already noted, this Court must, at least for the purposes of this leave application, proceed on the basis that the facts found by the High Court have the potential to influence the assessment by the CJEU of the validity question which has been referred to it.

6.11 It seems to me to follow that Facebook at least has a legitimate interest in seeking to invite this Court to review the facts as found by the High Court subject to the legal issues which arise concerning the admissibility of any appeal to this Court and the type of appeal which might be found to be maintainable. The facts have the potential at least to influence the ultimate result of these proceedings.

6.12 Against the backdrop of those general observations I propose to turn to the question of whether it is appropriate to grant leave to appeal in this case.

7. Should Leave be Granted

7.1 It would clearly be inappropriate for this Court to grant leave to appeal in a case where, clearly, no appeal lay. But, as the brief analysis of Irish and Union law set out earlier demonstrates, there can be cases where there may be a significant dispute as to whether an appeal is permissible either generally or in respect of some aspect of a case.

7.2 In my view it is not possible to adopt a hard and fast rule as to the proper approach which the Court should adopt in such circumstances. It may be that, in a case where the issue of whether an appeal lies is straightforward, the Court may consider it appropriate to resolve that question on the application for leave and to decline leave, even if it would otherwise have been justified, if persuaded that no appeal is possible. On the other hand, where there are real issues of substance involved in the question of whether an appeal lies in the first place, it may be more appropriate to grant leave to appeal and to include as one of the issues to be determined on the appeal the question of whether an appeal lies in respect either of some or of all of the issues sought to be canvassed.

7.3 Nevertheless, where it is clear that no appeal lies then the more appropriate course of action would obviously be to refuse leave on that ground alone.

7.4 The first question which must be addressed, therefore, is as to whether it is clear that no appeal lies in the circumstances of this case. In my view there is a stateable issue as to the definition of the precise parameters of the*Campus Oil*jurisprudence and in particular whether it applies to a case such as this where it is possible that findings of fact made by a trial court may, in practice, become immune from review because of the unusual nature of the proceedings and the consequent fact that the final decision in substance will be made by the CJEU. The issue of what may be an appealable decision for Irish constitutional purposes may also arise in that context. For the purposes of this judgment it is unnecessary to say anything about the strengths and weaknesses of the arguments on either side of that question. It is only necessary to record that it is arguable that Facebook may be entitled to pursue an appeal.

7.5 In saying that it is also important to acknowledge the closely connected question as to the type of appeal which might be permitted having regard both to the Irish constitutional jurisprudence and that of the CJEU.

7.6 Given my view that there are issues which require to be determined both as to whether an appeal lies at all and, if so, the type of appeal which may be permitted, it seems clear that the issues thus raised are of very considerable significance affecting as they do the proper interaction of the Irish Constitution with the reference procedure set out in Article 267. Those issues clearly meet the constitutional threshold for leave to appeal and are of particular general importance. It is next necessary to turn to the factual issues.

8. The Factual Questions

8.1 Two issues arise here. The first is as to whether, as was argued on behalf of the Data Protection Commissioner and Mr. Schrems, no arguable basis has been put forward by Facebook for suggesting that this Court could reverse the findings of fact under challenge having regard to the*Hay v. O'Grady*jurisprudence.

8.2 That issue, in turn, touches on the question of the proper approach of this Court in a case such as this where what is involved is an assessment substantially of expert evidence and where that expert evidence, in turn, concerns the law of another country. Against that background, and in the context of the limited scope which this Court has to review the merits of the factual issues in an application for leave to appeal, I am not satisfied that it can be said that the arguments which Facebook wish to advance are not arguable. I do so, as I have indicated, on the basis of the limited review which is appropriate at this stage and entirely without prejudice to the merits, one way or the other, of any arguments which may be made.

8.3 However, I am satisfied that this Court should proceed on the basis that it is at least arguable that Facebook might be in a position to persuade this Court that some or all of the facts under challenge should be reversed.

8.4 The second question concerns whether grounds relating to facts, such as those which Facebook seeks to argue, meet the constitutional threshold. Ordinarily questions of fact would not be considered to give rise to a matter of general public importance. However, this Court has on certain occasions determined that some additional issues might be raised on appeal under the "interests of justice" alternative criteria where those issues might have to be dealt with on appeal in any event (whether in the Court of Appeal or this Court) and where it was expedient that all issues involved in the case should be tried in one court. The possibility of such an approach was highlighted in the judgment of this Court in*PWC*.

8.5 I am satisfied that this is such a case. The issues which arise in these proceedings are of very great significance both nationally and internationally. It is in the interests of justice generally, and in the interests of the parties, that clarity be brought to these matters as quickly as possible, consistent with the matters being dealt with in an appropriate fashion. Splitting up issues of fact from issues of law would not make sense in this case.

8.6 Obviously one theoretical way in which the issues which might potentially arise in this case might ultimately be resolved would be for this Court to confine itself to considering the important issues of principle concerning whether an appeal lies and, if so, the type of appeal which might be permitted and leaving over any questions of fact to be dealt with, if at all, by the Court of Appeal within the parameters of whatever type of appeal, if any, that this Court determined was possible. But such a splitting up of the issues would not be conducive either to the effective use of court time or to achieving a timely resolution

of these proceedings having regard to the fact that a clock, is, as it were, ticking in Luxembourg. For those reasons I am satisfied that it is in the interests of justice that the issues of fact which arise in this case should be dealt with in the same appeal as the important issues of law which arise concerning the appellate jurisdiction of this Court in cases such as this. The final issue which needs to be considered is whether the criteria for permitting an appeal direct to this Court have been made out.

9. Should there be Leapfrog Leave?

9.1 As already identified, the principles applicable to the grant of leapfrog leave have been explored by this Court in a number of determinations but in particular in*Wansboro*. I have already set out the reasons why I consider that it is expedient that the important issues of law which arise on this appeal should be considered as part of the same appeal which deals with the questions of fact. This Court has already embarked on a consideration, at least tentatively, of some of the legal issues which arise. In those circumstances, and having regard to the undoubted urgency with which these proceedings should be brought to a conclusion, it seems to me that the*Wansboro*principles point towards allowing leapfrog leave.

9.2 I would, therefore, propose that this Court grant leave to appeal on both the legal and factual issues identified, on the basis that the legal issues meet the general importance criterion and the factual issues meet the interests of justice requirement. The exceptional circumstances warranting a direct appeal are also, in my view, met on the facts of this case.

10. Conclusions and Directions

10.1 For the reasons set out earlier I would propose that the Court should grant leave to appeal. As is now common practice I would grant leave to appeal on all of the issues raised on behalf of Facebook but would leave the question of the refinement of those issues to be considered by the case management judge in due course. In that context I would, in particular, draw attention to the fact that, at least on one view, the proposed appeal appears to suggest that, if successful, this Court would be invited to reverse the decision of the trial judge to make a reference in the first place and also, at least to an extent, to alter the questions as formulated by the trial judge. It was my understanding from the oral submissions made on behalf of Facebook that it was not asserted that this Court could have the power to actually reverse the decisions of the High Court in that way having regard to the*Cartesio*jurisprudence. It is important, therefore, that the precise type of order which Facebook intends to urge that this Court should make in the event of a successful appeal should be clearly identified in the written submissions filed by Facebook for the avoidance of any doubt. Any issues arising in that regard can, I would propose, be dealt with by the case management judge.

10.2 Clearly the whole urgency and importance of this appeal stems from the fact that it is sought to obtain orders which may have an impact on the ultimate resolution of the reference before the CJEU. As already noted there are, of course, issues as to whether any such orders are permissible as a matter of national and Union law. However, if and to the extent that such orders may be permissible, and if Facebook persuades this Court on the merits that such orders should be made, then same could only be of value if this Court’s judgment is delivered well in advance of the likely hearing of the reference before the CJEU.

10.3 With that in mind, I would propose that the Court should direct that Facebook file any Notice of Intention to Proceed within 7 days and written submissions by the 14th September with replying submissions on behalf of the Data Protection Commissioner and also on behalf of Mr. Schrems to be filed by Friday 5th October. Thereafter the matter will be put in for early case management with a view to the appeal being made ready for hearing before the end of the year. The parties should keep that timeframe in mind in

making preparation for compliance with the sort of directions for the preparation of the appeal which are likely to be made at the case management hearing.

10.4 It will be for the case management judge to adopt appropriate measures to ensure that there is no unnecessary repetition of the submissions already made on some of the issues.

BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII
URL: *http://www.bailii.org/ie/cases/IESC/2018/S38.html*