

THE HIGH COURT

[2020 No. 2651 P]

BETWEEN

DAVID KAVANAGH

PLAINTIFF

AND

THE CARETAKER GOVERNMENT OF IRELAND

AND

THE PRESIDENT OF THE REPUBLIC OF IRELAND

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Allen delivered on the 11th day of May, 2020

1. On 8th April, 2020 I heard an *ex parte* application by Mr. David Kavanagh, who acts for himself, for an interim injunction suspending the operation of the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act, 2020. The premise of the application was that the legislation was somehow invalid because no new Government had been appointed following the dissolution of Dáil Éireann on 14th January, 2020 and the general election which was held on 8th February, 2020.
2. On the same day, for the reasons given in a short *ex tempore* judgment in open court, I refused the application.
3. On 27th April, 2020 Mr. Kavanagh sent to the registrar a form of notice of motion which he proposed to issue, returnable for 29th April, 2020 seeking an order for the release to him of a transcript of the digital audio recording ("*DAR*") of the hearing before me on 8th April, 2020. The grounding affidavit sworn in support of the application does not disclose the reason why the transcript is sought but the notice of motion indicates that the transcript is required for the purposes of an appeal. The form of notice of motion was addressed to the Chief State Solicitor, the Registrar of the Supreme Court and unidentified "*solicitors for the caretaker Government of Ireland and the President of the Republic of Ireland.*"
4. Order 123, r. 9 of the Rules of the Superior Courts allows any party or person who seeks access to any part of a record of proceedings which is held by or for the High Court to apply to the court for such access. The rule provides that any such application should be made by motion on notice to the other party or parties to the proceedings, grounded on an affidavit. Leaving aside the obvious misconception and misdescription in the title to the proceedings, I do not believe that, purposively construed, the rule requires notice to be given to the named defendants in a case where the record concerned is the record of an *ex parte* application in proceedings which have not been served and of which the named defendants were not on notice.
5. Order 123, r. (9)4 allows the court to permit an applicant to have access to the relevant record where the court considers it necessary in the interests of justice to do so. As the Court of Appeal recently explained in *Bank of Ireland v. Gormley* [2020] IECA 102, access to the *DAR* is not automatic or something to which an applicant – even if a party to the

proceedings – is entitled as of right. There is an onus on the applicant to give a legitimate reason for the request.

6. The intention of an applicant for access to the DAR to pursue – or perhaps defend - an appeal is, as in this case, frequently the reason given. Mr. Kavanagh has a right of appeal under the Constitution and I am satisfied that it is in the interests of justice that he should have access to the DAR.
7. The application on 8th April, 2020 was made, and my decision given, in open court. In the circumstances it seems to me that nothing would be achieved by requiring Mr. Kavanagh to issue and serve a notice of motion and I am satisfied that the application is one which can properly be dealt with *ex parte*.
8. By O. 123, r. 9(5), unless the court otherwise directs, access to the relevant record where permitted is to be afforded solely by the provision to the applicant of a transcript, on payment to the transcript writer of the fee for producing the transcript. Mr. Kavanagh asks for the “*oral transcripts [DARS]*” which I understand to mean a transcript, rather than a copy of the audio recording. If I misunderstand what Mr. Kavanagh seeks and he wished to have the audio recording, I see no reason to depart from the ordinary rule that access is to be afforded by the provision of a transcript.
9. In light of the Covid-19 pandemic and in accordance with the practice direction given by the Chief Justice and the Presidents of each court jurisdiction on 24th March, 2020 a copy of this ruling has been sent to Mr. Kavanagh before being posted on the Courts Service website.