

## **Ireland, Graham Dwyer v. Data Commissioner, The High Court, n. 351/2015, 6 December 2018**

Area of law

Data protection - Data retention

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Summary Facts Of The Case

On 27th March, 2015, Mr Graham Dwyer was convicted by a jury of the murder of Ms. Elaine O'Hara for which he received a life sentence on 25th April, 2015. The investigation leading to the trial used the mobile telephony data generated by the phone provided by the Plaintiff's employer to the Plaintiff. This data was retained and accessed under the 2011 Act.

Dwyer claimed that data gathered from his phone, under the 2011 Communications (Retention of Data) Act, should not have been used at his 2015 trial before the Central Criminal Court.

The data, which was generated by Dwyer's work phone, placed the phone at a specific place at a particular time. That data was used to link Dwyer to another mobile phone the prosecution says Dwyer acquired and used to contact Ms O'Hara.

Mr Dwyer claimed that Section 3(1) of the 2011 Act contravened Article 15(1) of the 2002 Directive read in light of articles 7, 8, 11 and 52 of the Charter and Articles 8 and 10 of the ECHR, in so far as it permits the retention of telephony data in a manner which is general and indiscriminate.

This part of the claim is in addition to the plea that provisions of the 2011 Act are repugnant to the Constitution having regard to the duty of the State under Article 40.3.1? (to vindicate personal rights), 40.3.2? (protect from unjust attack) and 40.6.1? (liberty to exercise right of expression).

The State had argued that the laws that allow the authorities to access and utilise retained data are important in the detection, prevention and investigation of serious crime, including cybercrime, organised crime gangs, murder and terrorism. The Irish High Court has ruled that Irish law on the retention of telecommunications data contravenes EU law and the European Convention on Human Rights.

The Court said this ruling does not mean telephone data accessed and retained contrary to EU law used by the prosecution in Dwyer's trial will lead to the quashing of his murder conviction. Stressing the primacy of European law, it found that sections of Ireland's retention laws contravene EU law and findings of the European Court of Human Rights. He said the European Court had found the fighting of serious crime cannot justify the general and indiscriminate retention regime.

The Court remarked that the state should tread carefully when trenching upon the dignity and privacy of the human person in the sphere of telephony data retention and access.

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### Relation to the scope of the Charter

Recalling Digital Rights Ireland, which declared invalid the Directive of 2006 on data retention, the Court held that the obligation on service providers to retain data for the purpose of making it accessible to the competent national authorities did raise questions under Arts. 7 and 8.

The 2006 Directive laid down the obligations on service providers to retain certain data which was generated or processed by them and to ensure that that data was available for the purpose of investigation, detection and prosecution of serious crime, as defined by each Member State in national law.

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### Sources - EU and national law

Arts. 1(3) and 15 Directive 58/2002/EC

### Sources - ECHR

Arts 8 and 10 ECHR

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### Sources - CJEU Case Law

*Digital Rights Ireland Ltd (C-293/12) v Minister for Communications and Others*, (Joined Cases C-293/12 and C-594/12, 8 April 2014, ECLI:EU:C:2014:238

*Tele 2 Sverige AB v. Post- och telestyrelsen, and Secretary of State for the Home Department*, Joined Cases C-203/15 and C-698/15, 21 December 2016, ECLI:EU:C:2016:970

*Ministerio Fiscal*, Case C-207/16, 2 October 2018, ECLI:EU:C:2018:788.

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### Sources - ECtHR Case Law

*Big Brother Watch and others v. the UK* (App. Nos. 58170/13, 62322/14 & 24960/15, ECtHR 13th September, 2018)

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### Comments

Constitutional aspects and EU law

The Court held that “*the requirements of the Charter to the Constitution*” is still founded because “*the Irish Superior Courts have exclusive jurisdiction to define the scope and limits of the rights protected under the Constitution which have been guaranteed over many decades long before the Charter was proclaimed or given legal effect*”. Further, *the logic that informed the ECJ analysis does not necessarily apply in precisely the same way to constitutional analysis*”.

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