THE SUPREME COURT

[Record No: AP: IE: 2015:0089]

O'Donnell J.
McKechnie J.
Clarke J.
Laffoy J.
Dunne J.

IN THE MATTER OF THE FREEDOM OF INFORMATION ACTS 1997-2003 AND IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 2014

Between /

PATRICK KELLY

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

-and-

UNIVERSITY COLLEGE DUBLIN, NATIONAL UNIVERSITY OF IRELAND

Notice Party

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 1st day of June, 2017

Introduction

1. The instant appeal, moved with the written permission of this Court given on the 12th February, 2016 ([2016] IESC DET. 23), raises an important and complicated point of statutory interpretation arising out of the Freedom of Information Acts 1997-2003 ("the 1997 Act") and, in particular, from the provisions of sections 34 and 42 thereof. In essence, the first certified point upon which leave was given requires an opinion from this Court as to whether a person concerned can appeal a "decision" by the Information Commissioner to discontinue a review on the basis that the application or the application to which the review relates is frivolous or vexatious. That same point is also certified under the equivalent provisions of the Freedom of Information Act 2014 ("the 2014 Act"). In the first instance, however, I propose to thread the relevant issues through the 1997 Act.

2. At the outset of this judgment it is important to state that whilst net and narrowly defined, the point at issue is a technically difficult one. It is therefore appropriate to acknowledge the quality of both the written and oral submissions made by and on behalf of the parties, and in particular those made by the appellant. He is self-evidently a person of considerable legal understanding, with much litigation experience to his name. Although appearing for himself, he did not suffer at any level by reason thereof.

Summary

3. In the twelve month period commencing in April, 2012, Mr. Kelly made a total of seven applications under the 1997 Act to the public body in question. None of these applications were successful, either at first instance or at internal review level. The appellant then sought a review of each of these decisions by the Information Commissioner ("the Commissioner"). By letter dated the 11th September, 2013, the Commissioner informed Mr. Kelly that she was discontinuing all such reviews, as in her opinion the underlying applications or the applications made to her ("the application(s)") were vexatious. Both that decision and the grounds thereof were made pursuant to section 34(9)(a)(i) and (9)(b) of the 1997 Act (paras. 15 and 17, *infra*).

4. The appellant appealed this decision, or this series of decisions, to the High Court, purportedly under section 42 of the 1997 Act. In her judgment delivered on the 7th October, 2014 ([2014] I.E.H.C. 479), O'Malley J. held that "the Court [had] no jurisdiction to entertain [the] appeal" under section 42 of the Act (para. 98), but added that even if she was wrong in that regard, she was "satisfied that the respondent's interpretation of the statutory terms and her application of them [i.e. the meaning of 'frivolous or vexatious'] were within her statutory powers and entirely justifiable" (para. 106). An Order for Costs was subsequently made against Mr. Kelly. It should be noted that whilst UCD was originally a Notice Party to the present application, that body was dismissed from the proceedings by Order of the High Court made on the 20th January, 2014.

5. Mr. Kelly served a notice of appeal against the judgment and Order of the High Court. The Court of Appeal delivered its judgment on the 30th November, 2015 ([2015] I.E.C.A. 270). It was of opinion that the sole ground for determination was whether or not there was a right of appeal to the High Court from such a "discontinuance" under section 42 of the 1997 Act. Save for one other issue, not of relevance, the judgment of the Court was to dismiss the appeal and uphold the decision of the High Court. Costs followed the event.

6. On Mr. Kelly's subsequent application for leave to appeal, this Court certified two questions as being of general public importance. These are as follows:-

> "(i) Did an appeal lie to the High Court under section 42(1) of the Freedom of Information Act 1997 in respect of the decision of the Commissioner made on the 11th September, 2013 to discontinue the review pursuant to section 34(9)(a)(i)?; and
>
> (ii) Does a similar issue arise under the Freedom of Information Act 2014?"

Background

7. Even though the following historical context does not influence the outcome of the legal issues raised in this appeal, it would leave an unexplained void in this judgment unless mention was made of the long-running and antagonistic, if not downright bitter, controversy which has surrounded the appellant's dispute with University College Dublin ("UCD"). It is difficult to believe that litigation lasting for over fifteen years has followed from a decision by UCD not to offer Mr. Kelly a place, in their first round offers, on a Masters in Social Science (Social Worker) Mode A course which he applied for in December, 2001. Such an offer, albeit described as "provisional", was made in August of the following year, but was declined by the appellant. By that stage the initial process utilised by Mr. Kelly to ventilate his grievance had commenced.

8. In April, 2002, Mr. Kelly made a formal complaint of gender discrimination, alleging breaches of section 3(1)(a) and section 3(2)(a) of the Equal Status Act 2000, to the Director of the Equality Tribunal. The factual basis for this complaint rested, *inter alia,* on an assertion by Mr. Kelly that he was "more qualified than the least-qualified female applicant" for the course, and that UCD's initial decision was gender-based. He also alleged some rudeness at interview. Following the decision of the Tribunal that the applicant had failed to establish a *prima facie* case of discrimination on gender grounds, Mr. Kelly appealed such decision to the Circuit Court.

9. Before that appeal could be heard, however, the appellant sought copies from UCD of the applications and of the scoring sheets of the 49 candidates whose application forms had been retained. That application was refused by the President of the Circuit Court and, on appeal, by a written judgment of the High Court delivered on the 31st July, 2008, with the grounds therefor being that under domestic law the documents in question were confidential in nature. Subsequently, however, Mr. Kelly successfully persuaded that Court to refer four questions to the Court of Justice under Article 234 TEC, with a fifth question being added following representations made by UCD. In light of the answers given, which did not require disclosure of the documents under EU law, the substantive appeal on the discrimination claim was dismissed. Incidentally, it was I, as the presiding judge, who delivered the July, 2008 judgment and who made the European reference.

10. In between the events which I have described, multiple other applications were made to the High Court by Mr. Kelly. These are referred to in some but not exhaustive detail by Hedigan J. in his decision of the 29th January, 2013, one of many which he, like me, gave in this litigation (*Patrick Kelly v. University College Dublin* [2013] I.E.H.C. 23). It would be unduly burdensome to this judgment if such events were fully or even substantially recited. It is sufficient to fast track the detail and explain the situation following the judgment of Hedigan J.: the learned judge, having dismissed the substantive appeal, made an Order (i) staying permanently all the existing proceedings against UCD, and (ii) prohibiting the making of any further applications or the issuing of further proceedings against that body arising out of underlying dispute, save with the prior consent of the High Court. That Order was subsequently set aside on jurisdictional grounds by the Court of Appeal in a decision of the 26th May, 2017 ([2017] I.E.C.A. 161), and the discrimination claim remains yet to be fully concluded.

11. The above account, however, reflects only in broad terms how this controversy has played out. More of the detail would disclose the extremely serious and highly disparaging allegations made by Mr. Kelly against senior personnel within UCD, the vast of majority of which were found by the High Court to be groundless. In his judgment of the 29th January, 2013, Hedigan J., referring to the history, gives a flavour:-

> "It recounts a sad and sorry tale of interminable, highly complex applications, most of which were found to be groundless. All of this has stretched over a period of more than ten years. Vast amounts of court time here in Ireland and in Luxembourg have been expended. Immense costs on the part of the defendants have been incurred." (Para. 4)

It is difficult, if not impossible by any objective standards, to disagree with this rather benign description of affairs. However, and notwithstanding the view which he reached, the learned High Court judge, as I too have acknowledged, went on to refer to the enormous effort, energy and talent which Mr. Kelly had obviously put into each application brought by him as part of this litigation.

Freedom of Information Process

12. Evidently with the possible making of such a prohibitory order in mind, Mr. Kelly adopted a different approach in his ongoing pursuit of UCD: he looked to the provisions of the Freedom of Information Act 1997. Hence, the seven applications as mentioned. Apart from helping to contextualise the current controversy which the Court is called upon to determine, it must be noted that however meritorious Mr. Kelly may see the dispute as being, however egregious it is to the college, and whatever its ultimate outcome may be, such matters are not relevant to the key question of statutory interpretation which arises on this appeal.

13. It would be excessively intrusive on the reader to refer to the extensive documentation generated by the initial applications, the internal reviews carried out by UCD, and the various applications to the Commissioner arising out of the decisions made by that public body (see paras. 31-59 of the High Court judgment in this case). I will therefore confine myself to the following brief survey of what these applications entailed.

14. Upon receipt of each individual review application, three of which related to a section 7 request, one to section 17 and the remaining three to section 18 of the 1997 Act (para. 25, *infra*), the office of the respondent communicated each such application to UCD and sought from it copies of any relevant documentation, as well as details of the background giving rise to the decisions made at both levels by that body (paras. 23 and 24, *infra*). The parties were then invited to make submissions. Whilst some variation is evident in the uptake of this invitation, such as the filing of submissions in some instances but not in others, by and large this was the standard office procedure by which the applications progressed.

15. A Senior Investigator with the respondent, Mr. Stephen Rafferty, then considered each of the applications, together with the aforesaid documentation and any submissions made. By letter dated the 4th September, 2013, his preliminary opinion was communicated to, *inter alia*, Mr. Kelly: it was that each review should be discontinued pursuant to section 34(9)(a)(i) of the 1997 Act on the grounds that the same were "frivolous or vexatious". The applicant was then invited to make submissions on this provisional

finding, which he did. Having considered these further submissions, the Commissioner at the time, Ms. Emily O'Reilly, furnished her final decision to Mr. Kelly by letter dated the 11th September, 2013. It was to the same effect as that previously indicated.

16. Even though neither the reasons upon which such decision is based nor the merits upon which it rested are matters of concern to this Court, it is informative nonetheless to outline the approach which guided that decision. The Commissioner stated:

> (i) that an application may be discontinued where she is of opinion that it is either frivolous or vexatious – both are not necessary;
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> (ii) that such may follow if the application "is made in bad faith or forms part of a pattern of conduct that amounts to an abuse of process or an abuse of the right of access";
>
> (iii) that the "cumulative effect" of multiple requests is relevant, as is the course of dealing which the person concerned had with the public body, as well as that person's previous engagement with the office of the Commissioner; she noted, for example, that on three occasions (once each in 2003, 2006, and 2011) she had either discontinued or refused to accept a total of 68 applications made by Mr. Kelly, the majority of which related to Trinity College Dublin;
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> (iv) that each of the applications directly in issue related to his long-running grievance with UCD, details of which were then outlined, as were several passages from the judgment of Hedigan J. above referred to, which at the time was still under appeal; and, finally,
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> (v) that Mr. Kelly's applications were yet another part of his strategy for prolonging his dispute with UCD, and as such constituted a pattern of conduct which was an abuse of the FOI process .

17. The Commissioner concluded that the provisions of the 1997 Act were being used for a purpose unrelated to their objectives; she also found that the requests were motivated by a desire to cause a nuisance and were intended to increase the administrative burden on UCD. As a result, "the applications or the applications to which the reviews relate" (to use the wording of the section) were, in her view, vexatious. Accordingly, in the exercise of her discretion under section 34(9)(b) of the 1997 Act, the Commissioner discontinued all such reviews pursuant to section 34(9)(a)(i).

The Appeal to the High Court

18. In the originating Notice of Motion, dated the 7th October, 2013, Mr. Kelly raised several grounds of appeal upon which he wished to rely. In addition to his central argument that the Commissioner had incorrectly interpreted the phrase "frivolous or vexatious" as it appears in section 34(9)(a)(i) of the Act, he alleged:

> (i) that the Information Commissioner had breached his right to fair procedures in that she received representations from UCD "behind his back", and
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> (ii) that, in the circumstances outlined, the principal deponent of the replying documentation had no authority to swear the affidavits which he did, or to do so on behalf of the Information Commissioner.

Furthermore, he also sought an Order directing the respondent to display on its official website a copy of a judgment delivered by Herbert J. on the 16th April, 2008, in proceedings which he had successfully taken against the Commissioner.

19. The Commissioner, whilst anxious to have these issues determined, maintained at all times that, as a matter of law, there was no right of appeal to the High Court from her decision: such was not permitted under section 42 of the 1997 Act. In turn, this contention was heavily disputed by Mr. Kelly.

20. In order to better understand how the High Court and the Court of Appeal dealt with the issues, it is appropriate at this stage to set out both the structure and relevant provisions of the Freedom of Information legislation.

The Freedom of Information Act 1997

21. As I stated in *Deely v. Information Commissioner* [2001] 3 I.R. 439, the passing of the 1997 Act was undoubtedly a significant piece of social reforming in the public's relationship with institutions of the state and other public bodies with whom they might reasonably be expected to engage. For the first time ever, under force of legislative enactment, rights were conferred on members of the public, *inter alia*:

> • to access records held by public bodies (sections 6 and 7);
>
> • to have corrected any personal information held by such bodies which, for whatever reason, is incomplete, incorrect or misleading (section 17); and
>
> • to obtain information regarding acts of such bodies which "affect" such persons at an individual level (section 18).

Whilst the exercise of these rights was conditional, being subject, *inter alia*, to the public interest and to the right of privacy, nonetheless the imperative of the Act's underlying policy was transparency driven and people based.

22. In order to facilitate the exercise of such rights to the greatest extent possible, as the preamble to the Act ordains, it was necessary to put in place an appropriate structure by which this could be advanced at each of the three different levels of interaction, namely, those of initial request, internal review and Commissioner's review. Thus:

> (1) *Public Bodies*
>
> The head of each public body is designated by statute as the person responsible for performing the functions of that body under the legislation. He or she can, however, delegate most of those functions to a staff member, including those which are relevant to this case (section 4 of the 1997 Act). Many such bodies, if not virtually all,

have done so. Accordingly, there is normally in place:

(i) A dedicated person to whom the initial application is made and who must within a specified time make a decision on the request and notify the applicant of the result (sections 7 and 8 of the Act); and

(ii) A second such person, of greater rank, to whom an application can be made to conduct an internal review of the decision first made ("internal review") and who likewise must notify the applicant of the resulting decision, again within a specified time (section 14 of the Act).

(2) *Information Commissioner*

(i) The office of Information Commissioner was established, the holder of which is known as the "Information Commissioner" and is independent in the performance of the functions vested in him or her under the Act (section 33 of the Act).

(ii) These functions include the power to review a decision made at internal review level, being one, *inter alia*, to refuse to grant a section 7 request, or to refuse to amend a record or grant an application under sections 17 and 18 of the Act, respectively.

(iii) Such review is conducted by way of a documentary examination, with those having an interest in or affected by the impugned decision being given an opportunity to make submissions, which must be considered before a final determination is made.

(3) *Appeal on a Point of Law*

(i) There is an appeal on a point of law from the Commissioner's decision to the High Court (section 42).

(ii) The normal appellate provisions regarding a further appeal from any such decision to the Court of Appeal or this Court apply (see section 27 of the Freedom of Information (Amendment) Act 2003).

Consequently, as can be seen from this short, general description of the statutory provisions in question, there are at least four tiers of investigation and decision-making involved whenever the full process is invoked.

23. As one would expect, the 1997 Act also sets out in broad terms the ground rules within which these conferred rights can be exercised, as well as the powers and functions of each adjudicating body at every level of the process. In the first instance, a request must be made for access to records held by a public body (section 7 of the Act). This request may be granted in whole, in part, or, in either instance, granted subject to conditions; the latter may include a deferral of access, access to part(s) of record only, or conditions as to the manner and mode of such access (sections 8 and 11-13 of the Act). Access may also be refused. The grounds for such refusal are specified, *inter alia*, in section 10 of the Act; one such ground is where the head of the public body is of the opinion that the application is "frivolous or vexatious" (section 10(1)(e)). The Act then goes on to set out what may occur at both internal review level and on a review by the Commissioner, but its provisions are much more explicit when dealing with the latter rather than with the antecedent process.

24. At internal review level, the head of the public body concerned, or the person nominated to perform that function, can affirm, vary or annul the decision made at first instance within the organisation (section 14(2) of the 1997 Act). In fact, the powers so given in this regard are expressed in identical language to that vested in the Commissioner at his or her level of involvement. It is, however, the provisions as applying to the Commissioner which are really the introductory point to the issues in controversy on this appeal.

25. Section 34 of the 1997 Act deals, *inter alia*, with reviews carried out by the Commissioner regarding decisions made at internal review level under section 14 of the Act. As stated, that section covers a request for access to documents (section 7), an application to amend records relating to personal information (section 17), and an application for information by a person both affected by and having a material interest (as so defined) in an act of the public body (section 18). Subsection (2) of section 34 is one of two provisions which the Commissioner may invoke when her office is asked to review a section 14 determination. It reads as follows:-

"34.—(2) Subject to the provisions of this Act, the Commissioner may, on application to him or her …

(a) review a decision to which this section applies, and

(b) following the review, may, as he or she considers appropriate—

(i) affirm or vary the decision, or

(ii) annul the decision and, if appropriate, make such decision in relation to the matter concerned as he or she considers proper,

in accordance with this Act."

26. The second such provision is that contained in subsection (9), which states:

"34.—(9) (a) The Commissioner may refuse to grant an application under subsection (2) or discontinue a review under this section if he or she is or becomes of opinion that—

(i) the application aforesaid or the application to which the review relates ("the application") is frivolous or vexatious,

(ii) the application does not relate to a decision specified in subsection (1), or

(iii) the matter to which the application relates is, has been or will be, the subject of another review under this section.

(b) In determining whether to refuse to grant an application under subsection (2) or to discontinue a review under this section, the Commissioner shall, subject to the provisions of this Act, act in accordance with his or her own discretion."

It is these two provisions, as informed by other related sections of the Act and their relationship to section 42, which are at the heart of this appeal.

27. Section 42 provides the third level of review, namely, an appeal to the High Court on a point of law. Its precise wording is of importance and should be noted:-

> "42.—(1) A party to a review under section 34 or any other person affected by the decision of the Commissioner following such a review may appeal to the High Court on a point of law from the decision."

As the submissions show, the question directly in issue is whether a decision to discontinue a review because the application(s) is considered frivolous or vexatious can be the subject of an appeal to the High Court under this provision. It is not in any way a straightforward point to determine.

The High Court Judgment

28. The learned High Court Judge, quite correctly in my view, carefully discerned which issues would be appropriate for her to decide and those which would not. The reason for this approach was that even if no statutory appeal lies against the impugned determination(s) of the Commissioner, it has never been doubted but that, at the level of principle, a challenge by way of judicial review is available. Hence it was important not to influence whether, in the particular circumstances of this case, such a remedy could still be availed of and, if so, what its outcome might be. Consistent with that approach, O'Malley J. therefore determined the main "jurisdictional issue"; the correct meaning of the phrase "frivolous or vexatious" and its application by the Commissioner to the material before her; and the objection to the authority of Mr. Rafferty to swear the replying affidavits on behalf of the respondent. The latter point arose due to the swearing of the affidavits after Ms. O'Reilly had left the office of Information Commissioner but before the appointment of the incumbent Commissioner, Mr. Peter Tyndall; purely for convenience, the feminine pronouns 'she' and 'her' are used throughout this judgment when referring to the Information Commissioner. Subject to the aforegoing, the learned judge decided that the remainder of the issues raised (para. 18, *supra*) should be let stand.

29. O'Malley J. outlined the various submissions made by both parties on the central question and extensively reviewed the relevant provisions of the 1997 Act. In particular, she recalled Mr. Kelly's reliance on *Killilea v. Information Commissioner* [2003] 2 I.R. 402 ("*Killilea*") in support of his interpretation that the provisions of section 42 of the 1997 Act permit an appeal to the High Court following a discontinuance decision. On the other hand, from the respondent's point of view the most informative authority was the judgment of the High Court (Birmingham J.) in *Nowak v. Data Protection Commissioner* [2012] I.E.H.C. 449 ("*Nowak*"), which, it was said, had overtaken any influence which *Killilea* perhaps once had. The appeal from that decision to this Court had not been heard as of October, 2014.

30. Her analysis of the issues can thus be described:

> (i) The 1997 Act is more complex than the Data Protection Act 1988 and, accordingly, the sequential analysis adopted by the learned judge in *Nowak* did not as such afford a satisfactory answer to the jurisdictional issue in this case.
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> (ii) On an application under section 34 of the 1997 Act, the Commissioner is not obliged to determine the 'frivolous or vexatious' point at the commencement of her engagement with the facts; rather she can do so at any stage of the process. This follows from the wording of section 34(9)(a), which says "… if he or she is or <u>becomes</u> of [that] opinion" (emphasis added). Accordingly, such a decision can be made at any point.
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> (iii) A review can only be discontinued if one was already in being; such a conclusion, however, was not the end of the matter.
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> (iv) Under section 34(2)(b) of the 1997 Act, the Commissioner, "following the review", may affirm, vary or annul the decision in question. This type of determination could only be made "following the completion of a full process of review": it would not be open to her to make that decision "on the basis of a partly completed process".
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> (v) A virtually identical phrase – "following such a review" – appears in section 42(1) of the Act. Accordingly, it should be given the same meaning as in its earlier reference in section 34, and therefore must be taken as relating to a substantive decision on the merits of the matter after concluding a full process of review.

31. Against that background the learned judge continued:

> "The statutory appeal process is intended therefore to relate to points of law arising from such substantive decisions and not to a decision made by the Commissioner as to whether to carry out a review, or to discontinue one that has commenced. Complaints as to these latter decisions, as with any other aspect of the process adopted by the Commissioner, are more properly addressed by judicial review." (para. 96)

32. O'Malley J. then acknowledged that her analysis did not fully accord with that of Murphy J. in *Killilea.* However, the learned judge considered that such decision could be distinguished on the basis that the issue in question was not fully pressed or argued before Murphy J. Accordingly, she concluded that the Court had no jurisdiction to entertain the appeal in the instant case, as the provisions of section 42 of the 1997 Act when properly construed did not so permit.

The Court of Appeal

33. Mr. Kelly appealed that decision to the Court of Appeal, which delivered judgment on the 30th November, 2015. In the 'Discussion' section therein, the Court, having referred to section 34(2) of the 1997 Act, pointed out that such provision did not give the Commissioner power to refuse an application made to her: rather, that was to be found in subsection (9) of the section. Under the latter subsection, the Commissioner could either refuse to grant an application made under section 34(2) of the Act, or alternatively

could discontinue the review which an applicant sought. The obvious distinction between both was that in the instance first mentioned the review did not commence, whereas with a discontinuance it necessarily had to have done so. It was the latter situation which applied to this case.

34. The position, in the Court's opinion, was that whilst a review had commenced, it was aborted when the Commissioner, in the exercise of her discretion, found that the applications were "vexatious" within the meaning of section 34(9)(a)(i) of the Act. Accordingly, the review was not concluded in the manner envisaged by section 34(2), as a decision under that provision could only be arrived at subsequent to or "following" such a review, which does not arise when a decision is made to discontinue a review.

35. The Court rejected a further submission by Mr. Kelly that simply by being a party to a review one could appeal to the High Court on a point of law, whereas all other persons could only do so if "following a review", as properly understood, they were affected by the decision of the Commissioner. The Court held that such a reading of section 42(1) of the Act was strained and artificial and therefore was contrary to its proper meaning.

36. In summary, as access to a further appeal was conditional on a review coming to a conclusion in the manner suggested by O'Malley J. (para. 30(iv), *supra*; paras. 68 and 82, *infra*), which in light of the Commissioner's decision had never occurred, Mr. Kelly was not entitled to avail of section 42(1) of the 1997 Act, and thus could not ask the High Court to judicially intervene.

37. Finally, the Court described *Killilea* as being at best a "very weak authority" for the proposition advanced by the appellant. In its view, whilst a point referable to section 42(1) of the 1997 Act was raised in that case, it was not actually considered, nor was it necessary to do so in light of the central issue for the Court's determination. If it had to, however, the Court of Appeal would not adopt the decision as representing a correct interpretation of that provision, preferring instead the reasoning of O'Malley J. As a result, the appeal by Mr. Kelly was dismissed.

The Submissions of the Parties

38. Following the obtaining of leave in February, 2016, initial submissions were filed on behalf of both parties. However, following the decision of this Court in *Nowak v. Data Protection Commissioner* [2016] I.E.S.C. 18 on the 28th April, 2016, the parties were given leave to file further written submissions in light of that judgment. Those on behalf of the appellant were dated the 11th May, 2016; those of the Commissioner were dated the 8th June, with the replying submissions becoming available a week later. For ease of reference, I will deal with the substance of both submissions from Mr. Kelly in the first instance and then refer to the most significant points raised by the respondent.

The Submissions of Mr. Kelly

39. Mr. Kelly submitted that an appeal to the High Court from a discontinuance decision made by the Commissioner was warranted by a correct interpretation of section 42(1) of the 1997 Act, and in support he relied heavily on what he described as the precedent therefor created by *Killilea*. In that regard, he noted the variation in treatment in how Professor Maeve McDonagh, as between the second and third editions of her book *Freedom of Information Law,* dealt with that decision (2nd Ed. (2006) at p. 510; 3rd Ed. (2015) at pp. 736-737). In the earlier version it was stated that the learned judge had determined the appeal point in a manner favourable to Mr. Kelly, whereas in the third edition it was said that he had chosen not to address it. In any event, and whatever views others may have, the appellant was entirely satisfied that *Killilea* decided the point and did so in a manner which supported his interpretation of section 42(1). Not surprisingly, the appellant also relied upon the then very recently decided decision of this Court in *Nowak.*

40. Mr. Kelly cited a great deal of law on the effect of a decision which is arrived at without argument or adequate argument, one given *per incuriam*, one passing *sub silentio*, and one which was clearly *obiter*. Cross & Harris, *Precedent in English Law* (4th Ed., 1991) was cited as to the precedential value, if any, of a decision where no or no adequate argument was had on the point at issue, as was *Morelle Ltd v. Wakeling* [1955] 2 Q.B. 379. The appellant also referred to an article by Valentine D.G. in the *Modern Law Review* 18(6) (1955) [602-604] in respect of the correct meaning of "*per incuriam*", and relied upon Salmond on *Jurisprudence* (12th Ed., 1966) to fully explain the circumstances in which a decision passes as "*sub silentio*". However, whilst all of this material is highly interesting, it does not have any direct bearing on my reading of *Killilea,* which in any event is not binding on either the Court of Appeal or this Court.

41. The appellant went on to analyse section 42(1) of the 1997 Act in much precise detail, with several cases from various jurisdictions being quoted in support of his primary submission. The case of *Scottish Borders Council v. Scottish Ministers* [2012] CSIH 79, a decision of the Inner House of the Court of Sessions, was outlined at length, it being claimed that such is an authoritative decision which should commend itself to this Court.

42. In addition, Mr. Kelly strongly disagreed with the proposition that was being ascribed to him, namely, that there was no difference in meaning between section 42(1) of the 1997 Act and section 24(1) of the 2014 Act. That was not his position nor is it the correct interpretation of the statutes in question, as even a cursory examination of the wording actually used will show. Whilst Mr. Kelly acknowledges that a person could not appeal a refusal to accept an application under section 34(9) of the 1997 Act, he claims that no similar restriction appears in the corresponding provision of the newer legislation.

43. The rest of the appellant's submissions were either unrelated to the certified questions, or were in response to the submissions made on behalf of the respondent. Whilst all noteworthy in their own right, those of direct relevance are dealt with later in this judgment.

The Submissions of the Information Commissioner

44. As is to be expected, the respondent stands over the judgments previously given in this case, all of which favour her interpretation of section 42(1) of the 1997 Act. From her point of view the only decision which the provision covers is one taken by the Commissioner "following such a review". She further supports the finding by O'Malley J. to the effect that this phrase has the same meaning in that subsection as it has in section 34(2) of the Act. If authority was required for this proposition, the decision of Scott Baker L.J. in *London Borough of Hounslow v. Thames Water Utilities* [2003] 3 W.L.R. 1243 supplies it. As the requirement to conduct a review of the type described in the judgment referred to relates only to the making of any one of the three substantive decisions outlined in section 34(2) of the Act (*i.e.* a decision to affirm, vary or annul), and as a discontinuance is not such a decision, it follows that an appeal therefrom cannot be prosecuted in the High Court.

45. Support for this conclusion, it is suggested, can be derived from other provisions, such as from section 34(6) and (8) and section 44 of the 1997 Act. Subsection (6) deals with a notification requirement where the Commissioner "proposes to review" the impugned decision, with subsection (8) giving each party to the process and other "notified" persons the right to make submissions "[i]n relation to a proposed review". These provisions therefore show a clear distinction between a review which is merely "proposed" and one which has actually been conducted. In addition, it is said that it makes no sense whatsoever to speak of 'staying' a discontinuance decision under section 44 of the 1997 Act. Accordingly, such a decision is not, and should not be regarded as, one falling within the ambit of section 42(1) of the Act.

46. The analysis of the parallel provisions in the 2014 Act leads to a similar outcome. Whilst there are some differences in the actual working of the provisions corresponding to sections 34 and 42 of the 1997 Act, namely, sections 22 and 24 of the 2014 Act, these are not significant and neither individually nor collectively permit or justify a different outcome. Thus both pieces of legislation, in the context of the issue for decision, exclude from the jurisdiction of the High Court any decision made by the Commissioner to discontinue a review application made to her.

47. Section 10 of the Data Protection Act 1988, as amended by the Data Protection (Amendment) Act 2003 ("the 1988 Act"), under which the Data Protection Commissioner may investigate a complaint, make a decision thereon and give notification thereof, and section 26 of that Act, which gives a right of appeal to the Circuit Court, are by their express terms quite distinct from sections 34 and 42, respectively, of the 1997 Act. As a result, it is claimed that this Court's decision in *Nowak*, which is more extensively dealt with at paras. 88-92, *infra*, is clearly distinguishable on several grounds, only two of which I propose to mention at this point.

48. As noted at para. 24 of the *Nowak* judgment, the data protection legislation has an EU dimension arising from Directive 95/46/EC, with the rights given thereunder also being enshrined in the Charter of Fundamental Rights. It would therefore seem incongruous if a person concerned was entitled to notification only of the decision under section 10(1) of the Act, but was not afforded a right to appeal it under section 26 thereof. As such an interpretation would be inconsistent with the general thrust of the Directive, it should not be entertained. No similar external dimension exists in this case. Moreover, what was at stake in *Nowak* was a significant point of law, relating to data protection; no such significant point could be said to arise in any shape or form in the context of Mr. Kelly's long-running dispute with UCD. In fact, to underline its importance, this Court has made a reference to the Court of Justice under Article 267 TFEU, and awaits the opinion of that Court on the questions raised. For these and many other reasons, it is submitted that the decision in *Nowak* does not offer any assistance to Mr. Kelly in this case.

49. The respondent further submits that very much the same applies to the decision in *Killilea.* As the Court of the Appeal held, the judgment of O'Malley J. in the instant case is to be preferred to that of Murphy J. in *Killilea* if it should be suggested that some conflict exists between the two. In fact, and in any event, the respondent argues that one does not have to travel that distance: quite clearly it can be seen from the *Killilea* judgment itself that the procedural point under discussion was not taken, as such, in that case. Accordingly, it does not assist Mr. Kelly on any basis.

50. It has been submitted that there is very little, if any, good reason why reference should be made to cases from other jurisdictions which deal with quite different legislative regimes. Accordingly, the appellant's reliance on *Scottish Borders Council v. Scottish Miners* is misplaced.

51. For these reasons, this Court should answer both certified questions in a manner clearly indicating that no appeal to the High Court lies from a discontinuance decision under either section 42 of the 1997 Act or section 24 of the 2014 Act.

52. Finally, the respondent points out that, as the Determination of this Court makes clear (para. 6 *supra*), there is but one question for decision, even if that must be considered by reference to both the original legislation as amended in 2003, and the substituted and current provisions as set out in the 2014 Act. This means that no other issue is before the Court. Such explains the absence from the respondent's submissions of any reference, *inter alia*, to the appropriateness or otherwise of utilising the 'frivolous or vexatious' ground as an exclusionary barrier from the appellate jurisdiction of this Court.

Discussion/Decision

Appeals in General

53. Experience has shown that the legislative use of language when conferring a statutory right of appeal has been notoriously diverse in its wording, meaning and effect. This has created a vast array of schemes with multiple variations; these differences manifest in issues ranging from who might be a 'qualifying person', to the ongoing influence of the impugned decision, the type or extent of the appeal, the threshold for intervention, the approach of the appellate body, and the range of options which may be open to it. In effect, virtually no aspect of either the factual or legal framework within which one must operate has been immune. Given the enormous sweep of public administration, the diversity of sectors reached by such provisions is likewise immense. Such may arise at administrative level, either *ad hoc* or formal, as well as at judicial level, be it at first instance or within the appellate structure. It is no exaggeration to say that the resulting instability has often led to complex and costly litigation simply to scope out the remit of the provision in question, this without ever embarking on the substantive analysis. Not surprisingly, this situation has attracted a good deal of judicial comment, if not criticism, for its lack of uniformity and coherency, thus giving rise to much uncertainty as to the extent and reach of individual provisions.

54. This concern has been evident for several years, with many judges voicing their unease and calling for a more systematic approach driven by greater simplicity and clarity of language. In *Fitzgibbon v. The Law Society* [2015] 1 I.R. 516 ("*Fitzgibbon*"), Clarke J. picked up on the same theme in sections 3-7 of his judgment (paras. 97-128 of the report), where he discussed in some depth a number of different appellate provisions. He did so by reference to certain broadly defined classifications, such as:-

(a) a *de novo* appeal,

(b) an appeal on the record,

(c) an appeal against error, and

(d) an appeal on a point of law.

Whilst any analysis of what was said by the learned judge is outside the scope of this judgment and in any event is not required by the issues arising, nonetheless the insightful evaluation which he made forcefully demonstrates the judicial disquiet in this regard.

55. This difficulty was also dealt with in my judgment in the same case, where I contrasted some of the numerous variations which exist, even within individual statutes, regarding the right to appeal. Cases such as *Dunne v. Minister for Fisheries* [1984] I.R. 230, *M & J Gleeson & Co v. Competition Authority* [1999] 1 I.L.R.M. 401, *Orange Communications Ltd v. Director of Telecommunications Regulation (No.2)* [2000] 4 I.R. 159 ("*Orange*") and several others were mentioned in this context. Section 24 of the Competition Act 2002, which was dealt with in *Rye Investments Ltd v. The Competition Authority* [2009] I.E.H.C. 140, is a good example of a highly complex provision. See also the judgment of O'Donnell J. in *Nowak*, where at paragraph 28 the learned judge identifies a particular feature of the general problem, namely, the consistent failure of the legislature to specify what form of review/appeal it has in mind to cover situations which obviously and with certainty will arise.

56. Whilst I expressed some sympathy with the draftsman in *Fitzgibbon* as regards why the legislature may feel circumscribed in streamlining the phraseology used, nonetheless it seems to me that greater urgency must be instilled into a structured overview of the ongoing situation. It must be possible to render such provisions more easily intelligible and to establish a finite set of parameters which might more readily lend themselves to a uniform meaning, and thus a more efficient application of their terms in any given case. This would enable both the parties and the courts to quickly get to the substance of the issue without having to engage with the level of preliminary scrutiny which is presently demanded. The instant appeal is a good example of why this remains a major and indeed pressing issue of concern.

57. Finally on the point, could I refer to Hogan & Morgan, *Administrative Law in Ireland* (4th Ed., 2010), where the authors, with their customary clarity, state at para. 11-130 that:-

> "The High Court finds itself pulled in multiple directions in this area. The sheer variety of statutory schemes and decisions rendered under them counsels a variable, shifting standard of review, but the desire for legal certainty pulls in favour of a simple, uniform test."

Reform is therefore imperative.

58. Be that as it may, where the legislature has provided for a statutory right of appeal, such must be regarded as conferring some benefit over and above that which otherwise might be available, for example, by way of judicial review. Something additional and separate is required beyond a simple "test" for legality, or the mere quashing or remitting of a decision based on standard review grounds. The range of possibilities in this regard, as above touched on, is extensive, varying from a full appeal on both facts and law (section 38 of the Courts of Justice Act 1936) to one strictly limited to, say, an appeal on a point of law, and perhaps even further restricted by the nature of the point or by the requirement of certification by the trial court (section 29 of the Courts of Justice Act 1924, as amended, and section 50(4)(f) of the Planning and Development Act 2000, are examples). In between, as the pervious discussion discloses, one can find several variable forms of "appeal". It therefore follows that the right of appeal in one piece of legislation may not necessarily be the same as that given under a different statute. Costello J., in *Dunne v. Minister for Fisheries* [1984] 1 I.R. 230, said that "in every case the statute in question must be construed" (p. 237). Barron J. in *Orange* stated that "the test for competition cases cannot be a guide for other codes" (p. 238): certainly without much concordance on many other important factors, this surely must be right. Accordingly, such being the situation, it then becomes necessary to consider each legislative framework in its own right.

59. Finally, at a general level it should be said that even allowing for the use of precise wording, it is important to bear in mind that excessive parsing of this word or that phrase, or an over-reliance on syntax and grammar, can sometimes distract from the overall picture, a perspective of which can be highly illustrative in the search for legislative intent. It would therefore be a mistake, even on a narrow issue of interpretation such as that in this appeal, to isolate one provision from all others, particularly where assistance as to meaning can also be deduced from associated provisions. This particular case is one which can benefit from such an expansive approach.

The FOI Review Provisions

60. In an earlier part of this judgment I have set out, in the most general terms, the structure of the Act relative to the underlying issues. Rights have been conferred and their exercise is structurally facilitated; this includes an adjudicative process at both internal and external levels. Apart from accessing the judicial route, the final decision at administrative level is made by the Commissioner, whose independent office was established by the Act. Many different circumstantial situations may arise, all of which have to be accommodated within her decision-making powers.

61. He or she is tasked with performing the functions set out in Part IV of the 1997 Act, which may give rise to complex matters calling for resolution. Issues of the highest importance may be at stake: a cursory examination of Part III of the Act alone will immediately demonstrate this (see sections 19-32, dealing with "Exempt Records"). Access to institutions of the state, even those responsible for its defence, security and external relations, is provided for, but with limits and attendant safeguards. Side by side with this, there is a legal obligation on every public body, so listed or prescribed, to have in place a functional system by which the rights conferred and obligations imposed can efficiently be utilised and discharged.

62. This means that the Commissioner must be in a position to deal effectively with each application addressed to her, and to do so in a methodical manner, consistent with good administration. It is therefore not in the least bit surprising that provision is made in the Act permitting her to screen claims and, if the same are plainly misconceived, as applying to the statutory scheme, to terminate any inquiry at the appropriate time. The contrary situation would render the system untenable, unproductive and highly dysfunctional. One filter tool so provided applies where the review requested by the person concerned, or the underlying application, is frivolous or vexatious.

63. Although the wording is different, a similar power is to be found in section 10(1)(b) of the Data Protection Act 1988. In relation to this provision, O'Donnell J. referred in *Nowak* to the necessity to have in existence some process of termination, much like what I have just described, and the reasons why in his opinion such is required. I respectfully agree with the observations made in this regard (see para. 16 of the judgment).

64. As appears from the statutory provisions above quoted, the Commissioner's powers, relative to applications made to her, are essentially contained in section 34 of the 1997 Act, and in particular in subsections (2) and (9) thereof. A sharp distinction is made in the legislation between the two. Subsection (2) is premised on the application being accepted and the necessary inquiry or examination being conducted, resulting in a decision to affirm, vary or annul the decision of the public body made at internal review level. Under this provision she has no power to reject an application submitted to her.

65. The situation under subsection (9) is entirely different. First, she cannot make a decision of the type just described. Secondly, in any given case she can exercise one or other of the options provided for, that is:-

> (i) to refuse to grant the review application, or
>
> (ii) to discontinue her review where either the underlying application or that made to the Commissioner is, in her opinion, frivolous or vexatious.

The remainder of her jurisdiction is to be found elsewhere.

66. Section 34 of the 1997 Act also contains subsidiary provisions regarding the operation of subsection (2): an application thereunder must be made within a particular timeframe, the same can be withdrawn up to a certain point, and a decision under its terms must be notified within the period specified. All of these provisions relate solely to subsection (2), and have no direct association with the Commissioner's powers under subsection (9) of the Act.

67. The meaning of section 34(2) of the 1997 Act is, in my view, largely uncomplicated. By giving the language used its ordinary meaning, the Commissioner must not only commence a review, but must also conclude such review before she can arrive at her final decision, whether that be to 'affirm, vary or annul' that which is under consideration. As the section makes clear, it is only "following the review" (section 34(2)(b)) that she may come to one of the three options as mentioned, or indeed any other decision which she considers appropriate (section 34(2)(b)(ii) of the Act).

68. I have no doubt but that the type of finality envisaged by this provision can only be arrived at where the decision under review, relative to the grounds of appeal advanced, has been fully explored, whether such involves issues of fact, of law, or other matters, as the case may be. A decision of that kind, which must include a consideration of all relevant points, could not otherwise be validly reached or legally sustained. Although this process of adjudication has been described by the High Court, perhaps quite understandably, as "following the completion of a full process of review", I am somewhat reluctant to badge that exercise as such, for fear of ambiguity – this for reasons which will become apparent in a moment. Instead, I would prefer to say "following such a review process as is legally required prior to the making of a substantive merit-based decision under section 34(2) of the 1997 Act".

69. Whilst the difference(s) between section 34(2) and section 34(9) of the 1997 Act may be relatively obvious, the provisions of the latter are not of themselves altogether that easy to understand: the distinction between the option of refusing to grant an application, or discontinuing a review, being a case in point. What differentiates the Commissioner's entitlement to refuse, from her right to discontinue? Perhaps the situation may have been a little clearer if both options had been separately and distinctively treated, but they were not. Neither have they been in the 2014 Act, although that statute, by reason of the added grounds upon which either power may be exercised, gives a better understanding of what is intended.

70. Although section 34(9) of the 1997 Act in its original terms has been quoted earlier in this judgment (para. 26, *supra*), it is of value to cite the full substituted section now contained in section 22(9) of the 2014 Act: that version is more informative than the original version as regards what the legislature had in mind, at least as of 2014. It reads as follows:

> "22. (9) (a) The Commissioner may refuse to accept an application under subsection (2) or may discontinue a review under this section if he or she is or becomes of the opinion that—
>
> > (i) the application aforesaid or the application to which the review relates (the "application") is frivolous or vexatious,
> >
> > (ii) the application does not relate to a decision specified in subsection (1),
> >
> > (iii) the matter to which the application relates is, has been or will be, the subject of another review under this section,
> >
> > (iv) the applicant has failed to provide the Commissioner with sufficient information or particulars, or otherwise has failed to co-operate with the Commissioner in the conduct of a review,
> >
> > (v) there is no longer any issue requiring adjudication, as access to the records in question has been granted by the FOI body in the course of the review,
> >
> > (vi) the application forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who, in the opinion of the Commissioner, appear to have made the requests acting in concert, or
> >
> > (vii) accepting the application would, by reason of the number or nature of the records concerned or the nature of the information concerned, require the examination of such number of records or an examination of such kind of the records concerned as to cause a substantial and unreasonable interference with or disruption of work of his or her Office."

The first three grounds are identical to those in the original section, but the remainder have been inserted for the first time by the 2014 Act.

71. The first ground upon which the provision may be invoked is that referable to the 'frivolous or vexatious' point, which I will return to in a moment. The second concerns applications that do not relate to a decision specified in subsection (1) of section 22, which is the source of the Commissioner's jurisdiction to review. The third is designed to avoid duplication and applies where the subject matter has previously been reviewed or is currently under review, or with predictable certainty will be dealt with in the near future. Where any of these circumstances exist, no purpose or value would be served by undertaking yet another review as requested in that particular application. Grounds (iv) and (v) are self-explanatory, with (vi) being designed to strengthen the barrier against abusive applications, and (vii) to maintain the operational integrity of the office.

72. It is therefore instructive to consider what type of investigative process is required in order to arrive at a decision on any one of the grounds specified in that subsection. The answer seems self-evident in most situations. It will be clear at an early stage, and certainly before the completion of a full review, whether the Commissioner has jurisdiction to entertain the appeal (ground no. ii), whether the application involves unnecessary and avoidable duplication (ground no. iii), whether the appellant has failed to supply sufficient information (ground no. iv), whether there remains any live issue for resolution between the parties (ground no. v), or

whether, if the application is undertaken and the review process commenced, the same would be oppressive to the essential functioning of the Commissioner's office (ground no. vii). In addition, one could hardly conclude that an application was "manifestly" unreasonable unless such was reasonably obvious or patently became so rather quickly (ground no. vi).

73. Accordingly, those nominated grounds suggest that a decision on any one or more of them can and should be arrived at in a manner and through a process which is essentially summary in nature, and one which is not as exhaustive or as intensive as that required to arrive at a decision under section 22(2) of the 2014 Act. Subject to what is next stated it is most likely that even when called upon to address the 'frivolous or vexatious' ground, the required decision can and will be made at an early stage. Therefore, it seems to me that at a legislative level a distinction of significance is made with regard to what type of inquiry is necessary so as to deal with decisions appropriate to subsection (2) of section 22, as distinct from those available for consideration under section 22(9)(a) of the 2014 Act. This evaluation applies with equal force to the corresponding provisions of the 1997 Act.

74. Notwithstanding the views which have just been expressed on how the nominated grounds set out in both section 22(9) of the 2014 Act and section 34(9) of the 1997 Act will normally be dealt with, I should explain why I have entered a caveat to adopting O'Malley J.'s description of the review process under section 34(2) of the earlier Act (para. 68, supra). Dealing specifically with the 'frivolous or vexatious' ground, it is conceivable, though unlikely, that a full review of the case may be necessary before a conclusion to that end can be arrived at. That would not be in any way inconsistent with the terms of the provision in question. This is quite clear from the wording of the subsection itself, which says that the Commissioner may exercise the power so contained "if he or she is or becomes of opinion…" (emphasis added). I therefore do not see any cut off point, event or timing restriction, or other act or circumstance by or as a result of which the Commissioner must arrive at a decision under subsection (9)(a) of section 34 of the 1997 Act. It seems to me, at the level of principle, that once any one or more of the grounds above identified are found to exist, the only other pre-condition to the exercise of the power so given is that the Commissioner must arrive at a decision to refuse to grant the application, and/or to discontinue the review. That, in my view, may occur at any point along the spectrum of the investigative process.

75. Finally, could I say what is undoubtedly obvious, which is that no decision, even one provided for in section 34(9) of the 1997 Act, could be arrived at without some form of investigation into the facts or issues raised in the review application, which perhaps have been further expanded in the later documentation or in the submissions as made. In some instances – indeed, as I have said, probably on the vast majority of occasions – it may be possible to arrive at a decision very early on, and to do so swiftly and decisively. Others may require some greater scrutiny. What is clear, however, is that whatever inquiry is necessary to arrive at a decision compatible with statutory requirements and fair procedures must of course be done. To take but one example, it may become self-evident at the outset that the decision by the public body is not one within the competence of the Commissioner to review. At that point, without further debate and certainly without a merit-based examination, she will be perfectly entitled to operate the provisions of section 34(9)(a)(ii), as in fact was the issue in *Killilea*. In other situations the process may take longer. Whichever, it seems to be that the legislation is sufficiently flexible to cover all such circumstances. I therefore wish to caution against any undue isolationist approach to words such as 'review', 'inquiry', 'investigation', 'decision', 'determination', 'conclusion' or the like. Context means everything.

76. This analysis informs but does not quite determine the question of when or in what circumstances it would be appropriate to refuse to entertain an application, as distinct from commencing a review but then terminating the process at some point thereafter. I think the answer to this issue is case-specific and should be determined by reference to the grounds upon which the Commissioner intends to exercise the powers contained in section 34(9) of the 1997 Act, and now in section 22(9) of the 2014 Act. For example, if the application relates to a decision over which she has no jurisdiction, or where she is being denied sufficient information or suffers from a lack of cooperation, then it may be appropriate to decline the application. On the other hand, in some of the other circumstances provided for, it may be necessary to commence the process so as to form a view as to whether the application should be discontinued on any of the other disqualifying grounds. This will ultimately be a matter for the discretion of the Commissioner and must, of course, be carried out in accordance with due process.

The Appeal Provision

77. The relationship between section 34 and section 42(1) of the 1997 Act is critical; indeed, it goes to the heart of the within appeal. With some misgivings, but in the knowledge of its brevity, I cite the latter provision again:-

> "42.—(1) A party to a review under section 34 or any other person affected by the decision of the Commissioner following such a review may appeal to the High Court on a point of law from the decision." (Emphasis added)

Whilst it is not possible to view this subsection in isolation, neither can one determine its meaning without some analysis of its individual sub-parts. In so doing, however, could I caution against focusing with undue intensity on every word, or series of words or sub-phrases, for fear of becoming subsumed by the *minutiae* which by unconscious detachment can easily distort its overall meaning.

78. On one reading of the opening wording of the subsection it can be said to do no more than simply identify which persons may invoke its provisions. It nominates two classes of such individuals: first, a "party to a review under section 34", and, secondly, "any other person affected by the decision of the Commissioner". At first glance this part of the subsection, if looked at on its own, appears unremarkable, but, when viewed within the section as a whole, it has a further purpose and a more expansive meaning than what might initially appear.

79. It is acknowledged that the phrase "following such a review" has and must be given a meaning: it is equally accepted that the second category of persons mentioned, the "affected persons" class, should be identified with that provision and therefore such a group is constrained in what they can appeal to the High Court: it is only a decision arrived at by the Commissioner "following such a review". If that be correct, as I believe it to be, it follows that the purpose of the opening words, at least for that group, is not as may first appear, but rather is designed to further condition their general right to appeal. In short, there is an appeal from a section 34(2) type decision only. This interpretation is not seriously contested.

80. It is, however, asserted by the Commissioner, and disputed by Mr. Kelly, that this qualification equalises the position of all persons who seek to avail of section 42(1) of the 1997 Act. The question is whether such an interpretation as agitated for is consistent with the text of section 34, and, even if so, how would such fit with the rest of subsection (1) of section 42, which simply speaks about an appeal on a point of law "from the decision". Whilst raising some difficulties of interpretation, I feel the answer is ultimately to be found within the statutory provisions themselves.

81. As stated, section 42(1) of the 1997 Act is not free from ambiguity in its interpretation. Does a person have a right to appeal from

any decision of the Commissioner simply because he is a party to a review application? On the submissions made, that would appear to be the position of Mr. Kelly, who says that what follows after the disjunctive word "or" in the subsection is intended to apply only to the second group identified, namely, that class of persons "affected by the decision of the Commissioner". Such a submission, as I have said, is rejected by the respondent, who asserts that any right of appeal, by whichever group, is conditioned by the phrase appearing immediately thereafter, that is, "following such a review". Furthermore, she also claims that the final wording of the subsection – "from the decision" – clearly relates back to one arrived at following such a review. Accordingly, it is at this junction that the acute and pivotal conflict arises.

82. The phrase "following such a review" (section 42(1)) is strikingly similar to that used in section 34(2) of the 1997 Act, "following the review". As with the High Court and the Court of Appeal, which have previously dealt with this wording, I seen no reason why it should not be given the same meaning in both provisions. It is a standard rule of interpretation that, presumptively at least, this approach should be adopted: such should only be departed from or displaced where required by the subject matter or other circumstances as properly contextualised. No such matters arise in this case. Accordingly, both phrases must be given the same meaning where they appear in section 34 and section 42 of the 1997 Act. It follows, therefore, that where such are in play, a review of a plenary type is both envisaged and required. It equally follows that where not applicable, the decision-making process does not have to involve a review of that nature. In the instant case, the only review under consideration is that demanded by section 34(9) of the 1997 Act.

83. It is difficult to understand how the expression "following such a review" could qualify the right of one category of persons to appeal, but not the other, without some reason to justify the resulting discrimination. It would be entirely anomalous if that was the situation. Therefore, in my view, it seems logical in approach, and consistent with the scheme of the Act and the provisions in question, to hold that that the phrase in issue also applies to the first category of persons identified, namely, "a party to a review", as it does to the second group, being the "affected persons" class.

84. This view is very much reinforced by that part of section 42(1) of the 1997 Act which gives a right of appeal – to cite the actual wording – "from the decision", which by reference to the earlier part of the subsection can only relate to a decision of the Commissioner arrived at following the type of plenary review above discussed. Accordingly, I am satisfied that unless the case law next mentioned requires a contrary conclusion, the correct interpretation of the relevant provisions does not permit an appeal to the High Court from a discontinuance decision made by the Commissioner under section 34(9)(a)(i) of the 1997 Act.

85. Before looking at the relevant authorities, however, it is convenient at this juncture to refer to the second certified question. It is identical in its terms to the first, save that it relates to the 2014 Act. Having considered the submissions made, I cannot identify any significant distinction on this point between the relevant provisions of the 1997 Act and those which replaced it in 2014. Section 22 and section 24 of the current legislation correspond with sections 34 and 42 of the 1997 Act, respectively. Section 22(2) is, for practical purposes, identical in its terms to section 34(2) of the 1997 Act. Section 22(9)(a) states that the Commissioner "… may refuse to accept an application", whereas under its predecessor the phrase was "… may refuse to grant an application". That is the only point of difference relevant to the present issue. Likewise, with the appellate provisions. In section 24(1) of the 2014 Act, the first category of person identified is a "party to an application under section 22", whereas the earlier provision refers to "a party to a review under section 34". The original section uses the terminology "following *such* a review" (emphasis added), whereas the 2014 version simply says "following a review", and also adds the possibility of an appeal on a finding of fact where it is contended that the release of a record concerned would contravene a requirement of EU law. Otherwise, both subsections are almost identical. I cannot see how any of these differences touch upon or affect the key provisions upon which the certified questions in this case were allowed. Accordingly, I do not believe that Question No. 2 is amenable to any answer different from that given to the first question.

Case Law

86. The question remains: is this conclusion disturbed by either *Killilea* or *Nowak*? I have no doubt but that the answer is no.

Killilea

87. With regards to *Killilea,* I believe that the correct way of reading the relevant passage of the judgment of Murphy J. is to acknowledge that the appellate point and the argument made in support were outlined by the learned judge, but from my reading of his judgment he did not make a definitive decision on it. At p. 423 of the report, the learned judge, having set out the point, stated that "[a]s the appellant has, until recently, represented himself in these proceedings, this procedural point was not taken." Whilst it is correct to say that the learned judge did say that in his opinion there had been a review, this observation was based on a letter from the Commissioner which stated "In carrying out my review…". I do not see what was stated by the judge as being of any great moment, as obviously some form of inquiry had to be engaged in by the Commissioner. Certainly in my view it is not inconsistent in any way with either what the High Court or the Court of Appeal held in this case. Accordingly, I do not see any necessity to prefer the judgment of the High Court in this case to that of Murphy J. in *Killilea.* From my reading of the latter, the real point at issue in the instant appeal was simply not decided.

Nowak

88. As noted above (para. 38, *supra*), following this Court's decision in *Nowak v Data Protection Commissioner* [2016] I.E.S.C. 18 ("*Nowak*"), the parties to the present appeal were given time to file further written submissions in light of that judgment. In that case, the High Court ([2012] I.E.H.C. 449, Birmingham J) had held that a determination by the Data Protection Commissioner that an application was frivolous or vexatious did not fall to be challenged by way of statutory appeal. That decision was upheld by an *ex tempore* judgment of the Court of Appeal delivered on the 24th April, 2015. The respondent, in her initial written submissions to this Court, submitted that the judgments of the High Court and the Court of Appeal in *Nowak* provided further support to her opposition to Mr Kelly's appeal, albeit with an acknowledgment that the relevant provisions of the Data Protection Acts 1988 and 2003 were not identical to those at issue in the present case.

89. The parties' positioning relative to *Nowak*, however, was to change following the judgment of the Supreme Court, delivered on the 28th April, 2016. This Court took the view that a decision was made by the Data Protection Commissioner in relation to a complaint under section 10(1)(a) of the Data Protection Acts 1988 and 2003 and that, accordingly, an appeal lay to the Circuit Court under section 26 thereof. Thus in his further written submissions to this Court, the appellant has placed some reliance on this Court's decision in *Nowak*, whereas the respondent now seeks to distinguish that case on a number of bases. I take the view that the *Nowak* decision does not assist in the particular point of statutory construction now in issue, and, accordingly, that it cannot avail the

appellant.

90. As noted by O'Donnell J. in *Nowak*, the precise terms of the relevant freedom of information legislation are different from those in the data protection legislation and the "issue depends upon an interpretation of the statutory language used in each case" (para. 19). The Data Protection Acts provide a right of appeal to the Circuit Court on a "decision in relation to a complaint". The same is not limited to an appeal on a point of law. Moreover, as pointed out by the respondent in her further written submissions, there are a number of crucial distinguishing features between *Nowak* and the instant case. First, as stated, the express terms of the right of appeal in *Nowak* were much broader than those currently under discussion. Second, the maxim *exclusio unis inclusio alterius* forecloses on the appellant's interpretation of the 1997 and 2014 Acts, as both pieces of legislation posit separate concepts of a "decision" and a "discontinuation", with the right of appeal arising only in respect of the former.

91. Third, in *Nowak*, if the right of appeal had been limited to cases which had not been determined to be frivolous or vexatious, it would have followed that there was no statutory obligation on the Data Protection Commissioner to notify the parties of the decision to that end. The same was an unlikely meaning and thus a powerful reason against adopting the interpretation proposed on behalf of the Commissioner. The same issue does not arise in the present case, as the 1997 and 2014 Acts expressly provide for an obligation to notify persons of a discontinuation. Fourth, the EU law dimension which arose in *Nowak* does not feature in the within appeal. Fifth, it is submitted that a key feature of *Nowak* was that the decision in question was a significant decision on the law relating to data protection, which was precisely the sort of issue which should be capable of an appeal to a court of law. By contrast, no similar statement can be made in respect of the discontinuance determination in the instant case, which is relevant only to the appellant's long-running dispute with UCD.

92. There is merit to each such distinguishing feature urged by the respondent. Ultimately, however, the key point is a simple one: the issue in this appeal is a fine point of statutory interpretation. It is accepted by all that the wording of the relevant provisions of the Data Protection Acts is not identical to that of the Freedom of Information legislation. As each statute falls to be interpreted per the well-established canons of statutory construction, it is readily apparent why an interpretation which prevails in respect of one piece of legislation will not necessarily win the day in respect of an altogether distinct statute, addressing a fundamentally different topic, and, crucially, drafted in terms which do not mirror those of the first statute. This is not to say that *Nowak* and many other cases cannot assist in terms of the approach to statutory interpretation; the point, simply, is that just because a right of appeal may have been found to exist in the Data Protection Acts, does not mean that the same will be found in the Freedom of Information legislation. Such a conclusion may be reached only if the wording of the Act, when interpreted in the usual way, so provides.

Miscellaneous Case Law

93. As previously outlined, Mr. Kelly has made extensive reference in his written submissions to several cases from other jurisdictions; he asserts that these decisions support his suggested interpretation of the provisions at issue in this appeal. I regret to say that I do not share this view. Take, as an example, the case of *Scottish Borders Council v. Scottish Ministers* [2012] CSIH 79. The entire discussion by the Inner House of the Court of Sessions in its judgment concerned certain provisions of the Land Compensation (Scotland) Act 1963, and certain articles of Regulations made thereunder. Both the Act of Parliament and the Regulations were dealing with a subject matter entirely different from the Freedom of Information Act, and in any event neither the language used nor the text set out are in any way comparable to that under consideration by this Court. Caution must always be exercised in the use of such cases, particularly where a point of purely domestic interpretation or construction is at issue. I therefore do not find such case law to be of any real assistance.

Conclusion

94. I am therefore satisfied, for the reasons above outlined, that the first certified question set out at para. 6, *supra*, must be answered in such a way as to indicate that no appeal lay to the High Court under section 42 of the 1997 Act from the exercise by the Commissioner of her power to discontinue a review under section 34(9)(a) of the Act. The same conclusion follows in respect of the equivalent provisions of the 2014 Act. In coming to this conclusion, it should be pointed out that a person aggrieved by such a decision of the Commissioner is not without recourse to legal remedy, as the judicial review procedure is available to him. The fact that "leave" may have to be obtained and that the remedy is discretionary creates no injustice where a decision is made under section 34(9)(a) of the 1997 Act. The questions must therefore be answered in the manner suggested.