THE HIGH COURT
JUDICIAL REVIEW

Record No.: 2013/765 JR

Between:-

MAXIMILLIAN SCHREMS

Applicant

-and-

DATA PROTECTION COMMISSIONER

Respondent

OUTLINE SUBMISSIONS ON BEHALF OF THE RESPONDENT IN RESPECT OF AN AMICUS APPLICATION BROUGHT (POST-JUDGMENT) BY DIGITAL RIGHTS IRELAND LIMITED

A) Introduction

1) Subsequent to the delivery of the judgment of the Court in this matter on 18 June 2014, the Commissioner was served with a motion, issued on 26 June 2014, in which Digital Rights Ireland Limited ("DRI") seeks to intervene as *amicus curiae* to the case.

2) The position of the Commissioner is that he is not objecting to the application by Digital Rights Ireland Limited but he does wish to make certain observations by way of assistance to the Court in respect of the appropriate legal principles to be applied in the exercise of its discretion.

B) Chronology

3) The following is a short chronology of the proceedings to date:

   (i) On 21 October 2013 the Applicant was granted leave to

bring the within judicial review proceedings;

(ii) Opposition papers were served by the Respondent on 16 December 2014.

(iii) A trial date was fixed on 28 January 2014.

(iv) That trial duly took place on 29 April 2014.

(v) Judgment was delivered on 18 June 2014.

(vi) The within motion was issued on 26 June 2014.

C) Relevant legal principles

4) An *amicus curiae* has been defined as:

> *"A friend of the court, that is to say a person, whether a member of the bar not engaged in the case or any other by-stander, who calls the attention of the court to some decision, whether reported or unreported, or some point of law which would appear to have been overlooked."*[1]

5) The first case to address the issue in this jurisdiction at Supreme Court level was ***H.I. v Minister for Justice, Equality and Law Reform*** [2003] 3 IR 197. Giving the judgment of the Supreme Court, Keane CJ stated:

> *"It is … a jurisdiction which should be sparingly exercised. Clearly, the assistance to be given to an appellate court will be confined to legal arguments and supporting materials. It is not necessary to consider the circumstances in which it would be appropriate for the High Court to appoint an amicus curiae. It is sufficient to say that, as was pointed out in United States Tobacco Company v. Minister for Consumer Affairs (1988) 83 A.L.R. 79, the position of an amicus curiae is quite different from that of an intervener. It was said in that case that an amicus curiae, unlike an intervener, has no right of appeal and is not normally entitled to adduce any evidence."* (page 204)

[1] Jowitt's *Dictionary of English Law* (2nd ed; 1977) p 98

6) In ***O'Brien v Personal Injuries Assessment Board*** [2005] 3 IR 328 Finnegan P held that the Law Society could not be joined to the case as an intervenor as there was no general jurisdiction for this. However it could act as an amicus curiae. Finnegan P identified the following considerations to which the Court should have regard in connection with an application for appointment as amicus:

(i) The applicant should have a bona fide interest and should not just be acting as a "meddlesome busybody";

(ii) The case should have a bona fide public law dimension; and,

(iii) The decision should be one that may affect a great number of persons.

7) On the particular facts of the case before him, Finnegan P concluded that the Law Society of Ireland should be appointed amicus, noting the following:

> "*I am satisfied given, again, the history of involvement of the society that that body has not just a sectional interest, that is the interest of its members, but a general interest which should be respected and to which regard should be had"* (page 333).

8) In ***Fitzpatrick v FK*** [2007] 2 IR 406, the High Court refused an application by a society representing members of the Jehovah's Witness' to join proceedings as amicus. Clarke J reviewed the law (including a decision of the Supreme Court in *Doherty v. South Dublin County Council* [2007] 1 IR 246) and stated as follows:

> *"For the reasons identified by Macken J. in the course of her judgment in Doherty v. South Dublin County Council [2006] IESC 57, [2007] 1 I.R. 246, it seems clear that amongst the important factors to be taken into account are:-*
>
> *(a) whether the proposed amicus curiae might be reasonably said to be partisan or, on the other hand, to be largely neutral and in a position to bring to bear expertise in respect of an area which might not otherwise be available to the court; and*

(b) the stage which had been reached in the proceedings with particular reference to a distinction between trial courts and appellate courts.

In addition, it seems to me that a factor of particular importance should be the extent to which it may be reasonable to assume that the addition of the party concerned as an amicus curiae *might be said to bring to bear on the legal debate before the courts on an issue of significant public importance, a perspective which might not otherwise be placed before the court. In similar vein it seems to me appropriate for the court to consider whether there is a risk that an issue of significant public importance might be debated in circumstances where there may not be an equality of arms."* (pages 415-6)

9) Having considered the facts of the particular case before him, Clarke J stated that:

"I have therefore come to the view that the majority of the criteria properly applied to a consideration of whether to join a party as amicus curiae point against joining the society at this stage in these proceedings. The society would adopt a partisan approach which is unlikely to differ, to any significant extent, from that likely to be adopted by the first defendant. There would be risk, certainly at the trial stage, associated with the society being involved in proceedings which involve the facts of the individual case. This arises, not least, from the fact that representatives of the society appear to have had a role in the events leading to the application to the court. Finally, it does not appear, at this stage, that the presentation of the first defendant's case will lack in resources or that it is likely that the society would bring to bear a perspective on the proceedings that would not otherwise be present." (page 418)

10) In ***EMI Records (Ireland) Ltd v UPC Communications Ireland Ltd*** [2013] IEHC 204, Kelly J refused an application by DRI to be appointed as *amicus curiae* to the case. Kelly J stated:

"The applicant cannot be equated with bodies which to date have been joined as amici. It is not charged in either domestic or international law with a public role in the area

which is the subject of this litigation." (para 62)

11) Amongst other things, Kelly J held that, having regard to the facts of the particular case before him, and public commentary made by the Applicant in connection with the subject matter of the proceedings, the company was not neutral on the particular issue before him and would not provide to the Court a perspective on matters of principle or public importance which would not otherwise be available to it.

12) Kelly J held:

> *"The applicant cannot be equated with bodies which to date have been joined as amici. It is not charged in either domestic or international law with a public role in the area which is the subject of this litigation.*
>
> *A reading of the affidavit grounding this application would suggest that the applicant is a neutral body wishing to assist the court from that standpoint of neutrality. But the investigations carried out on behalf of the plaintiffs and deposed to in the affidavit of Ms. Sheehy have cast an altogether different light on the position. It is clear that the applicant's solicitors have been conducting what they call a "public interest campaign" with one of them identified as a press contact on the "Stop SOPA" campaign. Their website made their views clear that the Minister ought not to sign into law S.I. 59 of 2012. When he had done so, the decision was described as a disgraceful one.*
>
> *Mr. McIntyre addressed members of the public on his website and asked for support for the campaign being conducted under the Stop SOPA banner. I think it is particularly significant and somewhat disturbing that his website contained a redacted section of the UK Ofcom report showing a way of circumventing blocking orders made by the United Kingdom Courts.*
>
> *It is difficult in these circumstances to see how the applicant could be regarded as a neutral party. I am unable to do so."* (paras 62-65)

13) Kelly J concluded:

> *"Insofar as reliance is placed upon the fact that this is a test case in relation to what is described as a "novel statutory power", I am of opinion that that argument is not made out. It is undoubtedly true that this is the first time that a court in this jurisdiction is being asked to make orders authorised by S.I. 59 of 2012. But that statutory instrument does no more than give effect to Article 8.3 of the Copyright Directive of 2001 in respect of which there is now a body of case law both in the European Court of Justice, the United Kingdom Courts and to a limited extent, the Irish courts.*
>
> *Insofar as the court may be required to conduct a balancing exercise or to direct a person be notified of the substantive application, I am of opinion that it can do so well within the parameters of the litigation as constituted at present. I am satisfied that the court will, at trial, have full submissions made to it on the relevant legal authorities. If dissatisfied with the material put before it, the court can seek from the present parties any additional assistance which it may need. I do not believe that the relevant Directives require the appointment of an amicus curiae. Even if they did, I do not believe that the current applicant would be an appropriate entity to fulfil that role."* (paras 70-71)

D) <u>The Commissioner's observations</u>

14) As noted above, the Commissioner is not objecting to the *amicus* application made by DRI, DRI being an organisation he holds in high regard and whose *bona fide* interests in the subject matter of the within proceedings is acknowledged. The Commissioner also fully respects the fact that the decision whether or not to accede to the application is a matter for the discretion of the Court. The Commissioner does, however, wish to make the following observations in relation to the application.

15) As a preliminary point, and acknowledging that the formulation of the reference questions is a matter for the Court, the Commissioner considers that the reference questions as presently formulated are entirely appropriate, having regard to the analysis contained in the Judgment delivered herein on 18 June 2014. The Commissioner makes no application for any adjustment to those questions.

16) The Commissioner notes that DRI's application is not one made at appellate stage. Mindful of the rationale underpinning the Courts' established reluctance to appoint parties as *amicus* save at appellate stage, the Commissioner observes that this would appear to be a point of relevance in the present application.

17) The Commissioner notes that, at paragraph 26 of the submissions filed by DRI, reference is made to DRI's intention to adduce *"expert opinion and research … made available to it from leading experts in the areas of technology, society and the law …"*. Separately, the Commissioner notes that DRI also intends to ask this Honourable Court to refer an additional question for determination by the ECJ.

18) In circumstances where he is satisfied that the reference questions as presently formulated are appropriate, the Commissioner would observe that, in this case, the role envisaged by DRI for itself, if appointed as *amicus*, does not appear to be confined to the making of submissions on the particular questions formulated by this Honourable Court, but extends to re-formulating those questions and, in turn, introducing factual and/or expert evidential material in support of the position it would then advocate for.

19) The Commissioner observes that, expressed in these terms, the *amicus* role as envisaged by DRI appears to go considerably further than the role typically played by parties appointed as *amicus*. It may also be said to give rise to a question as to whether the particular role envisaged by DRI for itself in this particular case presents a difficulty in terms of the 'neutrality' requirement referred to in the case-law, particularly in circumstances where that expanded role is not one that would be fulfilled by a statutory body with a defined public role.

20) In the course of this Court's Judgment, reference is made to the fact that, in the within judicial review proceedings, neither Commission Decision 2000/520/EC nor Directive 95/46/EC have been challenged in and of themselves. In that regard, the Commissioner notes that the additional reference question proposed by DRI appears to target, directly, the Commission Decision and, as such, would not appear to be appropriate.

21) Separately, the Commissioner notes that, at paragraph 22 of its outline legal submissions, DRI makes reference to the fact that it

seeks to address questions of national law as well as European law. The Commissioner considers that, if appointed as *amicus*, it would not be appropriate for DRI to address any issue of national law in circumstances where the entire thrust of this Court's Judgment has been to say that the key question that arises for determination is one that arises under European law.

22) Finally, the Commissioner would observe that the nature and extent of the particular expertise that DRI would be in a position to bring to bear in connection with the reference questions as presently formulated (and which said expertise might not otherwise be available to the Court) does not appear to have been fully developed in its application to date. The Commissioner considers it appropriate that DRI would supplement its submissions to address this point at the hearing of the within application.

Paul Anthony McDermott
1 July 2014