THE HIGH COURT

1999 No. 99MCA

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 1997 AND

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 42 (1) OF THAT ACT

BETWEEN

THE MINISTER FOR EDUCATION AND SCIENCE

APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDANT

JUDGMENT of Mr. Justice Aindrias Ó Caoimh dated the 31st day of July 2001

This is an appeal taken by the Minister for Education and Science (hereinafter referred to as the Minister) pursuant to Section 42 subsection 1 of the Freedom of Information Act 1997 against the decision of the Information Commissioner (hereinafter referred to as the Commissioner) in relation to requests made by a number of newspapers to it, The Sunday Times, The Sunday Tribune and The Kerryman, whereby subject to terms and conditions set out in his decision, the Commissioner directed the Minister to give these newspapers access to certain records held by the Minister concerning the results of the Leaving Certificate Examinations held in 1998. The Minister further seeks a declaration that the decision and the consequential directions given by the Commissioner in connection therewith are wrong in point of law. A declaration is also sought that the requesting newspapers are not entitled to access to the records requested by them or any of them.

The grounds upon which the Appellant brings this appeal are stated as follows:

1. The Commissioner erred in law in his construction and/or application of Section 21 (1) (A) of the Freedom of Information Act 1997 ("The 1997 Act").

2. Without prejudice to the generality of the foregoing, the Commissioner erred in law and the construction of the said Section by imposing upon the Minister an evidential burden that was excessively onerous and which was not warranted by relevant part of the said Section.

3. The Commissioner erred in law in finding that access to the records could not reasonably be expected to prejudice the effectiveness of tests and examination conducted by or on behalf of the Minister and specifically the Leaving Certificate Examination.

4. Whether, or in the alternative the Commissioner erred in law in finding that access to the records could not reasonably be expected to prejudice the procedures and/or methods employed for the conduct of the Leaving Certificate Examination.

5. The Commissioner further erred in law in this construction and/or application of Section 21 (1) (B) of the 1997 Act.

6. Without prejudice to the generality of the foregoing the Commissioner erred in law in his construction of the said Section 21 (1) (B) by imposing upon the Minister an evidential burden that was excessively onerous and which was not warranted by the relevant part of the said Section.

7. The Commissioner further erred in law in finding that access to the records could not reasonably be expected to have a significant adverse effect on the performance by the Minister and his Department of any of their functions

relating to management, including (but not limited to) industrial relations and management of staff.

8. The Commissioner further erred in law in finding that access to the records could not reasonably be expected to have a significant adverse effect on the performance by the Minster and his Department of their functions relating to the planning and allocation of resources to schools in the evaluation and enhancement of the quality of education in secondary schools in the state.

9. The Commissioner further erred in law in this construction and/or application of Section 53 of the Education Act 1998 ("The 1998 Act").

10. Furtherherein the alternative the Commissioner erred in law in failing to take any or any adequate account of the said Section 53.

11. The Commissioner erred in law in findings that the said Section 53 had no application to the requests and subject of this appeal.

The decision of the Commissioner related to four requests for access to records pursuant to the provisions of the 1997 Act as these requests related to records of a similar nature and were considered by the Commissioner to raise similar issues under the 1997 Act, the requests were considered together by him and determined on the same basis. The dates of the relevant requests were as follows: the Times Newspapers limited 27th July, 1998, Tribune Newspapers Plc 22nd August, 1998, Connor Keane 20th October, 1998, The Kerryman Limited 20th October, 1998.

With regard to the construction and application of Section 21 (1) (A) of the 1997 Act it was and remains the position of the Minister that access to the records could reasonably be expected to prejudice the effectiveness of tests and examinations conducted by or on his behalf specifically the Leaving Certificate Examinations. With regard to the

provisions of Section 21 (1) (b) of the 1997 Act it is contended on behalf of the Minister that he was entitled to refuse the requests the subject of this appeal if access to the records could in his opinion, reasonably be expected to have a significant adverse effect on the performance by the Department of any of its functions relating to management (including industrial relations and management of its staff). It is submitted *inter alia* that the Commissioner failed to attach any or any adequate or sufficient weight to the opinion of the Minister and the Department of the effect of granting access to the records on their functions relating to the planning and allocation of resources to schools and the evaluation and enhancement of the quality of education in secondary schools in the State.

A further ground of appeal relates to the provisions of Section 53 of the Education Act in 1998. As appears from the decision of the Commissioner he concluded that Section 53 was not retrospective in effect and could not be taken into account by him in determining the requests the subject of this appeal by virtue of the fact that the said requests were initially made prior to the coming into effect of Section 53. The Minister contends that this determination was wrong in point of law in that the Commissioner ought to have taken account of Section 53 and having done so ought to have refused to grant the requests for access to the records in accordance with the provisions of Section 32 (1) of the 1997 Act.

The main aspect of this appeal argued before this Court was the application of Section 53 of the Education Act of 1998. By Section 53 it is provided as follows:

> *53 - This Section entered into force on the 5th February, 1999 and the essential issue that arises from these proceedings is whether this Section has any application to a request for information made pursuant to The Freedom of Information Act prior to the coming into force Section 53. It is to be noted that all the requests for information were made prior to this enactment and indeed the provisions of Section 53 did not come into force until after appeals were*

taken by each of the newspapers in question against the refusal of the Minister to release information to them. These appeals were the appeals to the Commissioner and were subsequent to applications made to the Minister to review earlier decisions refusing to furnish the information in question. However, it is to be noted that while Section 53 of the 1998 Act came into force on the 5th February, 1999 the decision of the Commissioner which is impugned in these proceedings was not made until the 7th of October, 1999.

The long title to the 1997 Act is as follows:

"An Act to enable members of the public to obtain access to the greatest extent possible consistent with the public interest and the right to privacy to information in the possession of public bodies and to enable persons to have personal information relating to them in the possession of such bodies corrected and, accordingly, to provide for a right of access to records held by such bodies, for necessary exceptions to that right and for assistance to persons to enable them to exercise it, to provide for the independent review both of decisions of such bodies relating to that right and of the operation of this Act generally (including the proceedings of such bodies pursuant to this Act) and, for those purposes, to provide for the establishment of the Office of Information Commissioner and to define its functions, to provide for the publication by such bodies of certain information about them relevant to the purposes of this Act, to amend the Official Secrets Act 1963, and to provide for related matters."

Section 6 of the Act deals with the right of access to records. At Section 6 (1) it is provided as follows:

> 6(1) "*Subject to the provisions of this Act, every person has a right to and shall, on their request therefore, be offered access to any record held by a public body and the right so conferred is referred to in this Act as the right of access".*

Pursuant to the provisions of Section 7 of the Act of 1997 requests for information were made to the Minister by each of the newspapers concerned. In each case where a request was made pursuant to Section 7 of the Act to the Minister, it resulted in a refusal to supply the information under the terms of the Act. Thereafter pursuant to the provisions of Section 14 of the Act an application was made to review the decision refusing to furnish the information in question to the respective newspapers. Upon a review of the decision in each case a decision was made to affirm the earlier refusal to supply the information sought by the newspaper.

Under the provisions of Section 32 of the Act of 1997 a head is required to refuse to grant a request under Section 7 if:

> (a) the disclosure of the record concerned is prohibited by any enactment other than certain provisions of Statutes specified in the third schedule to the Act**,** or
>
> (b) the non-disclosure of the record is authorised by any such enactment in certain circumstances and the case is one in which the head would, pursuant to the enactment, refuse to disclose the record.

Following upon the review pursuant to Section 14 an application was made to the Commissioner by each of the newspapers concerned to review the decision made pursuant to Section 14. It is clear from a reading of the provisions of Section 34 that following this review the Commissioner may (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 the Act. Having regard to the provisions of subsection (12) of Section 34 of the Act it is clear that in a review under the section the onus of proof lies upon the head concerned who has refused to allow the request and therefore it can be seen that the onus does not lie on the party seeking the review in these circumstances. Subsection (12)(b) of the Section reads as follows:-

> "(12) in a review under this section -
>
> .....(b) a decision to refuse to grant a request under Section 7 shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified."

In this case the Commissioner made a decision pursuant to Section 34 of the Act in regard to each of the requests for information and in doing so he annulled the decision previously made in relation to the matter concerned which he considered proper.

From the decision that the Commissioner made pursuant to Section 34 the Minister has appealed the matter to this Court pursuant to section 42 on a point of law. The decision of this Court on the appeal is stated pursuant to subsection (8) of the section to be final and conclusive.

With regard to the review carried out by the Commissioner pursuant to Section 34 it was submitted by Counsel on all sides that the review in question was a *de novo* hearing notwithstanding the use of the term review appearing in the section. It was submitted on behalf of the Minster that Section 34 involves a decision to apply the law as of the date of the determination pursuant to Section 34.

The Minister in this appeal relies essentially upon the provisions of Section 53 of the Education Act which came into force before the Information Commissioner made his

decision. As previously stated the requests for information were made at a time before the coming into force of Section 53.

While Section 42 indicates that a party to a review under Section 34 or any other person affected by the decision of the Commissioner for such a review may appeal to the High Court on the point of law from the decision, it is silent as to whether it is anticipated that the Commissioner or the decision maker will be a party to any appeal before this Court. In the instant case the Commissioner was represented in the proceedings before me and no issue was taken in relation to his right to appear on this appeal.

SUBMISSIONS OF COUNSEL ON BEHALF OF THE MINISTER:

It was submitted on behalf of the Minister that the Commissioner wrongly failed to have regard to new law namely Section 53 of the Education Act; that Section 53, while it represented new law, did not effect any vested rights in any of the parties and thereby was law which the Commissioner was bound to have regard to in reaching his decision. Mr. Donal O'Donnell, Senior Counsel for the Minister pointed to the terms of the review carried out by the Commissioner to show that he himself engaged in a *de novo* appeal rather than a limited review of the decision addressed to him. Counsel pointed out that in a previous case coming before this Court, this Court took the view that the right of review vested in the Commissioner was limited in its terms and did not amount to a *de novo* appeal. It was submitted that if that decision was correct then clearly the Commissioner was wrong in his treatment of the review.

In anticipation of an argument to be made against the Minister that the provisions of Section 53 were retrospective in nature and thereby offended the Constitution insofar as they affected vested rights in an applicant for information, it is submitted firstly, that the right to information is not a vested right and is contingent upon an application being made and, secondly, that the application of the section was not properly described as retrospective

in nature but more retroactive in nature. In that regard reference is made to the judgment of the Chief Justice in the case of ***Hamilton -v- Hamilton*** [1982] IR466 where the Chief Justice stated, *inter alia,* as follows at page 573 of the report:-

> *"This brings me to the subject of retrospectivity: it is necessary to state with some precision what I regard as such in a statute. Many statutes are passed to deal with events which are over and which necessarily have a retrospective effect. Examples of such statutes, often described as ex post facto statutes, are to be found in acts of immunity or pardon. Other statutes having a retroactive effect are statutes dealing with the practice and procedure of the Courts and applying to causes of action arising before the operation of the statute. Such statutes do not and are not intended to impair or affect vested rights and are not within the type of statute with which, its seems to me, this case is concerned. For the purpose of stating what I mean by retrospectivity in the statute, I adopt a definition taking from Craies on Statue Law (7th Ed.,P387) which is, I am satisfied, based on sound authority. It is to the effect that a statute is to be deemed to be retrospective in effect when "it takes away or impairs any vested rights required under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed.""*

Counsel for the Minister further referred this Court to the decision of the High Court in the case of ***O'H -v- O'H*** [1990] 2 I.R. 558 where it was held by Barron J. that there was a general presumption against retrospective construction of a statute. In this particular case Barron J. again indicated the difference between retrospection on the one hand and rectroactivity on the other hand. Barron J. indicated *inter alia* at page 565 of the judgment that

to take into account facts which predated the date upon which the Act came into force would not be giving the Act retrospective effect. He indicated that if such facts are not taken into account, then for some time after the operative date a considerable portion of the jurisdiction created by the Act would be unenforceable, What was at issue in those proceedings was Section 29 of the *Judicial Separation and Family Law Reform Act 1989*. At the same page of the judgment Barron J. indicated that in the absence of an express intention to such effect it must be presumed that the statute did not intend to take away or impair the vested rights acquired under existing laws or impose a new duty or attach a new disability in respect of transactions or considerations already passed.

Counsel for the Minister further referred this Court to the judgment of Henchy J. at page 480 in the case of ***Hamilton -v- Hamilton*** where he addressed the common law rules relating to retrospection and stated as follows:-

> *"From a wide range of judicial decisions I find the relevant canon of interpretation of common law to be this. When an act changes the substantive, as distinct from procedure law then, regardless of whether the act is otherwise prospective or retrospective in its operation, it is not to be deemed to affect proceedings brought under the pre-act law and pending at the date of the coming into operation of the Act, unless the Act expressly or by necessary intendment provides to the contrary."*

Further at page 481 of the report Henchy J. stated as follows:-

"***Maxwell on the Interpretation of Statutes*** *, (12th ed., pp 220-1), puts the applicable rule of interpretation thus in general when the substantive law is altered during the pendency of an action, the rights of the parties are decided*

according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights. I would cavil at that statement of the law to the extent that the rule of interpretation it sets out is stated to be only a general one, thereby suggesting that it admits of exceptions. In my opinion the judicial authorities show that it is a universal rule which applies to all pending actions, unless the language used in the enactment is susceptible of no other conclusion and that the rights of parties to pending actions are intended to be affected."

In these proceedings it is submitted that no constitutional impediment exists to the application of Section 53 of the Education Act to the review carried out by the Commissioner such as to preclude him from making a decision directed towards the non disclosure of the information sought and that the application to the Commissioner cannot be considered as equivalent to a situation of a proceeding pending before the Courts. It is submitted that there is no authority which extends the common law principal enunciated by Henchy J. beyond the field of judicial determinations in the Courts of Justice. With regard to the suggestion that the Applicant might have vested rights prior to the review carried out by the Information Commissioner insofar as any application for information had resulted in a refusal that no right in any event had vested at the time. If this submission was not accepted by the Court that a further question remains as to whether the Act by its expressed terms or necessary intendment intended the contrary situation such that it would apply to past situations.

Mr O'Donnell refers this Court to the decision of ***Quilter -v- Mapleson*** (1882) 9 Q.B.D. 672 where the Court of Appeal considered that it was entitled to take into account the law as it stood at the hearing of the appeal, which appeal amounted to a rehearing, and that it was not confined to the law as it stood when the decision had been made by the inferior Court,

but it was entitled to make such further or other order as the case might require. In this instant case what was an issue was whether the Court of Appeal was entitled to give relief against forfeiture to a tenant based upon an Act of Parliament which was passed since the initial determination of an action for possession brought by the landlord against the tenant. Lindley, L.J. indicated in his judgment at page 676 of the report that the enactment in question was in terms retrospective and must be construed according to its terms as being retrospective.

He pointed out that it was urged, however, that though the enactment applied to leases made before the Act, it did not apply to breaches of covenant committed before the Act. He pointed out that it was not expressly in terms declared to apply to them, but when one looked at the object of the enactment it did not appear to be going beyond a fair construction to say that it applied to breaches before the Act and to pending proceedings.

At page 677 of the report Bowen, L.J. stated:-

"*No doubt, as a general rule, a statute does not affect pending proceedings, but that rule is only a guide where the intention of the Legislature is obscure, it does not modify the clear words of a statute."*

He went on to hold that the relevant provision had a retrospective force and was applicable to a pending litigation.

In the context of the instant proceedings Mr O'Donnell submitted that while Section 53 did not contain any express provision applying its terms to pending applications it was not an unfair construction to apply it to the applications brought in the instant case and that such a construction was consistent with the general blanket application as contained in Section 53.

Mr O'Donnell pointed out that Lord Denning MR in the case of ***Wilson -v- Dagnall*** [1972] 2 All E.R. 44 approved of **Quilter's Case** which had been expressly approved

by the House of Lords in ***A.G. -v- Birmingham, Tame and Rea District Drainage Board*** [1912] A.C. 788 [1911-13] All E.R. Rep. 926 and indicated that **Quilter's Case** was held to be authority for the general proposition that the Court of Appeal is entitled and ought to rehear the case as at the time of rehearing.

Mr O'Donnell accepted that these authorities were decided without reference to any issue of constitutional restriction. In this regard he referred the Court to the authority of ***Chestvale Properties Limited -v- Glackin*** [1992] I.L.R.M. 221 where the High Court held that the Companies Act, 1990 was such as to enable an Inspector appointed under that Act to secure documents or obtain information relating to events which predated the coming into operation of the Act. In so holding Murphy J. indicated that this was his view notwithstanding the presumption against retrospectivity in all legislation enacted by the Oireachtas. He held that the operation of the sections at issue did not constitute an impermissible or unjust attack on the property rights of the Applicants or either of them. He indicated that the minimal interference in the law was justifiable as a means of reconciling the exercise of property rights with the exigencies of the common good as provided by Article 43.2.1 of Bunreacht na hÉireann.

Mr O'Donnell further referred this Court to the decision of O'Higgins J. in the case of ***Mullins -v- Harnett*** [1998] 4 I.R. 426 where at page 430 of the report he addressed principles and canons of construction and interpretation to be applied to the Act under review in that case and addressed in the first instance the principle of the presumption against retrospection and thereafter applied the "public good" construction, the common sense rule of construction and fourthly the main rules of construction of transitional provisions. He submitted that in applying the public good construction and the common sense rule that if one was to construe Section 53 of the Education Act to apply only to the year 1998 and no other year that an absurdity would result in a partial time limit to disclosure of information which would not be in the public interest and was a result that no one contended for. With regard to

the fourth rule addressed by O'Higgins J. namely rules of construction of transitional provision Bennion states at page 213:-

> "*Where an Act contains substantive, amending or repealing enactments, it commonly also includes transitional provisions which regulate the coming into operation of those enactments and modify their effect during the period of transition. Where the Act fails to include such provisions expressly, the Court is required to draw such inferences as to the intended transitional arrangements as, in the light of the interpretive criteria, it considers Parliament to have intended."*

It is submitted by Mr O'Donnell that in the instant case the Oireachtas in enacting the legislation intended the provision of Section 53 to apply to information in the existence prior to the coming into force of the Act.

In the context of the written submissions filed in this Court it was submitted inter alia that the information Commissioner was wrong in law in treating the procedure under the *Freedom of Information Act* as analogous to litigation, that the principle outlined in ***Hamilton -v- Hamilton*** is a one which is derived from the constitutional separation of powers and the inviolability of the judicial process. The principle identified by Henchy J. in the same case is rooted in the separation of powers and in Ireland, in the concept of a constitutional right of access to the Courts and to have matters determined by the judicial organ of the State. It is submitted that no such constitutional underpinning is applicable to reviews by the Head of Department and subsequently the Information Commissioner pursuant to the *Freedom of Information Act*. There are no constitutional equivalents and there is therefore no basis for the analogy implicitly drawn by the Information Commissioner and no basis for departing from the general rule identified by the Information Commissioner that he should take into account in

conducting his review any relevant legislation enacted since the review commenced and therefor to make such order as the Head of Department could have made if the matter had been determined by him on the date upon which the Information Commissioner came to have the matter decided, namely the 7th of October 1999.

SUBMISSIONS OF COUNSEL ON BEHALF OF THE INFORMATION COMMISSIONER:

On behalf of the Information Commissioner Mr Rory Brady Senior Counsel submitted that the categorisation of the right of the Applicant as an incohate right was incorrect, that the rights in question were vested under the Act and submitted that this could be discerned from an examination of the pre-existing legal positions. He said that there was no common law right of access to the information in question, that the right was one discovered in the course of litigation and that one could not take into account the reasons for the request for information or the view of the Head of Department. He submitted that under the Freedom of Information Act a milestone was reached in the balance between citizens and public bodies and that a right of access to the information was granted to the citizen. The Oireachtas could have formulated the Act in a different manner such that the right would just simply have been one to apply for the information, that the right in question was not simply a right to apply for the information but a right to the information and it is submitted that in this regard Section 6 confers the right while Section 7 deals with the exercise of that right. Mr Brady stressed that the wording of Section 6 of the Act is important in that it provides that every person "has a right to and shall, on request therefor, be offered access to any record". This is a right which is vested in every person, upon the adoption of the Act and further referred to the provision of Section 6 wherein it is stated "the right so conferred is referred to in this Act as the right of

access". It is submitted that this Court is concerned with the vested statutory right conferred for the benefit of every person but that the right, however, is not an unqualified one.

Mr Brady made specific reference to the long title to the Act of 1997. He submitted that the Act restored a balance between the administration and the citizen and it involved the creation of a new right in favour of the citizen. There was a *de novo* appeal procedure under the Act and the existence of an independent Commissioner was to vindicate the right of the citizen. The independent Commissioner vindicates the right where he makes a decision in favour of disclosure.

Mr Brady referred to the provisions of Section 8(4) which provides that in deciding whether to grant or refuse to grant a request under Section 7 (a) any reason that the requester gives for the request, and (b) any belief or opinion of the Head as to what are the reasons of the requester for the request, shall be disregarded. In this regard Mr Brady indicated that the provision indicates the approach to the assessment of the right in question. He says that by reference to this one can see what was intended by Section 53 of the Education Act. He submitted that the wording of Section 53 is limited in its terms. One should have regard to the plain and ordinary meaning of the Section. If there is to be a retroactive effect clear and unambiguous language must be used. It is submitted that the Minister is asking the Court to enlarge upon the legal basis appearing in the section itself. Mr Brady referred in particular to the judgment of O'Higgins C.J. in ***Hamilton -v- Hamilton*** at pages 473-475 where he deals with the subject of retrospectivity. In particular reference is made to the portion of the judgment adopting the definition taken from Craies on Statute Law where a statute is deemed to be retrospective in effect when it

> *"takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed".*

Mr Brady referred to the rule of construction which leans against retrospectivity and adopted from the judgment of the Chief Justice at page 474 the words of Lord O'Hagan at page 601 of the report in ***Gardner -v- Lucas***, (1875) 2 App. Cas. 582

> *"...unless there is some declared intention of the Legislature - clear and unequivocal - or unless there are some circumstances rendering it inevitable that one should take the other view, we are to presume that the Act is not intended to be retrospective in its application".*

Mr Brady indicated that he was not contending that any constitutional right of the Applicants was violated by a retrospective application of section 53 of the Education Act. He did however submit that Section 53 starts with a vested right and it requires clear and unequivocal words to remove that right. He submitted that a removal of that right would be *prima facie* unjust to adopt the words of O'Higgins CJ. Mr Brady submitted that it would require unequivocal and clear language to capture pre-existing requests for information which are an exercise of a right under the Act. Whether it was intended to capture such pre-existing requests had to be determined by reference to the language of the section. Mr Brady submitted that the principles outlined in the judgment of the Chief Justice in **Hamilton's Case** are such that they mandated the conclusion arrived at by the Commissioner that Section 53 could not operate so as to defeat the vested entitlement of the requesters to the information sought. Mr Brady referred to a portion of the judgment of Barron J. in ***O'H. -v- O'H.*** at page 562 of the report where he stated:-

> "*I am satisfied that whether or not a statute should be regarded as having retrospective effect is a matter of construction of the provision concerned. There is a presumption against retrospective construction. This, however, is*

only another way of saying that unless there is a clear intention that it should be, it will not be so construed."

Mr Brady referred further to a portion of the judgment of Barron J. at page 563 where he quoted from the decision in ***Pawys -v- Pawys*** [1971] P. 340 where at 350 Brandon J. stated:-

"*The true principles to apply are in my view, these: that the first and most important consideration in construing a statute is the ordinary and natural meaning of the words used; that, if such meaning is plain, effect should be given to it; and that it is only if such meaning is not plain, but obscure or equivocal that resort should be had to presumptions or other means of explaining it."*

Mr Brady submitted that the Information Commissioner is entitled to submit his decision for that appealed from. He is entitled to look at fresh events or fresh states of affairs and to look at the fact that a new law has been introduced. The question which arises is whether there is a ground of refusal. In the instant case the Court has to decide whether Section 53 precludes the granting of access to information to a then current application before the Commissioner or whether it applies to applications post dating the coming into force of Section 53 itself. Mr Brady submits that there is absent from the provisions of Section 53 the words "whenever made or whensoever made" which would have been a simple addition to the provisions of the Section had that been the intention of the Minister in relation to an application for information under the *Freedom of Information Act*. In Section 53, insofar as there is any application to requests under the Act it is applicable only to applications made after that enactment came into force. Mr Brady postulates the question in the instant case "Has the legislature taken away vested rights by clear and unequivocal language?" He submits that the

answer must be in the negative. The legislature chose a situation pertaining to future applications and it cannot have intended that the Section will apply to then pending applications. It may be that only results for the year 1998 have escaped the legislative net. The legislature chose to give a right for the public benefit. It is submitted that the language of the section does not show an intention to stop that right dead in its tracks without clear and unequivocal language.

Mr Brady says that Section 34(2) involves a *de novo* decision. The Commissioner decides afresh upon the request that has already been made. He makes his decision in the instant case. The effect of the introduction of Section 53 is to seek to repudiate an existing statutory right vested in every person by Section 6. It can only do so with effect from the 5th of February 1999, that is the date when the section came into force. If it had been the intention of the legislature to capture requests for access to information that had already been determined by a public body (and specifically the Head of a Public Body) aware that it might be the subject of a review by the Information Commissioner, then it could have easily have so stated. It did not so state. On the contrary Section 53 applies exclusively to applications upon which no decision has then been made by the public body. On its face, it enables a Minister to refuse access to any information of the nature set out in that section. But in this case the Minister has already made a decision to refuse access to the relevant information. The whole scheme of the *Freedom of Information Act, 1997* is that requests for information, determine whether to allow access and review of any such decisions by the Respondent. Whilst the public body determines to refuse access, its role in this matter is spent save for complying with any decision on review made by the Respondent. In order for the wording of Section 53 to encompass what has in fact occurred in respect of the applications under appeal, different wording was required. In essence, what the Minister has to convince the Court is that Section 53 enables the Minister to ignore the review of the Respondent after

the head has already made a refusal. If Section 53 bears the interpretation which the Minister contends for then its wording in this regard is scant. It does not even allude to the role of the Respondent in terms of an application that has already been determined by the Minister. It is submitted that, when looked at in this light, what the Minister was seeking to achieve was blocking access to documentation in respect of applications made for access thereto which were made after the enactment of this legislation or that were then pending before the Minister. It is submitted that the section does not cover the situation that arises in the instant case.

Counsel referred to the provisions of Section 42 of the Act which gives a right of appeal from a determination of the Information Commissioner on a point of law from a decision. The period allowed for such appeal is four weeks. It is submitted that the legislature has strictly confined the nature of an appeal to the High Court and strictly limited the time for appeal and that this is a strong indication of the desire of the legislature. Mr Brady submits that it is important to have regard to all sections of the Act in construing the specific references made to Section 34(12)(b) which provides as follows:-

> *"In a review under this section*
>
> *(b) a decision to refuse to grant a request under Section 7 shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified"*

It is submitted that the exceptions provided for in the Act have to be restrictively applied. With regard to the grounds or exception contended for by the Minister before the Respondent, these were rejected by the Respondent.

It is accepted on behalf of the Commissioner that the instant case did not involve the administration of justice. The powers of the Commissioner are such as to be possessed only by a limited number of bodies in the State.

SUBMISSIONS ON BEHALF OF THE APPLICANTS FOR INFORMATION:-

On behalf of the Applicants Hugh Mohan, Senior Counsel submitted that Section 53 gives only a limited right to the Minister to refuse information which was sought. In this regard he adopted the submissions previously made by Mr. Brady. He submitted that the Minister's sole argument rests on the applicability of Section 53 of the Act. Had the Act not been passed, his clients would have been entitled to the information which they seek. The grounds of exception set forth in Section 21 (a) and (b) have been abandoned by the Minister. It is submitted that it is necessary to consider the nature of what the Applicants have and it is submitted in this regard that they have rights under the Act. What is essentially the issue is to whether the section must be considered to be merely prospective in its application or otherwise. While Counsel for the Minister submits that the section is prospective and does not affect any vested right, with reference to the definition of retrospectivity appearing in Craies quoted by O'Higgins C.J. in ***Hamilton -v- Hamilton***, Mr. Mohan said in reference to the definition where it indicated that legislation will be considered to be retrospective where it "takes away or impairs any vested right acquired under existing laws, or creates a new application, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed" that the section of the Education Act imposes a new duty on transactions or considerations already passed. A previous request has been made and refused. The refusal of the request was wrongful and this has been so found by the information Commissioner. If a request was made when the Applicant newspapers had the right or entitlement to the information sought, the only provision against the granting of this information to the newspapers concerned is Section 53. This can only be applied prospectively and not retrospectively. In determining whether there are considerations already passed one must ask when were the applications made in the instant case. With regard to whether the rights of the

newspapers are to be considered vested or incohate rights, it is submitted that these cannot be incohate rights and in this regard Mr. Mohan also relies on the provisions of Section 6 subsection (1) of the Act of 1997. It is submitted that the entire act is premised upon the provisions of this subsection. Mr. Mohan referred to portion of the judgment of O'Donovan J. in the case of ***The Minister for Agriculture and Food -v- The Information Commissioner*** (High Court, unreported, 17th December, 1999). He submits that this highlights the fact that the Act conferred vested rights on the Applicant newspapers. This is an expressly granted right and it is not an incohate right. The right is the starting point and anything restricting it must come within the exceptions provided for in the Act. It is submitted that the onus is on the refuser to satisfy the Commissioner that the refusal in question is justified. Mr. Mohan stressed that these vested rights should not and cannot be interfered with by retrospective legislation. If the rights in question are vested rights the Act cannot interfere with same. Mr. Mohan relied upon the dicta Barron J. in ***O'H -v- O'H*** to the effect that there was a general presumption against retrospective construction of a statute and there was nothing in the Act of 1997 to rebut the presumption. Mr. Mohan in particular referred to the absence of any express intention of the part of legislature to take away or impair a vested right acquired under existing laws. It is submitted that a removal or restriction of the right must be clear and unambiguous in view of presumption against retrospection.

Mr. Mohan referred in particular to Bennion on the Interpretation of Statutes and in particular the passage there to the effect that if a provision of a statute is intended to be retrospective in its application that this should be clearly stated for it to be so. It is submitted that one had to have regard to the natural and ordinary meanings of the words or there should be no ambivalence or uncertainty in the provision in question. Mr. Mohan referred to the presumption of prospectivity and in the instant cases he submits that it cannot be read into Section 53 of the Education Act that it refers back.

With regard to authority of ***Quilter -v- Mapleson*** quoted by Mr. O'Donnell, Mr. Mohan adopted the words of Jessel, M.R. where at page 674 of the report he indicated that the question whether an act of parliament is retrospective in its operation must be determined from the provisions of the Act itself, bearing in mind that a statute is not to be construed retrospectively, unless it is clear that such was the intention of the legislature. Mr. Mohan compared the wording of Section 14(9) of the Conveyancing Act of 1881 with the provisions of Section 53 at issue in the instant case.

While Mr. O'Donnell had referred to ***Mullins -v- Harnett*** as supporting the case been made by the Minister, Mr. Mohan submitted that, on the contrary, it supplemented the case being made by the Commissioner and the newspapers. In this regard he adopted the relevant rule of interpretation as quoted by Henchy J. in ***Hamilton -v- Hamilton*** where it is stated "in general when the substantive law is altered during the pendency of an action the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights." In this regard Mr. Mohan stressed the words the pendency of an action. He said that the same principle applies in this case even though there was no action at the relevant time. Mr. Mohan submitted that there was no ambiguity in Section 53 but if there was an ambiguity there was a presumption against retrospectivity. He said this arose from the vested rights of the newspapers. It is submitted that in the instant case Section 53 is not stated to be retrospective, therefore it must be construed to be prospective in its nature. It is submitted that the canons of construction are against retrospectivity and the facts of the instant case are that the requests for information were made pursuant to rights vested in the Applicant newspapers. It is submitted that this was a substantive legal right at the time.

THE MINISTER'S REPLY:-

In reply on behalf of the Minister, Mr. Maurice Collins of counsel submitted as follows: with regard to Section 53 being ambiguous that it could not be plainer. The effect of the submission made by Mr. Mohan on behalf of the newspapers is that the words 'but he may not refuse' should be incorporated into the section by reference to a pending request. The section intended and allows the Minister to refuse a request for information. It is not an issue of ministerial intention but the policy of the Oireachtas which is at the heart of the instant case. The issue is whether statutory rights had been qualified by Section 53. It is submitted that this is down to an issue of construction. The Minister's contention is that this section exists and under it he may refuse the information, that the refusal is not a retrospective act and it is not the exercise of power in a retrospective manner. Mr. Collins adopted the words of Barron J. in the case of ***O'H -v- O'H*** where he said that the distinction had to be drawn between applying a new law to past events and taking past events into account. It is submitted that Section 53 enabled the Commissioner to take into account facts existing at the time of the exercise by him of his powers under the Freedom of Information Act. It is submitted that the factual matrix included all the matters canvassed on behalf of the Minister on the circumstances leading to the decision under Section 34. In this regard it is submitted that in the instant case taking into account past events is not to be construed as being the same as giving the section a retrospective application.

Mr. Collins submitted that a principal argument in this case is whether the section impairs rights which are vested in the requesters or otherwise. One had to have regard to the construction of the section itself to ascertain whether the rights contended for were vested rights. It is submitted that there is confusion in this regard. Counsel for the Respondent Commissioner and for the newspapers acknowledged that if the newspapers had made the request in question after the time when Section 53 came into force that they would not be entitled to the information. It is submitted that the date of the vesting had nothing to do with the date of the request. What is relevant is the date when the matter came before the

Information Commissioner and he made his decision. It is clear that no problem would exist if the legislation had been passed and had come into force at the date when the review commenced. It is submitted that the contentions put forward on behalf of the Respondent and the newspapers is untenable; that Section 6 of the Act is a fons et orego of the right to obtain information, Section 6 involves a statement of principle, and to determine what a person is entitled to may involve the matter having to go on appeal. There are up to four steps that may arise in this regard and only when the process comes to an end may there be vested in any requester a right to any particular information. It is submitted that by the process of going to the Information Commissioner may a right be determined. There is a range of exceptions and qualifications under the Act. The consideration of the Act involves exercises of judgment and opinion. In many cases the Act is not absolute. For example, the granting of information may give rise to a prejudice to national security or to a public body. These are not black and white exceptions but require judgment. It is submitted in this regard that there is no vested right prior to any consideration of these exceptions. Counsel contrasted the facts of the instant case with cases in which the Court found that vested rights existed such as in the cases of ***Hamilton -v- Hamilton*** and ***O'H -v- O'H***. It is submitted that there is a marked contrast between both these cases and the facts of the instant case. It is submitted that only when a request has resulted in a decision can a right have been vested. This had yet to happen prior to the making of his determination by the Information Commissioner in the instant case. On the date on which he made his decision, Section 53 of the Act had come into force and if that is the appropriate date then no question of retrospection applies.

With reference to the decision of O'Donovan J. previously referred to, it was submitted that no consideration of the legal nature of the right whether it be inchoate or vested arose in the particular case in question.

With regard to the submission made by Mr. Mohan, that section 53 imposes a new duty on considerations or transactions already passed, it is submitted by Mr. Collins that this suffers from a logical frailty, that the rights vested only when the process has been determined and at the same point the transaction takes place. It is submitted that at the stage of the Respondent's wrongful application of the Act, the requesters had not got the information sought. The decisions after that point had been made *bona fide*. The Information Commissioner took a different view in making his fresh determination. It is submitted that no suggestion has been advanced that a contrary view was untenable, hollow or contrived. The mere fact of a different view prevailing following a full review does not provide any basis for rewriting history and treating the matter as if events had unfolded differently.

The Information Commissioner was wrong to conclude that there was any analogy with an interference in the judicial process. The same does not arise in the instant case as the process involved is an exclusively administrative one which is self contained in the 1997 Act.

When the Commissioner asked himself the question whether the statute was intended to be retrospective, he had to have regard to the fact that the decision was being made as of that particular date. It was submitted that his error was compounded by the manner of construing Section 53. He effectively asked himself the question whether there were words in the section to make it mandatory for him to give it retrospective effect. While it was clear that there were no express words to be found in the section, it is submitted that nothing turns of the absence of the kind of language which Mr. Brady and Mr. Mohan contended should be present. Each of the parties in this action are relying on the same authorities. It is submitted that one construes a section not by merely looking at the words but looking at the intention on the legislature. It is submitted that one must look at the section in the context of the entirety of Part II of the Act. Counsel referred by reference to the approach of the Court of Appeal in ***Quilter***

-v- Mapleson where it looked at the objective of the statute that the same approach had to be adopted in the instant case. He posed the question: Would it frustrate the policy of the act not to apply the Section? It was submitted by Counsel that the answer should be answered in the affirmative.

CONCLUSIONS

This Court is not concerned with whether there should or should not be access to information to permit league tables to be published in regard to performance of schools. This is something that has already been determined by the Oireachtas in the context of Section 53 of the Education Act of 1997. The sole issue for determination in these proceedings is whether the newspapers in question are entitled to such information as has been requested by them in respect of results in State examinations in 1998, being the year in question before the Education Act came into force and subsequent to the coming into force of the Freedom on Information Act 1997. The central issue is whether the provisions of section 53 of the Education Act 1997 was required to be applied by the Information Commissioner in his determination such as to preclude the information requested being granted to the Applicant newspapers. In determining this issue a further issue arises, namely, whether there exist in favor of the Applicant newspapers vested rights to the information in question and if the answer to this is in the affirmative whether the provisions of Section 53 can be applied such as to preclude the granting of the information in question.

Insofar as the determination to be made by the Information Commissioner was based upon the circumstances then prevailing at the time of his decision and insofar as his decision involved a fresh appraisal of the facts and circumstances of the case, I am of the opinion that the provisions of the Act cannot be construed as granting a vested right in favour of an Applicant although the Act is framed in a manner such as to confer *prima facie*

entitlement to information. The Act is clearly framed in line with its policy as set forth in the long title to the Act. Such a right as does exist involves an application for the information in question and a positive determination to entitlement of the right.

In the first place importance must be attached to the fact that the nature of the appeal agreed between the parties arising under Section 34 of the Act is by way of a hearing *de novo* by the Information Commissioner. This is a crucial fact to the argument presented on behalf of the Minister. In light of this fact it is clear that the decision that was to be made by Information Commissioner in light of the appeals taken to him were to made in light of the facts and circumstances applying at the date of the review by him and not those facts and circumstances pertaining on the date of the original decision. It is further to be noted that the hearing before the Information Commissioner has been agreed between the parties not to amount to the administration of justice. In light of these facts I am of the opinion that there is no bar to Section 53 of the Education Act of 1998 applying to the subsequent decision of the Information Commissioner made on 7th October, 1999 in circumstances where the relevant provision of the Education Act came into force on the 5th February, 1999. In light of this fact I conclude that in the instant case the application of Section 53 was retroactive rather than retrospective. I am satisfied that if the request for information was one made to the head of the Department on the 7th October, 1999 that he would have been entitled to refuse access to the information sought in the instant case. Clearly if section 34 of the Act were to be construed narrowly as involving merely a review of an earlier decision and not involving a rehearing then the provisions of Section 53 could not apply to the determination of the Information Commission without it having a retrospective effect. In particular I conclude that the provision of Section 53 must apply in conjunction with Section 32 of the Freedom of Information Act of 1997 which permits a head to refuse to grant a request under Section 7 in circumstances where

"the disclosure of the record concerned is prohibited by any enactment or the non disclosure of the record is authorised by any such enactment...."

In the instant case the provisions of Section 53 are stated to apply "notwithstanding any other enactment" and they permit the Minister to refuse access to information which would enable the compilation of information that is not otherwise available to the general public in relation to the comparative performance of schools in respect of the academic achievements of students enrolled therein and further to refuse access to information relating to the identity of examiners. It has to be stressed that the policy of refusing access to this information is one that has been laid down by the Houses of the Oireachtas and that the decision of this Court is not in any way to be construed as a judgment upon the policy in question.

I am further satisfied in the context of Section 53 of the 1998 Education Act that it does not take away or impair any vested right. I am satisfied that a right in the instant case of the Applicants was a right to apply for the information but did not vest until a decision had been made notwithstanding the terms of the Act itself. It is clear that in the instant case there is no interference with the judicial process whatsoever.

I am particularly influenced by the statement of Mr. Justice Barron in the case of ***O'H -v- O'H*** where he drew a distinction between applying the new law to past events and taking past events into account. As previously referred to herein, he indicated that to do the latter is not to apply the Act retrospectively. Furthermore as indicated in the quoted passage from Craies on Statute Law "a statute is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing." In the instant case it is clear that the law takes past events into account.

In light of the conclusion that I have reached in relation to the nature of the application of Section 53 of the Education Act of 1998 it is strictly speaking not necessary to look at the provision of Section 53 to see whether it is clear and unequivocal in its terms in applying to the situation facing the Information Commissioner in the instant case. However, I am satisfied that, even if Section 53 were to be construed as being retrospective in its effect, the intention of the provision was such that it should apply to the situation pertaining in the instant case. I am further satisfied that even if one was to conclude that the provisions of Section 53 failed to include transitional provisions expressly that this Court is required to draw such inferences as to the intended transitional arrangements as, in the light of the interpretative criteria, it considers the Oireachtas to have intended. I am satisfied that the Oireachtas did not intend to leave a lacuna whereby an area of exception to the general rule of non-disclosure of information should exist. Accordingly I would allow the appeal of the Minister pursuant to Section 42 of the Freedom of Information Act of 1997 in circumstances where I have concluded that the Information Commissioner erred in law in his construction and/or application of Section 53 of the Education Act, 1998.