# THE HIGH COURT

**[2016 No. 4809P. ]**

**BETWEEN**

**THE DATA PROTECTION COMMISSIONER**

**PLAINTIFF**

**AND**

**FACEBOOK IRELAND LIMITED AND MAXIMILIAN SCHREMS**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Costello delivered on 2nd day of May, 2018**

**1.** On the 3rd October, 2017 I delivered a judgment in which I indicated that I intended to make an order for reference for a preliminary ruling pursuant to Article 267 TFEU to the Court of Justice of the European Union in this matter. On the 12th April, 2018 I delivered my order for reference to the parties and Facebook applied for a stay to enable it to appeal the order for reference. This is my judgment on the application for a stay.

**2.** The applicable principles whether to grant a stay on an order pending an appeal – whether it be on a final order or an interlocutory order of the court – have been confirmed by the Supreme Court in *C.C. v. The Minister for Justice and Equality* [2016] 2 I.R. 680. Clarke J. said that the court must act so as to minimise the risk of injustice. The Supreme Court confirmed that the principles he had enunciated in *Okunade v. The Minister for Justice* [2012] 3 I.R. 152 applied to all applications for a stay.

**3.** The first matter for the court to consider is whether the applicant has established an arguable case; if not then the application must be refused.

**4.** In this case the issue to be considered is whether it is possible to appeal a decision of a court to seek a preliminary ruling from the CJEU under Article 267 TFEU. Facebook relied upon the case of *Cartesio* (C–210/06) [2008] ECR I-09641. In that case, the Court held that the national rules of law of a member state may allow for an appeal from the decision of a lower court to seek a reference but that the autonomous jurisdiction conferred on the referring court to make a reference to the Court of Justice means that the appellate court cannot prevent a lower court from making a reference. The appellate court cannot vary the order of reference or set aside the order of reference.

**5.** In *Campus Oil Ltd v. Minister for Industry and Energy* [1983] I.R. 82 the Supreme Court considered whether an appeal lay to the Supreme Court from a decision of the High Court to refer questions to the Court of Justice. Walsh J. gave the decision of the court. He held that one of the results of Ireland's accession to the EEC Treaty was that the Treaty itself became part of the domestic law of the State. He noted that in Irish law there were no rules of court and no statutory provisions which purport to permit this appeal to the Supreme Court. At p. 86 of the judgment he held:

> "*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.*

*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 provisions 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.*

*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."*

**6.** This is a decision of the Supreme Court which is binding upon me. Unless and until the Supreme Court revisits this point I am required by law to abide by the decision.

**7.** It remains the case that there are no rules of court or statutory provisions which purport to permit an appeal from the High Court to either the Court of Appeal or the Supreme Court in respect of a reference under Article 267 TFEU.

**8.** Walsh J. considered the constitutional right to appeal all decisions of the High Court to the Supreme Court under Article 34 of the Constitution. While the Article has been amended, this essential appellate jurisdiction in respect of "all decisions of the High Court" remains the same. Walsh J. expressly held that a reference for a preliminary ruling by a High Court judge to the Court of Justice is not a decision within the meaning of Article 34.

**9.** Walsh J. held that the making of reference does not involve an order having any legal effect upon the parties to the litigation.

**10.** Separately he held that even if the reference of questions to the Court of Justice were a decision within the meaning of Article 34 of the Constitution, Article 29, s.4 ,sub-s. 3 of the Constitution has the effect that the Treaty, including Article 177 of the Treaty, is part of Irish law, and, as part of Irish law, it qualifies Article 34 of the Constitution.

**11.** As a matter of Irish law an Irish judge has an unfettered discretion to make a preliminary reference to the Court of Justice upon the validity of acts of the institution of the community.

**12.** The right of a judge to have direct and unimpeded access to the Court of Justice may not be fettered by making the right to make a reference subject to review on appeal.

**13.** The court was fully apprised of the fact that other member states allowed appeals to higher courts against decisions to refer questions under Article 177 by national judges. Walsh J. was aware of the case law of the Court of Justice itself in examining the question as a question of community law. He held that he must decide the question in the context of Irish law only and he did not seek to rely upon any of the decisions of the Court of Justice because the matter was to be decided as a question of Irish law. As a matter of Irish law he held that no appeal lay and the Supreme Court had no jurisdiction to entertain it.

**14.** Facebook sought to distinguish *Campus Oil* from the instant case on the basis that the sole relief in these proceedings is a reference from the High Court to the Court of Justice in order that the Court of Justice may rule on the validity of the SCC decisions. I find this submission to be without merit. I was asked to consider whether to make a reference to CJEU and I have decided to send a request for a preliminary ruling pursuant to Article 267. I have drafted an order for reference. No order has been made that has legal effect upon the parties to the litigation. The fact that the proceedings only ask the High Court to make the reference in no way alters the exercise or jurisdiction upon which the court was engaged. Finally, Walsh J. expressly held that the principle he enunciated applied to a reference to the Court of Justice upon the validity of an act of an institution of the community, which is precisely what is occurring here.

**15.** In my opinion the decision in *Campus Oil* is binding upon me and it is not altered by the decision of the Court of Justice in *Cartesio*. *Cartesio* is permissive but subject to the limitation that the appellate court cannot set aside the order of reference or vary the order of reference. It

does not require member states to provide for appeals from a decision to make a reference in their domestic legal order.

**16.** Facebook has indicated that it wishes to appeal the decision to make a reference to the Supreme Court. Following *Cartesio,* the Supreme Court (or the Court of Appeal) may not oblige the referring court to revoke the order of reference. Therefore, it does not assist Facebook in its efforts to establish that it has an arguable case based on an appeal to overturn the decision to seek a reference.

**17.** Facebook also intends to appeal certain findings of fact in the judgment. Counsel submitted that if the Supreme Court makes amendments to the findings of fact in the judgment and in the reference that these may be binding findings of facts which this court would be required to adopt when sending the order for reference to the Court of Justice. Counsel says that *Cartesio* did not apply to the facts found by the referring court and therefore the prohibition on an appellate court varying an order for reference did not apply to an appeal relating to those facts. It argued that it had a constitutional right of appeal under Article 34 of the Constitution and in the normal way this court will be bound by the decisions of the appellate court and therefore will be required to give effect to the decisions of the appellate court on matters of fact. In effect the High Court will be required as a matter of domestic law to amend the reference to take account of the decision of the higher court to reverse the findings of fact in the judgment and order for reference.

**18.** There is no decision of the Court of Justice which permits an appellate court to limit the right of a national court to seek a reference to CJEU by altering the findings of fact made by the referring court. Facebook submits that the absence of such express authority leaves it open to appellate courts, in accordance with the domestic law of the member state, to vary the findings of fact in an order for reference. It relied on Broberg and Fenger, Preliminary Reference to the

European Court of Justice, Second Edition, 2014 para 2.2.1 but the passage related to appeals on matters falling outside the jurisdiction of CJEU under Article 267 and so is of no assistance on the point at issue in this case. There is no reason in principle why an appellate court should be prohibited from varying an order of reference of a referring court on all matters other than the facts set out in the reference. I do not accept that as a matter of EU law there is an arguable case, within the meaning of *C.C.*, that an appellate court may vary the facts as found by the referring court in its order of reference. The jurisprudence all points against this conclusion and it is contrary to the underlying rationale of the decided cases. Facebook cannot rely upon national law to support its proposition. In my judgment, reliance upon an alleged right of appeal under Article 34 is misplaced by reason of the decision in *Campus Oil*.

**19.** Of course this is not to say that Facebook may not seek to appeal the decision but unless and until such an appeal is granted and the decision in *Campus Oil* is modified or overturned, I am bound by it. I cannot assess whether Facebook has raised an arguable case by ignoring a binding decision of the Supreme Court on point on the basis that the party intends to invite the Supreme Court on appeal to revisit its decision and thus it is a matter for the Supreme Court.

**20.** As a judge of the High Court I am bound by the decision in *Campus Oil*. *Cartesio* does not require me to depart from that decision. On that basis I must hold that Facebook has not established an arguable case that it has a right to appeal the decision to make a reference to either the Supreme Court or the Court of Appeal. In accordance with *C.C.* and *Okunade* I must refuse the stay sought.

**21.** If I am incorrect in that matter, the court must then assess how to minimise the risk of injustice by either the grant or withholding of a stay.

**22.** In essence the court is asked to decide whether it should abide the outcome of any application to the Supreme Court for leave to bring a so called leapfrog appeal and if leave to

appeal is granted, for the hearing of the appeal and the delivery of judgment upon the appeal. In the alternative, if the Supreme Court declines to hear an appeal, then Facebook wishes to appeal to the Court of Appeal. The court has then to await the outcome of either appeal and then reconsider its order for reference in the light of the decision of either the Supreme Court or the Court of Appeal bearing in mind the ruling of the Court of Justice in *Cartesio.* This unfortunately will take some time.

**23.** It has to noted that there are delays in obtaining hearing dates before the Court of Justice, not least because of the need to allow parties to intervene in the proceedings. The risk identified by Facebook is that the hearing before the Court of Justice may take place before the appeal procedure (if there be one) has concluded in this State. If that were to occur, and if Facebook did have a right of appeal and the appellate court had a right to issue findings of fact different to those in the judgment and order of reference and to have those facts placed before the Court of Justice, then its appeal would be rendered moot and it would be deprived of a meaningful appeal. Most surprisingly, counsel did not give any indication as to how soon it was likely that a hearing before the CJEU could occur.

**24.** On the other hand, counsel for the DPP pointed out that it may well be that the appellate process, if it were to occur, could conclude before the Court of Justice would hear the reference. It was accepted that it always remains open to the referring court to revoke or amend the reference and thus it would be possible to take account, if necessary, of any binding decision varying the facts as found by the High Court. This would enable the Court of Justice to have the benefit of the outcome of the appeal process and proceed on the correct factual basis (on the assumption that Facebook is correct in its arguments regarding this court's findings of fact). In addition, it would be open to the Court of Justice at its discretion to suspend the reference to allow the national

appellate court process to conclude. The DPC therefore submitted that the prejudice identified by Facebook was in truth relatively slight.

**25.** She submitted that in contrast to Facebook, there was no doubt as to the risk of injustice if a stay is granted. The prejudice suffered by the DPC and Mr. Schrems is potentially very grave. Millions of data subjects throughout the EEA continue to have their data processed pursuant to the SCC decisions. If the DPC is correct, and the court has noted that it shares her concerns, then the data of millions of data subjects may continue to be processed unlawfully. The DPC has a duty under both statute and European law to protect the data privacy rights of all data subjects in the EEA whose data is processed by Facebook. In my opinion very real prejudice is potentially suffered by Mr. Schrems and the millions of EU data subjects if the matter is further delayed by a stay as sought in this case. Their potential loss is unquantifiable and incapable of being remedied.

**26.** If I refuse a stay and forward the reference to the Court of Justice the case will not come on for hearing for some time before the Court of Justice. There are inevitable delays in bringing a case of this nature before the Court of Justice, so it is already inherent in the process that there will be further delays. I do not believe that this court should compound this unavoidable matter. It will then be a matter for the Court of Justice to decide whether the hearing before it is to proceed before the finalisation of any appeals process in this jurisdiction.

**27.** Finally, Facebook says that it intends that the first ground of appeal is that a reference is inappropriate because the High Court failed to have regard to the fact that the Directive *"will imminently be repealed and replaced with the General Data Protection Regulation. As such, the legal basis for the SCCs will be fundamentally altered, and the question in respect of Directive 95/46/EC will be moot. Facebook will contend that the Reference itself will be rendered moot*

*since the core issues (sic) the legality of the SCCs and this cannot be decided without considering the Directive which will no longer be in force."*

**28.** On 3rd March, 2017, day 15 of the trial at pp. 115 and 116 of the transcript Counsel for Facebook was considering the fact that the General Data Protection Regulation (GDPR) would come into effect on 25th May 2018. I had asked whether this fact goes to mootness. The exchange was as follows:

> *"Ms. Justice Costello: and what you are saying is by the time, if there were to be a reference, by the time it will be heard by the CJEU, the regulation will have come into effect?*
>
> *Counsel for Facebook: Exactly. So two things will have changed certainly by the time the CJEU will consider this issue if you referred adequacy in the context of Article 25. It'll have been replaced by a new assessment. And that is certain. And then, even if the CJEU heard the matter very quickly – and there are other cases, two other cases, Mr. Collins again drew your attention to where issues with regard to Privacy Shield have been raised that are prior in time to this – so the prospect of this being determined prior to the Directive which is the basis of the concerns being replaced certainly are not high, I'll put it no further than that."*

**29.** The discussion then moved on to another aspect of the case. That was the sole discussion on this point in a case where innumerable points were argued intensely over 21 days.

**30.** If Facebook had wished to argue that the reference would be moot on the grounds it has set out in what will be its first ground of appeal, that argument was available to it and ought to have been made explicitly and clearly and not in the oblique passing fashion, one might almost say as an aside, which I have cited from the transcript. The parties to the proceedings were entitled to

know the case that Facebook was going to make. It did not advance this case so as to alert the other parties to the fact that this was a point upon which it intended to place such reliance.

**31.** In addition to the parties, the court was entitled to know that this was an issue in the case and that this was an issue upon which the court was required to reach a decision.

**32.** The fact that the point is only now being raised gives rise to considerable concern as to the conduct of the case by Facebook and the manner in which it has dealt with the court. The court was not alerted to the fact that as far as Facebook was concerned there was a clock ticking down. This meant that the case was not expedited to ensure that the case was not in effect decided by effluxion of time. The wishes of the parties and the diaries of counsel were accommodated by postponing hearing dates in relation to applications made after judgment was delivered and before the order for reference was prepared to suit all parties without regard to the fact that Facebook was contending, or intended to contend, that the case would become moot once the GDPR came into effect on 25th May, 2018. Facilitating the attendance of counsel by postponing subsequent hearing dates meant an inevitable delay in this court dealing with the issues raised. The reality is that a judgment of this nature is very difficult to write during a legal term due to the pressure of court sittings. In effect it must be written during the vacation. Instead of being written over the Christmas vacation with a decision in early January 2018, it could not be written until the Easter vacation, approximately three months later.

**33.** Facebook has now indicated that this is a point it intends to raise as its first ground of appeal. Clearly the existing delays have already potentially gravely prejudice the DPC and Mr. Schrems. I do not propose to exacerbate this potential prejudice any further. If I had been prepared to grant a limited stay on the order of reference to allow for an application to be made to the

Supreme Court for leave to appeal, I am firmly of the view that this argument clearly weighs against the grant of any stay in the circumstances.

**34.** I am of the opinion that the court will cause the least injustice if it refuses any stay and delivers the reference immediately to the Court of Justice. I so order.