UNAPPROVED

THE COURT OF APPEAL

Record Nos.: 2022 182/2022 184

Edwards J. **Neutral Citation Number [2023] IECA 125**

McCarthy J.

Donnelly J.

BETWEEN/

STEPHEN TALLON

RESPONDENT

-AND-

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND, AND

THE ATTORNEY GENERAL

APPELLANTS

-AND-

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

JUDGMENT of Ms. Justice Donnelly delivered on this 25th day of May, 2023.

Introduction

1. This is an appeal brought by the Director of Public Prosecutions ("the DPP"), Ireland, and the Attorney General ("the State") seeking to set aside the decision of the High Court (Phelan J.) ([2022] IEHC 322). Phelan J. granted orders of certiorari quashing the *civil order* made against the respondent, Mr. Tallon, by Gorey District Court on 31 August 2020 pursuant to the Criminal Justice Act, 2006 ("the 2006 Act"), and the subsequent convictions ensuing from breaches thereof.

2. Part 11 of the 2006 Act is entitled "Civil Proceedings in Relation to Anti-Social Behaviour". Section 113(2) of the 2006 Act provides that "a person behaves in an anti-social manner if the person causes or, in the circumstances, is likely to cause, to one or more persons who are not of the same household as the person—

(a) harassment,

(b) significant or persistent alarm, distress, fear, or intimidation, or

(c) significant or persistent impairment of their use or enjoyment of their property."

3. The process which may result in a civil order being made by the District Court can only commence if a member of An Garda Síochána issues "a behaviour warning to a person who has behaved in an anti-social manner" (s. 114(1) of the 2006 Act). The behaviour warning must indicate certain matters, such as a statement that the person has behaved in an anti-social manner and indicating what that behaviour was and when and where it took place, demanding that it ceases, and indicating that failure to comply or the issuance of another behaviour warning may result in an application for a civil order. Time limits are provided for how long the notice will remain in force.

4. If that person does not comply with a behaviour warning or has been issued three or more behaviour warnings in less than six consecutive months, a member of An Garda Síochána not below the rank of Superintendent may make an application to the District Court for a civil order prohibiting that person from continuing to engage in the specified anti-social behaviour (s.115(3)).

5. Section 115 permits the District Court, on application to it, to make an order ("a civil order") prohibiting a person from doing anything specified in the civil order if the District Court is satisfied, to the civil standard of proof, that

"(a) the respondent has behaved in an anti-social manner,

(b) the order is necessary to prevent the respondent from continuing to behave in that manner, and,

(c) having regard to the effect or likely effect of that behaviour on other persons, the order is reasonable and proportionate in the circumstances."

6. The 2006 Act provides a process for a legal aid certificate to be granted, by the court, in respect of an application for a civil order in s. 118. Mr. Tallon chose to represent himself at the hearing of the application.

7. The person who is the subject matter of the civil order or a senior member of An Garda Síochána may apply to court, on notice, to vary or discharge a civil order (s.115(7) of the 2006 Act). The civil order may be appealed by the person who is subject to the order. The appeal must be brought within 21 days to the Circuit Court. Section 116(3) provides that notwithstanding the appeal, "the civil order shall remain in force unless the court that made the order or the appeal court places a stay on it". The appeal is "in the nature of a rehearing of the application" (s.116(3)).

8. A criminal offence is committed under s. 117(1) of the 2006 Act where a person who is the subject of a civil order without reasonable excuse does not comply with the directions of that order.

9. Mr. Tallon was convicted of two offences contrary to the 2006 Act and of two offences under the Criminal Justice (Public Order) Act, 1994 ("the 1994 Act"). Mr. Tallon challenged the legality of the civil order made against him and the subsequent criminal convictions. He also challenged s. 115 and s. 117 of the 2006 Act as being repugnant to his constitutional rights. He was represented by solicitor and counsel in the High Court but, it seems, he did not retain them for this appeal. Mr. Tallon did not file a

respondent's notice nor any written submissions to the Court. He appeared in person at the hearing of this appeal and made oral submissions on his own behalf.

10. The Irish Human Rights and Equality Commission ("IHREC") made an application pursuant to its statutory function under s. 10(2)(e) of the Human Rights and Equality Commission Act 2014 for liberty to appear as *amicus curiae* in this case. This was granted by the Court, to which they made written and oral submissions. IHREC considers that these proceedings raise concerns as to human rights, namely the rights to freedom of expression, the right to trial in due course of law, and the right to equality.

11. The DPP and the State were separately represented at the appeal and made written and oral submissions to the Court.

Background

12. Mr. Tallon received five behaviour warnings over the period encompassing June and July 2020. The warnings received by Mr. Tallon referred variously to "excessively loud" public-speaking, "preaching and commentary", which caused "interference", "distress and intimidation", "annoyance and concern" to members of the public and people working nearby.

13. An application for a civil order was made by Superintendent Doyle of Wexford Garda Station. Neither Mr. Tallon nor the Superintendent were legally represented in the District Court at the hearing of the application. This Court was informed that to the best of the knowledge of the legal representatives for the DPP, the State and the *amicus,* this was the first such order made by the District Court. In light of what has transpired in this case, it is regrettable that no legal representative was present to ensure that the District Court judge would have every legal assistance in dealing with this application.

14. Before the District Court, evidence was received from six Garda witnesses and nine civilian witnesses, all of whom reiterated the disturbance, distress, and annoyance

caused by Mr. Tallon's heralding. The civilian witnesses included members of the public who lived locally and business owners with premises in the centre of Wexford town. Some business owners gave evidence that Mr. Tallon's preaching, through an electronic speaker, described by one witness as "noise pollution", was a deterrent to customers who did not want to listen to his statements. One witness' evidence, which was not atypical, described a situation which had gone on for a number of years in which he espoused his version of "a bible or espousing on his theories on COVID or his version of morals or his version of how the gardaí behave, how the legislature behaves, how the government behaves, how the judges behave and it is incessant and I described it to one of the other business - it's like - almost like a worm in my ear because I try and block it out but once it registers at all, it's in my ear all day long and I have, on occasion, had to leave the office early because I just wasn't able to do my work."

15. Mr. Tallon, in evidence before the District Court, said there was a lack of understanding in Wexford that street preaching was a cornerstone of our society and that freedom of expression applies to it. He denied having made any personal remarks to people or isolating them or addressing them unless they approached him. He said he would answer questions raised by people on the street with a biblical quote. He was genuinely trying to reach out to people. He said he had chosen the Bullring because it was the centre of town and thus the centre of activity.

16. The District Court heard submissions from the Superintendent who said all the elements required under the 2006 Act were present. The judge then heard from Mr. Tallon who challenged the submission that this was costing the owners business. He also said that he had not engaged in any activity that was interfering with another person or harassing or causing alarm or distress.

17. The District Court judge gave judgment as follows:

"... I've listened very carefully to the evidence of all the people who took the trouble to come here to court today and the garda witnesses and I've also heard Stephen give his side of the story and he disputes the accounts and narratives and interpretations of the various witnesses. But having listened carefully to all the evidence in this case, I'm fully satisfied that the State has proven its case to the required standard and accordingly, I will make an order in terms of the notice of application… (*see below*). And I'd just like to thank the State for the professional manner in which the case was presented. I'd just also like to add if the defendant finds some way to circumvent this order, I'm here for the whole month of September and I'd urge the State not to let it drag on and cause any more disruption to these people and the rest of the people of Wexford but to move swiftly to deal with the situation…."

18. The Superintendent immediately thereafter sought, as part of the order, a prohibition on Mr. Tallon from publishing the case on Facebook or social media which the Superintendent said again may cause distress to people. The judge did not do so. The Superintendent then said it was the intention of the Gardaí to arrest Mr. Tallon and bring him to court if he breached the order. The Superintendent asked that if the respondent saw fit to appeal the order that the civil order would still stand unless the court said differently. The judge replied as follows: "Yes. Yes, Stephen, you have to desist in the behaviour that's been complained of here today forthwith and there's to be no – if you want to appeal this order and its's entirely your right to appeal this order to the circuit court". Mr. Tallon interjected "understood" and the judge said "but there'll be no stay in the event of an appeal. You are prohibited from engaging in that behaviour."

19. The operative part of the civil order made by the District Court reads as follows:

"HEREBY ORDERS pursuant to section 115 of the said Act of 2006 that the respondent be prohibited from engaging in public speaking and recording anywhere within the environs of Wexford Town including North Main Street, South Main Street Bullring, Selksker *(sic)* Square at any time"

20. The Superintendent in opening the application is recorded in the exhibited transcript as having said that his application was for a civil order prohibiting Mr. Tallon "from engaging in public speaking *or* recording anywhere in the environs…" (*Emphasis added*). Only one witness appears to have mentioned "recording" and it appears from the transcript that she was repeating what he "went on last week about". Thus, little or no attention appears to have been placed on the question of what precisely the word recording was meant to address.

21. The civil order contains a warning that a person who does not comply with the order, without reasonable excuse, commits a criminal offence and sets out the penalties, namely a fine not exceeding €4,000 or to imprisonment for a term not exceeding six months or to both. Pursuant to the 2006 Act, the civil order was to last for two years from the date it was made, no other lesser time period being specified in the order (see s.115(6) of the 2006 Act). It does not appear to have been raised in the High Court, nor in this appeal, but it is striking that this time period of the civil order is not stated on the face of the order which is required by the form provided by the District Court Rules (Form No. 96C.2). While that is not germane to the issues to be decided, it is emblematic of the problems in this case which derive in part from this being the first occasion, or one of the first occasions, on which such an order was made and the absence of input from any lawyers representing the parties in the District Court.

22. On 2 November 2020, Mr. Tallon appeared before the District Court on four separate charges, two charges for breach of the civil order contrary to s. 117 of the 2006 Act,

and two separate charges pursuant to sections 7 and 8 of the 1994 Act respectively. He was legally represented on that day.

23. The evidence before the District Court was that Mr. Tallon was arrested later on the day the civil order was made for allegedly breaching that order. The evidence was that on 31 August 2020, Mr. Tallon left the District Court and returned to the Bullring and was observed by the Garda engaged in speaking – no evidence was given that he was speaking with a loudspeaker - and he was heard to say "that no court in the land could stop him from his right as an Irish man." He was brought before the District Court and charged under s. 117(1)(b) with a breach of the civil order made earlier that day without reasonable excuse. Further charges arose under ss. 7 and 8 of the 1994 Act in relation to an event on 19 September 2020 in related to an allegation of displaying a sign "which was threatening, abusive, insulting or obscene with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace might have been occasioned." Finally, on 7 October 2020, he was arrested again at the Bullring and charged with an offence under s. 117(1)(b) of the 2006 Act. The evidence to the District Court was that he was singing and the arresting Gardaí said "I interpreted that Mr. Tallon was engaging in public speaking. He was referencing Jesus."

24. Mr. Tallon was convicted on all four counts in Gorey District Court (by a different judge from the judge who made the civil order). He was sentenced to four months on both of the s. 117 charges, to be served consecutively in consideration of the ss. 7 and 8 charges under the 1994 Act. The District Judge concluded that while Mr. Tallon's displays did not meet the definition of 'obscene' under s. 7 of the 1994 Act, he was satisfied nonetheless that they were offensive and insulting and could be described as hate speech. Those offences were taken into consideration with the conviction in respect of the offence under s. 117(1)(b). His sentence was backdated to 7 October

2020 which was the date he was refused bail having been charged with the second s. 117(1)(b) offence.

25. An appeal against these convictions was lodged, and Mr. Tallon appeared before Wexford Circuit Court on 6 November 2020. On that day, his counsel informed the court that leave to apply for judicial review had been sought from the High Court in relation to the District Court convictions. He sought to have the Circuit Court proceedings stayed pending the outcome of the High Court proceedings. The Wexford Circuit Court Judge agreed to the stay on the condition that Mr. Tallon gave an undertaking to refrain from preaching in Wexford County until the conclusion of the High Court proceedings, and until any remaining matters were dealt with by the Circuit Court. Mr. Tallon gave that undertaking.

High Court Proceedings

26. In the High Court, three orders of certiorari were made in favour of the respondent: one in relation to the civil order made pursuant to s. 115 of the 2006 Act dated 31 August 2020, one in relation to the criminal conviction under s. 117(1)(b) of the same, and one in relation to the District Court Order made pursuant to s. 117(1)(b) of the same. He was not granted orders of certiorari in respect of the convictions under ss. 7 and 8 of the 1994 Act and there has been no appeal or cross-appeal by Mr. Tallon.

27. The grounds of challenge to the civil order can be characterised as those typically associated with a challenge by way of judicial review. It was claimed that for s. 115, and therefore any civil order made thereunder, to be consistent with the Constitution, the prohibited acts must only be those that themselves are antisocial. It was also claimed that the constitutional right to freedom of expression could only have been prohibited by expression of convictions or opinions which are inherently anti-social by virtue of their content or by virtue of being expressed in a language or manner which

constituted anti-social behaviour. The statement claimed that the temporal reach as well as the breadth of the prohibition on public speaking was not permitted by the legislation, but if it were so permitted, the section itself was unconstitutional. Extensive complaint was made about the manner in which s. 117 criminalised behaviour by the applicant which was not criminal if committed by another person.

28. The trial judge did not accept the submissions of the DPP and the State that the court should refuse the applications for judicial review on the ground that there were alternative remedies available in respect of challenging the civil order and the criminal convictions. Her reasoning for rejecting those submissions will be addressed later in this judgment.

29. Various preliminary objections made by the DPP and the State as to the manner in which the application had been made, such as alleged non-disclosure and the non-joinder of the judge to the proceedings, were rejected by the trial judge. Although the State raised a ground in its notice of appeal regarding, in particular, the "significant and unexplained default regarding directions for written submissions" which resulted in the State's time for preparing submissions being constrained, these objections were not actively pursued in the appeal.

30. The trial judge granted these orders of certiorari having concluded that the orders made under ss. 115 and 117 of the 2006 Act were *ultra vires*. In the course of her judgment, she observed that the open definition of "anti-social behaviour", combined with the low evidential standards required, gave rise to the potential for an unwarranted interference with individual rights in people whose views or behaviours are unpopular, distasteful or discriminatory, but not criminal. While some of the behaviour may amount to a civil wrong (like nuisance), other behaviour may not constitute any wrong at all.

Accordingly, she said the District Court had to be vigilant in the exercise of the wide powers granted to it in Part 11 of the 2006 Act.

31. In considering whether the orders made under s. 115 and s. 117 respected Mr. Tallon's right not to be tried on a criminal offence save in due course of law, the trial judge relied upon the well-known dicta in *King v Attorney General* [1981] IR 233. She held that where the civil order was sufficiently closely tailored to the evidence given as to the condemned anti-social behaviour, then a recurrence of that behaviour might justify criminalisation of a defendant having regard to the principles of legal certainty. She held that this civil order did not meet those standards having regard to the facts. The order went too far in prohibiting all public speaking and not just loud, persistent, aggressive, and offensive speech. She was of the view that an order had to be tailored to the behaviour which was found to constitute anti-social behaviour, for example, by use of an amplifier.

32. The trial judge also held, having regard to the requirement that penal provisions be clear and strictly construed, that she was not satisfied that the civil order as drawn clearly and unambiguously criminalised the singing of a non-offensive hymn in a public place in a manner which satisfies the due process requirements.

33. The trial judge also held that the principle of equality before the law was violated by reason of "extending the reach of the criminal law to [Mr. Tallon] and not others who engage in the same behaviour in a manner which excessively interferes with [his] rights".

34. In addressing the restriction on the fundamental right to communicate, the trial judge was satisfied that in consequence of the civil order being overbroad – as it encompassed matters of nuisance which were not necessarily criminal in nature – was *ultra vires* the powers of the District Court. The fact that there was a penalty of imprisonment in this

case to punish those non-criminal acts (but for the civil order) was "disproportionate where the order is not clearly tailored and narrowly drawn."

35. The trial judge concluded as follows:

> "135. The risk of unwarranted interference with personal rights associated with the broad definition of anti-social behaviour which occurred in this case is compounded by the lower standards of evidence and proof required under the legislation to criminalize behaviour which is the subject of a civil order. As the civil standard applies to a civil order made, the behaviour in question, even if capable of amounting to a criminal offence, will therefore not have to be proved to a standard of beyond all reasonable doubt and a defendant can be placed under a civil order even if there is reasonable doubt as to the behaviour in question and thereafter convicted of an offence by reason of the failure to comply with a civil order. The nexus between the original application for a civil order and its criminal counterpart under s. 117 is a cause for real caution for the part of the judge who is required to give effect to the provision as the initial civil procedure defines the outer limits of the behaviour which can constitute a criminal offence in circumstances where either i) in respect of behaviour which actually amounts to a crime, a conviction may be obtained without proving the crime; and ii) in respect of behaviour which is in breach of a civil order but does not otherwise constitute criminal wrongdoing, a conviction may also be obtained.
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> 136. I have decided that the standards of fairness inherent in the concepts of constitutional justice and equality before the law which inhere in our constitutional order are not met where a civil order is drawn under s. 115 in a manner which extends beyond the mischief of anti-social behaviour covered in

the evidence led before the District Court and in a manner which encroaches into areas of human activity which are perfectly lawful and are constitutionally protected. By failing to tailor the civil order made to capture recurrence of behaviour adjudged on the evidence led to be anti-social, the District Judge exceeded the jurisdiction vested under Part 11 of the 2006 Act. Similarly, the failure to tailor the order to the offending behaviour results in a disproportionate interference with the Applicant's personal rights including his right to equality before the law and his right to freely communicate."

36. The trial judge did not examine the constitutionality of Part 11 of the 2006 Act where she had already decided the civil order made under s. 115 exceeded the parameters of the District Court's jurisdiction because it had not been properly tailored to the offending behaviour on which evidence had been given. She did, however, say at para 134:

"I would merely observe that I do not accept as necessarily correct the submission advanced before me that the case advanced on behalf of the Applicant as to the constitutionality of the provisions was radical and would encompass an offence of breach of a barring order or an offence of failing to comply with notification requirements under the Sex Offenders Act, 2001. It seems to me that other provisions identified to me in argument are limited and targeted provisions where the offence is expressly provided for in clear terms. The parameters of offences created in the comparator legislation are fixed by limits in the legislation itself. It seems to me that the provisions under consideration in this case are novel because the parameters of the offence are set by the District Court within an area of broader discretion. Further, unlike the statutory restriction on free speech considered in *Murphy v. IRTC* [[1997] 2

ILRM 467], the offence created by a particular civil order under the 2006 Act does not have the public or constitutional status of a law which has passed through the legislative process and undergone legislative and constitutional scrutiny in that process."

37. The trial judge also noted that the question remained open as to whether ss. 115 and 117, operating to create a criminal conviction arising from behaviour which is not inherently criminal, results in a conviction which is obtained other than in accordance with the due course of law.

The Appeal – An Overview

38. The DPP and the State appealed the High Court decision in its entirety. At the appeal, the focus was on the findings with regard to the civil order and, as responsibility for that order rested on the State, counsel for the State addressed the Court first. It was accepted, quite reasonably, by the DPP that should the appeal against the quashing of the civil order be dismissed, then the appeal against the quashing of the criminal convictions ought to be dismissed also. I take this concession to have been made because if the civil order is quashed by way of certiorari, in proceedings taken by Mr. Tallon, then he could not legally be held to have been in breach of such an order. The possible effect on a conviction of a subsequent variation or successful appeal of the order is addressed below at para 87 and, as will be shown, it is not as straightforward as the quashing of the original civil order by certiorari.

39. Counsel for the State made a number of preliminary submissions. He submitted that while many interesting arguments may be made in this area of law, these were academic on the facts of the case. This was because the case had to be viewed through the civil order as made in this case and the facts of the subsequent criminal prosecutions. It was academic to argue about what the perfect civil order may look like in those

circumstances. For example, an issue about the geographical area covered by the civil order did not arise in this case because Mr. Tallon had never made the case, nor could he make the case, that he was uncertain about the area. This was similar to any argument as to proportionality because Mr. Tallon never made the case that he wanted to do something else, to communicate in another way which would have been precluded by the order. Counsel submitted that if, for example, he had wanted to preach in a church, this was only of academic interest because he had never placed any evidence before the court that he wished to do so and he had never sought to vary the civil order in the District Court or on appeal to the Circuit Court.

40. The State placed significant emphasis on the existence of alternative remedies and contended that for this reason the High Court should, in the exercise of its discretion, refuse to grant relief by way of judicial review. It was submitted that the trial judge, in opting not to do so, and in granting the relief of *certiorari*, erroneously distinguished a number of authorities relied upon by the State.

41. The State also appealed on the basis that the civil order was not an impermissible interference with the respondent's right to freedom of expression, which, they submitted, is not an absolute right. They sought to challenge what they deemed to be the core finding of the High Court judgment, which was that the terms of the civil order should be restricted to a precise reflection of the type of anti-social behaviour the appellant had engaged in. The State claimed that this is not a requirement of the 2006 Act nor the Constitution, and the trial judge's assessment of such risked exceeding the limited function of judicial review. Similarly, they said that the trial judge erred in assessing the proportionality of the sentence imposed on the respondent as it was within the discretion of the District Court on which the Oireachtas had conferred jurisdiction. The State claimed that the High Court erred in determining that the present matter did

not meet the standards required so as to be sufficiently clear, and/or erred with respect to the application of the law on unconstitutional vagueness.

42. The DPP appealed on the grounds that the trial judge exceeded the narrow remit of judicial review functions by, *inter alia*, making findings on the correctness of the District Court rulings, the interpretation of statute by prosecuting Gardaí, the proportionality of the sentence imposed by the District Court, and therefore acted as a form of court of appeal. The DPP also appealed on the ground that orders of certiorari granted by the High Court were inappropriate given the criminal appeal filed by the respondent in the Circuit Court, and that the High Court erred in holding that s. 115 was a penal provision and was therefore required to be construed strictly.

43. Mr. Tallon appeared midway through the appeal hearing and accepted an invitation to make submissions to the Court. He submitted that the issue was not one of proportionality or detail but was whether it could ever be conceivable that an Irish man would be told he cannot talk. He questioned whether there should ever be a disconnect between what was deemed unlawful and what was deemed anti-social. He said he was never aggressive and said that he was heralding people and that by removing his right to speak the State was removing the people's right to hear. Communication, he submitted, was a two-way street. He questioned how a member of An Garda Síochána could ever be involved in a civil matter or indeed give a behaviour warning where there had been no due process. He also raised the issue of what was a reasonable excuse; an issue he had raised with the District Court judge immediately after the civil order was made. He asked rhetorically why he was arrested if he was not breaking the law, i.e. why was he arrested if his behaviour of itself, absent a civil order, was not unlawful.

44. The *amicus* addressed what is said were the key human rights issues in the case, namely a) the availability of judicial review, b) the requirement for legal certainty in terms of

the civil order and c) the statutory and constitutional requirement for proportionality in the framing of civil orders. The *amicus* submitted that the civil order was impermissibly vague and disproportionate

Alternative/Discretionary/Exhaustion of Remedies

The High Court judgment

45. The DPP and the State pleaded in their statements of opposition, and made submissions, to the effect that Mr. Tallon was not entitled to relief by way of judicial review because judicial review was a discretionary remedy and he had not exhausted his alternative remedies. The trial judge rejected the submissions in relation to both the civil order and the convictions.

46. Dealing with the challenge to the civil order, the trial judge said that the State's reliance on *A v Governor of Arbour Hill* [2006] 4 IR 88 was misplaced. She said that this challenge to the civil order was brought within the time and the manner provided by law. There was no delay and he had brought a claim impugning the validity of the order only when a constitutional frailty was identified in other proceedings.

47. The trial judge did not accept that an alternative adequate remedy existed. She identified the challenge as to the constitutionality of the legislation coupled with the challenge to the *vires* to make the civil order, as being questionable as to whether an appeal to the Circuit Court could constitute an adequate alternative remedy. She said she would not decide to deal with these proceedings on discretion on any grounds on the basis that an appeal should have been brought first. She noted that the time for appealing the civil order had passed by the date Mr. Tallon was arrested and charged with respect to the breach of the order in October 2020.

48. With respect to the appellants' reliance on *CC v Ireland* [2006] 4 IR 1, the trial judge stated:

> "87. It is contended by the Respondents that the Applicant is applying to this Court before and instead of pursuing the remedy of an appeal to the Circuit Court but the circumstances in this case are distinguishable from those in the Circuit Court. This is not a case such as those referred to in *CC*, relied on in submissions, where judicial review is sought during the currency of the trial where relief by way of judicial review will be granted only in the most exceptional circumstances. In cases such as this one I am entitled to consider whether the issue which arises is one that would be best met by the appellate court or the court in judicial review proceedings. It seems to me that given the civil order is challenged as to its *vires* and that separate issues arise in relation to the constitutionality of the legislation on foot of which convictions have been entered and these are issues which could not be determined by the Circuit Court on appeal, that this is a case where it is appropriate to pursue relief by way of judicial review rather than await the outcome of an appeal to the Circuit Court (by which stage a challenge to the *vires* of the civil order would be out of time)."

49. The trial judge also distinguished the case of *DC v DPP* [2005] 4 IR 281, on which the State had relied, saying it was a challenge which had been made pre-trial when there was a duty of a trial judge to ensure due process, and to grant what that applicant sought (which in that case related to matters of previous sexual history) would be to introduce a back door to evade the policy laid down by the Oireachtas (in that case, by s. 3 of the Criminal Law (Rape) Act, 1981). She also held that as constitutional issues were at stake, these could not be addressed by way of case stated. In all the circumstances, the

trial judge was satisfied that the proceedings were properly pursued by way of judicial review.

50. With reference to the argument that the doctrine of "reach constitutional issues last" ought to be applied to refuse relief, she accepted it should inform the approach of the Court. She held however that it did not operate to require a convicted person to pursue an appeal before challenging the constitutionality of the provisions on foot of which he has been convicted and held in custody. She referred to *PP v Judges of Dublin Circuit Court* [2020] 1 IR 123 as authority for the proposition that a person charged under a criminal provision (as Mr. Tallon had been) has *locus standi* to challenge it, albeit by reference to their personal circumstances rather than a hypothetical circumstance.

51. With reference to the power to state a case from the Circuit Court (to the Court of Appeal when hearing an appeal from the District Court), the trial judge rejected this as a reason to refuse the availability of the remedy as the constitutionality of the legislation could not be determined through stating a case. She also rejected arguments that had been made in the High Court as regards how the application to the High Court had been based on a 'sanitised' version of events by reason of the failure of Mr. Tallon to address the details of the court proceedings. She had earlier in the judgment highlighted that the challenge to the civil order was not based on the finding of anti-social behaviour was flawed or made without evidence, but rather that the civil order which followed was unlawful.

Submissions

52. The State, with whose oral submissions on this point the DPP adopted, submitted that judicial review ought not to have been granted given the alternative remedies that were available to the respondent. Their submission was that it is well-established that

judicial review does not properly fall to be granted where alternative remedies are available.

53. Counsel submitted that even if a person was arguing that a civil order was overbroad, the existence of an alternative remedy was always relevant. This was a matter of court resources and the availability of the solemn remedy that is judicial review. If one can obtain the same result within the confines of the statutory scheme, then that is what one should do. An applicant cannot opt for judicial review where it was clear that an alternative remedy was always available.

54. In written submissions, the State cited several authorities in support of the submission that there was an obligation to utilise alternative remedies, including:

i) *State (Abenglen Properties Ltd) v Dublin Corporation* [1984] IR 381, which held that where there exists a self-contained administrative scheme, that scheme should be utilised before seeking judicial review.

ii) *EMI Records (Ireland) Ltd v Data Protection Commissioner* [2013] 2 IR 669, which held that the default position of the law is that a statutory appeal should be taken before judicial review is sought.

iii) *Habte v Minister for Justice and Equality* [2020] IECA 22, which found that a court may refuse to accede to an application for a relief where an alternative remedy can provide the same relief, even going as far as to debar a person from seeking judicial review in such cases.

iv) *Chubb European Group SE v Health Insurance Authority* [2020] IECA 91, which examined circumstances in which judicial review and alternative remedies were at issue. The Court found that the onus was on the party seeking judicial review to establish the inadequacy of the alternative remedy, that an appeal is intended to supplant judicial review absent any unusual circumstance,

and that where issues could be addressed equally suitably in a statutory application or by judicial review, the presumption is that judicial review would be a duplication of concurrent proceedings.

v) *Spencer Place Development Company v Dublin City Council* [2020] IECA 268, which held that a person with a right of appeal should exhaust that appeal before instigating judicial review proceedings in order to prevent premature and unnecessary consumption of court resources. The general rule, the Court found, is that the statutory process should be followed and concluded absent any exceptional circumstance.

55. The State submitted that the High Court judgment did not address their argument regarding the jurisdiction of the District Court to vary a civil order under s. 115(7). It was submitted that the insufficient tailoring of the order identified by the High Court could have been addressed through this provision of the 2006 Act.

56. Secondly, they submitted that even where the Circuit Court did not have the jurisdiction to address the question of constitutionality of various provisions of the 2006 Act, it still could have ruled on the '*vires'* issue had an appeal been brought under s. 116. The High Court identified the *vires* issue as follows:

> 131. "… A Court in exercising a jurisdiction to make a civil order must do so in a manner which is targeted, clear, precise, tailored, narrowly drawn and directed to specific behaviour which might properly be treated as criminal behaviour if the Court is to exercise that jurisdiction to make orders which respect the requirements of the Constitution. The Civil Order made in this case was not sufficiently tailored, targeted, clear, narrowly drawn or precise and for that reason resulted in an unconstitutional interference with the Applicant's rights and was *ultra vires* the powers of the District Court."

57. The State submitted that the fact that a constitutional challenge was included in the statement of claim cannot preclude the requirement to pursue alternative remedies. The State submitted that this was compounded by the fact that the High Court did not actually rule on the constitutionality issue, and therefore all issues addressed by the High Court in this case were capable of being, and could have been, determined through the alternative remedies available to Mr. Tallon.

58. The State further submitted that the High Court decision had the potential to incentivise litigants adding a constitutional challenge or argument to their statement of grounds in order to avail of a High Court hearing where a lower court would otherwise be a suitable jurisdiction. This same argument is raised by the State in relation to the High Court's determination that Mr. Tallon's failure to submit a Circuit Court appeal within the 21-day time limit precluded him from availing of those alternative remedies. This, the State submits, could further incentivise litigants to deliberately allow time limits for initiating proceedings in a lower court to lapse in the hopes of being granted a High Court hearing instead. The State submitted that at the very least the High Court should have asked the question as to why judicial review was being pursued ahead of those alternatives, which was not done so in this case.

59. Thirdly, they highlighted that the High Court did not in fact find that a Circuit Court appeal would be an inadequate alternative remedy, but that its' adequacy was 'questionable' (para 85).

60. The High Court found that the correct test to be applied where a question of the suitability of alternative remedies versus judicial review arises is one of determining the most appropriate forum. The State submits that even if this is the correct test to be applied, an application to vary the order to the District Court, or a statutory appeal

before the Circuit Court, would have been the most appropriate remedy where there were several alternatives available.

61. At the hearing of the appeal, counsel for the State emphasised that where Mr. Tallon took issue with the appeal, it was open to him to either apply to have it varied or take an appeal of the order. In such a case where, as counsel submitted, the question of alternative remedies arises, there is an obligation on the most basic level to establish locus standi or a factual evidential basis before applying for judicial review.

62. Finally, the State reiterated their submission that judicial review is not supposed to function as an appeal on the merits. Citing *Duffy v Deery* [2003] IEHC 618 and *West Cork Bar Association v Courts Service* [2017] 2 ILRM 281 in support, the State objected to the High Court's findings that the civil order of the District Court and the subsequent custodial sentence for its breach were disproportionate on the basis that the Oireachtas has explicitly given jurisdiction to deal with these matters to the District and Circuit Courts in the 2006 Act.

***Submissions of the* amicus**

63. On the question of alternative remedies, the *amicus* submitted that the trial judge correctly exercised her discretion on the matter and that the appellants had failed to identify the type of error which would cause this Court to overturn that decision. The *amicus* submitted that the importance of judicial review as a mechanism of human rights protection under the Constitution had emphasised by the courts (citing *inter alia Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701). The *amicus* submitted that for that reason there can be no categorical rule requiring exhaustion of other potential remedies before judicial review can be granted. The exhaustion of alternative remedies is an issue that goes to the exercise of the court's discretion to grant judicial review.

64. The *amicus* submitted that the constitutional claim which was argued before the High Court could only be determined by the High Court, and if Mr. Tallon sought to have the order varied or vacated or appealed, those applications would be determined before a lower court. Counsel submitted that the appellant's arguments regarding the exhaustion of alternative remedies would, if correct, have obliged the respondent to initiate multiple proceedings in different courts. The High Court was therefore the correct forum for this case. The issue was not whether the civil order was incorrect but, by reference to the statute and to the constitutional rights at issue that it was unlawful. The *amicus* submitted that the State's point about an application to vary might have had more force save for the fact that he was arrested and charged with non-compliance almost immediately after the civil order was made.

65. The *amicus* drew the Court's attention to certain case law from England and Wales and from Northern Ireland, which had not been raised in the High Court. While these cases addressed the issue of legal certainty, it is appropriate to mention them now in light of a point made by counsel for the State in reply. The cases, primarily, involved situations where preventive orders were being imposed during the sentencing process in respect of convictions for separate criminal offences. These cases stress that the orders are preventative and that they must be expressed in clear and precise terms so that the subject of the order and any police officer will know what the subject can or cannot do.

Submissions of Mr. Tallon

66. Mr. Tallon did not make any submissions directed towards the specific issue of the existence of alternative remedies, instead he repeated his view that these were orders that transgressed upon his rights and were not permitted under the law and the constitution.

Discussion and Decision on Alternative remedies to the challenge to the civil order

67. In written submissions the State posited three separate alternative remedies open to Mr. Tallon. The first was the right to apply to vary the order, the second was the right to appeal to the Circuit Court, and the third was his full right of appeal against criminal conviction. In my view, the right to appeal his criminal convictions is not a matter that ought to bar a challenge by way of judicial review to the civil order. It cannot be that case that an individual must run the risk of arrest, incarceration pre-trial, and conviction and sentence, prior to being permitted to challenge a *civil order* which itself may render what is ordinarily non-criminal activity into criminal activity. If it were otherwise, a person would be *obliged to test* the boundaries of the civil order *prior* to being permitted to challenge it.

68. The current situation is distinct from a situation where an applicant makes a general challenge to criminal provisions. On the contrary, the civil order affects only *this particular applicant* and it affects *all of the behaviour* that is stated on the face of the order. To insist that he wait for criminal charges to be completed before he can challenge the civil order is entirely illogical because if he decided never to create a risk of breaching the order, he would never be able to challenge it, yet his behaviour would continue to be constrained by the terms of the civil order.

69. The first two alternative remedies do however raise significant legal issues. The case law relied upon by the State on the issue of alternative remedies establishes that judicial review is a discretionary remedy and that the default position is that there is a requirement to exhaust alternative remedies unless the remedy is in fact not adequate or there is a particular exigency in the interests of justice which requires otherwise (see *EMI Records (Ireland) Ltd. v Data Protection Commissioner* [2013] 2 IR 669, *Habte v*

Minister for Justice and Equality [2020] IECA 22, *Chubb European Group E.E. v Health Insurance Authority* [2020] IECA 91).

70. The State have relied upon particular *dicta* from some of the case law, but these require careful scrutiny. The State seek to say that the existence of the statutory process of variation or appeal was such that it was an adequate remedy. They rely on the following passage from Murray J. in *Chubb* "…it is understandable that – at least absent a definitive determination in the context of the precise scheme in issue – prudent legal advisors will seek to protect to the greatest extent possible their client's rights by instituting parallel judicial review proceedings. However, the grounds in issue here were all capable of being addressed within the statutory application and, even if that was not the case, it would not have been correct for the Court to have duplicated consideration of issues addressed in the statutory application, in the judicial review proceedings." (emphasis per the State's submissions).

71. It must be recalled that the particular situation at issue in *Chubb* was that there were two sets of proceedings at issue before the court. One was a challenge to an enforcement notice by way of a statutory application to the High Court for cancellation of the directions contained in it, the second was an application for judicial review. The statute provided for what was in effect a statutory appeal to the High Court and Murray J. was stating that the High Court was capable of addressing all the issues raised in the judicial review in the course of that appeal and that even if it were not there was no point in duplicating the issues that could be dealt with in the statutory appeal. In so far as the State rely on the latter to say that *Chubb* indicates that it does not justify a judicial review court dealing with the issues that could be dealt with in an appeal, I am of the view that it is not a case which is on all fours with the present case; it has a particular

relevance to the situation where the statutory appeal and the judicial review proceedings which were taking place in tandem and could equally address the same issues.

72. The *EMI* decision cited by the State concerned a judicial review taken in a situation where a statutory right of appeal to the Circuit Court in relation to an Enforcement Order of the Data Protection Commissioner existed. Clarke J said that "the entirety of the case made herein by the applicant could have been made" by way of the statutory appeal. It is of some note that Clarke J referred to the judgment of Hogan J. in *Koczan v Financial Services Ombudsman* [2010] IEHC 407 in which Hogan J. referred inter alia, to cases "touching on the constitutionality of legislation or the validity of statutory instruments" where the legal issues cannot properly be raised in the appeal.

73. In the present case, the trial judge questioned the contention that the appeal to the Circuit Court would be adequate where both the constitutional and *vires* issues could not be met. The State strongly criticise the trial judge for dealing with the case on the basis of whether it was "questionable" that the Circuit Court appeal would not be an adequate remedy. They argue, correctly, that in *Chubb*, Murray J. stated that the onus was on the applicant in a judicial review to establish the inadequacy of the remedy. This, the State submits, was a clear error in principle by the trial judge. In my view however, the onus that lies on an applicant to demonstrate such inadequacy may be discharged in a number of ways. It may be discharged by pointing solely to the legal position that pertains with respect to the various remedies at issue and/or by reference to specific factual matters at issue in their case. Affidavits are to address facts and not law and thus an affidavit cannot be required where an applicant relies on legal matters. Where matters of fact are set out in a statement grounding the application for judicial review, all that is required is a brief verifying affidavit. Furthermore, the applicant

cannot be prevented from referring to and relying on any facts that emerge from the evidence of the respondents to the judicial review in so far as they may be relevant.

74. While the use of the word "questionable" is not the best choice of words in the context of assessing whether the alternative remedy was inadequate, I consider that the judge was using it to demonstrate that in the totality of the case, taking into consideration the issues raised, including the constitutional challenge to the legislation, she was not satisfied that that there was an alternative adequate remedy. It is not insignificant that having said this, she immediately noted that, the time for an appeal had lapsed by the time of Mr. Tallon's arrest on 7 October 2020. As I will address further below, even if there had been an appeal of the civil order at that stage, it could not have assisted him. He was, however, still within the time set out in O. 84 RSC to bring this judicial review challenge to the civil order.

75. The State have argued that the fact that a constitutional challenge formed part of the judicial review proceedings cannot preclude the requirement to pursue alternative remedies. This is an argument that has merit; if it were otherwise, it would be an encouragement to join a constitutional challenge to every judicial review no matter how unrealistic such a challenge may be. On the other side of the coin, however, the fact that the constitutional challenge did not require to be dealt with during the course of the High Court hearing cannot *of itself* be the determining factor. That would be to impose a *mandatory* requirement to exhaust each and every alternative remedy first; that is not the legal position, the High Court retains a discretion to grant judicial review. Some cases which involve challenges to the constitutionality of legislative provisions may be resolved by way of judicial review without the necessity to address whether the legislation is constitutional.

76. How, then, is a court, when faced with deciding whether alternative remedies exist, to determine those cases *touching* on the constitutionality of legislation? In other words, at what point does the court have to decide to reject the application for judicial review on the basis of the existence of alternative remedies which do not include the possibility of a constitutional challenge? Logic dictates – given that a main justification put forward by the State is the use of court resources - that the decision must be made at the outset of the judgment and thus without having to reach a conclusion on the very issue raised in a particular case, namely whether the legislation upon which the impugned order is based is, itself, constitutional. The court when it decides to reject the challenge cannot know if in fact the *only* remedy that will ever benefit an applicant is the constitutional challenge. It goes without saying therefore that there is no *a priori* answer which can be applied in every case.

77. It is important to recall, as the Supreme Court (Denham J.) said in *Stefan v Minister for Justice* [2001] 4 IR 203 (and cited by Clarke J. in *EMI*), that "[i]t is clear that whilst the presence of an alternative remedy, an appeal process, is a factor, the court retains jurisdiction to exercise its discretion to achieve a just solution." That case considered fair procedures and the Supreme Court held that in those particular circumstances, it was for the Court to exercise its discretion whether to grant certiorari and that discretion had been correctly exercised by the High Court. In *EMI*, Clarke J. also said with respect to the exception to the default position that "the set of such circumstances is not necessarily closed", although he accepted that the principal areas of exceptions had been identified. Clarke J. also stated that a court had to examine the features of the alternative remedies at issue to assess whether they were adequate. This leads to a conclusion that the court retains a jurisdiction to exercise its discretion to achieve a just solution in all cases involving applications for judicial review. It is the totality of the

situation that presents itself to the court that must be assessed when exercising the discretion to refuse judicial review because of the existence of alternative remedies. In addition to viewing the totality of the case, it is important to recall, as the *amicus* submitted, that the fact that this is an appeal means that the appellants must establish that the discretion was incorrectly exercised to grant certiorari.

78. The State's submission that the Circuit Court could have ruled on the *vires* issue is an understandable one where the High Court identified that the civil order "was not sufficiently tailored, targeted, clear, narrowly drawn or precise and for that reason resulting in an unconstitutional interference with" Mr. Tallon's rights and was *ultra vires* the District Court. They argue that it would have been open to Mr. Tallon if he thought it was too wide to bring an application to the District Court to vary the order. The also submit that the breadth of the order could have been addressed in the Circuit Court appeal. These submissions have to be considered in light of the facts of this case.

79. The State criticises the High Court judge for failing to address their point about the District Court having a jurisdiction to vary the Order. This is not a particularly strong ground of appeal where the trial judge dealt with the issue of an appeal (as distinct from a variation) and where the arguments made appeared to be quite similar to those made in relation to the jurisdiction to vary. More importantly however, on the facts of this particular case, the existence of a right to apply to vary (on notice) was hardly relevant in circumstances where the District Judge had specifically stated that there was to be no stay on the order and Mr. Tallon was arrested later that day. Simply put, there was no possibility of making an application, on notice, to vary the order.

80. I do not understand the State to be making the argument that Mr. Tallon ought to have applied there and then in the courtroom to seek to vary. That would be at odds with

what would appear to be meant in the 2006 Act by an application on notice but also would be contrary to the usual rule that one does not question a judgment that has just been handed down in court. Moreover, in this case the order apparently (subject to "and" perhaps being inserted for "or") reflected the notice of application. While it may be said that there is a responsibility on each side of a hearing to engage with a court on jurisdiction matters (particularly where each party is legally represented where those legal representatives have duties to the court as well as to their clients), there is a particular responsibility on the moving party to ensure that the court is being requested to make an order that is within jurisdiction. Moreover, while every litigant in a civil case may bear a responsibility to engage with issues regardless of legal representative, there is a particular onus on the State as a moving party in criminal - or *quasi* or pre criminal proceedings such as were at issue here - to ensure that any order which may lead to a criminal sanction is within the jurisdiction of the court. The State sought and was granted by the District Court *this civil order* with this precise wording. This was not an error that crept into the proceedings by way of some type of judicial or clerical error. That is a factor of significance *in the entire circumstances* of this particular case as to whether it was a proper exercise of judicial discretion to hear this. Some of those circumstances include the particular issue of whether an application to vary or appeal was an adequate remedy or the "same" remedy where there was no stay placed on the civil order.

81. That issue is particularly relevant in circumstances where Mr. Tallon was arrested for an offence of breaching the civil order on the same day it was made. Counsel for the State submitted that if the Circuit Court allows the appeal against the civil order on the ground that it did amount to a breach of Mr. Tallon's constitutional rights, he "would have thought the answer was no" as to whether a criminal prosecution or conviction

could have been maintained on foot of the District Court order. He had no authority to hand on that point and submitted that he did not think the matter had come up for consideration. A similar situation would have to apply to an application to vary.

82. Counsel for the State accepted that there could be an interregnum when rights are at risk but there were procedural protections in place in terms of a challenge. Counsel also submitted that there were similarities with the situation where a person is convicted of a criminal offence but makes a successful appeal. The criminal appeal procedure is part and parcel of the statutory process and, a person may be lawfully incarcerated while the appeal is going on.

83. I do not accept these submissions of the State. In the **first** place, we are not dealing with a criminal appeal; what took place in the s. 115 hearing was not a criminal process at all (although it had created a personal criminal offence for the applicant). In addressing this, it is appropriate to acknowledge that there are differences as to the nature of the right to appeal in criminal cases, which is dependent on the jurisdiction in which one is convicted of a criminal offence. A conviction in the District Court may be appealed to the Circuit Court where there is a full rehearing of the case. This is unlike the position where a person is convicted in the Circuit Court or Central Criminal Court on indictment and the hearing is based upon the transcripts of the trial. Given the existence of a full right of appeal from the District Court, that Court is obliged to fix recognisances in the event of an appeal and the person is free from any penalty imposed upon them by the District Court.

84. In the case of a civil order under the 2006 Act, the default position is that there is no stay on the order, although the court retains a power to place a stay. Therefore, although there is a right to a full rehearing in the Circuit Court of the application for the civil order (even if, as the State submitted, the extent of the rehearing may be limited by

virtue of the notice of appeal), unlike the situation in a criminal appeal from the District Court, there is no automatic stay on the enforcement of the order. This is of even greater significance in a situation where the civil order may be granted to prohibit conduct not necessarily itself criminal in nature, but which becomes criminal conduct if engaged in without reasonable excuse contrary to the civil order. Thus, Mr. Tallon was prohibited from public speaking (and recording) in the environs of Wexford Town (for a period of two years) where every other person was permitted to so engage, provided of course that they do not contravene any other criminal provision, for example s. 2 of the Prohibition of Incitement to Hatred Act, 1989.

85. The fact that Mr. Tallon was arrested almost immediately after the civil order was made is indicative of how extensive this power is and how it differs from the imposition of a criminal penalty in the District Court. He had no opportunity at law to challenge the making of the order before he was subject to its implementation. He could not have made the application to vary on notice and have it heard before he was subject to being arrested. Furthermore, he could not have had his appeal heard before he was arrested.

86. The State submit that the facts of the criminal proceedings do not display any difficulty with the understanding that Mr. Tallon had with the nature and extent of the order in that his words and deeds of 31 August 2020 demonstrate an intention to breach the order. There is indeed substance to that submission, it was clear from the points made by Mr. Tallon to the District Court and to this Court during the appeal that he does not accept that he (or anyone else) ought to be bound by any type of civil order that prevents him doing what may be otherwise lawful and that he considers any prohibition on him public speaking to be a violation of his rights. At a matter of law, his belief that the order is unlawful and violates his rights does not give him any legal right to violate orders lawfully made. All that he has is a right to challenge the order through the courts

system. It is possible that a person may lose certain rights to challenge the legality of discretionary or equitable orders by virtue of their conduct, but it is not necessary to examine the parameters of that limitation here.

87. On the facts of this particular case however, it would not be appropriate that his somewhat intemperate remarks and deeds on the day the civil order was made could be said to disentitle him to challenge by way of judicial review at a subsequent date when the reality of the criminal conviction for his words and deeds had become all too apparent to him (having served a considerable period in pre-trial custody). Moreover, I do not consider the fact that he wishes to maintain a challenge to the *entirety* of the order ought to disentitle him from maintaining a challenge (or to resist an appeal) based upon more limited errors of the exercise of the District Court jurisdiction. His fundamental conviction that the civil order wrongly violates his rights to continue to "herald" or "preach" in the same manner and place that he has heretofore does not mean the High Court cannot address the other points that have been raised in the proceedings, quite properly, by the lawyers who acted for him in the High Court.

88. It is also of some significance that the second offence for which he was convicted under s.117(1)(b) concerned a situation where he was "singing" rather than "speaking". Without getting into the details now as to whether the trial judge was correct in her analysis that the civil order was not drawn sufficiently clearly and unambiguously to criminalise the singing of a non-offensive hymn in a public place, the fact of "singing" rather than "speaking" demonstrates, as per Mr. Tallon's evidence to the District Court in the criminal trial, that there was at least some attempt by him to act in a manner that did not violate the limits that had been imposed upon him in the civil order. It is also important to again note, as the trial judge did, that by the time of his arrest for this alleged breach of the order on 7 October 2020, the 21 days for the appeal had expired.

89. Secondly, the nature of the case that was made by Mr. Tallon in the judicial review proceedings before the High Court was of the kind that is most usually made in judicial review proceedings. It was a claim that was clearly directed to the legality of the order itself and not a challenge based upon the evidence that had been before the District Court. It was inherently bound up in issues as to constitutional rights and whether mistakenly or otherwise, was tied closely to claims regarding the constitutionality of the legislation. It was made in circumstances where, on its face, the civil order had a certain vagueness (was public speaking and recording to be interpreted conjunctively or disjunctively/ did the order incorporate singing?) and these were matters which are not usually dealt with on an appeal which is a full rehearing of the application. It will be recalled that it has long been the law that "certiorari is an appropriate remedy to quash not only a conviction bad on its face or where a court or tribunal acts without or in excess of jurisdiction" (Clarke J. in Sweeney v. Brophy [1993] 2 I.R. 202 at p. 211, is an example of such dicta). The present appeal deals with a civil order but it does amount to the creation of an individual criminal office and it is appropriate to say that certiorari *may* be an appropriate remedy when such an order is bad on its face.

90. Thirdly, although counsel for the State has posited that a subsequent appeal or variation would have affected the original conviction (or even prosecution), that does not appear to be based upon any authority. On the contrary, court orders on the civil side speak from the time they are made unless there is a stay placed upon them or a particular starting time stated in the order. The reference in s. 116(3) to *notwithstanding the appeal, the civil order shall remain in force* unless otherwise ordered reflects the intention of the 2006 Act that those who are subject to the order must obey it despite the existence of an appeal. Considering that disobeying the order means the commission of a criminal offence, there is no reason in principle, and certainly none

offered by the State, as to why the *subsequent* variation or amendment or overturning of the order by way of an appeal would nullify that offence. Indeed, I consider that what authority there is on this matter to be against the position of the State. In *DK v Crowley & Others* [2002] 2 IR 744, the Supreme Court declared s. 4(3) of the Domestic Violence Act, 1996 unconstitutional in circumstances where there was no provision for a time limit as to the operation of an interim barring order. In the course of the judgment of the Supreme Court, Keane CJ stated, in a passage quoted by the trial judge in this case,

> "… The interim barring order, moreover, even when obtained on an ex parte application, is not merely mandatory in its effect but brings in its wake draconian consequences which are wholly foreign to the concept of the injunction as traditionally understood. A person who fails to comply with such an injunction commits no offence, although the plaintiff may put in train the process of attachment for contempt in order to obtain compliance with the order. In the case of an interim barring order obtained ex parte in the absence of the respondent, the latter automatically commit a criminal offence in failing to comply with the order, **even if it should subsequently transpire that it should never have been granted.** He or she is, moreover, liable to be arrested without warrant by a garda having a reasonable suspicion that he or she is in breach of the order." (**Emphasis added**)

91. There is a significance difference between the statutory remedies of seeking a variation of or appealing the civil order and the remedy of seeking to quash the order by way of judicial review. Unless the civil order was quashed by judicial review, Mr. Tallon remained at risk of being convicted on an order that was ultimately found to have been made *ultra vires* the legislation. No appeal or order of variation could have protected

him from that risk given the fact that no stay had ever been placed on the order. Even if he had proceeded with his appeal to the Circuit Court and had been successful in his appeal, he would have remained liable for breach of the original order. That, it appears, is the only interpretation that can be given to the construction of the Act which makes it a criminal offence to breach the civil order. On the facts of this case, this is significant in assessing that the trial judge correctly exercised her jurisdiction to exercise her discretion to grant judicial review. When combined with the other matters identified, in particular, the finding made below, that there is a problem with the legality of the civil order, it is clear that the remedy of judicial review was required to deliver a just solution in this case.

92. **Fourthly**, it is also of some significance that this was the first case, or, at least, the first case to come before the High Court, which addressed the making of a civil order prohibiting behaving in an anti-social manner. While Part 11 of the 2006 Act is not the first legislation to make breach of a civil order a criminal offence (the example of breaches of safety and barring orders under the Domestic Violence Act, 1996, being an obvious one), it does have a particular reach into the realm of freedom of expression. Counsel for the State correctly points out that the courts ought to be wary of academic arguments in relation to the legislation. It is not, however, an academic argument for the courts to be concerned with the legality of court orders which render criminal, when carried out by the subject of the order, that which is otherwise lawful when carried out by the rest of the denizens of Wexford. The exercise by the High Court of a discretion to hear a challenge, brought within the statutory time allowed, to the making of such a civil order which has resulted in criminal convictions and could result in further such convictions in the absence of any previous authority on the making of those orders is not, in all the circumstances of this particular case, a wrongful exercise of that

discretion. This has a particular relevance to this case in that by the time that any challenge was made Mr. Tallon had already been in custody for some time and stood convicted of certain matters under the legislation.

93. Furthermore, it is also necessary to address here the State's reliance on a type of *jus terti* argument that Mr. Tallon may only rely upon the facts that have a particular concern to him and these are limited by his return to, and it appears his desire, to engage in public speaking in the centre of Wexford town. The case of *PP v The Judges of the Circuit Court* states that a person charged under a criminal provision has *locus standi* to challenge its compatibility with the Constitution but only by reference to the personal circumstances rather than a hypothetical set of circumstances. The present challenge is significantly different. This is a challenge to a civil order directed solely against Mr. Tallon. It is not merely a challenge to a particular criminal accusation (indeed he has already been convicted and challenged those as part of the judicial review). The significance lies in the fact that it is the breach of the civil order that amounts to the commission of a crime, a factor to which the trial judge referred at the outset of her remarks on the availability of an alternative remedy. The civil order is in effect an individualised criminal provision – a description that the State does not disagree with - which subjects Mr. Tallon to the risk of criminal conviction should he do anything which is prohibited thereby. Thus, on the face of the order at least, if he were to engage in public speaking inside a church, on invitation by that church within the environs of Wexford Town, he would be committing a criminal offence.

94. Finally, counsel for the State strongly urged that within the statutory appeal there existed another alternative remedy in which Mr. Tallon could have raised all his points, including a full challenge to the order on evidence or he could have said he objected to parts of it as disproportionate. Counsel strongly disagreed with the suggestion that Mr.

Tallon was entitled to seek judicial review merely because this was a special situation or because there were possible concerns about the extent of the order and the risk of conviction. This, it was submitted, remained an application for judicial review which had to be addressed within the principles of judicial review which included that it is a discretionary remedy.

95. I would agree with the submission that there is no general proposition that a person who is subject to a civil order under the 2006 Act has an absolute entitlement to challenge it by way of judicial review in the absence of engaging with alternative remedies. I would also agree that in general a person must engage with the particular circumstances which pertain to their situation in terms of the order. What presented in this case, however, was a very particular situation where despite this being, apparently, the first of these civil orders to come before the court, there was little by way of legal submission from the State – unsurprisingly, where no lawyer represented the State – as to the nature and extent of the order that would be made. Mr. Tallon represented himself – unwisely, it may be said, given he would have had entitlement to legally aided representation – and while he is an articulate man, his single-minded demand to a right to continue doing what he was doing was not directed towards the legal intricacies of an expansive order. What had been brought before the High Court was primarily an issue of law going to the lawfulness of the civil order that was made.

96. The *amicus* has also focused on general issues of law which arose from the facts that had been established. An illustration of why the fact that this was the first case of its kind gave this case an exceptional quality is how counsel for the State countered the case law from England and Wales produced by the *amicus* in this appeal, by saying that those cases referred to what *ought to occur* within a trial or appellate process when the ambit of the prohibitory order is being set. Yet in this case, the first of its kind, no such

engagement occurred between the judge and the superintendent who made the application. No criticism is made here of the superintendent; he marshalled his witnesses and presented the case well before the District Court. What was missing, however, was the type of legal overview that a lawyer would have brought to the proceedings. Given the significance of what was being ordered because of its potential impact on other constitutional rights, the State had a responsibility to give that type of assistance to the District Court to ensure that from the outset there was scrupulous compliance with the parameters of the 2006 Act in any civil order that was to be made.

97. In conclusion and in view of the foregoing, this was truly an exceptional case. It was the first – apparently – of its kind. No input from lawyers had been available to the District Court judge to ensure that all relevant matters were considered. It is also relevant that Mr. Tallon had been arrested later on the day the civil order issued being that there was no stay on the civil order. It was relevant also that his arrest on a later date was for conduct for which an argument could be made – albeit unsuccessful before the District Court – that his conduct was outside the civil order. At the time of that conviction, he was out of time to appeal the civil order. In so far as the State argued that there must be a link to his own circumstances before he can challenge an order on wide grounds such as vagueness or lack of clarity, this is not accepted in the specific circumstances of this case. He was subject to an individualised criminal prohibition which had not been previously tested. To require him to have established in evidence or before an appeal court all the other things he might have wished to do, e.g. preach indoors or record music or any other conceivable "acceptable" behaviour, before he could apply to the High Court is to place too high a burden on him in all of these circumstances. There was, in the overall sense, no error in the trial judge exercising her discretion in this case to permit him to challenge the legality of such a wide order

by way of the one process which could guarantee him the widest possible relief; namely that of judicial review.

Legal Certainty

Preliminary Points

98. In opposing the findings of the judge concerning legal certainty, the State maintained in essence, a preliminary objection to the trial judge's finding that

> "… it cannot be said that the civil order as drawn is sufficiently precise to reasonably enable the Applicant to foresee the consequences of singing in public or indeed engaging in any speech no matter how unobjectionable, with or without amplification and to this extent I consider the terms of the civil order to be impermissibly vague and uncertain…".

They did so on the basis that Mr. Tallon, at no point indicated a lack of clarity in relation to the behaviour prohibited by the order. The State criticise what they call Mr. Tallon's two-line affidavit verifying the statement of grounds but in view of the fairly extensive matters set out in the grounding statement, it is not a valid criticism to complain of the brevity *per se* of the affidavit. Moreover, given that Mr. Tallon gave sworn evidence in the District Court that he believed he was entitled to sing, this argument dissipates.

99. The State also objected saying that Mr. Tallon made submissions in the High Court that the ingredients of the provision under s. 117(1)(b) were impermissibly arbitrary and vague but did not do so with respect to the terms of the civil order itself. Additionally, it was submitted that the evidence of Garda Murray demonstrated Mr. Tallon's breach of the civil order was a deliberate act of defiance of the terms of the order and did not arise from a misunderstanding of those terms. This was supported, they say, by the evidence of Gardaí who arrested Mr. Tallon for exhibiting what they referred to as the

"mens rea of breaching" the order, such as holding signs and singing as a means of "trying to get around" the terms of the civil order. In my view these arguments have been mainly addressed above when addressing the question of whether there was an alternative remedy. It is also the position that Mr. Tallon gave evidence in his defence in the District Court that he *believed* he was not prohibited from singing by the civil order.

100. With relevance to the claim that the issue related to the ingredients of s. 117(1)(b) and not to the civil order itself, I view Mr. Tallon's written submissions to the High Court as being addressed to the civil order, to the convictions and to the constitutionality of s.115 and s.117 of the 2006 Act. These were intertwined with a clear statement that if the civil order was to be understood as prohibiting him from carrying out any form of public speaking in Wexford town as the judge in the criminal proceedings thought, then if such a construction were permitted, it would render the section invalid and a more limited construction had to be given. We do not have a transcript of the High Court hearing but it is clear from the trial judge's conclusion that there was a challenge to the civil order itself. There was, perhaps a focus in the case made on behalf of Mr. Tallon on the criminal convictions and the constitutionality of the particular sections but it appears from the judgment (e.g. paras 105, 109 and 110) that the submissions on the convictions were linked to the lack of legal certainty stemming from the civil order itself. The trial judge was correct however to focus in the first place on the *terms* of the civil order rather than the *legislative section* under which it was made in addressing whether the civil order was constitutionally sound.

101. It is appropriate to note that the State did not contest that the civil order, as an individualised criminal provision, had to be strictly construed although they submitted that it was not a piece of legislation. In my view, the Court must first pursue all the

usual canons of interpretation in seeking to construe the civil order and if there remains an ambiguity after they have been applied, then such ambiguity must be resolved in favour of the person subject to the order. The starting place, however, is to look at the plain and ordinary meaning of the words in the civil order given the context in which they appear.

The law

102. The trial judge referred to the case of *Dokie v DPP* [2011] 1 IR 805 when holding that the terms of the civil order were impermissibly vague and uncertain. The State submitted that the High Court's analysis in para 110 through the lens of *Dokie v DPP* is erroneous, as *Dokie* can be distinguished from this case on the facts. The two reasons that the State submits that *Dokie* is distinguishable are: i) the requirement to warn of the possible consequences of failing to provide a 'satisfactory explanation' is not an issue where Mr. Tallon had been in court several times and been the subject of several behaviour warnings, and ii) the 'satisfactory explanation' required in *Dokie* had to be given immediately to a Garda or immigration officer, whereas s. 117 of the 2006 Act required a hearing before the District Court before a conviction could arise. While the State's submissions are correct to distinguish the facts of *Dokie*, it is the wider principle stated therein, and not the facts, on which the trial judge relied; provisions of criminal law ought not to be impermissibly vague or uncertain.

103. That principle was also restated by the Court of Appeal in *Bita v DPP* [2020] 3 IR 742 which the *amicus* drew to the Court's attention. The Court of Appeal reviewed the case law which included *King v Attorney General*, *The People (Director of Public Prosecutions) v Cagney* [2008] 2 IR 111, and *Douglas v Director of Public Prosecutions* [2017] IEHC 248, in holding that criminal law must be certain and

specific. The Court of Appeal (Donnelly J.) agreed with the trial judge (Ní Raifeartaigh J.) in that case when she stated:

> "It is clear from the authorities in the area, many of which were cited to me and which include the above, and indeed certain American and European Court of Human Rights authorities, which have sometimes featured in the Irish judgments referred to, that there is a distinction between (1) an offence the ingredients of which are expressed in excessively vague language (which is constitutionally impermissible) and 2) an offence the ingredients of which are expressed in general terms in order to maintain appropriate flexibility to encompass the variety of factual situations which may arise but are nonetheless considered sufficiently clear notwithstanding the general language used (which is constitutionally permissible)."

104. As stated in *Bita v DPP,* the following dictum of Hardiman J. in *People (DPP) v Cagney* neatly encapsulates the law: "[f]rom a legal and constitutional point of view, it is a fundamental value that a citizen should know, or at least be able to find out, with some considerable measure of certainty, what precisely is prohibited and what is lawful". The State submitted that an argument going to vagueness can be distinguished between vagueness of legislation of general direct effect, and a targeted, discrete civil order drawn up against one individual, as in this case. That submission is not well-founded. This level of certainty applies just as much to a criminal statute as it does to a civil order under the 2006 Act because such an order is, in effect, an individualised criminal provision. Its breach, without reasonable excuse, amounts to a breach of the criminal law by the person – and only that person - who is the subject matter of the civil order. This requirement of legal certainty in the drawing up of legal conditions, a breach of which may have the consequence of depriving a person of their liberty, is a

commonly understood requirement. For example, the *amicus* referred to a statement in O'Malley, *Sentencing Law and Practice* (3rd ed) (Round Hall Dublin 2016) at p 659 which, although it was addressed to conditions attaching to suspended sentences, also applies to a civil order under the 2006 Act:

> "Conditions should conform, first and foremost, with the principle of legality; they should be clearly expressed and indicate precisely what the offender is required to do or refrain from doing."

105. It was further submitted by the State that in order for a challenge regarding unconstitutional vagueness to stand, the vagueness complained of must be significant, citing *Cox v DPP* [2015] 3 IR 601 and *King v Attorney General*. The State submitted that what Mr. Tallon really complains of is an order that is, in his view, overbroad, and not one that is unclear. That submission does not however catch the overlap between overbroad and unclear. If a civil order is "overbroad" and catches behaviour going far beyond what is reasonable and proportionate, it will be *ultra vires* the Act. On the other hand, if the breadth of the order is unclear, it may be said to be overbroad and transgress the principle of legal certainty. In my view, it is in this latter sense that the civil order was impugned by the High Court in its finding that the order did not comply with the requirements of legal certainty inherent in the protection of due process rights.

106. In the appeal, the State and the *amicus* relied on a number of cases in support of their respective positions on the issue of legal certainty. They both referred to *Mooney v. DPP* [2019] IEHC 625. This was a challenge brought to an order made under s. 10 of the Non-Fatal Offences Against the Person Act, 1997. In that case, Simons J. found that the order was in fact disproportionate because the prohibition it imposed was indefinite, unlike Mr. Tallon's two-year restriction. The order in the *Mooney* case prohibited the subject of the order from residing within a certain distance of the injured

party. This was found to be too vague as it did not identify the address which he was obliged to avoid. Counsel for the State distinguished the case, calling the order in *Mooney* 'a moving target' as the address was capable of change, and therefore uncertainty could not be denied. I accept that the facts are not on all fours with the present case.

107. The case law from the jurisdictions of England and Wales and, Northern Ireland are indicative of the care which must go into the drafting of these prohibitory orders. The legislative provisions in England and Wales have changed over time from the situation where a breach of an Anti-Social Behaviour Order (an "ASBO") constituted a crime to the present situation where such an order is considered an injunction and enforced by a civil remedy. The legislation also provides for restrictive orders to be made as part of the sentencing phase in the criminal process. In Northern Ireland, the breach of an ASBO amounts to a criminal offence.

108. The *amicus* referred to *R v P* [2004] EWCA Crim 287, a decision of the Court of Appeal of England and Wales in which the court highlighted, *inter alia*, the need for precision. In *R v. Boness* [2005] EWCA Crim 2395, the Court of Appeal of England and Wales took the opportunity to address not only the specific ASBO before them which had been imposed as part of a sentence but to give guidance of a more general nature on the making of ASBOs. They took the opportunity to review the case law in England and Wales that already existed. In re-iterating that an order must be precise and capable of being understood by an offender, counsel for the *amicus* submitted that "a court should ask itself before making an order: "Are the terms of this order clear so that the offender will know precisely what it is that he is prohibited from doing?"".

109. Of particular interest in the case of *R v Boness* was the Court of Appeal's view on the importance of ascertaining that the order was *necessary* to protect persons from

further anti-social behaviour (this being a requirement of the law in England and Wales which differs slightly from the law in this jurisdiction although necessity is still required). The Court of Appeal emphasised that a sentencing court ought not to be diverted by the possibility of imposing an ASBO instead of a sentence of imprisonment because the purpose of the ASBO was prevention and not punishment. This differs from the Irish legislation where the court is making a civil order unrelated to any criminal conviction. How the court interpreted the concept of "necessity" is interesting. The Court said that it followed from the requirement of necessity that the court should not impose an order which prohibits an offender from committing a specified criminal offence if the sentence which could be passed following conviction for the offence would itself be a sufficient deterrent (but queried necessity in the situation where only a fine could be imposed for the other offence). The court said that the "test for making an order is not whether the offender need reminding that certain matters do constitute criminal conduct, but whether it is necessary." The Court of Appeal of England and Wales highlighted another reason why a court should be reluctant to impose orders which prevent criminal behaviour because the aim was to prevent anti-social behaviour. The court said that to prevent that behaviour, the police had to be able to take action before the anti-social behaviour it is designed to prevent takes place. The court gave the example of the person who caused criminal damage by graffiti by spraying, saying the order should be aimed at facilitating action to be taken to prevent graffiti spraying before it takes place. Thus, an order prohibiting him being in possession of a can of spray paint in a public place gives the police the opportunity to take action before spraying takes place.

110. While that case concerned the question of necessity which was not raised before the High Court, the logic of it, if accepted, would address what appeared to be one of

the main concerns of the State in the present case. The State was concerned about the finding of the trial judge when she said that the terms of the civil order go beyond the behaviour found to be anti-social and *encompassed behaviour which was not legally objectionable*. In other words, the State submitted, in some cases prohibiting preparatory or surrounding behaviour may well be appropriate in a given situation if that is what is deemed necessary. The aim of the civil order is to prevent anti-social behaviour and the legislation appears to permit the court to make necessary orders to prevent that behaviour, following its finding that the person has engaged in anti-social behaviour. I am not required to make any finding on that issue in light of the findings I reach as regards the requirement of legal certainty for other reasons, which will be explained. In that context, it is appropriate to return to the case of *R v Boness*.

111. The order imposed in *R v Boness* had 14 separate components. Apart from the necessity to make any ASBO at all, the court rejected many of the individual orders; the Crown accepted that these orders were variously unnecessary, unclear, and too broad without geographical limit. Examples of lack of clarity were where he was prohibited from "entering any land or building on land which forms part of education premises [without permission]". This was in part unclear because "educational premises" arguably lacks clarity, for example did it include teaching hospitals? That appellant was also barred from wearing in a public place or having anything with him that could be used to cover the face or part of the face and the order gave examples which did not include a scarf. The court agreed with the Crown's submissions that the terms were too wide and resulted in a lack of clarity. Another order which was unclear and was far too wide was a prohibition on "doing anything which may cause damage", the court asking rhetorically "was the Appellant prohibited from scuffing his shoes?".

112. Another case highlighted by the *amicus* was the High Court of England and Wales decision in *R (Allan) v Croydon London Borough Council* [2013] EWHC 1924 (Admin). This was a case stated from a Magistrates Court decision to impose an ASBO. That court again highlighted the prohibitory nature of an ASBO, and the requirement for necessity and proportionality. With regard to the requirement to be precise and be capable of being understood, the court said that "an exclusion zone should be clearly delineated by a map which should clearly identify those with whom the offender should not associate." The reference to association with others was by reference to one of the orders that had been made in that case which was not to associate with named individuals in "a public place in the London Borough of Croydon."

113. The English authority of *R v. Khan* [2018] 1 WLR 5419 concerned an appeal against sentence where there was a challenge to a "criminal behaviour order" which had no geographical limits as to where it could be enforced. The Court of Appeal of England and Wales held that the order should never have been made in the particular circumstances but re-iterated the following statement of principle having regard to the decision in *R v P* and also *R v Boness*:

> "Because an order must be precise and capable of being understood by the offender, a court should ask itself before making an order "are the terms of this order clear so that the offender will know precisely what it is that he is prohibited from doing?" Prohibitions should be reasonable and proportionate; realistic and practical; and be in terms which make it easy to determine and prosecute a breach. Exclusion zones should be clearly delineated (generally with the use of clearly marked maps, although we do not consider that there is a problem of definition in an order extending to Greater Manchester) and individuals whom the defendant is prohibited from contacting or associating

with should be clearly identified. In the case of a foreign national, consideration should be given for the need for the order to be translated." (para 15, *R v Khan*)

114. Another English case which addressed a geographical limitation of an order is *R v. Cornish* [2016] EWCA Crim 1450. The order in that case prevented the subject of the order from entering a named village "or surrounding areas" and was challenged for being impermissibly vague. The Court held that in the absence of a map or other delineation of a boundary the reference to the village itself lacked definition and the additional phrase "or surrounding areas" was vaguer still. The area could have been defined by a map, but the court said there were other ways of making it clear. The *amicus* also referred to a judgment of Court of Appeal in Northern Ireland, *R v Hanrahan* [2019] NICA 75, in which the court found that the Crown Court had erred in imposing "intrusive and unnecessary" orders observing that "particular care must be invested in the language in which the terms are formulated. Simple, clear and succinct terms are essential."

Uncertainty and this civil order

115. Applying the principle that an order that imposes an obligation to abide by it on pain of criminal sanction, must be clearly expressed and indicate precisely what the subject of the order is required to do or refrain from doing, I am satisfied that this civil order was correctly held by the High Court to violate the principle of legal certainty. While some of the reasons I so found may go further than the High Court in holding that the order was vague and impermissible, it is appropriate to do so in the hope of providing assistance to courts called upon to address these civil orders in the future.

116. I make my finding that the civil order violates the principle of legal certainty on the following grounds:

A) The term *within the environs of Wexford Town including North Main Street, South Main Street Bullring, Selksker (sic) Square* is hopelessly vague. What constitutes the boundaries of Wexford Town? The State have not pointed to any legal definition or delineation of "Wexford Town". Even if there had been a prohibition which related to the county of Wexford that would have to be defined by some reference to how those boundaries are to be set, e.g. to the historic borders of a county or to the boundaries of the jurisdiction of the local county council or relating to the description of the county for the purpose of the Dáil constituency. The best way would be to include a map. The word "environs" is also lacking the precision that "an individualised criminal prohibition" ought to have. What does it mean? Does it mean within the Town itself or go slightly beyond the Town?

B) The civil order would appear on its face to prohibit all public speaking whether indoors or outdoors. As the *amicus* points out, there is uncertainty as to whether Mr. Tallon is prohibited from addressing people publicly via social media from his residence in Wexford. Precision of that nature is especially required where the prohibition interferes with the right of freedom of expression. This is a situation where the apparent breadth of the provision, which may include such indoor public speaking of that kind, renders the civil order unclear in its scope. In the circumstances of this case, where the evidence before the District Court was addressed to preaching outdoors, it ought to have been made clear that Mr. Tallon was entitled to know whether he was prohibited from speaking inside, for example, a church or other hall to which he has been invited. If such a wide order had been intended, it ought to have been stated.

C) The phrase *public speaking* is itself uncertain and imprecise. While it ought, as counsel for the State submitted, to be understood in its ordinary sense to mean some

sort of presentation before an audience and not a "request to a butcher for a half kilo of sausages", it lacks clarity as to whether it includes singing. For example, a musician would not describe their presentation to a live audience as public speaking but would describe it as a musical performance, concert or other such similar concept.

D) The phrase "public speaking and recording" is also unclear. It appears to be conjunctive but if so, such a requirement, appears entirely at odds with the apparent intention of the District Court in granting the order which was, apparently, to prevent anti-social behaviour by way of the incessant preaching and heralding that was occurring.

E) Even if the phrase "public speaking and recording" could be construed as disjunctive the reference to *recording* renders the civil order vague and unclear. What does *recording* mean? Is it using the phone as a type of dictation device to make a fleeting record of one's thoughts? Is it recording the gulls as they flock along the quays in Wexford? Or was it meant only to cover the recording of interactions with passers-by and with the Gardaí? None of this is clear and it ought to have been. If, as the State seemed to suggest, it was Mr. Tallon's public speaking, recording and subsequent broadcasting on social media platforms which was at issue, then that precise activity ought to have been made clear in the order. I would, however, add that any preventative order would have to be directed towards preventing the type of anti-social behaviour that was established before the court making the civil order. No evidence was given to the District Court as to this type of recording activity.

Proportionality

117. The State, the DPP and the *amicus* addressed the court on the issue of proportionality. In light of the findings above it is not necessary to address the issue of proportionality. It is appropriate to observe however that the DPP raised a concern that the High Court went beyond the function of judicial review when it embarked on a re-analysis of how the legislation was applied by the District Court during the criminal trial. The DPP submitted that the District Court erred in entering into a consideration of the proportionality of the sentence imposed by the District Court.

118. The DPP referred to para 122 of the judgment in which the trial judge stated:

> "The sanction of detention for breach of a civil order also raises potential issues concerning the principle of proportionality in sentencing which requires that the penalty be proportionate to the circumstances of the offence. There is no evidence that the Applicant's behaviour on either day caused actual offence or distress to any person, and he was prosecuted for breach of the civil order simpliciter. The use of the penalty of imprisonment in this case to punish acts of nuisance which are not necessarily criminal in nature nor indeed constitute any wrong in law, that is were it not for the terms of the civil order, is to my mind disproportionate where the order is not clearly tailored and narrowly drawn."

119. I would agree with the DPP that the issue of the proportionality of the particular sentence was not raised in this judicial review and this ought not to have been considered by the trial judge as a standalone ground for quashing the convictions. Moreover, the issue of proportionality of a sentence is more properly a matter for appeal. I would not go so far as to say that a question of proportionality of sentence (where no further appeal lies) can never be the subject matter of a judicial review but that would be in wholly exceptional circumstances which it is not necessary to seek to

identify here. On a more general level, I would observe that where a court has concluded that a person has engaged in deliberate and repeated breaches of the criminal law, a custodial sentence may not necessarily be disproportionate.

Equality

120. While it is perhaps unnecessary to address this issue as the appeal is already being dismissed, it is appropriate to observe that the High Court judge's finding that the civil order amounted to a breach of the equality provisions of Article 40.1 was made without any analysis of the proviso to Article 40.1, i.e. *differences in capacity and social function*. There was no engagement with whether Mr. Tallon was similarly situated to any putative comparator person. It is also noted that the *amicus* did not seek to have the High Court order upheld on this basis.

Mr. Tallon's Perspective

121. Mr. Tallon's submissions at the appeal have been outlined above. These submissions were made to the Court in a respectful manner which nevertheless conveyed the depth of his feelings that civil orders were unconstitutional and that the real issue was beyond one of legal certainty or proportionality.

122. Unfortunately for Mr. Tallon, he had not filed a respondent's notice so there was no cross-appeal on any other issue. More importantly, however, not only do the courts apply a presumption of constitutionality to statutes before it, but the courts apply the rule of self-restraint to the effect that a court ought not to decide an issue on the validity of legislation unless it is necessary for the determination of the case before it. In this instance, Mr. Tallon has succeeded in quashing the civil order and quashing the criminal convictions which were made on foot of it.

123. It is appropriate to say, however, that the constitutional rights to freedom of expression, to freedom of conscience and to free profession and practice of religion are subject to public order and morality. Furthermore, the State has to guarantee in it laws to respect and, as far as practicable, by its laws to defend and vindicate the right of the citizen. This may entail a balancing of rights. What is clear however is that no single citizen can decide which laws he or she is bound by and which laws he or she is not to be bound. Unless or until a law is set aside then each person must obey it. Where a court order is made directing a person to do or not to do something, then the person is bound by the order until the order is set aside by another court or is quashed by another court.

124. None of the foregoing is to be taken as an indication that these provisions ought to be found constitutional or unconstitutional. The 2006 Act is presumptively constitutional. In so far as the High Court judge may have indicated views as to the constitutionality or otherwise of the provisions, these are not views that are endorsed or rejected by me. I consider that the more appropriate approach is to restrain from expressing any views as to the constitutionality of the legislation.

Conclusion

125. The appeal brought by the State and by the DPP is dismissed. The trial judge did not err in exercising her discretion to hear the judicial review in the exceptional circumstances of this case. The trial judge was also correct to hold that the civil order was impermissibly vague and uncertain. As it has been conceded that the criminal convictions cannot stand if the civil order stands quashed, it follows that the orders of certiorari made by the High Court in respect of those orders of convictions were correctly made.

Costs/Expenses

126. The *amicus* has indicated it will cover its own costs.

127. The appeal of the State and the DPP has been dismissed. Mr. Tallon represented himself in the appeal. He did not file any papers and seems to have appeared at the directions hearing remotely and without making submissions. He did however appear at the hearing of the appeal and in those circumstances, it would appear that he is entitled to his expenses of so doing. It is appropriate in the circumstances for the court to make a specific order in relation to the amount of those expenses. I would propose a presumptive order in the sum of €150 to cover his expenses is appropriate. If Mr. Tallon, the State or the DPP contend for a different order they may apply within 14 days of the date of this judgment to the court office for a date to be fixed for a short hearing on costs/expenses.

As this judgment is being delivered electronically, my colleagues Edwards and McCarthy JJ. have authorised me to record their agreement with the judgment and the orders proposed.